033 Hot Topics and Regulatory Initiatives in Labor and Employment Law

Reginald C. Govan
Associate General Counsel
Freddie Mac

Michael J. Lotito
Partner
Jackson Lewis

Faculty Biographies

Reginald C. Govan

Reginald C. Govan is associate general counsel—employment law at Freddie Mac, in McLean, Virginia. He provides legal advice on all aspects of the employment relationship including hiring, retention, compensation, reorganization, acquisitions, employee discipline, regulatory compliance, employment agreements, corporate policy, and internal investigations.

Previously, Mr. Govan directed the Employment Law and Litigation Group of Organization Resources Counselors, a New York based management-consulting firm that conducts audits and other assessments of compliance issues, human resources processes, and business organization and strategy. Mr. Govan provided legal, management, and regulatory advice to senior corporate counsels and senior management about recurring and emerging workplace issues.

Mr. Govan served five years as counsel to the U.S. House of Representatives' Committee on Education and Labor, where he was primary legal advisor to the chairman and Democrat members on the Civil Rights Act of 1991, Americans with Disabilities Act, and Older Workers Benefit Protection Act of 1990. He has also served as counsel to the U.S. Senate's Committee on the Judiciary, where he was the principle attorney to the chair and Democrat members on matters related to the nomination and confirmation of federal judges and legislation relating to the administration of justice.

After acquiring a degree from Carnegie-Mellon and a JD from the University of Pennsylvania Law School, Mr. Govan clerked for the Honorable Nathaniel Jones, U.S. Court of Appeals for the Sixth Circuit.

Michael J. Lotito

Michael J. Lotito is a partner at Jackson Lewis, a preventative labor, employment, immigration, and benefits law firm in San Francisco, representing management exclusively. He has devoted his entire professional career to representing management interests in labor and employment law.

Mr. Lotito was the first nonpractitioner to chair the Society For Human Resource Management(SHRM). He is the immediate past chair of SHRM, past chair of SHRM's National Legislative Affairs Committee, and he served on SHRM's Employee and Labor Relations Committee. In these capacities, he has influenced legislation such as the ADA and has testified before the United States Senate and the House of Representatives. Mr. Lotito is a resource for TEC Worldwide, an international organization of company presidents. He has given numerous presentations before TEC groups and was named TEC's Most Outstanding Resource.

Mr. Lotito has appeared on PBS' "NewsHour with Jim Lehrer," Fox TV's "The Schneider Report" and "The Full Nelson, " CBS Radio's "Gil Gross Show, " and frequently speaks on National Public Radio(NPR). He is regularly quoted on a variety of employment law topics

in major publications including *Forbes*, *Business Week*, *The Washington Post*, *The Wall Street Journal*, and *The New York Times*. He is a member of the California and American Bar Associations.

Mr. Lotito graduated from Villanova University and Villanova Law School.

RECENT DEVELOPMENTS IN EMPLOYEMENT LAW

HOT TOPICS SEMINAR
AMERICAN CORPORATE COUNSEL ASSOCIATION
HYATT REGENCY
SAN DIEGO, CALIFORNIA
OCTOBER 15, 2001

Reginald C. Govan
Associate General Counsel
Freddie Mac
McLean, Virginia
(703) 903-2770
reginald_govan@freddiemac.com

TABLE OF CONTENTS

I. SAME SEX DOMESTIC PARTNER BENEFITS

Irizzany v. Board of Education, 2000 U.S. Dist LEXIS 12414, (N.D. Ill. 2000). The court applied a "rational basis" level of scrutiny to and dismissed an equal protection claim challenging the grant of health benefits for same sex domestic partners of unmarried employees, while denying such benefits for opposite sex partners of unmarried employees. The court, relying on prior Seventh Circuit case law, held that classifications based on marital status are examined under the rational basis test, because homosexual status is not a suspect or quasi-suspect class entitled to greater protection.

II. WORKPLACE VIOLENCE POLICY

Bauer v. Sampson, No. 99-56964, 9th Cir, 8/15/01. A tenured professor of ethics and political philosophy anonymously published several articles and illustrations in a campus newspaper called "Dissent" challenging the appointment and policies of an Acting President. The offending material contained the following statements wishing that "a two-ton slate of polished granite drop on the President's head," "no decent person could resist the urge to go postal," a fantasy description of the President being asphyxiated "by a lurid gas." The illustrations were of the President creating an enemies list and then beheading his enemies, and of three shrunken people assembling a rifle, with one pointing it outward.

The Chancellor of the college determined that the writings violated the college's policies on workplace violence and racial discrimination/harassment and disciplined the professor. The race discrimination/harassment allegation resulted from the professor's use of the name "Mr. Goo" for the college president. The name allegedly is a play on the pejorative term "gook" and the fact that "Goo" means "excrement in Hindi. The professor contended that the name "Goo" is simply a play on the similarity of the President's first name, Raghu, and that of the cartoon character, Mr. Magoo.

The Ninth Circuit held that the college's workplace violence policy, which prohibited "verbal threats, violent behavior or physical conduct, and violent behavior overtones," was facially unconstitutional to the extent of its proscription of "violent overtones." The court also held that the workplace violence and harassment prevention policies were unconstitutionally applied to the professor because "though at times adolescent, insulting, crude and uncivil, [the professor's] publication focuses directly on issues of public interest and importance." It agreed with the district court's determination that the writings were "hyperbole of the sort found in non-mainstream political invective and in context…are patently not true threats."

III. SELF EVALUATIONS

Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (8th Cir. 2001). Plaintiffs challenged the use of employee self-assessments based on the fact that the supervisor did not advice staff at the time that they were completing the evaluations and that the assessments would someday be used to decide which employees to lay off. The court found no difficulty with the employer using self-evaluations even where the employee was not told the purpose of the evaluation. It stands to reason that, had the employees known that the assessments would be used in lay-off decisions, they would have had an incentive to artificially inflate their scores, the court reasoned.

With respect to factors used in ranking employees, the Eighth Circuit also rejected plaintiff's arguments that certain omitted factors had an adverse impact based on age. Appellants point out that Alliant's "original ranking procedures" included "protections for older employees" and argue that, instead of eliminating these protections from its lay-off criteria, Alliant could have left these protections intact or replaced them with other similar protections. It is clear that a system with built-in protection for older employees would result in less of an adverse impact on older workers. Without evidence that such a system would be comparably effective in achieving Alliant's legitimate goal of retaining the best employees, appellant's claims fail.

IV. EMPLOYEE PARTICIPATION COMMITTEES

Crown Cork & Seal, 334 NLRB No. 92 (July 20, 2001). Under Section 8(a)(2) of the National Labor Relations Act, it is an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. "Labor organization" is defined in Section 2(5) of the Act as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of play, hours of employment, or conditions of work."

In *Crown Cork*, the employer established seven employee participation committees, empowered to perform numerous managerial functions, including investigating accidents, making disciplinary decisions, and suggesting modifications to matters such as work hours, layoff procedures, and smoking policies. Each committee's managerial decisions were subject to higher management review. In upholding the legality of the committee's, the Board compared the authority exercised by these committees to the authority of front-line supervisors in a traditional plant setting and characterized their committee's activities as nothing more than the familiar process of managerial recommendations making their way up the chain of command.

V. TEAM ROTATION SYSTEM

Kiphart v Saturn Corp., 6th Cir., No. 99-6656, 5/31/01. At issue is Saturn's unique operating concept where employees are placed on "teams" and expected to be able to rotate through all the positions on the team and whether a disabled employee is able to perform "essential job functions." Saturn contended that job rotation was essential to the operational vision of Saturn and its unique approach to staffing. To rebut that assumption, plaintiff offered job announcements that did not list the ability to fully rotate as necessary qualification. In addition, employees testified that the teams did not operate in the ways Saturn envisioned and that employees switched jobs without rotating or some employees never rotated at all. The court held that Saturn Corp. did not require employees to be fully functional/fully rotational in assignments. "The evidence presented suggests that, prior to 1997, the only time Saturn fully implemented its job rotation concept was when it placed employees with medical restrictions. Then, and only then, did it require applicants for permanent openings to be fully functional/fully rotational," the court concluded.

VI. FLSA-DISCRETION VERSUS PRODUCTION EMPLOYEES

Bell v. Farmers Ins. Exchange, 87 Cal. App. 4th 805 (2001). The California Court of Appeals drew a sharp distinction between administrative employees and production workers for the purposes of determining the exempt status of employees. Farmers Insurance claims representatives sued for nonpayment of overtime compensation. The court looked to federal law to differentiate between administrative employees and productions workers. The company contended that the adjusters exercised substantial discretion determining liability, setting and recommending reserves, recommending coverage, estimating damage or loss, providing risk advice, identifying subrogation rights, detecting potential fraud, determining whether reservation of rights letters should be sent, and representing the company at mediations, arbitrations and settlement conferences. These adjusters may have had authority to settle, without further approval, claims in the hundreds of thousands of dollars.

The court described administrative employees as "performing work 'directly related to management policies or general business operations of his employer or his employer's customers,'" while describing production employees as "'those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce.'"

Recognizing that some employees' duties cannot be categorized in such a neat manner, the court analyzed the nature of Farmers Insurance as a business, as well as the plaintiff's role in that business. The court determined that Farmer's Insurance employees engaged in "routine and unimportant" work, which "place[d] the plaintiffs in the sphere of rank and file production workers." If the employee is a "production worker," the administrative exemption is not available and it is irrelevant whether the employee exercises discretion. Consequently, the court held that Farmers Insurance employees were not exempt under the administrative exemption. This decision resulted in massive liability for Farmers, well over $90 million in overtime due employees, plus interest and attorney's fees.

VII. COBRA-GROSS MISCONDUCT

McKnight v. School Dist. of Philadelphia, 2001 U.S. Dist. LEXIS 4751 (E.D. Pa. April 18, 2001). A teacher within the Philadelphia School District was fired after being charged with criminal sexual contact with a former student. The criminal charges levied against the teacher were eventually dropped; however, the teacher was not reinstated. The teacher alleged she did not receive adequate COBRA notice on the continuation of her health benefits. The court ruled that, when reviewing an employer's determination as to whether an employee was terminated for gross misconduct, the court must look to the relevant evidence available to the employer at the time the employer made the decision to terminate the employee. COBRA permits employers to deny coverage to employees fired for "gross misconduct."

Admiral Ins. Co. v. R.A. Jakelis & Co., Civ. A. Nos. 2000 U.S. Dist. LEXIS 14151 (E.D. La. Sept. 21, 2000). The court held that materials prepared by an audit firm were not entitled to work product protection because they did not "map out [the client's] actual litigation strategy."

Copper Market Antitrust Litigation, 200 F.R.D. 213, 215, 219 n.4 (S.D.N.Y. 2001). The court held that employees of a "crisis management" public relations firm hired to "handle public relations matters arising from the copper trading scandal" engulfing Sumitomo were entitled to have privileged communications with Sumitomo management, because the firm "was the functional equivalent of a Sumitomo employee."

VIII. FMLA

A. Flu Covered

Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001). A three-day absence due to the flu was protected as a "serious health condition" because it required "continuing treatment" within the meaning of the Family and Medical Leave Act, the Fourth Circuit held. Labor Department regulations implementing the FMLA state that ordinarily the flu is not covered by the act. However, Plaintiff was unable to work for several consecutive days and required continuing treatment by a physician, thereby meeting the regulatory criteria for a "serious health condition," the court said. The court rejected the employer's contention that Congress never intended for the act to cover a minor illness like the flu.

The regulations state "Ordinarily, unless complications arise, the common cold, the flu, ear aches,…,etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave." (29 C.F.R. § 825.114(c) (2000)). The court noted that the law itself defines "serious health condition" broadly and does not provide a list of included or excluded ailments. "Consistent with the statutory language, the regulations promulgated by the Secretary of Labor establish a definition of 'serious health condition' that focuses on the effect of an illness on the employee and the extent of necessary treatment rather than on the particular diagnosis," the court stated.

B. Paid Sick Leave

Strickland v. Water Works and Sewer Bd. Of Birmingham, 11th Cir., No. 99-14103, 1/22/01. Acknowledging that the language of the act and its implementing regulations is "unartful," the Eleventh Circuit held that an employee's failure to exhaust his paid sick leave is no bar to his eligibility for unpaid leave under the Family and Medical Leave Act. The law explicitly permits employers to provide FMLA leave on an unpaid basis and also states that in those circumstances "an eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for…any part of the 12-week period." The court reasoned that "these provisions, taken together, make clear that an employer who is subject to the FMLA and also offers a paid sick leave policy has two options when an employee's leave qualifies under the FMLA and under the employer's paid leave policy: the employer may either permit the employee to use his FMLA leave and paid sick leave sequentially, or the employer may require that the employee use his FMLA leave entitlement and his paid sick leave concurrently.

C. Leave

Hatchet v. Philander Smith College, 8th Cir., No. 00-1693, 6/1/01. "We hold that the legislative history of the FMLA and the statute's restoration provisions demonstrate that an employee who could not otherwise perform the essential functions of her job, apart from the inability to work a full-time schedule, is not entitled to intermittent reduced schedule leave," the court held. Plaintiff was the business manager of a small, private, historically black college in Little Rock, Ark. After she was struck on the head by falling debris from a broken hotel skylight, plaintiff was unable to perform more than routine work tasks, such as answering telephones, signing checks, and processing mail. Plaintiff argued that she would have been able to return to work by the time her FMLA leave had expired if the college would have allowed her to gradually work up to full time."

The court determined that the employer had no such obligation under the FMLA. "The purpose of the FMLA is to allow an employee to be away from the job, as opposed to using the statute as a means to force an employer to be directly involved in an employee's rehabilitation," the court reasoned. "While the employee is receiving treatment and is away from his or her job, the employee is unable to perform the functions of her job and is entitled to leave under the FMLA. However, while the employee is at his or her job, the employee must be able to perform the essential function of the job."

Bachelder v. America West Airlines, F.3d, 2001 U.S. App. LEXIS 17691 (9th Cir. Aug. 8, 2001). The Ninth Circuit held that an employer may be liable for damages under the FMLA for attendance-related disciplinary action even if management *honestly*, albeit mistakenly, believed the absences in question were not covered by the FMLA. America West believed that, as of February 1996, plaintiff was not yet entitled to a fresh 12-week allotment of FMLA leave. Thus, management did not designate the February absences as FMLA leave and did not attempt to determine if plaintiff's absences were qualified under the FMLA.

Preliminarily, the court characterized plaintiff's lawsuit as one for "interference" with her FMLA rights, rather than one for discrimination or retaliation. In order to prove an interference claim, plaintiff only had to show that her FMLA leave was a "negative factor" in management's termination decision; she did not have to prove that America West intended to punish her for using FMLA leave. The court noted that, while the FMLA's implementing regulations give employers four choices for calculating the FMLA "leave year", they do not state how the employer should indicate its choice. Nonetheless, employers have an implied duty to notify employees as to which leave year they are using. America West failed to satisfy this implied notice obligation because it merely stated that employees were "entitled to a total of 12 weeks of FMLA leave during any 12-month period."

As a result of such failure, by law, it had to calculate plaintiff's eligibility for leave in the way most advantageous to her. Because plaintiff was entitled to a fresh 12-week leave allotment starting on January 1, 1996, under the "calendar year" method, her absences were covered by the FMLA. The court further held that even though there were two independent grounds for the decision, they were tainted by improper consideration of the 1996 absences. And, because plaintiff did not have to prove intentional interference with her rights, America West's claim that the error was made in "good faith" was wholly unavailing.

Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791 (11th Cir. 2000). The court held that a customer service representative's failure to give notice of her need for emergency medical leave within two business days of its commencement rendered moot any other FMLA claims. Namely, she could not argue that she had been made eligible by her employer's failure to notify her of her ineligibility for having worked less than 1250 hours in the previous year.

Russell v. First Health Services, United States Department of Labor, Wage and Hour Div., 2001 U.S. App. LEXIS 10774 (4th Cir. 2001). The court held that an employer does not violate FMLA when it terminates an employee on the third day of a week-long absence because she failed to provide enough information to put the employer on notice of her need for FMLA leave. The plaintiff fulfilled FMLA regulations by providing two-day notice of her need for time off. However, she failed to fulfill her threshold obligation under the FMLA by affirmatively declining to give her employer enough information to determine whether her absence related to a reason covered by the FMLA.

Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933 (8th Cir. 2000). The court held that an employee with cancer who was terminated after exhausting her company's seven month leave was not entitled to an additional twelve weeks leave although her employer did not notify her that her leave was FMLA designated. The court found that the Department of Labor regulations regarding employer notification of its designation of leave as FMLA qualifying was in conflict with Congress's intent. It held that the DOL regulations created rights which the statute did not confer and the employer successfully showed that the employee's twelve weeks of leave ran concurrently with her medical leave, even though it never officially designated it as such.

IX. HARASSMENT

A. Supervisor Harassment - Corporate Policy Affirmative Defense

Gentry v. Export Packaging Co., 238 F.3d 842 (7th Cir. 2001). Affirming jury verdict for sexual harassment plaintiff. Where employer did not clearly designate who was the "Human Resource Representative" to whom its sexual harassment policy said harassment should be reported, jury could properly have found that employer failed to take reasonable care to prevent and correct harassment.

Leopold v. Baccarat, Inc., 239 F.3d 243 (2nd Cir. 2001). Affirming summary judgment for employer where complaint procedure instructed employees to speak to "any officer of the company," including the president, if the supervisor could not handle the complaint or, as was the case here, the supervisor was the harasser, and where plaintiff's entire explanation for making no complaint was her "conclusory assertion" that she was "too scared." Company policy wasn't deficient for failing to promise confidentiality and nonretaliation.

Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001). Employer satisfied first prong of defense by distributing an antiharassment policy that designated any manager, including the company president, as a proper recipient of a complaint,

and promised nonretaliation, and by terminating the supervisor who harassed plaintiff within a week of independently discovering the harassment. Second prong is satisfied because, even though plaintiff told two lawyers, seven coworkers, and the CEO's son about the harassment, she never informed anyone designated by the policy, and there is no evidence that management ever learned of her complaints. Plaintiff cannot excuse her failure to utilize antiharassment policy by asserting that company president was a "good friend" of harasser and she feared retaliation – this fear was "speculative." No more of an excuse was plaintiff's belief that complaining would "not do any good." "We cannot accept the argument that reporting sexual harassment is rendered futile merely because members of the management team happen to be friends."

Anderson v. Deluxe Homes of Pa., Inc., 131 F. Supp. 2d 637 (M.D. Pa. 2001). Where in opposition to summary judgment motion plaintiff asserts that she failed to report sexual harassment in accordance with employer's harassment policy because other employees told her she would be in danger of losing her job if she complained, she has created a jury question as to the second prong of the affirmative defense – whether her failure to utilize her employer's procedures was "unreasonable."

See also, *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001); *Frederick v. Sprint/United Mgmt. Co.*, 2001 U.S. App. LEXIS 5557 (11th Cir. April 4, 2001).

B. Tangible Employment Action

Molnar v. Booth, 229 F.3d 593 (7th Cir. 2000). Though a "close call," sexual harasser-principal's confiscation of art teacher intern-plaintiff's art supplies after she rebuffed his sexual advances constitutes a tangible employment action, precluding assertion of the *Ellerth/Faragher* affirmative defense. Also a tangible employment action was the principal's negative evaluation of plaintiff, which unchanged would have resulted in her being unable to obtain her teaching license. Though the evaluation was overruled by the school board, to hold it was not a tangible employment action "would mean that harassing supervisors could demote employees who rejected their advances with impunity, as long as they later reversed the demotion and restored the employees to their former positions."

C. Imputed Knowledge of Coworker Harassment

Anderson v. Deluxe Homes of Pa., Inc., 131 F. Supp. 2d 637 (M.D. Pa. 2001). Jury could find notice of sexual harassment to plaintiff's fellow employee to be notice to a "management level" employee, and hence imputable to employer, where employee had the title "Captain," gave daily work instructions to plaintiff and other employees, and was the person plaintiff and other employees "went to with problems."

Kornely v. Carson's Ribs, 2000 U.S. Dist. LEXIS 17722 (N.D. Ill. December 4, 2000). Where employer restaurant's sexual harassment policy involved filling out and dropping into a suggestion box "employee communication forms," and where the form itself said that the restaurant manager should first be informed and the form submitted if the "problem hasn't been remedied," factfinder could find that there was no "clearly designated" channel for reporting

harassment complaints, thus precluding summary judgment. In addition, there was disputed evidence in the record that supervisory employees were informed of the alleged harassment. The court held that an employee's hostile work environment claim brought under Title VII could survive summary judgment where the plaintiff failed to bring the alleged conduct to the employer's attention. It reasoned that although the plaintiff had not followed the established complaint procedure, she had cited several instances of direct interaction with management that could have alerted the restaurant to some probability that a hostile work environment existed. The court stated that even if the employer's policy clearly designated a channel for sexual harassment complaints, the plaintiff could withstand the employer's motion for summary judgment by presenting evidence that she gave the employer enough information to make a reasonable employer think there was some probability that she was being sexually harassed.

D. Harassment by Others in Same Protected Class

Ross v. Douglas County, 234 F.3d 391 (8th Cir. 2000). Black supervisor's use of racial epithets directed at black employee plaintiff, such as "nigger" and "black boy," and references to plaintiff's white wife as "whitey," can support a hostile-environment racial harassment claim.

E. Sexual Stereotypes

Nichols v. Azteca, 2001 U.S. App. LEXIS 16064, 2001 W.L. 792488. The First Circuit held that a food server ridiculed for being too effeminate, constantly mocked for walking and carrying his tray too much like a woman was abused because he "did not act as a man should" and thus, may have a cause of action for harassment.

Jones v. Pacific Rail Servs., 2001 WL 127645 (N.D. Ill. February 14, 2001). "Jones' claim that he was being harassed because of his alleged effeminacy ['your hands are so soft – what are you doing after work?'; 'why don't you come strip for me?'] is sufficient to state a claim" under Title VII.

F. "Blue-Collar Environment"

O'Rourke v. City of Providence, 2001 U.S. Dist. LEXIS 165 (1st Cir. January 8, 2001). In sexual harassment case involving a female firefighter, court rejects employer's argument that jury should have been instructed that co-workers' conduct had to be "evaluated in the context of a blue-collar environment." This would mean that the more hostile and sexist the environment, the less likely the employer could be held liable. Further, "women working in the trades do not deserve less protection from the law than women working in a courthouse." See also *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999).

G. Evidence of Similar Conduct/Comments

Molnar v. Booth, 229 F.3d 593 (7th Cir. 2000). Evidence that principal who made unwelcome sexual advances to teacher intern-plaintiff previously had made such

advances to another teacher intern was admissible under Fed. R. Civ. P. 404(b) as evidence of motive in principal's behavior toward plaintiff.

Mason v. Southern Ill. Univ., 233 F.3d 1036 (7th Cir. 2000). Where plaintiff's claim was limited to his supervisor's alleged hostile-environment racial harassment, district court did not abuse its discretion in limiting testimony to racist remarks supervisor allegedly made or that co-workers made in the supervisor's presence. Evidence of what co-workers said outside of both plaintiff's and supervisor's presence was properly excluded as irrelevant: because there was no evidence that plaintiff had ever become aware of any such statements, it was not relevant to pervasiveness, even if such a co-worker-caused hostile environment could be imputed to supervisor; nor was it relevant to the supervisor's motives in negative treatment of plaintiff that was neutral on its face, because there was no evidence the supervisor was aware of the statements.

Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000). Plaintiff cannot establish that she worked in an "objectively" hostile environment by pointing to harasser's sexual harassment of other women employees where she was unaware of it at the time of her own harassment. Such harassment of others can have had no bearing on whether she reasonably perceived her own working environment as hostile. This is especially true here because harasser was terminated as soon as his misdeeds came to light.

X. RETALIATION

A. Supreme Court

Clark County Sch. Dist. v. Breeden, 121 S. Ct. 1508 (2001). In a per curiam decision and consistent with prior precedent, the Court ruled that subsequent transfer suffered by a complainant did not constitute illegal retaliation when the activity plaintiff complained about could not reasonably be interpreted to violate Title VII. However, in refusing to find any casual connection between the transfer and the filing of the suit, the court cited with approval a series of cases holding that the lapse of three or four months suffices to defeat the causality due to the absence of temporal propriety.

B. Second Circuit

McNereny v. City of Rochester, 241 F.3d 279, 284-5 (2nd Cir. 2001). In reversing the grant of summary judgment, the Court held that oppositional or participational retaliation includes unlawful employment practices by *any* employer. There, the employee of the City was investigating an allegation of sexual harassment by the union's secretary against the union president whose union represented city employees. After the investigation started, the city employee was denied a promised promotion by the Chief of Police. The members of the union were also city employees. Because the City and union had a relationship that may give one of them an incentive to retaliate, the denial of the promotion by the Chief of Police after the city employee began investigating a sexual harassment complaint against the head of the city employees union created an issue of fact.

Matima v. Celli, 228 F.3d 68 (2nd Cir. 2000). The court held that the way in which an employee presses complaints of discrimination can be so disruptive or insubordinate that it strips away protections against retaliation. The court explained that even when a complaint of discrimination is involved, "[a]n employer does not violate Title VII when it takes adverse employment action against an employee to preserve a workplace environment that is governed by rules, subject to a chain of command, free of commotion, and conducive to the work of the enterprise." After a series of internal complaints were investigated and found to be without merit, the plaintiff sent threatening letters to the Ayerst's top executives. The Plaintiff was ultimately terminated after a confrontation over a time sheet on which he said his recent absences were due to illegal retaliation. Ayerst officials testified that plaintiff was fired for insubordination and basically creating such havoc and discontent in the lab that it was not a suitable work environment for the remaining people on the staff.

C. Fifth Circuit

Medina v. Ramsey Steel Co., 238 F.3d 674 (5th Cir. 2001). The court reversed summary judgment on the employee's retaliation claim because the employee raised "a conflict in substantial evidence on the ultimate issue of retaliation" by showing that he began receiving an increased number of corrective action memos after he complained of age discrimination. The plaintiff also testified that a high-level manager stated in a meeting that it would be hard for the employee to collect if he sued the company.

Gorence, et al. v. Eagle Food Ctrs., Inc., 242 F.3d 759 (7th Cir. 2001). In affirming summary judgment, the court found that plaintiffs did not show an adverse employment action because transfers without loss of pay or benefits or change in job title without loss of pay or benefits are not adverse employment actions. Also, the plaintiff could not succeed on his retaliation claim because there was nothing pretextual about his suspension for having an affair with another employee.

See also, *Bell v. EPA*, 232 F.3d 546 (7th Cir. 2000).

Oest v. Illinois Dep't. of Corrections, 240 F.3d 605 (7th Cir. 2001). In affirming summary judgment, the court held that an eight-month time interval from the filing of the EEOC complaint to the disciplinary event was too long to show a causal connection. In addition, certain actions and remarks, though cause of some concern, were not retaliatory because they were not made by the person responsible for the plaintiff's discharge.

D. Eighth Circuit

LaCroix v. Sears, Roebuck & Co., 240 F.3d 688 (8th Cir. 2001). In affirming summary judgment, the court found that plaintiff claims of adverse employment action were based on her own conclusory statements that cannot rebut a motion for summary judgment. In addition, negative performance evaluations that do not result in "a material employment disadvantage" are not adverse employment actions. And, the offer to plaintiff of a new position upon the elimination of her job through a companywide restructuring program though at a lower grade was not an adverse employment action because there was no reduction in pay. Lastly, the allegation of a denial of training or promotions was only backed up by plaintiff's

conclusory statement and there was no evidence that she requested or was denied training and for the position she did not receive, she was not qualified because she lacked the necessary four-year college degree.

E. Ninth Circuit

Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1028-31 (9th Cir. 2001). The court affirmed summary judgment on the basis that the plaintiff's lawyer failed to bring to the Court's attention a declaration in which the plaintiff alleged that a vice president of the defendant stated that "as long as [the plaintiff] continues to maintain legal proceedings against the District, [the plaintiff] will be unable to obtain employment with the district." Even though the defendant filed a declaration that the vice president never made the statement, the court would have decided that the statement alone created a genuine issue of material fact. However, the Ninth Circuit reaffirms prior precedent under Rule 56 that though an affidavit may be on file, unless it is brought to the court's attention the court need not consider it.

XI. PROMOTIONS

Application Requirement - Dews v. A.B. Dick Co., 231 F.3d 1016 (6th Cir. 2000). A qualified employee, who is not notified of an available promotion or offered a procedure to apply for it, need not show that he applied and was considered for the promotion as part of his prima facie case of discriminatory failure to promote under Title VII. The company had no formal mechanism by which an employee could apply for the position in question, and when the plaintiff inquired about the job, the company dissuaded him from pursuing it. The court reasoned that "it would be impossible for any plaintiff to meet these requirements [prongs two and three of the prima facie case] if the company would not allow him to apply for and be considered for the position." Summary judgment reversed.

XII. PRETEXT - GENERALLY

Kulumani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681 (7th Cir. 2000). The Seventh Circuit upheld the lower court's grand of summary judgment for the employer and ruled that a pretextual explanation must entail more than simply and unusual outcome; instead, it must be deceitful in nature. "To show pretext for discrimination, plaintiff needed to establish not that it was unusual, but that the stated reason (quality control) was a fabrication, designed to conceal an unlawful reason. A 'pretext for discrimination' means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's tracks."

The Second Circuit, however, has held that significant irregularities or the failure to follow standard procedures can suffice to create a triable issue of fact as to whether an employer's justification is pretextual.

See also, *Stern v. Trustees of Columbia Univ.,* 131 F.3d 305 (2d Cir. 2000).

XIII. PRETEXT - PROMOTIONS

Durley v. APAC Inc., 2000 U.S. App. LEXIS 33725 (11th Cir. December 26, 2000). Summary judgment for employer reversed in failure to promote sex discrimination claim where job description for the position in question was created after the plaintiff filed an EEOC charge. The employer promoted a warehouse foreman to purchasing agent and bypassed the plaintiff who had extensive administrative and purchasing experience and had successfully performed the job when the incumbent was absent. There was a question as to whether the job description was accurate, or whether it was designed to make the warehouse foreman appear more qualified. Discriminatory intent could be inferred from the company's decision to emphasize the promoted individual's warehouse skills over the purchasing and administrative skills possessed by the plaintiff.

Haley v. General Electric Co. and International Union of Electronic Workers Local 703, 2001 U.S. App. LEXIS 1702 (6th Cir. January 23, 2001). Neither General Electric nor the union representing production employees at a Tennessee plant discriminated against a female employee when GE withdrew a promotion offer after the union complained about the promotion and threatened a three-day strike. The plaintiff had been awarded the promotion over male applicants based on additional criteria, such as leadership skills, agreed in advance by the Operations Manager and HR. After the plaintiff was awarded the promotion, the union complained to HR that the additional criteria violated the labor contract, which called for promotions to employees with the "necessary qualifications" and most seniority. The job was subsequently awarded to a male applicant. Compliance with the labor agreement (the necessary qualifications and seniority standard) was found a legitimate, nondiscriminatory reason for withdrawing the promotion. Summary judgment affirmed.

Dodoo v. Seagate Technology Inc., 2000 U.S. App. LEXIS 32024 (10th Cir. December 15, 2000). The Tenth Circuit upheld a $455,000 jury award to a black, 46-year-old computer engineer who was denied two promotions because of his age and race. The plaintiff had applied for and was denied several promotions within the company. On one occasion, the position was filled by a younger white male who had been with the company less than a year because the company considered him to be a future "star" and too valuable to lose to a job offer from his old company. On another occasion, the offer of promotion was withdrawn for budgetary reasons, but only after the plaintiff withdrew his name for other promotions after being told he was to receive the promotion. The court pointed to the plaintiff's 16 years of experience over the other employee's two months and the statements in the employee handbook that limited promotions to employees of less than one year made the selection "highly irregular."

Blow v. City of San Antonio, 236 F.3d 293, (5th Cir. 2001). A reasonable fact-finder could conclude that the explanation that a black librarian was not promoted because a white external candidate already had been hired by the time she applied was pretextual because the supervisor on the hiring team concealed the job opening and discouraged the plaintiff's application. A conclusion that this explanation was false would allow a jury to rule in her favor because the case presented "no unusual circumstances that would prevent a rational fact-finder

from concluding that [the City's] reasons for failing to promote her were discriminatory.

Pratt v. City of Houston Texas, 2001 U.S. App. LEXIS 7155 (5th Cir. April 19, 2001). Two black city employees provided sufficient evidence to infer that race was a factor in the City's failure to promote them. Both plaintiffs were well qualified for the promotion, while the white candidate selected for the position had minimal qualifications at best. The City claimed it did not promote the plaintiffs because they failed to complete the hiring process; however, plaintiffs introduced evidence that the City did not give them the opportunity to complete the process. Given the better résumés of the plaintiffs, the special treatment the white candidate received, and allegations that the hiring supervisor had discriminated in favor of white applicants on other occasions, a jury could reasonably infer that the hiring process was manipulated and that it was preordained that the white candidate would be awarded the position over demonstrably better credentialed blacks. Summary judgment reversed.

Griffis v. Norman, 2000 U.S. App. LEXIS 25947 (10th Cir. October 17, 2000) (unpublished). The greater qualifications of a black police department employee may be evidence that the employer's articulated reason for not promoting her was a pretext for race discrimination. The district court "ignored" the fact that the plaintiff was more qualified for the promotion than the person selected, a view supported by the testimony of the city's own personnel director. The plaintiff had 21 years more experience than the probationary trainee who had worked for the city for only five months, and the plaintiff had previously performed the job with commendations. Summary judgment reversed.

XIV. ADA REASONABLE ACCOMMODATION

A. Unlimited Time Off

Nicosia v. Yellow Freight, 7th Cir., No. 99-3415, 6/12/01. The Seventh Circuit held that an employee suffering from HIV was not entitled to unlimited days off as an accommodation under the ADA. Almost from the beginning of his employment, plaintiff had recurring problems with attendance. He requested time off for an unspecified medical problem, but was informed that he was ineligible for family and medical leave. He was offered 90 days of unpaid leave, however, plaintiff refused the unpaid leave and instead elected to call in sick for two weeks. After informing the company that he was HIV positive, his work attendance declined even more, and the company responded with its five-step progressive disciplinary system. Two months after plaintiff filed an EEOC charge, he was terminated for excessive absenteeism.

The Seventh Circuit held that plaintiff, whose presence at the job site was required to perform his position, was not qualified with or without and accommodation because he was unable to maintain regular attendance. The court went on to hold that a request for unlimited time off with no penalties was not a reasonable accommodation. Such and accommodation was unreasonable, the court concluded, because a business would be unable to operate effectively if its employees fail to show up on a regular basis.

B. Telecommuting

Heaser v. Toro Co., 8th Cir., No. 00-1294, 4/26/01. An employer does not have to provide the accommodation of working from home to an employee with multiple chemical sensitivity and fibromyalgia, because they were unable to provide her with the necessary computer technology. The employer did not have a work-at-home policy but some employees had been permitted to do so for short periods. Plaintiff was allowed to leave work when she was feeling too sick to remain at work, and ultimately plaintiff moved to another office in the building. However, these approaches were unsuccessful. When plaintiff's short-term disability ended, she again asked for the accommodation of working from home, which was again rejected. The company agreed to some environmental changes and plaintiff agree to "give it a try."

The company asked for a note from her physician. The physician said plaintiff needed to avoid plastics, carbonless paper, copiers and their fumes, exhaust fumes, and other personnel who may be wearing perfumes. After receiving the note, her employment was terminated. The employer's expert testified that the software necessary for plaintiff's position could not be used through remote access and therefore it would not be possible for her to work from home.

C. Comparator Evidence

Maynard v. Pneumatic Products Corp., No. 99-12881, 2000 WL 1736903 (11th Cir., Nov. 22, 2000). ADA regulations state: "The term 'substantially limits' means [u]nable to perform a major life activity that the average person in the general population can perform." The EEOC's interpretive guidance on the ADA further explains:

> [A]n impairment is substantially limiting if its significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking.

The court held that plaintiff failed to demonstrate that his ability to walk was substantially limited as compared to the average person in the general population's ability to walk. This is called "comparator evidence." Even though Maynard stated repeatedly that he could not walk more than 40 to 50 yards (and the court believed him!), he offered the court no evidence of how far the average person could walk. "He must demonstrate that he is significantly restricted in the performance of a major life activity 'as compared to…the average person,'" the court reasoned. The court rejected Maynard's suggestion that a judge or a jury should determine whether his walking limitation was substantial.

Humphrey v. Memorial Hospitals Association, No. 98-15404, Ninth U.S. Circuit Court of Appeals (February 13, 2001). Plaintiff's skills were excellent, and she consistently exceeded performance standards, however, she attributed tardiness and absenteeism to a series of obsessive rituals in which she engaged. Plaintiff was then diagnosed with obsessive-compulsive disorder (OCD) in 1994. MHA offered to accommodate her condition by granting

her a flextime arrangement under which she could begin work at any time within a 24-hour period on days she was scheduled to work. She accepted the offer but continued to experience attendance problems. Two months later, she requested that she be allowed to work from home. Under the association's policy, anyone who had received performance warnings was not eligible to work from home, and because plaintiff had been disciplined for her tardiness and absenteeism, the company rejected her request. Plaintiff continued to miss work and, as a result, was terminated.

According to guidelines adopted by the Equal Employment Opportunity Commission (EEOC), "caring for oneself" is a major life activity. The Ninth Circuit wrote: "An individual who has a physical or mental impairment that causes him to take inordinately more time than others to complete a major life activity is substantially limited as to that activity under the ADA." The court found that although regular and predictable performance is an essential function of her job, physical attendance at MHA's offices is not. The company could not deny her the opportunity to participate in the work-at-home program based on her prior discipline.

Finally, MHA contended that plaintiff had been provided with a reasonable accommodation and, therefore, its obligations under the ADA had been met. The Ninth Circuit, however, found that employers' obligations do not end there– "the duty to accommodate is a continuing duty that is not exhausted by one effort." When it became clear that the flextime accommodation was not succeeding, MHA had a duty to explore alternative accommodations, the court concluded.

XV. LEGITIMATE, NON DISCRIMINATORY REASONS

Lococo v. Barger, 200 U.S. App. LEXIS 28057 (6th Cir., November 2, 2000). The court held that a discrimination claimant does not win even after disproving the defendant's proffered examination "if the evidence reasonably supports another nondiscriminatory motivation." Plaintiff's boss told her "I'm firing you because you are a woman. OK? You have a hell of a discrimination case and I want you to file." The district court took the boss at his word—plaintiff was fired because she was a woman. The appeals court did not find that "smoking gun" statement conclusive. Other nondiscriminatory motives were possible, such as the court postulated that the boss could have been trying to help plaintiff by "coach[ing] her on how to regain her job."

XVI. SUBJECTIVE DECISION MAKING

Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 2000 U.S. App. LEXIS 23723 (3d Cir. 2000). The court held that a competency assessment tool which matched employees with the new positions based on primarily subjective criteria, will not shield the employer from liability for allegations of race and gender discrimination in violation of Title VII.

District Managers evaluated each of their employees' drive, selling process, ability to build relationships, product knowledge, business savvy, analytical competency, administrative competency, and time management. The managers also measure each employee according to his or her leadership, pricing and contracts, presentation skills, organizational skills, and computer skills. Each competency and skill score was given a weight that would vary

according to the importance of applying such competency or skill to each employment position within the company.

In addition, there was a second part of the evaluation, independent of the Matrix in which the managers would submit recommendations concerning the placement of the employees that they had supervised. The court noted that while the Matrix scores might not be determinative because of the limited availability of candidates for each position, "a reasonable fact finder could also conclude that the Matrix did not have the importance [the employer] claims, and that …reliance on it to explain [plaintiff's] placement is merely a pretext to cover [the manager's] discriminatory motive in not recommending her for the 'better' positions." The court also noted that it was highly skeptical of the so-called "objective" measure of the Matrix. While an objective numerical ranking is ultimately compiled, the criteria and weighting of the Matrix are themselves "highly subjective," and "should not be relied upon to overcome a prima facie case."

Although the court noted that the use of subjective criteria does not ultimately prove discrimination, the court held that the district court erred in granting the employer summary judgment because the plaintiff's claim that she was treated less favorably than white males with similar qualifications could not be decided as a matter of law.

Chapman v. AI Transp., 229 F.3d 1012 (11th Cir. 2000) (*en banc*). Court observes that "subjective reasons are not the red-headed stepchildren of proffered nondiscriminatory explanations for employment decisions," and can be sufficient as long as defendant "articulates a clear and reasonably specific factual basis upon which it based its subjective opinion." In ADEA failure-to-hire case, the proffered subjective reason was plaintiff's poor interview; the factual basis was plaintiff's failure to give sharp, concise answers to questions, to aggressively ask questions of his own about the position, and to adequately explain his recent job-skipping work history as compared to a younger candidate who was hired. The existence of a stereotype that older people are not as aggressive as younger people does not mean that the use of aggressiveness as a hiring criterion is equivalent to age bias or even raises a jury question as to age bias.

XVII. NON-COMPETE AGREEMENTS

ConAgra Poultry Company v. Tyson Foods, Inc., 30 S.W. 3rd 725 (Supreme Court of Arkansas, 2000). Tyson alleged that ConAgra had "raided" Tyson and hired away three of its top management executives who had access to confidential information, including pricing, pricing programs, cost of goods sold, profit margins, and marketing strategies. Tyson asserted that this information constituted trade secrets; that the trade secrets would be inevitably disclosed. The trial court found that Tyson's pricing, pricing programs, cost of goods sold, profit margins, and marketing strategies were trade secrets. The trial court then concluded that even though there was no evidence that ConAgra or the three executives misappropriated trade secrets, the three executives did have vast knowledge of Tyson's sales and marketing strategies. The court determined that disclosure of trade secrets by these three executives was inevitable, and for that reason, the court enjoined ConAgra from misappropriating any of Tyson's trade secrets for a period of one year and further from allowing Tyson's former employees to engage in the sale and marketing of poultry for the same period of time.

On appeal, ConAgra contended that Tyson failed to take reasonable steps to keep the information secret. None of the seven customer contracts that Tyson claimed involved trade secrets, contained a restriction on those customers to keep pricing information secret. Tyson had not entered into a covenant not to compete with the three executives, nor did Tyson have a separate confidentiality agreement with these executives. In short, the court concluded that Tyson had in place no protection against post-employment revelation of confidential information by these executives, and thus declined to enjoin Tyson's former executives from employment with ConAgra.

PSC Inc. v. Reiss, 111 F. Supp. 2d 252 (W.D.N.Y. 2000). PSC, a manufacturer of retail self-checkout systems, invoked the inevitable-disclosure doctrine and sought to enjoin its former sales manager, from working for a direct competitor, and from disclosing its alleged confidential information and trade secrets to his new employer. Specifically, the former sales manager was alleged to have attended PSC sales strategy meetings and learned confidential development plans for a new self-checkout product that would compete directly with the product of his new employer.

In rejecting the application of the "inevitable disclosure" doctrine, the court relied in part on the fact that the former sales manager was bound by a written confidentiality agreement with PSC and was otherwise bound by law requiring confidentiality in the employment relationship. Accordingly, the court reasoned that it "need not 'order' the former sales manager to do that which he is required by law to do by dint of his employment contract with PSC and the legal requirements resulting from that employment."

Lockheed Martin Corp. v. Aatlas Commerce Inc., N.Y. App. Div., No. 88042, 5/17/01. The appeals court affirmed the dismissal of Lockheed's claims that a former employee breached a confidentiality agreement and that Aatlas Commerce Inc. tortiously interfered with Lockheed's contractual relations and economic advantage by inducing the former employee to reveal information that allegedly led to the hiring of 13 former Lockheed software engineers. The court found that the former employee's confidentiality agreement did not cover the types of information allegedly disclosed, including information about the company's organizational structure and other employees' experience, abilities, and salaries.

Aatlas submitted affidavits signed by 13 former Lockheed employees stating that they initiated contact with Aatlas and had not been recruited by the former employee. They also asserted that they had not worked on e-commerce while employed by Lockheed. Lockheed submitted an affidavit by a current employee who said she received an unsolicited telephone call in March 2000 from someone with the former employee's first name recruiting her to join an unnamed technology firm. The former employee denied making any contact with the current employee.

The confidentiality agreement defined "confidential information" to include "personnel matters," but the agreement and the statement of understanding went on to provide that confidential information is material not made generally available to the public that is: generated, collected by, or used in Lockheed operations for actual or anticipated business, research, or development; or suggested by or resulting from any Lockheed work assignment. It "strains credulity" to characterize information on employee salaries, positions, and experience as protected confidential information, the court reasoned. "If [Lockheed's] construction of the agreement is accepted, no employee of [the company], including the former employee, could

fill out an employment questionnaire, resume or credit application without breaching the confidentiality agreement," the court stated. It also pointed out that Lockheed failed to allege in its complaint that the information was not readily discoverable through public sources.

Atmel Corp. v. Vitesse Semiconductor Corp., Colo. Ct. App., No. 98CA0586, 2/15/01. Atmel, a semiconductor company, has a manufacturing facility in Colorado Springs that employs more than 2,200 workers. Vitesse, also a semiconductor company, recently built a manufacturing facility in the area and began hiring employees. Many of Vitesse's new employees worked at Atmel previously. The companies do not manufacture competing products and do not compete for customers. However, they do compete for employees in "an extremely tight labor marker."

When Atmel hired three, now former, employees, they were required to sign an employment agreement that contained a non-solicitation clause stating: "I agree that I shall not for a period of one year following the termination of my relationship with the Company…either directly or indirectly…solicit, recruit, or attempt to persuade any person to terminate such person's employment with the Company." All three former employees left Atmel to work as managers at Vitesse.

After a trial, the court granted Atmel a preliminary injunction barring its former employees from soliciting Atmel's employees to apply for employment at Vitesse. In addition, it prohibited them from any hiring activities at Vitesse involving Atmel employees—even if Atmel employees first initiated contact. The Appellate Court concluded that "uncontroverted evidence established that custom in the semiconductor industry is to interpret non-solicitation covenants to prohibit only solicitation." The court noted that the words "solicit", "recruit," and "persuade" all "imply initiated contact" while the terms of the preliminary injunction "are much more expansive."

Dymock v. Norwest Safety Protective Equip. for Oregon Indus. Inc., Or. Ct. App., No. 16-98-18369, 2/14/01. An employee who was fired after refusing to sign a noncompetition agreement with his employer has a valid claim for wrongful discharge, the Oregon Court of Appeals held.

> "Under the proffered agreement, plaintiff not only could not solicit customers with whom defendant had already done business, but also could not solicit the business of an 'entity that was a target of [Norwest's] marketing.' That restraint was to continue for five years. Thus, the agreement at issue here falls squarely within the common meaning of 'noncompetition agreement' as that term is employed in revised statutes, 653.295(6). Accordingly, it was error for the trail court to dismiss the complaint on the ground that the tendered agreement is not a noncompetition agreement within the meaning of the statute," the court concluded.

ORS 653.295(1) provides that a noncompetition agreement between an employee and an employer "is void and shall not be enforced…unless the agreement is entered into upon" the employee's initial employment or connection with the "[s]ubsequent bona fide advancement of the employee with the employer. In addition, the court rejected the employer's contention that even if the agreement was a noncompetition agreement, plaintiff failed to make a valid claim "under any theory of wrongful discharge recognized in Oregon." The court reasoned

employers can be held liable for terminating an employee "for pursuing private statutory rights that are directly related to employment."

O'Regan v. Arbitration Forums, Inc., 246 F.3d 975 (7th Cir. 2001). Employee terminated for refusing to sign comprehensive employment agreement that included a noncompete clause failed to show that this was pretext for age or sex discrimination: Even if the agreement was "unnecessary, ineffective and unenforceable, ... Title VII and the ADEA do not prohibit [the employer] from foolishly requiring it." That president of employer did not sign it does not show pretext because president was "one of a kind," not similarly situated to the other professionals and managers required to sign. Contention that employer knew the agreement would have a "disparate impact" on older female managers because of their more limited alternative job prospects is without merit, since, if true, it was less burdensome for them to sign the agreement than it was for other employees, because they would be less inclined to leave anyway.

XVIII. SIMILARLY SITUATED/COMPARATORS

Cones v. Shalala, 199 F.3d 512, (D.C. Cir. 2000). The court reversed the grant of summary judgment on the plaintiff's promotional claim. The defendant explained that it filled the position in question by laterally transferring a GS–15 employee, rather than by promoting the GS–14 plaintiff, because it was required to downsize its GS–14 and GS–15 workforce. The court held that the plaintiff showed adequate evidence of pretext, in part because the plaintiff showed that three white GS–14 employees were promoted to GS–15 during the ten months after issuance of the downsizing order. The court stated that the defendant's explanation that they were not similarly situated because they had been serving in acting capacities at this time "is hardly conclusive at this stage of the litigation."

Silvera v. Orange County, 24 F.3d 1253 (11th Cir. 2001). School board did not discriminate against black employee who was terminated because he had been convicted of child molestation and had multiple arrests for violent assaults. A white employee, who was convicted of child molestation but was not terminated, was not similarly situated as plaintiff because he had not been convicted for violent conduct and plaintiff's arrests were more recent. Also, the school board acted under the assumption that it was bound by a preexisting agreement not to terminate the other employee because of his child molestation. Summary judgment reversed.

Logan v. Caterpillar, Inc., 2001 U.S. App. LEXIS 6002 (7th Cir. April 4, 2001). Male employee at Caterpillar failed to establish prima facie case of sex discrimination when he was fired after his "turbulent breakup" with another employee led to a restraining order against him, his indictment for residential burglary, and his arrest for criminal trespass. Plaintiff was unable to show that he was treated less favorably than his former girlfriend, who was disciplined for abusing the company's E-mail system but where there were no reports she had engaged in harassing conduct as did the plaintiff. Summary judgment affirmed.

Dent v. Federal Mogul Corp., 129 F. Supp. 2d 1311 (N.D. Ala. 2001). African-American male's claim of discriminatory discharge arising from his gambling on employer's

premises contrary to company policy cannot survive summary judgment where, although there is some evidence that other employees gambled, there is no evidence they were caught. "In order to indicate that other employees outside of a protected classification were similarly situated and treated more favorably, it is not enough to show that other employees engaged in the same or similar misconduct but were never disciplined simply because they were not caught."

Graham v. Long Island R.R., 230 F.3d 34 (2nd Cir. 2000). A black railroad-car repairman may proceed with his claim that his discharge for drug and alcohol use was based on race discrimination. The plaintiff offered evidence that at least two white employees who also tested positive for drugs or alcohol received multiple last chance waivers while he was fired after being given only one. The district court had determined the plaintiff was not similarly situated to the two white workers because one worker's second last chance came after he was demoted and the other worker's last chances were for absenteeism violations unrelated to alcohol or drugs. Plaintiffs must show they were "similarly situated in all material respects" to the individuals with whom they seek to compare themselves, which requires a similarity in workplace standards and conduct of comparable seriousness. There is no requirement that the conduct be identical. Summary judgment reversed.

Bogren v Minnesota, 2000 U.S. App. LEXIS 33574 (8th Cir. December 22, 2000). Dismissal of claims upheld where plaintiff, a former probationary state trooper who was terminated following a domestic altercation involving her former boyfriend, subsequently alleged gender and race discrimination. The court rejected the plaintiff's reliance on comparable-trooper evidence to show pretext because, with the exception of one officer, all of the troopers to whom she compared herself were beyond the probationary period and were thus governed by a CBA. The CBA, with its own grievance procedures, would create a different response by the patrol in disciplining or terminating those officers. The court also rejected the plaintiff's argument that she was treated differently from white male probationary officers, pointing out that none of the men had received a comparable criminal citation nor were multiple concerns raised about their performance. The court also rejected plaintiff's demographic evidence that she was the only black female trooper because it was "not probative of the reason for her termination" and there was no independent evidence to support it.

XIX. ADVERSE EMPLOYMENT ACTION

Russell v. Principe, 2001 U.S. App. LEXIS 16836. Denial or size of a bonus directly linked to employee's performance rating constituted an adverse employment action.

Davis v. Town of Lake Park, 2001 U.S. App. LEXIS 4564 (11th Cir. March 26, 2001). Judgment affirmed granting defendant town's motion for judgment as a matter of law on a black police officer's Title VII race discrimination claim where the officer's two corrective job performance memos and his removal from officer-in-charge status did not amount to adverse employment actions. The court held that to prove adverse employment action, an employee must show a serious and material change in the terms, conditions, or privileges of employment. The employee's subjective view of the significance and adversity of the employer's action is not

controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances.

Russell v. Board of Trustees, 243 F.3d 336 (7th Cir. 2001). The Seventh Circuit reinstated a sex discrimination claim brought by a female employee who claimed she was discriminated against when her male boss suspended her for five days without pay for falsifying her time card. The suspension constituted a materially adverse employment action as a matter of law – it became part of a spotless 30-year employment record, and her current or prospective employers would likely hold these charges against her when making employment-related actions. A formal suspension is much more than minor or trivial actions that make an employee unhappy.

Hinson v. Clinch County, Ga., Bd. of Educ., 231 F.2d 821 (11th Cir. 2000). Determining whether an employment action is adverse for purposes of Title VII is a matter of federal, not state, law. In this case, even though employee's transfer could not have been deemed a "demotion" under state law, which required a loss of *all* prestige, responsibility, and pay, it could have been an adverse employment action under Title VII, which requires only one of those three elements to be satisfied. A school board's attempted transfer of a female high school principal to a teaching position that contained "make-work" assignments could be considered an adverse employment action under Title VII. Although the plaintiff would retain her principal's salary, she would be required to work 20 more days than teachers normally worked and would be assigned to show up and sit at her desk with nothing to do. A jury could find that the assignments were "make-work" tailored to prevent the plaintiff contesting her removal. Summary judgment for employer reversed.

Suarez v. Pueblo International, Inc., 229 F.3d 49 (1st Cir. 2000). In ADEA case, reconfiguring company's operations so that plaintiff's functions changed somewhat, requiring plaintiff (who earned more than $190,000 per year) on one occasion to complete a three-page report overnight, excluding him from meetings as part of the reconfiguration, and some scattered remarks such as that plaintiff's proposals were "tired," that another employee "looked old," that the company needed "new blood," and a remark at a company social function by a nondecisionmaker that plaintiff should "dye his hair and retire," do not support a constructive discharge claim and do not, in fact, amount to adverse employment action at all.

XX. BANDING V. NORMING OF TEST RESULTS

Chicago Firefighters Local 2 v. City of Chicago, 2001 U.S. App. LEXIS 8081 (7th Cir. May 3, 2001). In a case of first impression, the Seventh Circuit ruled the Chicago fire department's practice of assigning a group of similar entrance and promotion numerical test scores to an alphabetical band, which treated all the scores as the same, is not prohibited race norming. The court rejected the Title VII discrimination claim brought by one of the plaintiffs in a consolidated challenge to the fire department's affirmative action plan. Banding that is adopted in order to make lower black scores seem higher would be a form of prohibited race norming. However, banding scores, even when it works to the advantage of minority groups, is not race norming per se. The fire department's banding practice was not intended as a means to

inflate minority test-taker scores artificially, but merely as an administrative means of eliminating meaningless gradations in scores.

XXI. CONTRACEPTIVES

13 states- California, Delaware, Connecticut, Georgia, Hawaii, Iowa, Maine, Maryland, Nevada, New Hampshire, North Carolina, Rhode Island, and Vermont have enacted legislation mandating insurance coverage of contraception where a policy covers prescription drugs or devices.

Erickson v. The Bartell Company, No. 00-1213, W.D. Wash. 6/12/01. The federal district court held that excluding contraceptives from a prescription benefit plan violates Title VII of the Civil Rights Act of 1964. It reasoned that male and female workers have "different, sex-based disability and healthcare needs," and employers have the obligation to provide "equally comprehensive coverage for both sexes." All of the benefits provided by the company's prescription plan were available to both men and women. Nonetheless, the court found that "mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women." The court stated:

> Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children or use prescription contraception. The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs. Even if one were to assume that Bartell's prescription plan was not the result of intentional discrimination, the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII.

The court rejected each of the employer's three defenses; that a woman's ability to control her fertility differs from the type of illness and disease normally treated with prescription drugs; that the plan's exclusion does not violate the terms of the PDA because it does not discriminate against pregnant women, and that employers should be entitled to limit the scope of employee benefit plans to control costs.

On December 14, 2000, the U.S. Equal Employment Opportunity Commission rendered a decision finding merit in two charges of discrimination alleging that an employer's failure to offer insurance coverage for the cost of prescription contraceptive drugs and devices violated Title VII of Civil Rights Act, as amended by the Pregnancy Discrimination Act.

The decision involved an employee health insurance plan which covered prescription drugs, vaccinations, preventive medical care for children and adults (including pap smears and routine mammograms for women), and preventive dental care. The plan also covered surgical means of contraception, namely vasectomies and tubal ligations. Excluded from coverage, however, were prescription contraceptive drugs and devices, whether used for birth control or for other medical purposes.

The EEOC based its decision on the Supreme Court case of *International Union, UAW v. Johnson Controls* (1991), which held that an employment policy that excluded women

capable of bearing children from holding certain jobs was an impermissible classification because it was based on the potential for pregnancy.

XXII. NATIONAL ORIGIN

EEOC v. Sears Roebuck and Co., 243 F.3d 846 (4th Cir. 2001). A longtime Sears Roebuck employee who was denied a similar position at a different store can proceed with a national origin discrimination claim. The plaintiff was Hispanic and spoke with an accent. He applied for a similar position at a different store, but Sears delayed responding to his repeated contacts and finally offered him a part-time job, but never established a start date or a reason for the delay. An admittedly less qualified female applicant was hired. The plaintiff had offered ample evidence to discredit Sears's proffered nondiscriminatory reason – its changing story to explain its failure to hire the plaintiff and several inconsistencies in the final explanation. Summary judgment reversed.

Bell v. EPA, 232 F.3d 546 (7th Cir. 2000). Seventh Circuit ruled the EPA's reasons for selecting four native-born Americans for promotion over four foreign-born plaintiffs were pretextual because the plaintiffs were more qualified. Plaintiffs had more experience, received more performance awards, and scored at or near the top in the preliminary candidates' objective rankings. Additionally, the lower court erred in excluding from evidence an internal EPA memorandum written by one of the decisionmakers who stated he thought two of the plaintiffs were more qualified than two of the selectees. The district court also erred in excluding plaintiffs' statistical report analyzing all EPA promotions for two positions in the upper Midwest region, which showed a statistically significant difference between the likelihood that foreign born applicants receive promotions and that other applicants receive those promotions. Summary judgment reversed.

XXIII. RELIGION

Ali v. Alamo Rent-a-Car Inc., 2001 U.S. App. LEXIS 3389 (4th Cir. March 6, 2001). In an unpublished, per curiam decision, a Muslim rental car employee, who was told she needed to remove her head scarf or would be moved to a position with less customer contact, was not discriminated against because she did not experience an adverse employment action. Legislative history and EEOC regulations did not alter the expectation that an adverse action was necessary in religious discrimination claims to trigger a violation. Summary judgment affirmed.

Bruff v. North Mississippi Health Services, 244 F.3d 495 (5th Cir. 2001). The Fifth Circuit reversed a jury verdict for a Mississippi employee-assistance program counselor, who claimed that her employer failed to accommodate her religious beliefs when it terminated her after she refused to counsel clients with respect to homosexual or extramarital sexual relationships. Requiring the medical center to accommodate the plaintiff's request to counsel only on subjects that did not conflict with her religion would result in more than *de minimis* costs and cause it an undue hardship as a matter of law. The plaintiff had rejected the medical center's reasonable accommodation offer of having 30 days to transfer to another position where conflict of care issues would be unlikely to arise.

See also, *Daniels v. City of Arlington*, 2001 U.S. App. LEXIS 6018 (5th Cir. April 9, 2001).

XXIV. EQUAL PAY / COMPENSATION

Kahn v. Dean & Fulkerson, P.C., 2000 U.S. App. LEXIS 29386 (6th Cir. 2000). The court held that a law firm had not violated the Equal Pay Act (EPA) when it paid a female attorney under a different compensation scheme than the one under which it compensated a similarly situated male attorney. The law firm established that the plaintiff was paid differently only after she had been offered and refused the same compensation system as the similarly situated male employee. Plaintiff apparently negotiated a different compensation system whereby she would not run the risk of having to pay expenses back to the law firm if she did not generate enough business. Thus, the difference in pay was due to a factor other than sex.

Howard v. Lear Corp., 2000 U.S. App. LEXIS 31547 (7th Cir. December 12, 2000). An HR Coordinator in a small, nonunion, nonproduction plant could not show her employer violated the Equal Pay Act by paying her less than HR managers in the company's larger plants. The plaintiff was not performing "equal work" as the HR managers because their jobs required greater responsibility – they worked in plants with larger employee populations, had more employees to train, union grievances to resolve, hourly wages to track, and more personnel records to monitor and maintain. There was no Title VII violation when the employer did not promote her to a manager's position. She failed to establish a promotional opportunity was available and that the promotion she sought was given to a male applicant or, alternatively, left unassigned. Summary judgment affirmed.

Lavin-McEleney v. Marist College, 239 F.3d 476 (2nd Cir. 2001). Jury verdict was upheld for a criminal justice professor alleging her college violated the Equal Pay Act. On appeal, the college argued the plaintiff failed to show she was paid less than a male comparator within her department and that she impermissibly compared herself to a male employee statistical composite. The court found there was sufficient evidence for the jury to have found the male comparator substantially equal to the plaintiff. The court also held that the additional use of statistical analysis was proper to establish gender-based discrimination and to calculate damages. The court did not decide, however, whether either type of evidence standing alone would have been sufficient to prove discrimination.

Fyfe v. City of Fort Wayne, 241 F3d 597 (7th Cir. 2001). A male city parks gardener, who was denied an opportunity to spray pesticides while on overtime as provided to a similarly situated female employee, has no Equal Pay Act claim when he was able to perform his duties during his regular working hours. Even if the difference in treatment regarding overtime could be interpreted as a pay differential, the City had demonstrated that the difference in treatment was based on factors other than sex: e.g., pesticide spraying was a greater part of plaintiff's job, and permitting the female gardener to occasionally perform her spraying duties after hours would cost the City less than having the plaintiff regularly spray after hours. Summary judgment affirmed.

The EEOC issued newly revised guidance that sets forth standards under which compensation discrimination is established in violation of Title VII of the Civil Rights Act (Title VII), the age Discrimination in Employment Act (ADEA), the American's With Disabilities Act (ADA), and the Equal Pay Act (EPA). This guidance was published as a new chapter of the EEOC's Compliance Manual. The guidance addresses the following issues:

a. Under what circumstances compensation discrimination is unlawful under Title VII, the ADEA, and the ADA;

b. How an investigator should determine whether base compensation discrimination is occurring in a workplace under Title VII, the ADEA, and the ADA;

c. How an investigator should determine whether an employer's non-base compensation is discriminatory or non-discriminatory under Title VII, the ADEA, and the ADA;

d. When pay differentials between men and women are lawful under the Equal Pay Act;

e. How an investigator should evaluate seniority, merit, and incentive systems under the Equal Pay Act;

f. What constitute "factors other than sex" that can serve as employer defenses under the Equal Pay Act; and

g. How Title VII and the Equal Pay Act interact.

XXV. ADMISSIBILITY OF SETTLEMENT OFFERS / PROMOTABLE

Coleman v. Quaker Oats Co., 232 F.3d 1271 (9th Cir. 2000). While circuit allows introduction of evidence of an employer's offer of a severance package in return for an employee's release when the offer is made contemporaneously with termination, trial court here did not abuse its discretion by excluding under Fed. R. Civ. P. 408 evidence of an offer to enhance a severance package already provided at termination, where the offer was made after plaintiff filed his EEOC charge.

The court rejected plaintiff's contention that Quaker Oats retention of a "promotable" employee during a reduction-in-force did not by itself give rise to an inference of age discrimination. The court determined that the reorganization eliminated hundreds of low-level positions that employees had kept for many years without any expectation that they would advance in the company. As a result, the remaining jobs were higher-level management/account executive positions. Hence, because Quaker now expected the retained employees to be promotable within two years to the management/account executive positions, promotability became an increasingly important consideration.

XXVI. EVIDENTIARY AND PROCEDURAL

A. Summary Judgment: Interplay of Federal & State Law Claims

Snead v. Metropolitan Prop. & Cas. Ins. Co., 237 F.3d 1080 (9th Cir. 2001). Under the *Erie* doctrine, the *McDonnell Douglas* order of proof is procedural and so must be applied to state-law employment discrimination claims in summary judgment proceedings. Court applies it in Oregon-law disability discrimination case, even though under Oregon

summary judgment procedure, employment discrimination plaintiffs automatically survive summary judgment if they can adduce a prima facie case. Court holds that the use of federal procedure is not outcome-determinative because a plaintiff who could not survive the third, pretext, prong of the *McDonnell Douglas* test "would only delay the inevitable by proceeding in a state court where, on the same record, a nonsuit or JNOV would be in order at the close of the plaintiff's case."

Watson v. Eastman Kodak Co., 2000 U.S. App. LEXIS 33443 (3rd Cir. December 21, 2000). Plaintiff account executive was notified by letter that he was immediately terminated from that position and would be terminated from defendant employer within a period of time if he did not find another position within the company. Plaintiff's administrative charge centered on his immediate termination from his account executive position; therefore, his cause of action accrued from that date. Nor did the possibility of obtaining an account executive position elsewhere in the company make the letter "equivocal," thus avoiding accrual, since the possibility of obtaining such a position was purely speculative.

Cox v. City of Memphis, 230 F.3d 199 (6th Cir. 2000). Following the Third Circuit and rejecting holdings of the Second, court holds that statute of limitations period begins running upon the promulgation of a discriminatory promotion eligibility list, and that promotions decisions based on that list are not actionable violations, but merely a present effect of a past discriminatory action, i.e., the promulgation of the list.

O'Rourke v. City of Providence, 2001 U.S. Dist. LEXIS 165 (1st Cir. January 8, 2001). There was no "single act of such permanence or import" that it should have triggered an awareness in plaintiff that she had an actionable claim. Therefore, plaintiff's cause of action may be deemed to have accrued only after the situation reached a clear "breaking point," where plaintiff's health had so deteriorated as a result of the harassment that she sought medical treatment, her co-worker brothers' attempts to intervene on her behalf had failed, and plaintiffs' own attempts at an "internal" remedy with employer had failed.

Freeman v. Madison Metro. Sch. Dist., 231 F.3d 374 (7th Cir. 2000). Plaintiff claimed that, because of his race, following his injury employer delayed returning him to work with an appropriate accommodation in accordance with its usual policy. Evidence of employer's conduct that occurred prior to the limitations period should have been admitted into evidence under the continuing violations theory: Each new letter from plaintiff's doctor releasing more restrictions was greeted by employer with a flurry of letters and requests for clarification; at no time did employer inform plaintiff he would not be accommodated and there was no specific event that should have triggered plaintiff's knowledge that he was the subject of discrimination.

B. Title VII Charge Verification Requirement

Edelman v. Lynchburg College, 228 F.3d 503 (4th Cir. 2000). Reading 42 U.S.C. §§ 2000e-5(b) and 2000e-5(e)(1) as having the "plain meaning" that a charge must be verified to be a charge, and as so verified must be filed with the EEOC within the limitations period, court invalidates 29 C.F.R. § 1601.12(b), which permits a verification made after the

limitations period to relate back to a timely-filed but unverified "charge"; disagreeing with the Fifth, Seventh, Ninth, and Tenth Circuits.

Vason v. City of Montgomery, 240 F.3d 905 (11th Cir. 2001). Requirement of 42 U.S.C. 2000e-5(b) that all administrative charges "be in writing under oath or affirmation" is mandatory and was not waived by the EEOC processing the charge and ultimately issuing plaintiff a right-to-sue letter. Consequently, plaintiff's Title VII civil action was properly dismissed on summary judgment.

C. Exhaustion of Administrative Remedies

Clockedile v. New Hampshire Dep't. of Corr., 245 F.3d 1 (1st Cir. 2001). Abandoning *Johnson v. General Elec.*, 840 F.2d 132, 139 (1st Cir. 1988), the court holds that under Title VII, a retaliation claim not asserted in EEOC charge may be asserted in subsequent civil action "so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency e.g., the retaliation is for filing the agency complaint itself."

W*alker v. UPS*, 240 F.3d 1268 (10th Cir. 2001). Joining Ninth and Eleventh Circuits and rejecting position of D.C. Circuit, the court upholds validity of regulation permitting EEOC to issue right-to-sue letters prior to the expiration of 180 days from filing of Title VII charge. In addition, district court erred in dismissing Title VII complaint on ground that EEOC failed to attach certificate to letter stating its inability to complete its investigation within 180 days, as required by regulation. Plaintiff "should be entitled to rely in good faith on the accuracy of a notice sent to her by a federal administrative agency [and] should not be denied her day in court because of EEOC's negligence."

D. Discovery

EEOC v. Rite Aid Corp., 2000 U.S. Dist. LEXIS 16332, 83 F.E.P. 1824 (D. Md. 2000). An employer that has been served with an EEOC subpoena seeking information about management personnel is required to extract, compile, and deliver such information to the EEOC. The EEOC was conducting an investigation of Rite Aid for allegedly discriminating against four female African American employees who filed charges of discrimination with the EEOC. Rite Aid argued that since the EEOC could obtain the information requested by reviewing the files and documents in Rite Aid’s possession, Rite Aid was not required to compile and deliver the information to the EEOC.

EEOC v. Morgan Stanley & Co., 2000 U.S. Dist. LEXIS 17096 (S.D.N.Y. November 27, 2000). EEOC's subpoenas demand documents from employer reflecting all complaints, "formal or informal," of race or sex discrimination within certain time periods. Court holds "informal" complaint an unduly vague term, since employer has over 93,000 employees in 500 offices worldwide, and therefore, even if the term could be defined, compliance would require a "massive and unduly burdensome effort," involving interviewing everyone who has recently worked in a supervisory position. Court accordingly declines to

enforce subpoena to the extent it demands documents concerning "informal" complaints. Court also references an unpublished order in another case that defines "formal" complaint.

Jones v. Scientific Colors Inc., No. 99-1959, (N.D. Ill. November 15, 2000), *reported in* Michael Bologna, *Judge Permits EEOC to Depose Staff of Defendant About Ku Klux Klan Affiliations*, BNA Daily Labor Report, November 24, 2000, at A-4. In racial hostile-environment harassment case that includes allegations of racist comments and graffiti referencing the Ku Klux Klan, court denies employer's motion for a protective order barring the EEOC from asking employees whether they are members of the Klan. The information is likely to lead to the discovery of admissible evidence, and the employer lacks standing to assert any First Amendment interests of its employees.

Hargrave v. Brown, 2001 WL 277846 (La. Ct. App. March 22, 2001). Supervisor whom plaintiff accuses of sexually assaulting her and who allegedly left a semen stain on plaintiff's clothing as a result of his assault must provide DNA sample, either by blood or cheek swab.

E. Psychotherapist-Patient Privilege

Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154 (9th Cir. 2001). A case of first impression in federal courts of appeals extends federal psychotherapist-patient privilege to unlicensed counselors in Employee Assistance Programs. The decision is a significant extension of the 1995 Supreme Court decision in *Jaffe v. Richmond* that created an absolute privilege for confidential communications between a licensed psychotherapist and patients in the course of diagnosis or treatment.

F. Consent Decrees

Holland v. New Jersey Dep't. of Corr., 2001 U.S. App. LEXIS 5699 (3rd Cir. April 4, 2001). District court's inherent power to enforce compliance with or modify a consent decree can be used to extend its term. With respect to compliance-enforcement power, court may extend term only if that is essential to remedy a violation and provide the parties with the relief bargained for in the order, and then only with respect to those parts of the order that were not complied with; with respect to modification power, extension is appropriate only if the decree failed to accomplish the result it was specifically designed to achieve. Court must also make specific findings of fact supporting any extension of the order. Rejects "deferential plenary" or "deferential de novo" standard of review of district court's interpretation of consent decrees, and adheres to simple de novo standard, holding that district court erred in extending term of decree where its "clear language" stated that its term was four years, and the language empowering the court to modify the decree made no reference

XXVII. OPINION TESTIMONY

Hester v. BIC Corporation, 225 F.3d 178 (2d Cir. 2000). The court reversed a judgment on a jury verdict for plaintiff on her race discrimination, and retaliation claims. The court held that the trial court erred by permitting plaintiff’s co-workers to testify to their

opinion that the nastiness of plaintiff's supervisor was racially motivated. It relied on Fed.R. of Evidence 701(b) to bar "lay opinion testimony" that amounted to naked speculation for a defendant's adverse employment decision.

Price v. Federal Express Corp., S.D. Tex., No. G-99-675, 1/12/01. A federal district court rejected Plaintiff's statistical evidence purporting to show that a senior manager for the company's southern region, who conducted the promotion process, had a discriminatory animus toward African-Americans. The senior manager received less favorable ratings from employees in a year in which he supervised more African-Americans, Plaintiff noted. The court ruled the Plaintiffs statistical evidence was "not substantial." For all the years surveyed except 1997, only five employees were surveyed. "[S]tatistical data in the form of surveys of five to 20 employees, over a period of five years, unaccompanied by any direct evidence of racial animus, is wholly inadequate to defeat summary judgment," the court ruled

Wyvill v. United Companies Life Insurance Co., 212 F.3d 296 (5th Cir. 2000). "Me-too" anecdotal age discrimination evidence was erroneously admitted. None of the "me-too" employees who testified held the same positions or had the same supervisors as the two claimants.

Kline v. City of Kansas City Fire Department, 175 F.3d 660 (8th Cir. 2000). Evidence that different supervisors discriminated against women other than the female plaintiffs was properly excluded. Such evidence would not tend to prove that plaintiffs were discriminated against because of their sex. The probative value of this evidence would be substantially outweighed by the threat of confusion of issues and unfair prejudice.

XXVIII. REMEDIES

A. Contract Damages – Stock Options

Scully v. US WATS, Inc., 238 F.3d 497 (3rd Cir. 2001). Plaintiff was terminated and denied his right to exercise stock options in breach of his employment contract. The shares purchasable pursuant to the option were "restricted" in that plaintiff could not sell them for a year after acquiring them. District court properly based plaintiff's damages award on the difference between the exercise price of the option and the market price of unrestricted shares, both calculated as of the date of breach (the date when plaintiff unsuccessfully sought to exercise the option). District court properly rejected plaintiff's proposed calculation, which was the difference between the option price and the market value as of a year after plaintiff sought to exercise the option, as too speculative, and also properly rejected defendants' proposed calculation, which was the district court's less a 30 percent discount because of the restriction, as understating the option's true value.

Gu v. Hughes STX Corp., 127 F. Supp. 2d 751 (D. Md. 2001). ADEA case. Plaintiff's rejection of defendant's offer of reinstatement was reasonable and did not result in her forfeiture of front pay claim where defendant made offer four years after plaintiff's discharge, two years after she initiated suit, and shortly after entry of partial summary judgment by consent in plaintiff's favor on back pay and liquidated damages; offer of "prior job" was vague, inaccurate, and potentially misleading; plaintiff would have to work with the same

people who had disparaged her performance in connection with her discharge; and plaintiff would have to relocate from Massachusetts, where she had moved in obtaining positions to mitigate her damages, to Maryland. The Court also held that where plaintiff properly requested reinstatement in her complaint, she did not "abandon" it or other future equitable relief such as front pay merely because it was not mentioned in the pretrial order.

B. Compensatory Damages

O'Rourke v. City of Providence, 2001 U.S. App. LEXIS 165 (1st Cir. January 8, 2001). In hostile-environment sexual harassment case, jury award of $275,000 was "not excessive as a matter of law" where plaintiff testified that she was a "nervous wreck," often shaking uncontrollably, suffering from insomnia and severe migraine headaches, gained 80 pounds in a short time, and eventually reached the point where she was unable to function and had to leave work on disability for a time. Plaintiff's psychiatrist testified that plaintiff suffered from post-traumatic stress disorder as a result of the harassment, that she was undergoing continuing treatment that included anti-depressant medication, and that her condition was probably permanent.

Bennett v. Smith, 2000 U.S. Dist. LEXIS 18253 (N.D. Ill. December 15, 2000). Based on a survey of Seventh Circuit case law, district court determines that jury's award of $240,000 in racial-discrimination failure-to-hire case that affected plaintiff's "self-esteem" and "caused her stress," manifesting in physical ailments such as headaches, vomiting and abdominal pain, was "monstrously excessive"; reduces award to $45,000.

C. Punitive Damages

Zimmerman v. Associates 1st Capital Corp., 251 F.3d 376 (2d Cir 2001). Statement by a corporate officer who terminated a female employee that he had been “exposed to HR training” and training on “hiring practices and equal opportunity”, meant that the employer had sufficient knowledge of the requirements of Title VII to support an award of punitive damages.

Cooke v. Stefani Mgmt. Servs., Inc., 2001 U.S. App. LEXIS 9223 (7th Cir. May 14, 2001). Where employer had published sexual harassment policy, had required harassing restaurant manager to attend a seminar on harassment, and had posted an antiharassment poster at the restaurant, employer not liable for punitive damages under *Kolstad v. American Dental Ass'n*'s, 527 U.S. 526 (1999), good faith defense. There was no evidence that anyone in upper management had "any inkling" that the harassment was taking place. Though antiharassment policy on its face required plaintiff to report harassment to the harasser, "common sense" should have led plaintiff to report the harassment to someone higher in the "chain of command." Plaintiff could not argue that because harasser was employer designee for reporting harassment, good faith defense was unavailable; plaintiff's claim is not that the designee failed to remedy the harassment, which is the required showing, but that the designee was the harasser.

Bruso v. United Airlines, 239 F.3d 848 (7th Cir. 2001). The court held that in determining whether a plaintiff is entitled to punitive damages under Title VII, although a written or formal anti-discrimination policy is relevant to evaluating an employer's good faith efforts at Title VII compliance, it is not sufficient in and of itself to insulate an employer from a punitive damages award. United had an anti-discrimination policy in place, and all of the personnel involved had had extensive training from United's senior litigation counsel on its policy of zero tolerance for discrimination and sexual harassment. United conducted an investigation and then demoted plaintiff on the grounds that he had either falsely accused another employee of sexual harassment or failed to report the other employee's inappropriate conduct in a timely manner.

The district court denied the plaintiff's request for injunctive relief and granted United's motion for judgment as a matter of law on the issue of punitive damages. The Seventh Circuit reversed the district court's order denying the plaintiff punitive damages. The court reasoned that the major players in the decision to demote the plaintiff who were managerial agents of the employer, were familiar with the anti-discrimination principles of Title VII and United's zero-tolerance-policy, and did not make a good-faith effort to comply with either.

D. Cap on Damages

Giles v. General Elec. Co., 245 F.3d 474 (5th Cir. 2001). Jury verdict for plaintiff on federal and state ADA claims resulted in award of $400,000 in compensatory damages and $800,000 in punitives. Trial court applied 42 U.S.C. §1981a in reducing award to $300,000, but then characterized entire award as compensatory. Employer challenged the $300,000 award, so characterized, as excessive. Court of appeals rejects trial court's characterization of the award as entirely compensatory, reasoning that since jury awarded compensatory and punitive damages in a 1:2 ratio, respectively, only $100,000 of reduced award could be characterized as compensatory. The Court of appeals also rejected plaintiff's contention that the entire amount of the award in excess of $300,000 should have been allocated to his state law claim to allow a greater award, holding that the state's express legislative policy of providing for the execution of the ADA's policies "would be better served by viewing the two caps as coextensive, not cumulative." Court deems inapposite *Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336 (D.C. Cir. 1999), because that case involved reallocating award to a D.C. statute that did not provide for a statutory cap.

E. Back Pay

1. Mitigation

Miller v. AT&T Corp., 2001 U.S. App. LEXIS 8507 (4th Cir. May 7, 2001). Plaintiff's post-termination enrollment in school did not toll accrual of back pay where plaintiff had first engaged in a "diligent but fruitless search for employment," and did not obtain training in school to "enhance" her earning capacity, but rather to qualify herself for a job in a different field that, in fact, paid $30/day less than plaintiff had been earning before her wrongful termination by defendant.

Szedlock v. Tenet, 2001 U.S. Dist. LEXIS 5622 (E.D. Va. April 11, 2001). Plaintiff failed to mitigate where from August 1998 until date of opinion she applied for only ten positions; placed her resume in a nationwide human resources database; searched vacancy announcements periodically; and, after relocating to California, limited her efforts to sending out three resumes. In light of plaintiff's hearing disability, court concludes that she should have found alternative employment within 24 months, and so limits back pay to that period.

XXIX. TAXATION

A. Lump-Sum Payments

The IRS taxes earned income when it is received even if it covers several prior tax years. This IRS rule can push employees receiving lump sum payments into higher tax brackets. Computation of this additional tax liability is complicated and requires expert testimony without which such relief will be denied, *Anderson v. Conrail,* 2000 U.S. Dist. LEXIS 15978 (E.D. Pa., October 26, 2000). Employer reimbursement of the extra taxes occasioned by a required lump-sum payment has been authorized in certain cases.

For example, a magistrate judge added $38,000 to an ADEA jury verdict for $519,000 to offset the extra taxes the successful plaintiff had to pay due to the negative tax consequences of receiving a lump sum payment of wages. The court followed the Third Circuit's rationale in *Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089 (3d Cir. 1995), which held that prejudgment interest "reimburses the claimant for the loss of the use of its investment or its funds from the time of the loss until judgment is entered." Because the Third Circuit recognized the economic necessity of compensating for the lost "time value of money" in accordance with the "make whole" doctrine, the court concluded that the Third Circuit would likewise compensate for the depletion of that money due to the increased taxes to which the award is subject because it was received in a single tax year, instead of being paid over time.

Consequently, the court found that the plaintiff should be reimbursed for the reduced amount of front pay money that he has to invest as a result of higher taxes, as well as for the higher taxes he must pay on his back pay award because he received the money in a lump sum,*O'Neill v. Sears Roebuck Co.,* 108 F. Supp. 2d 443 (E.D. Pa., July 31, 2000).

B. Back Pay

United States v. Cleveland Indians Baseball Co., 121 S. Ct. 1433 (2001). Back pay (or "back wages") are subject to FICA and FUTA taxes by reference to the year they are actually paid, rather than the year they should have been paid.

C. Corporate versus Individual Defendant

Longstreth v. Copple, 101 F Supp. 2d 776, 2000 U.S. Dist. LEXIS 9143 (N.D. Iowa 2000). The court held that a former employer improperly withheld taxes on a FLMA claim settlement because it was unclear whether the payment was attributable to actions of the former employer or of the claimant's former supervisor. The withholding obligation stems from whether an award is classified as "wages" and the language of the FMLA suggests that damages "do not per se constitute wages that are subject to statutory deductions." Because the

parties did not allocate the settlement between the corporate and the individual defendants, the entire payment could be construed as damages payable by the individual defendant, the court reasoned.

D. Punitive Damages

Foster v. United States, 2001 U.S. App. LEXIS 7889 (11th Cir. April 30, 2001). Punitive damages are part of gross income even under 1989 amendment to 26 U.S.C. §104(a) governing applicability §104(a)(2), which amendment was repealed in 1996.

E. Contingent Fees

Foster v. United States, 2001 U.S. App. LEXIS 7889 (11th Cir. April 30, 2001). Consistent with the decision of the Fifth Circuit in *Cotnam v. Comm'r*, 263 F.2d 119 (5th Cir. 1959), the Eleventh Circuit held that since under governing Alabama law, taxpayer-successful plaintiff could never have had access to money she assigned to her attorneys under a post-trial/pre-appeal contingent fee agreement, such money was excludable from her gross income.

Sinyard v. Comm'r, No. 99-71369, 9th Cir., 9/25/01. Under a settlement approved by a federal district court, the employer agreed to pay plaintiffs and their counsel to settle ADEA claims. Prior to initial litigations, plaintiffs agreed to pay their counsel one-third of any recovery. After deducting costs and disbursements, plaintiffs agreed to allocate one-third of their remaining recovery as compensation for tort injuries, one-third for lost wages and one-third for attorney fees. The Ninth Circuit held that plaintiffs had constructive receipt and concluded that the employer's satisfaction of a debt results in income to the taxpayer.

XXX. MANAGEMENT OF THE EMPLOYMENT LAW FUNCTION

A. Admissibility of Settlement Offers

Coleman v. Quaker Oats Co., 232 F.3d 1271 (9th Cir. 2000). While circuit allows introduction of evidence of an employer's offer of a severance package in return for an employee's release when the offer is made contemporaneously with termination, trial court here did not abuse its discretion by excluding under Fed. R. Civ. P. 408 evidence of an offer to enhance a severance package already provided at termination, where the offer was made after plaintiff filed his EEOC charge.

B. Evidence of Employer Conduct After Alleged Discrimination Took Place

Freeman v. Madison Metro. Sch. Dist., 231 F.3d 374 (7th Cir. 2000). In trial of black plaintiff's claim that he was discriminatorily denied accommodation and a return to work following his on-the-job injury, trial court erred in excluding evidence that after the alleged discrimination against plaintiff took place, two white employees were accommodated after being injured. Evidence before the court showed that the policy of accommodating injured employees had continued unchanged.

C. Threatening Letters

Walls v Floe International Inc. D. Minn., No. 00-1371, 9/18/01). A laid-off employee faxed a letter to the owner of the company, seeking rehire for the trailer season, stating that he had "an attorney in my family" and knew that he could "sue for back wages which would be around $3,600." The letter ended: "Now because this letter is going to save you and [his supervisor] money, I would like a two or three dollar raise if I do get called back, especially since I was off for six months. And in the long run, this raise would be a hell of a lot cheaper than those back wages." Shortly after sending the letter, the company discharged plaintiff on the basis of his "inappropriate" and "threatening" letter. "While it is true that many letters asserting an employee's rights could be read to indicate potential litigation, the court is not convinced that [the company's] response under the circumstances was unreasonable or pretextual. There is no evidence before the court that [the company's] decision to terminate plaintiff was based on anything other than its determination that the letter was threatening and inappropriate," the court concluded.

D. Record Retention

Rummery v. Illinois Bell Telephone Co., 7th Cir., No. 00-2137, 5/11/01. "Employers are not required to keep every single piece of scrap paper that various employees may create during the termination process," Seventh Circuit held. "It is sufficient that the employer retains only the actual employment record itself, not the rough drafts or processes which may lead up to it." Plaintiff argued that regulations of the Equal Employment Opportunity Commission, at 29 C.F.R. § 1602.14, require an employer to keep any record it makes "including but not necessarily limited to …records having to with …lay-off or termination" for a year from the date the record is made or the personnel action occurs. "While Illinois Bell [Telephone Co.] admits that the documents were destroyed intentionally, to draw an inference that the records favored Rummery requires us to conclude that the documents were destroyed in 'bad faith,'" the court said.

E. Polygraph Evidence During Internal Investigations

Subia v. Riveland, 2001 Wash. App. LEXIS 17 (January 5, 2001). Plaintiff corrections officer claims that his placement on paid administrative leave for three weeks pending an investigation of an inmate's allegation that he engaged in sexual relations with her constituted race discrimination. The investigation cleared plaintiff, who thereafter returned to work. Trial court excluded evidence that a polygraph test had indicated that inmate's allegation had been truthful. Jury verdict and judgment for plaintiff. Appeals court orders new trial, holding that polygraph evidence should have been admitted for the limited purpose of supporting corrections department's articulated legitimate, nondiscriminatory reason for placing officer on leave – that it genuinely believed there was sufficient evidence of sexual relations to warrant an investigation, which it was department policy to conduct with the target of the investigation placed on paid administrative leave so the investigation would be "unfettered."

F. Attorney-Client Privilege

Weeks v. Independent School Dist No. I-89, 230 F.3d 1201 (10th Cir. 2000). The plaintiff's attorney contacted two company employees, one of whom was not even a "supervisor" but rather had "support" responsibilities, such as checking overtime records, and the second of whom, while classified as a "support" employee without managerial or supervisory responsibility, had in fact low level supervisory authority over some office type operations.

The ethical rules in Oklahoma as well as most other jurisdictions prohibit communications (1) with persons who have managerial responsibility for the organization that is the opposing party, (2) with persons whose act or omission in connection with the matter can be imputed to the organization for purposes of liability, and (3) with persons whose statement may constitute an admission on the part of the organization.

The district court disqualified the plaintiff's attorney for violating the ethical requirement that an attorney refrain from contacting employees of a represented party. The Tenth Circuit applied the "scope of employment" rather than the "control group" test. The "scope of employment" test puts a broader group of employees " off limits" to plaintiff's without employer consent.

See also; *Stanford v. Harvard College,* 2000 Mass Super. LEXIS 489 (Superior Ct, Middlesex Cnty, 2000).

Wikel v. Wal-Mart Stores, Inc., 197 F.R.D. 493, 496(N.D Okla. 2000). The court reaffirmed that materials must also be prepared "because of" the litigation, and not created in the "ordinary course of business," in order to be protectable as work product. If some corporate policy requires that all incidents be investigated, the investigation materials might have been created to prevent reoccurrences, to improve safety and efficiency, and to respond to regulatory obligations.

Olson v. Accessory Controls & Equipment Corp., 757 A.2d 14, 26 (Conn. 2000). The court held that an environmental consultant's report was privileged. Pointing to the engagement letter between the law firm and the environmental consultant, which "indicated that [the lawyer] needed the [environmental consultant's] report in order to provide the appropriate legal advice to the defendant." The court rejected adversary's argument that "it should ignore the engagement letter and examine on the factual nature of the report."

See also; *Calvin Klein Trademark Trust v. Wachner,* 124 F Supp. 2d 207 (S.D.N.Y. 2000) and 198 F.R.D. 53 (S.D.N.Y. 2000).

W.R. Grace & Co. v. Zotos International, Inc., No. 98-838S, 2000 U.S. Dist. LEXIS 18096 (W.D.N.Y. Nov. 2, 2000). A defendant's lawyer directed that the defendant's testifying expert discard draft reports that the expert had prepared, to "avoid 'confusion.'" Although the plaintiff's request for such drafts arrived after they had been destroyed, the court nevertheless found that the defendant "had a duty to preserve and maintain [the expert's] draft reports for possible disclosure upon Plaintiff's request." The court ordered all remaining drafts produced and even mentioned a "potential basis" for sanctions.

Disidore v. Mail Contractors of America, Inc., 196 F.R.D. 410, 417 (D. Kan. 2000). Reaffirmed that under Federal Rule 26(b)(4)(B), a party may conduct discovery (through interrogatories or by deposition) of experts who are not expected to testify at trial only "upon a showing of exceptional circumstances under which is impracticable for the parties seeking discovery to obtain facts or opinions on the same subject by other means."

Ampa Ltd. v. Kentfield Capital LLC, No. 00-05008, 2000 U.S. Dist. LEXIS 11638, (S.D.N.Y. Aug. 16, 2000). The court held that the attorney-client privilege that would otherwise have covered discussions at a corporation's board of directors meeting "was waved by the presence of [the corporation's] outside accountant, who was not involved in the legal issue that was discussed in his presence, and whose presence therefore waves the privilege."

G. HR Personnel

Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836 (11th Cir. 2000). The City of Fort Lauderdale was justified in terminating its affirmative action specialist who distributed a report on the city's race relations, which contained her own dramatic personal commentary. Her supervisors had instructed her to eliminate the controversial material. The plaintiff could not show that the city's reasons for terminating her – refusal to follow her supervisors' instructions – were pretextual. The court noted that "[a]lthough the subject matter of the dispute between [Rice-Lamar] and her supervisors involved race and discrimination, the City's actions with respect to [Rice-Lamar] herself were not due to her race or gender. Rather, they were due to her insistence on including her own conclusions in the Affirmative Action Reports against her supervisors' wishes." Summary judgment affirmed.

XXXI. AFFIRMATIVE ACTION

Johnson v. Board of Regents, University of Georgia. No. 00-14340, 11th Cir., 8/27/01. The court struck down a University of Georgia admissions policy that it said unconstitutionally enhanced the chances of some blacks and other racial minorities of gaining admission to the school. Under the school's admissions policy, the vast majority of undergraduate students were admitted on the basis of high school grades and standardized test scores. But a group of students who were not automatically admitted was assigned additional "points" based on other factors, the most heavily weighted of which was race. The highest-scoring of these students were also admitted to the university.

The university had argued that ensuring diversity in its student body was a compelling state interest and that the policy would help remedy a history of racial discrimination. About 6 percent of the university's student body is black, while the state's population is more than 25 percent black. "A policy that mechanically awards an arbitrary 'diversity' bonus to each and every nonwhite applicant at a decisive stage in the admissions process, and severely limits the range of other factors relevant to diversity that may be considered at that stage, fails strict scrutiny," the court reasoned.

MD/DC/DE Broadcasters Association et al. v. Federal Communications Commission, 2001 WL 32786 (D.C. Cir. January 16, 2001). D.C. Circuit struck down a Federal Communications Commission EEO rule aimed at employee recruitment by

broadcasters, stating that the regulation was invalid because (1) it pressured licensees to recruit minorities and women; (2) such outreach constituted a "racial classification" subject to strict scrutiny; (3) the regulation was not narrowly tailored to prevent discrimination, violating equal protection; and (4) the invalid portion of the regulation was not severable.

Previously, the D.C. Circuit in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) held that the FCC's prior regulation on EEO was an unconstitutional race-based classification. The prior regulation required stations to seek out sources likely to refer women and minorities for employment, keep track of the source of each referral, and record the race and sex of each person hired. If the data collected indicated that the station was hiring a lower percentage of women and minorities than in the local workforce, the FCC would take that into account in determining whether to renew the station's license.

Thereafter, the commission issued a new EEO rule requiring licensees to achieve a "broad outreach" in their recruiting efforts. The rule stated that a licensee must make a good faith effort to disseminate widely any information about job openings and provided two options by which the licensees could comply. With Option A the licensee must undertake four approved recruiting initiatives every two years, but need not report the race and sex of the job applicants. With Option B the licensee may design it's own outreach program, but must report the race and sex of the job applicants as well as the source of the referral. The rule also reinstated the requirement that each licensee file an Annual Employment Report, using the data only to monitor industry trends.

The D.C. Circuit agreed that Option B did create pressure to focus on recruiting efforts upon women and minorities in order to induce more applications from those groups. The court noted that the Commission made it clear that if the data collected would be reviewed and if a license reported few or no women or minorities in its applicant pool, the Commission would investigate the broadcaster's recruitment efforts. The court reasoned that since the Commission has compelled broadcasters to redirect their recruiting resources so as to generate a larger percentage of applications from minority candidates, some non-minority candidates would be deprived of an opportunity to compete simply because of their race. The court also held that it did not have to decide whether the regulation was supported by a compelling government interest because the new EEO rule is not narrowly tailored to further the compelling government interest.

Danskine v. Miami-Dade Fire Department, 11th Cir., No 99-14493, 6/12/01. A group of male applicants for entry-level firefighter positions in Miami-Dade County failed to prove that the county violated the 14th Amendment's equal protection clause by granting female applicants a preference for hiring under a voluntary affirmative action plan. Affirming summary judgment in favor of the county, the appeals court held that the affirmative action plan, originally adopted in 1984, passes muster under the "intermediate scrutiny" applied to gender-based classifications under the 14th Amendment.

The Miami-Dade Fire Department excluded women from firefighter positions until the late 1970s or early 1980s. In 1983, the department's workforce was 1 percent female, while the general population of Dade County was 52 percent female. The county voluntarily adopted an affirmative action plan in 1984. Preferences for blacks and Hispanics were dropped by the 1990s because the county had satisfied its hiring goals for those groups.

In setting its 36 percent goal for female firefighters, the county relied on 1980 census data that 52 percent of the population was female and then discounted that proportion by 30

percent to reflect that not all women were interested in, or qualified for, the job of firefighter. All female applicants who passed the written exam were exempt from a lottery that determined which applicants would advance to the next stage, the physical ability test (PAT).

Although the court chided the county for not either adjusting its hiring goal or acting with greater urgency to meet its stated goals, it concluded that the affirmative action plan was justified. "[A]s of 1994-97, there was enough of a fit between the county's plan and its asserted justification of eradicating the Fire Department's past discrimination against women to satisfy intermediate scrutiny. The 36 percent target is not applied as a rigid quota, and indeed, does not appear to be used at all in implementing the plan from year to year. Just as critically, there has been no showing that the 36 percent goal, even if unsustainably high, caused appellants any injury."

Denney v. Albany, GA., 11th Cir., No 99-14162, 4/11/01. Affirming summary judgment for the city, the court said the fire chief permissibly relied on subjective factors such as leadership potential, recommendations from supervisors, and interpersonal skills in promoting two black firefighters from a pool of qualified candidates. In arguing that the asserted justification for the promotions was a pretext for race bias, the plaintiffs cited: statistical evidence that the chief scored black candidates higher on the oral phase of the qualification exercise than whites, even though white candidates scored higher on an "objective" test; the city's decision to make the promotion process largely subjective; evidence that the white plaintiffs were more qualified than the promotees, even on the subjective criteria articulated by the chief; the city's affirmative action plan, which set minority hiring and promotional goals; and a previous case in which the Eleventh Circuit had affirmed a finding that the chief had discriminated based on race in selecting a battalion chief.

Courts have been "extremely wary" of citing lawful affirmative action policies as evidence of pretext, and national policy "permits the use of voluntary affirmative action programs to remedy the legacy of discrimination," the courts reasoned. It also found that the Battalion Chief Job involved a distinct promotion process, involving different candidates with different qualifications, even though a key similarity is that the Battalion chief job involved the same actor making the same kind of personnel decision.

Price v. Chicago, 7th Cir., No. 00-3536, 5/24/01. The Chicago Police Department decides who it will promote based on officer's performance on certain tests. Officers who receive the same score on the tests are further ranked based on seniority. Officers with the same test scores and seniority are further ranked on the basis of birth dates. The court held that a black Chicago police officer failed to show that the city's policy of using an officer's date of birth as a tie breaker in promotion decisions, where other factors between competing applicants were the same, had a disparate impact on black officers. The city pointed to two rational reasons for hiring the older officer when other factors were even: birth dates were widely used and accepted among the officers as a fair, neutral criterion, and the policy helped insulate the city from liability under the Age Discrimination in Employment Act.

Bass v. Board of County commissioners, 11th Cir., No. 99-10579, 2/21/01). Reversing a grant of summary judgment in favor of the municipal employer, the Eleventh Circuit held that the Orange County Board of County Commissioners may have discriminated and retaliated against a white firefighter by using an affirmative action plan, which it did not

show was valid. "[A]n affirmative action plan may constitute direct evidence, even when a defendant denies having acted pursuant to its stated plan, "the court said. Plaintiff presented direct evidence of discrimination in the form of the affirmative action plans, even though the county denied using them in the decision.

The county adopted a five-year affirmative action plan in 1990, the court noted. The plan, stating that blacks and Hispanics were underutilized, set countywide goals to establish numerical hiring and promotional objectives. In 1993, the county adopted a "diversification plan" that set percentage hiring goals in positions found to have few minorities or women. Hiring processes were to be suspended when no qualified female or minority applicant was available.

Although the county argued that it did not offer the job to plaintiff for reasons unrelated to affirmative action, the court ruled there was "substantial circumstantial evidence" on which a jury could reasonably conclude that the division acted pursuant to the county's affirmative action plans. "While the mere existence of an affirmative action plan does not constitute direct evidence of discrimination, the existence of a plan combined with other circumstances of the type present in this case make available to a jury the reasonable inference that the employer was acting pursuant to the plan despite statements to the contrary from the decisionmakers involved."

Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, Mass., No. SJC-09396 5/29/01. The court upheld the findings of the Civil Service Commission and a state superior court that the police department, in promoting the minority candidates, relied on a consent decree that had expired, on Equal Employment Opportunity Commission guidelines that no longer were in force, and on a constitutional rationale that was "inapposite." In making promotions in 1996, the police department relied on scores from a civil service promotional exam conducted in 1992. But it departed from strict rank order in promoting sic minority officers to sergeant and two minority officers to lieutenant over nonminority officers with higher scores. In each case, the scores of the successful minority candidates were no more than two points lower than the scores of the bypassed white officers.

Two white managers for Ford Motor Co. are suing the automaker, alleging they were passed over for promotions in favor of women and minorities. The suits, filed June 22, 2001 in U.S. District Court in Detroit, accuse Ford of demanding that managers either meet quotas for hiring and promoting women and minorities or risk losing lucrative bonuses. Ford acknowledged that a manager's success at hiring and promoting women and minorities is a factor in their overall performance evaluation. Diversity is one of the performance issues for managers.

See also, *Dix v. United Airlines*, 2000 U.S. Dist. LEXIS 12464 (N.D. Ill. Aug. 28, 2000), Aff'd 2000 U.S. App. LEXIS (N.D. Ill. Feb. 23, 2001).

XXXII. PERFORMANCE APPRAISAL – FORCED RANKING

Siegal v. Ford Motor Co., No. 01-102583 Mich. Cir. Ct., 2/13/01. Nine salaried employees file suit challenging a recently established performance appraisal process applied to approximately 18,000 employees, that provided that the highest 10% in each business unit were ranked A, the 80% in the middle were ranked B, and the bottom 10% (later modified to 5%) to

be ranked C. Employees ranked C were not eligible for pay raises or promotions, and those who were ranked C for two consecutive years would be demoted or terminated. Plaintiffs alleged that the ranking system discriminated against older workers in violation of Michigan's EEO statute.

XXXIII. ERISA – MANDATORY ARBITRATION OF CLAIMS OK

Chappel v. Laboratory Corporation of America, No. 98-17361, 2000 WL 1693231 (9th Cir., Nov. 14, 2000). An Employee Retirement Income Security Act (ERISA) benefits plan had a claims procedure with a mandatory arbitration clause prohibiting either party from going to court. Lab Corp provided its employees with a summary plan description as part of her employment manual. The manual contained a description of the plan's claims procedure. The procedure required a participant who wanted to dispute the denial of benefits to file an internal appeal with the plan. If the plan denied the appeal, the participant was required to seek arbitration as his final remedy. The arbitration had to be requested within 60 days of the appeal's denial. The arbitration clause also provided that the arbitration's cost were to be split equally between the plan and the dissatisfied employee.

Under ERISA, an ERISA plan participant or beneficiary may file a lawsuit in federal court to recover benefits owed to him under the plan or to enforce his rights under the plan. However, before going off to court, he must first proceed through all of the steps of the plan's internal claims procedure. While the Ninth Circuit did not rule on the issue of whether an ERISA plan may provide that arbitration was the exclusive remedy for claims, the court rejected the contention that the arbitration clause was invalid because some of its terms (the cost-sharing provision and the standard of review requiring the arbitrator to defer to the plan's benefits determinations) were more stringent than plaintiff's rights under ERISA.

Employment Law **Michael E. Caples, Esq.**
The Events Of September 11th And Their Aftermath: **Michael J. Lotito, Esq.**
Issue Identification **Jackson Lewis**

1. COBRA for his family
   What part, if any, of his third quarter bonus is his estate entitled to?
   Can the estate exercise any of the vested, but not exercised, options?
   What, if any, rights does the estate have regarding the options not vested?
   Workers' Compensation Claim
   Life Insurance Entitlement

2. To what extent, if any, must the Company, or does the Company want to, pay employees on military leave?
   Does it make a difference whether the employees were called voluntarily or involuntarily?
   For how long, if at all, must leaves be granted?
   Are the employees employed only three months entitled to any leave, or to the same leave as longer-term employees?

3. The New York employee who lost a brother:
   Bereavement leave under Company policy?
   FMLA leave to care for mother?

   The New York employee who witnessed the event:
   Is there an ADA disability?
   ADA reasonable accommodation leave?
   Workers' Compensation
   FMLA

   The San Francisco employee:
   FMLA leave?
   Workers' Compensation

   The New York wheelchair user:
   ADA reasonable accommodation

4. Privacy rights.

5. Which, if any, of the reductions implicates the Worker Adjustment and Readjustment Notification Act (WARN)?
   If WARN is implicated, what requirements are imposed upon the Company?
   Can the Company escape the WARN notice requirement?
   What implications are there for the lay-off in St. Louis due to the collective bargaining agreement?
   What issues are raised regarding those laid off who have middle eastern surnames?
   Can the reservist on active duty be laid off? Does it make a difference whether he is based in Dallas or in San Francisco?

6. Religious accommodation
   National Labor Relations Act

7. Religious/Ethnic Origin discrimination/harassment.
   ADA reasonable accommodation
   FMLA leave
   Workers' Compensation
8. National Labor Relations Act.

Employment Law, The Events Of September 11th And Their Aftermath:

A Discussion

Michael E. Caples, Esq.
Michael J. Lotito, Esq.
Jackson Lewis

You are the General Counsel of a corporation with the following facilities.

Chicago - Headquarters and Administration, 200 employees
New York City - Sales, Administration, 125 employees
San Francisco - Sales, Administration, 45 employees
St. Louis - Manufacturing, Engineering, 300 employees
Dallas - Sales, Manufacturing, 200 Employees

You are based in Chicago. The Company considers itself an employer of choice. It is very proactive in its benefits, policies and relationships with employees and unions.

1. The events of September 11, 2001 have affected the Company in a number of ways. That morning, one of your senior executives was at a business meeting at the World Trade Center. He is still missing. He had an employment contract pursuant to which, among other things, he (i) earned a base salary of $200,000, (ii) received quarterly bonuses averaging $25,000 based on performance (the fiscal year is a normal calendar year), (iii) received 100,000 stock options, 50,000 of which have vested but have not been exercised, another 25,000 of which would have vested on October 1, 2001, and the last 25,000 of which would have vested on July 1, 2002. His life insurance policy is for $200,000 – his annual compensation. The benefits department wants to know what to tell his spouse about the Company's position as to what is payable and when.

2. As a result of the recent call-up of reserves and national guard, your controller, based in Chicago, has been activated involuntarily. Six other employees around the country also have been activated, four involuntarily, two voluntarily. One volunteer and one non-volunteer have been employed about three months. Human

Resources wants to know about the rights of these employees. The CFO wants to replace the controller.

3. In New York City, one of your employees lost a brother in the World Trade Center and has requested time off to care for his mother, who remains distraught over her loss. Another employee, who was on the way to work and witnessed the events at ground zero on September 11, has been diagnosed with post traumatic stress disorder and has presented you with a physician's note taking her off work for one month. In San Francisco, an employee was seriously injured falling down the stairs when the building was evacuated as a result of a bomb threat. In New York, a wheelchair user has reported he is afraid of entering the elevator and of being caught in the high rise in the event of an emergency. What rights do these people have?

4. In Chicago, building management now requires identification of all persons entering the building, is using scanners on all briefcases, purses and package, and has urged tenants to implement random search policies. The Chief Administrative Officer wants to know how to react; human resources wants to know what to say; risk management wants to implement the same procedures at all locations. What do you think?

5. Because of the slumping market and a desire to consolidate facilities, the Company has decided to close its San Francisco facility, and will be laying off 75 of the 200 employees in St Louis. The employees being laid off in St. Louis are represented by a union. Six employees have surnames which seem Middle Eastern, and one is known to the Company to be Muslim. Another person about to be laid off is a reservist who now is on active duty. The San Francisco operations head wants to know how to proceed and what will happen to him; the labor relations consultant who negotiated the collective bargaining agreement in St. Louis has called asking for your permission to proceed as he suggests.

6. Also, in St. Louis, two of the office employees, who are Muslim but had not been practicing, have decided they need to return to the faith. They have expressed their desire to participate in daily prayers, including the use of prayer rugs and the need for a location at work to pray.

7. In Dallas, one of the production supervisors is Afghan. Since September 11 his car has been vandalized in the Company parking lot and he regularly is taunted at work. As a result, he has become depressed and has presented the Company with a diagnosis of clinical depression requiring reduced work hours and an end to

harassment. You find out about this when your public relations person calls asking for your position on the issue since the employee has spoken to the Dallas Morning News and the Morning News called Dallas for a Company comment.

8. In New York, a group of four employees has come to the office and stated they now are afraid to ride in the elevator (your offices are on the 52nd and 53rd floors) and they are unhappy with the level of security, or lack thereof, in the building. What rights do they have?

Employers Taking Control: Strategies for Corporate Counsel In Tough Times

Presented by:
Michael J. Lotito, Esq.
Jackson Lewis Schnitzler & Krupman

Hot Topics and Regulatory Initiatives in Labor & Employment Law

---

Even before the devastating events of September 11, 2001, America's workplaces were under stress. Indeed, in perhaps no other area of corporate legal affairs do in-house counsel face the unending changes in laws, regulations, and rules for compliance than in the field of employment law. To help employers come to terms with these forces of change, in-house employment counsel need to develop preventive strategies for taking control of emerging workplace law developments from the courts, legislatures, and regulatory agencies, as well as from unexpected and sometimes catastrophic economic, societal and political events.

I. STAYING AHEAD OF LABOR LAW DEVELOPMENTS

The latest membership statistics continue to indicate a downward trend in the union movement. According to those statistics, the total number of union members declined slightly in 2000 to 16.3 million, compared to 16.5 million in 1999. The number of union representation elections held in the year 2000 decreased by 8.5% to 2,849 from 3,114 the year before. Although the percentage of wins increased slightly, the number of elections won by unions decreased to 1,484 in 2000 from 1,598 in 1999, as did the number of eligible voters by 13.9%. Daily Labor Report, 6/20/01.

With two seats vacant, the five-member NLRB is functioning with two Democrats, Wilma B. Liebman and Dennis P. Walsh, and one Republican, Chairman Peter Hurtgen. Mr. Walsh and Mr. Hurtgen are serving under recess appointments which expire, respectively, when the Senate adjourns this year and when it adjourns its 2002 season. This leaves two vacancies for President Bush to fill. In fact, the White House announced on October 4 that President Bush will nominate R. Alex Acosta, the current acting deputy assistant attorney general in the Department of Justice's civil rights division, to fill one of those vacancies.

Meanwhile, in May 2001, the Bush Administration did replace the former general counsel Leonard R. Page with new GC Arthur F. Rosenfeld. Prior to his appointment to the NLRB, Mr. Rosenfeld served for four years as labor counsel for the Republican members of the Senate Health, Education, Labor and Pensions Committee. He worked in the Office of the Solicitor for the Department of Labor for 10 years and was in private practice for 17 years, spending part of his time with the U. S. Chamber of Commerce.

Despite the declining interest in unionization, the legal issues making their way to the NLRB are not consistent with a dying institution Instead, they mirror the changes which are occurring within the workplace. How the NLRB general counsel and the members of the Board interpret the National Labor Relations Act in the context of the 21st century employment relationship is as contemporary as the rise and fall of the dot.com enterprise and the 24/7 nature of the wired workplace.

A. Recent Labor Cases of Interest

1. Employee Committees Delegated Managerial Responsibilities Are Not Unlawful "Labor Organizations" Prohibited by Federal Law

A recent favorable decision by the National Labor Relations Board has reinforced the viability of using employee committees for management purposes. In a number of prior

decisions, the NLRB has found employee committees to be unlawful employer dominated labor organizations, putting into question participative management initiatives sometimes known as employee participation committees. However, in this case, the Labor Board found a plant-wide system of production teams and second tier employee committees delegated the authority to operate and manage a manufacturing plant did not violate the National Labor Relations Act.

According to the 4-0 decision, the employee committees did not engage in bilateral "dealing with" management but rather exercised authority over plant-wide operations. Since the committees' purpose was to perform essentially managerial functions, they did not meet the definition of an employer dominated "labor organization" in violation of the NLRA.

The committees in question were made up of four production teams and three higher level administrative committees. Every employee was a member of at least one of the production teams, and some employees were also members of the administrative committees, along with representatives of management. Above the administrative committees were, respectively, a management team and the plant manager, who had the authority to review all decisions of the three administrative committees.

The tasks of the production teams included making and implementing decisions regarding production, product quality, training, attendance, safety, maintenance, and certain types of discipline. For the organizational review board, the advancement certification board, and the safety committee, the tasks included administration of plant policies, recommendations regarding terms and conditions of employment, review of disciplinary recommendations, certification of skill levels, recommendations for pay increases, review of accident reports and recommendations for enhanced safety programs.

In analyzing the employee committees and their functions, the Board found that "the authority being exercised is unquestionably managerial." With respect to the four production teams, the Board found they exercised authority comparable to that of a front-line supervisor. As to the administrative committees, the Board considered them also to be supervisory in nature. Moreover, the committee hierarchy with its process of forwarding recommendations on to the higher level of authority was not indicative of the kind of review process that would entail "dealing with" management.

Instead, the Board characterized the exchange among the committees as the "familiar process of a managerial recommendation making its way up the chain of command." Because the purpose of the committees was to perform essentially managerial functions, the committees did not "deal with" the employer in a manner that violated Section 8(a)(2), the Board concluded. [Crown Cork & Seal Company, Inc., 334 NLRB No. 92 (July 25, 2001).]

2. Charge Nurses Exercising "Independent Judgment" Are "Supervisors" Not Eligible for Union Representation

On May 29, 2001, the U. S. Supreme Court issued a ruling in NLRB v. Kentucky River Community Care, Inc., U.S. Supreme Ct., No 99-1815, finding certain health care professionals are supervisors because they direct the work of others. The Court, in a 5-4 decision, found that the charge nurses in question were supervisors and refused to enforce the Board's bargaining order, effectively resolving the case.

This case is of great importance for employers who work hard at maintaining proper management control of health care facilities' rights. The Court considered for the second time in seven years whether the Board had misinterpreted the law in determining that nurses were "employees" as opposed to "supervisors." For the second time, the Court ruled the Board misapplied the law.

At issue in the case was an interpretation repeatedly asserted by the Labor Board that registered nurses who were first level charge nurses at a long term care facility were not "supervisors" as defined by the National Labor Relations Act making them eligible to engage in union organizing activities and be part of a collective bargaining unit with other health care staff. The employer argued that the nurses had exercised "independent judgment" and other supervisory authority in directing the facility staff. The registered nurses at the facility directed licensed practical nurses in dispensing medication and served as the highest ranking employees in the building during the evening and night shifts. They could ask workers to come in early or stay late and move workers between four different units as needed. They also had the authority to "write up" employees who did not cooperate with staffing assignments.

Under the law, "supervisors" are people who possess authority over other employees. In the past, the Board frequently held the exercise of nurses' authority was not "supervisory" and not "in the interest of the employer" if it was done in the interest of "patient care." In 1994, the Supreme Court rejected this analysis as a way of defining supervisory status, finding that patient care was, of course, in the interest of the health care employer. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994).

Since the Supreme Court rejected the "patient care" standard, the Labor Board often has used the "independent judgment" standard to draw a distinction between nurses who exercise professional or technical judgment in working with less experienced subordinates and those who exercise supervisory "independent judgment" in carrying out other duties. The Board often held such professional or technical judgment is not "supervisory" as defined by the NLRA.

In its decision, the Supreme Court rejected this argument: "This interpretation of 'independent judgment' is no less strained than the interpretation of 'in the interest of the employer' that it has succeeded."

NLRB v. Kentucky River Community Care, Inc., U.S. Supreme Ct., No 99-1815.

3. Unionized Employees' Right To Representation During an Investigatory Interview Is Extended To Nonunion Employees

In a decision with the potential to impact *the workplace investigation practices of all nonunionized employers*, the National Labor Relations Board held nonunion employees have the right to a representative being present during an interview that might reasonably lead to disciplinary action. Ruling 3-2, the Labor Board found the so-called Weingarten rights of unionized employees also apply to union-free employees. Given the scope of this decision, all employers should be mindful of how it will affect the way they conduct investigations of non-supervisory, union-free employees.

Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92.

In 1975, the United States Supreme Court upheld a decision by the Labor Board that employees have a right to insist upon union representation during an investigatory interview by the employer, provided the employee "reasonably believes" the interview "might result in disciplinary action." NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975). The Supreme Court explained this right arises from the law's "guarantee of the right of employees to act in concert for mutual aid and protection." The Weingarten right has been applied to unionized workforces where an employee specifically requests representation. An employer is not required to advise the employee of this right in advance. It applies only to *investigatory* meetings as compared to meetings during which, for example, the employer communicates a *decision* regarding a disciplinary matter.

Whether the employee is reasonable in believing discipline might result from the interview is based on "objective standards" and upon an evaluation of all the circumstances. If the employee does have a "reasonable belief" and requests a representative, the employer must either grant the request, dispense with the interview, or offer the employee the option of continuing the interview unrepresented or not having an interview. If an employer refuses to allow union representation but goes ahead with the interview, or if the employer disciplines the employee for refusing to participate in the interview after denying the employee union representation, the employer has committed an unfair labor practice in violation of the NLRA.

In the early 1980's, the Labor Board applied Weingarten rights to nonunion employees for a brief period. However, since 1984 the Board held nonunion employees were not entitled to Weingarten rights. In the Epilepsy Foundation decision, the Labor Board concluded its earlier rulings were inconsistent with the Supreme Court's rationale in the Weingarten case and with the purposes of Section 7 of the NLRA.

The charging party in the Epilepsy Foundation case was a nonunion employee who, along with a co-worker, had prepared a memorandum to the Foundation's Executive Director outlining criticisms of their supervisor. The Executive Director requested a meeting with the employee and the supervisor to discuss the memo. The employee told the Executive Director he felt intimidated by the request. He asked for a co-worker to be present at the meeting. His request was denied, after which he again expressed opposition to the meeting. He subsequently was dismissed for gross insubordination.

The employee filed a charge with the National Labor Relations Board. The Regional Director found merit and issued a formal complaint. Following existing precedent, the Administrative Law Judge found the discharge did not violate the NLRA because the

Weingarten right to representation did not apply to nonunionized employees. The Board, however, reversed the ALJ and overruled the existing case law. The Board found the right to representation is grounded in Section 7 of the NLRA which guarantees the right of employees to engage in concerted activity for purposes of mutual aid and protection. Flowing from this right is the option to act together to address the imposition of unjust discipline. Since Section 7 rights apply to *all* employees, whether unionized or not, so the Board found the termination was unlawful. It ordered the employer to offer reinstatement and back pay.

The Weingarten/Epilepsy Foundation rule may have its most profound implications in an employer's investigation of highly sensitive workplace matters, such as sexual harassment allegations. The dilemma for employers is they must conduct full, complete, and confidential investigations of any such claims. Under this obligation, the employee who is the subject of the investigation may be entitled to bring in another employee with whom the employer may not feel comfortable discussing the sensitive and confidential nature of the incident.

How employers balance these and other competing rights and interests will require an assessment of current workplace investigation practices, as well as other laws and regulations which may govern the investigation, discipline and termination processes. Employers should seek the advice of employment counsel in any such policy review and development, or when confronted with a request for representation in which the employer is unsure of its rights and obligations.

4. Unions Can Organize Temporary Employees Along with Regular Workforce

In an August 25, 2000 decision, the Board ruled unions may organize nontraditional employees (temporary and other contingent workers) and include them in

collective bargaining units along with other regular employees. M.B. Sturgis, Inc., 331 NLRB No. 173. Consolidated with another case, the Sturgis decision significantly altered the legal framework under the NLRA for temporary employees procured through a "supplier employer" (i.e., temporary agency) in both unionized and union-free work environments. Jeffboat Division, American Commercial Marine Service Company, 331 NLRB No.173.

Since 1990, the Board has held the only way temporary workers could be represented by a union and bargain with the "user" employer was if both the temporary agency and its client company consented to multi-employer bargaining. The Board's new decisions overrule its prior position in Lee Hospital, 300 NLRB 947, clearing the way for temporary workers to be included along with a company's regular workforce in unorganized units voting for union representation and merged into existing bargaining units.

The Board will now use a two-step analysis in deciding these issues: 1) are the user-employer and supplier-employer "joint employers" within the meaning of the National Labor Relations Act; and, if yes; 2) do the temporary employees share a sufficient community of interest with the regular workforce of the user employer.

M.B. Sturgis, Inc. manufactures flexible gas hoses at its Maryland Heights, Missouri facility. The company has approximately 35 full-time employees and uses 10-15 temporary employees, supplied through a temporary agency, to perform the same work as Sturgis' employees. In 1995, the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 108 filed a petition to represent Sturgis' full-time employees. The company asserted the voting unit should include the temporary employees, but the NLRB Regional Director, citing the *Lee Hospital* decision, ruled the temporary employees could not be included in the unit without the consent of the temporary

agency. The Regional Director directed an election among the full-time employees only and the company appealed.

The case consolidated with the Sturgis case involved a unionized employer, Jeffboat Division, which operates an inland river shipbuilding facility in Jefferson, Indiana. The company has 600 employees in a production and maintenance unit represented by the International Brotherhood of Teamsters, Local 89. On a regular basis, the company also uses 30 unrepresented welders and steamfitters supplied by a temporary agency. Jeffboat managers and supervisors direct the temporary employees and have the authority to discipline them.

In 1995, Local 89 filed a unit clarification petition with the NLRB, asserting the temporary employees constituted an "accretion" to the existing production and maintenance unit at the shipyard. Under "accretion" a smaller group of nonunion employees is merged into a larger group of unionized employees without holding an election. Relying on Lee Hospital, the NLRB Regional Director dismissed Local 89's petition because the temporary agency had not consented to multi-employer bargaining.

At the heart of the Labor Board's reversal of opinion in the Sturgis decision is the increased reliance on temporary or "contingent" workers by employers. Recognizing the reality of today's workforce, the Board found the ruling requiring the consent to bargain of both the supplier employer and the user employer "effectively denied representation rights guaranteed them under the National Labor Relations Act." In overruling the Lee Hospital decision, the Board formulated a new analysis for temporary workers which does not depend upon the consent of those parties. Under the Board's new analysis, temporary workers may be included in a bargaining or voting unit with a user employer's regular employees based on the two factors mentioned above.

If joint employer status exists, the Board will then decide whether the temporary workers share a community of interest with the user company's regular workforce. Community of interest means there is a "mutuality of interests" in wages, hours and working conditions. However, if the temporary employees are performing the same work as the employees of the user company, and if they interact with each other and share facilities such as break rooms, parking lots and restrooms, then more likely than not the Board will find a community of interest and will grant representational rights.

There is another community of interest factor the Board considers when temporary workers, who have been hired directly by an employer without the involvement of a supplier company, are eligible for inclusion in a bargaining unit. In those situations, temporary employees who are employed on the eligibility date for a union election but whose tenure remains uncertain can vote if they otherwise share a community of interest with eligible employees. To make this determination, the Board looks at two factors: a reasonable expectation of further employment and, more importantly, a date certain. Generally, if temporary workers do not have a reasonable expectation of further employment, or their tenure is to end on a "date certain," they are not eligible to vote. The Sturgis decision clouds this long standing precedent.

5. Labor Board Guidelines on the Use of Union Dues for Non-Representational Purposes

An executive order signed by President George W. Bush in February, 2001 has prompted the National Labor Relations Board to issue guidelines about employee rights to object to the use of union dues for political and other non-representational purposes. Among other things, the executive order directs federal contractors and their subcontractors to post a workplace notice informing employees who are covered by a union security clause about their rights under federal labor law to object to certain uses of union dues.

Employees covered by union security clauses who have chosen not to become union members may object to the use of their union dues for activities unrelated to "collective bargaining, contract administration, or grievance adjustments." In the notice, employees are instructed to contact the Labor Board for more information.

The guidelines cite the U. S. Supreme Court's ruling in Communication Workers of America v. Beck , 487 U.S. 735 (1988), that a union is obligated to "provide notice to nonmember employees of their Beck rights; to refrain from charging objectors for nonrepresentational expenses; to provide objectors with a financial disclosure; and to establish procedures for objectors to challenge the accuracy of the union's disclosure." Included in the guidelines are the following series of typical questions and answers which Board agents may be asked by individuals inquiring about their Beck rights.

A decision by the U. S. Court of Appeals for the Ninth Circuit held dues paying nonmembers can object to the use of their money for union organizing activities. The court characterized organizing activity as unnecessary to carry out collective bargaining responsibilities; the union claimed the practical effects would be negligible. United Food and Commercial Workers Local 1036 v. NLRB, No. 99-7317 (5/17/01).

6. Labor Board Takes Position Against Limiting Access to Employees Through Use of Employers' Electronic Communications

Historically, one of organized labor's biggest challenges has been gaining "access" to targeted employees. Typically, union organizers needed physical access to employees by being outside a plant gate during a shift change or by sending written materials to employees homes with follow-up visits. These tactics have not always been successful and have created legal issues over what kind and how much access is guaranteed by the employees' rights to organize and bargain collectively under the National Labor Relations Act. Employer rules

limiting solicitation and distribution of campaign materials and other union literature to employees during work time and on company premises have been litigated before the Labor Board with varying interpretations about what is lawful and what is not.

Now organized labor has begun to use electronic communications and the media to reach millions of potential union members. The AFL-CIO and other unions' "home pages" on the Internet are filled with press releases, policy statements, news items, organizing materials, campaign strategies, and other information for use by organizers and employees to communicate the union message to the workplace and at home.

Many employers have instituted policies restricting the use of company communications systems and equipment to business only. However, policies restricting employee use of an employer's email system and company-issue computers to communicate about organizing and other union matters might be in conflict with rights under the National Labor Relations Act. The Labor Board has taken the position that restricting the use of company computers "for company business only" violates the Act as an overly broad no-solicitation/no-distribution rule. Additionally, the NLRB former general counsel had found NLRA violations where companies tried to prohibit employees from using company e-mail to further union organizing objectives.

In one case, the agency issued a complaint against a company after it disciplined an employee who sent e-mail messages to his coworkers announcing an upcoming NLRB-run union election. The general counsel decided, under the circumstances of this case, the company's e-mail system constituted a "work area," and the employee had a right to solicit his coworkers during non-work time via the company's e-mail system.

Other allegations of an employer's unlawful conduct relating to the use of email have been dismissed. Excerpts from General Counsel's Report of December 14, 2000, discussing some of these cases follow:

> We decided (1) to dismiss the allegation against the Employer's allegedly over broad rule restricting E-mail use for business only ... Regarding the Employer's rule, we had already concluded in the previously reported cases that the employees there used the employer's computers and computer network in such a way as to make them "work areas" within the meaning of Republic Aviation Corp. and Stoddard-Quirk, supra. It therefore followed that the Employer's rule in those cases, limiting E-mail to business only, i.e., prohibiting solicitation, was over broad and thus unlawful. In the instant case, we initially decided that the employees' regular work use of E-mail made the company's E-mail system a "work area" with the meaning of those cases. Although the Employer's E-mail use rule here therefore arguably also was unlawful as over broad, we decided to not proceed on that allegation.
>
> First, the Employer here apparently was not enforcing its E-mail rule against union communications. Rather, the Employer admitted that it allowed the unions at its facility to use E-mail for communications. Second, the Employer stated that although it had disciplined other employees for E-mail use, such discipline typically involved sending sexual materials. The Union adduced no examples of Employer discipline of employees for having used E-mail for solicitation or other protected Section 7 activity. Third and consistent with the above, the Employer did not generally enforce its E-mail rule against the steward here. The Employer instead disciplined the steward because of the content of his initial E-mail, and not because he simply had violated the rule. Since the Employer's rule apparently was not enforced in this case, was not generally enforced against union or Section 7 communications, and there was no current Board law governing the matter, we decided that it was unnecessary to proceed against this rule on the novel theory set forth in the above cases....
>
> Although we decided to issue complaint alleging that the above cited Employer rule was unlawfully overbroad, we also decided to not argue that the Employer's discipline of the employee for violation of that rule was unlawful, because the Employer's asserted business justification for the discipline was independent of the rule.
>
> First, concerning the Employer's rule, we noted that the employees in the instant case were situated similarly to the employees in the above reported cases, i.e., they spent a significant amount of their work time on their computers, using the Employer's email and internet communication systems. Thus in the instant case, as there, these employees used the employer's computers and computer network in such a way as to make them "work areas" within the meaning of Republic Aviation and Stoddard-Quirk. The Employer's rule here, as there, also prohibited all non-business use of its computer equipment, email and internet communications, which necessarily includes solicitation messages protected by Section 7. Thus, under the rationale of the previously reported cases, this rule was an over broad and unlawful restriction on protected solicitation....

> Regarding the discipline, we noted that the Employer disciplined the employee for having violated the above unlawful rule. The fact that the employee was disciplined pursuant to an unlawful rule would make his discipline also unlawful unless the Employer could independently justify that discipline.
>
> Thus, where an employer can adduce a separate reason for discipline, not implicating Section 7 and apart from the unlawful rule, such discipline is lawful.
>
> The Employer imposed the discipline here because the employee had misused "computer resources", i.e., he "created and printed [a file] on company property with company equipment . . ." during a time he should have been working. The asserted grounds for this discipline thus were not for engaging in protected communications in the employee's computer "work area." Rather, the Employer imposed discipline for "creating and printing" the document on company owned equipment. We decided that this reason did not implicate a Section 7 right, and could form a lawful basis for the discipline, separate and apart from the unlawfully overbroad aspect of the rule....
>
> While in certain circumstances computer systems can be a work area, they are also the employer's property which, like employer bulletin boards, can in other circumstances be regulated. We therefore concluded that an employer may lawfully limit the use of computer equipment when that equipment is not being used as a work area. This conclusion is fully consistent with the finding of violations in the above reported cases. Those cases did not concern the non-communicative use of company equipment, and instead only concerned an overly broad ban on protected E-mail communications."
>
> [General Counsel's Report on Case Developments (R-2416), December 14, 2000; 202-273-1991; www.nlrb.gov.]

II. TAKING TRAINING SERIOUSLY: THE GOLDEN OPPORTUNITY TO TAKE CONTROL OF EMPLOYMENT LITIGATION

A number of landmark rulings in the past several years have provided employers a powerful opportunity to take control of the employment litigation fury and to take affirmative steps to reduce and eliminate claims relating to harassment and discrimination in the workplace. Preventive employment law practices are the best tools to maintain a respectful work environment and fend off employer liability. Supervisory and employee training is one of the cornerstones of prevention. As the U.S. Court of Appeals for the Ninth Circuit stated, "to avoid liability under Title VII, employers may have to educate and sensitize their workforce to eliminate conduct which a reasonable victim would consider unlawful sexual harassment."

Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991). This principle has been dramatically highlighted by landmark decisions of the U.S. Supreme Court during its 1998 and 1999 terms.

Avoiding liability in employment litigation is a major reason to implement effective training programs. In addition, there are other important benefits of having a well-trained staff. Since workplace harassment and discrimination can lead to high absenteeism, employee turnover, low morale and low productivity, companies can experience bottom line savings from positive employment practices eliminating unlawful conduct, which can also foster dissension and reduce a group's ability to function as an effective and productive team. The costs associated with these consequences of poor employment practices have been estimated at over $6.7 million each year for a typical Fortune 500 company. See Dorraine A. Larison & Mary E. Olk, Ph.D, *Viewpoint: Sexual Harassment Awareness Training: It's Not the Boogie Monster*, 72 N. DAK. L. REV. 387 (1996).

Employee training is required by many state and federal employment laws as well as in various court orders. The federal government, courts and agencies have long viewed effective employee training as critical. For example, the Occupational Safety and Health Administration, and the courts recognize an employer can defend itself against OSHA citations by demonstrating it took all feasible steps to avoid the safety hazard at issue. Therefore, the adequacy of employee safety training is a key issue in contested OSHA cases.

Other educational requirements for employers receiving grants or contracting with the federal government are found in the Drug-Free Workplace Act. The DFWA requires the education of employees regarding drug use and chemical dependency hazards, the company's drug-free policy, resources for drug rehabilitation and counseling, and penalties for DFWA violations.

Most recently, the EEOC and some courts have mandated training as one remedy to prevent further discrimination or harassment in the workplace. Moreover, as a result of the 1999 Supreme Court decision in Kolstad v. American Dental Assoc., 119 S. Ct. 2118 (1999), courts will increasingly consider training efforts as a significant indicator of employer good faith in complying with EEO laws and in determining whether punitive damages can be awarded against an employer. Training has developed into an important tool in limiting the amount of damage awards to plaintiffs and reducing the costs of workplace harassment and discrimination. However, it is axiomatic that an employer's training efforts must be effective. The employer must not only provide the formal training, but must ensure its managers, supervisors and employees understand the training and consistently practice its directives in the workplace. Indeed, inadequate or defective training actually can exacerbate rather than minimize an employer's liability.

The importance of training in the workplace has evolved under the influence of recent Supreme Court decisions and EEOC enforcement guidance issued in the aftermath of these decisions. The prudent employer must be aware of important state and federal legal developments impacting workplace training, as well as be knowledgeable about effective training methods and the pitfalls to avoid.

A. Affirmative Defenses and the Legal Importance of Training

Recent developments have created a legal imperative for employment law training as demonstrated by the decisions of the United States Supreme Court in Burlington Industries v. Ellerth, 524 U.S. 724 (1998); Faragher v. The City of Boca Raton, 524 U.S. 775 (1998) and Kolstad v. American Dental Assoc. 119 S.Ct. 2118 (1999). The decisions in Ellerth and Faragher recognize that when sexual harassment by a supervisor does not result in tangible

economic harm to an employee, the employer has an opportunity to raise an affirmative defense to avoid liability and/or damages.

The Ellerth/Faragher affirmative defense requires proof of two elements. First, the employer must show it exercised reasonable care to prevent and promptly correct any sexually harassing behavior. Second, it must show the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Regarding the first prong of the affirmative defense, the Supreme Court stressed the importance of workplace training by stating "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen [supervisors], train them and monitor their performance." Faragher, supra, (emphasis added). More recently, the Supreme Court stated "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decision of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." Kolstad, supra. These decisions make clear effective workforce training helps demonstrate the employer's good faith, thereby reducing or eliminating liability and/or punitive damages in employment litigation.

In an enforcement guidance issued in 1999, the Equal Employment Opportunity Commission reiterated its view that training is an important indicator of an employer's good faith efforts. Significantly, the EEOC stressed periodic training of employees and managers can help ensure the employer is exercising good faith efforts to prevent harassment in the workplace. See EEOC ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, Notice 915.002, 118 Daily Lab. Rep. E-22, 23 (June 18, 1999).

The importance of training to establish the first prong of the affirmative defense is demonstrated by a sexual harassment case decided by the U.S. Court of Appeals for the Ninth Circuit. In Pacheco v. New Life Bakery, Inc., 1999 WL 543727 (9th Cir. 1999), the supervisor was "not sure" whether she had ever addressed the issue of sexual harassment with her staff and knew for certain she had never disseminated any materials on sexual harassment at any staff meetings. The Ninth Circuit denied the employer the benefit of the Ellerth/Faragher affirmative defense because the employer had no written policy or effective remedial measures in place to avoid liability. Not only had the employer failed to provide training for its supervisors, but rank and file employees were not educated about the procedures to follow if they had complaints.

B. Zero Tolerance of Workplace Discrimination

The Civil Rights Act of 1991 granted employees the right to jury trials in Title VII and ADA cases. In addition, Section 107 of the Act states "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was **a** motivating factor for any employment practices, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Therefore, it is critically important to educate all employees that discriminatory slurs, jokes or other behavior demonstrating bias toward an employee based on membership in a protected class cannot be tolerated. Otherwise, a jury could find that unlawful discriminatory factors motivated the decision-maker and establish liability, even when there are legitimate and compelling business reasons for the adverse employment action. See Section II, B, above, for the EEOC's September 14, 2001, statement urging workplace tolerance in the wake of the 9/11 terrorist attacks.

C. Case Law Supporting The Importance Of Workplace Training And Remedial Efforts

Undoubtedly, courts and juries are prepared to impose severe sanctions against employers failing to provide adequate supervisory training. For example, in EEOC v. Wal-Mart Stores, Inc., 11 F. Supp. 2d 1313 (D. N.M. 1998), a Wal-Mart supervisor, using the corporation's written interview guidelines, asked a job applicant to identify any current and past medical problems that might limit his ability to work at Wal-Mart. The court found Wal-Mart failed to remove this question from its standard form interview sheet and also failed to educate and train managers about the ADA. In light of this conduct, the court sustained a punitive damage award of $100,000. Another example of juries willing to be punitive is the Baker & McKenzie case, where the jury awarded $50,000 in compensatory damages, $225,000 in punitive damages against the harasser and $6.9 million in punitive damages against the law firm in a sexual harassment case (the award was subsequently reduced to $3.5 million). Although the law firm took some steps to address various complaints of harassment, the court held no formal action was taken and no informal action was effective in preventing the harasser's repeated wrongful conduct. Based upon the inadequacy of the firm's response, the court concluded the evidence was sufficient to sustain a substantial punitive damages award. Weeks v. Baker McKenzie *et al.*, 74 Cal. Rptr. 2d 510, 516 (1998).

According to news reports following the Baker McKenzie verdict, several jurors took offense to the hour-long training video on sexual harassment the firm produced *after* Weeks sued Baker McKenzie. See Mark V. Boenninghausen, *$7.2 Million Secretary*, THE AMERICAN LAWYER, October 1994. Some jurors indicated "they had no doubt that Baker McKenzie knew this guy was a problem and did not do anything about it." One juror referred to the employer's evidence of recent efforts to educate employees about sexual harassment after Weeks sued Baker

McKenzie as "coming to religion." In assessing damages, that same juror commented "since these people have gotten religion, they should do a little tithing." According to this juror, tithing, or giving 10% of one's income, was utilized to quantify the damages at $7.1 million (this award subsequently was reduced to $3.5 million, or 5% of the firm's net income).

In another illustrative case, effective training could have helped avoid a $1.9 million class action judgment. In Jenson v. Eveleth Taconite Company, 130 F.3d 1287 (8th Cir. 1997), female dock workers sued the Port of Tacoma alleging discrimination and harassment against shipping companies and labor unions. Notably, the judgment not only awarded payments to the individual claimants but required training for all Tacoma longshore workers. Ultimately, the court remanded the case for a punitive damage determination because the employer had taken no meaningful action to remedy the sexual harassment. Rather, the court found the company had facilitated the hostile environment.

Similarly, in Nicks v. Kramer, 67 F.3d 699 (8th Cir. 1995), the U.S. Court of Appeals for the Eighth Circuit affirmed an award of $70,000 in compensatory damages and $4,500 in punitive damages under 42 U.S.C. § 1983. The court emphasized the employer had no preventive measures in place and directed the company to circulate its sexual harassment policy and conduct training on the topic.

In contrast to the above holdings, the result was quite different in a recent case where the employer had provided sexual harassment training for its employees and supervisors and had posted its sexual harassment policy on every floor in the building where the plaintiff worked. See Maddin v. GTE of Florida, 33 F.Supp. 2d 1027 (M.D. Fla. 1999). In Maddin, the court held the employer was entitled to assert the affirmative defense recognized in Farragher "even if it could be said that [plaintiff's] work environment was characterized by pervasive or

severe sexual harassment." Id. at 1033. In another decision by the U.S. Court of Appeals for the Third Circuit, the employer's workplace training efforts were found to be sufficient to avoid liability in a Section 1983 claim. See Bonenberger v. Plymouth Township, 132 F.3d 20 (3rd Cir. 1997).

These cases illustrate that effective training provides a foundation for reduction, if not elimination, of substantial financial exposure for harassment and discrimination in the workplace. In addition, effective training provides employees, managers and supervisors with the opportunity to quash illegal behavior at first glimmer. Finally, effective training is a "best employment practice" promoting respect for diversity and individual differences and ultimately leads to a more satisfied and productive workforce.

D. State Employment Training Laws

Aside from existing mandatory workplace safety and health training, some states require employment law-related training. For example, Connecticut requires all private and public employers with fifty or more employees to provide two hours of sexual harassment training and education to all supervisory employees. See CONN. GEN. STAT. §46a -54 (1999). The training must provide information concerning the illegality of sexual harassment and the remedies available to its alleged victims. According to the legislative record, Connecticut state agencies are also required to provide three hours of diversity training. See Connecticut 1999 Regular Session of the General Assembly, Public Act No. 99-180, Substitute House Bill No. 5986.

The Illinois Human Rights Act requires a sexual harassment component in all ongoing or new employee training programs for all state agencies. See ILL. COMP. STAT. ANN.,

775 § 2-105(B)(5) (Smith-Hurd 1995). In addition, California has enacted mandatory sexual harassment training for local law enforcement officers.

Maine requires all public and private employers with 15 or more employees to provide sexual harassment training. See ME. REV. STAT. ANN. tit. 26 § 807 (1998). The training must include the definition of sexual harassment under state and federal law and emphasize it is illegal. Supervisors must receive additional training regarding the actions they need to take to address sexual harassment complaints. Massachusetts does not mandate sexual harassment training but has a statute strongly encouraging such training for new and existing employees.

Rhode Island has a statute encouraging companies to train and educate employees on the organization's policy against sexual harassment, the definition of sexual harassment and the actions required for addressing sexual harassment complaints. See R.I. GEN. LAWS §28-51-2 (1998). Tennessee requires all state government departments to plan and implement a policy to prohibit sexual harassment and to conduct training workshops to prevent sexual harassment from occurring. See TENN. CODE ANN. §3-13-101 (1999). A Utah statute requires the State's Department of Human Resource Management to provide sexual harassment training. See UTAH ADMIN. CODE § 477-16-7 (1995). Finally, under the Vermont Fair Employment Practices statute, employers are encouraged to conduct an education and training program addressing sexual harassment complaints. See 21 VT. STAT. ANN. tit. 21 § 495h (1999).

E. The Danger of Ineffective or Unlawful Training

In implementing training programs, employers must act with prudence and due diligence to avoid potential legal exposure from deficiencies in the content of the program. A 1996 case involving the Federal Aviation Administration vividly demonstrates how improper

training can actually create financial exposure for an employer. An air traffic controller specialist filed a suit in response to certain diversity training he was required to attend. The apparent objective of the training was to demonstrate sexual harassment from a woman's perspective. During the training, male attendees were forced to parade through a gauntlet of women, who groped and fondled them while making demeaning and belittling comments. The FAA settled the suit before trial and the offensive training was discontinued. See *FAA Settles Sexual Harassment Suit Filed by Male Air Traffic Controller*, 34 GERR 273 (February 26, 1996).

Another example of the danger of inappropriate training involved a California supermarket chain. During a management training program, an outside consultant requested that each participant volunteer a stereotype they heard in the workplace. Responses included statements such as "women won't work late because their husbands won't let them," "the crew won't work for the black female," "women cry more" and "women are considered the weaker sex." Company officials took notes of these comments, which were then preserved in the company's files. After a discovery dispute, the notes were acquired by the plaintiffs' attorneys. As a result of a settlement reached prior to trial, the company was required to budget $20 million toward additional diversity programs and training costs and pay $75 million in damages to its employees. See Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992).

F. Tips for Effective Supervisory Training

In discussing effective training, it is important to note first and foremost that the employer must practice zero tolerance of workplace discrimination and publish and disseminate a zero tolerance policy. A "zero tolerance" policy should be written in plain language and should clearly prohibit discrimination, harassment and retaliation for complaints of harassment

or discrimination. Employers must adequately identify and train all supervisors and managers and hold them accountable for compliance with the employer's zero tolerance policy. Training for rank and file employees is also highly recommended.

Among other things, training should provide supervisors and managers with a working knowledge of the definitions of all illegal harassment and discrimination (i.e. Americans with Disabilities Act's definition of disability discrimination, etc.). Supervisors should recognize the company's training programs and commitment to a harassment-free workplace as corporate priorities of senior management. To reinforce this commitment, many companies will select a senior executive to introduce and attend the training programs.

To take advantage of the Supreme Court's affirmative defenses, an employer must offer objective proof it made good faith efforts to comply with the employment discrimination statutes and exercised "reasonable care" to prevent illegal harassment and to promptly eradicate any such behavior. An effective supervisory training program enhances an employer's ability to take advantage of these new legal defenses. In addition to this legal incentive, effective training increases the likelihood supervisors will respond appropriately to a complaint of harassment.

It is also important for a company to train non-supervisory employees on harassment and discrimination policies and the employer's internal complaint procedures. By training non-supervisory employees, an employer breathes life into its discrimination and harassment prevention policies. Such training enhances an employer's ability to establish it took reasonable steps to prevent illegal behavior and to show, when appropriate, an employee

[1] See Appendix A for a sample Table of Contents for a basic employment law training course. Appendix B lists the laws most frequently covered in preventive employment training sessions conducted by our firm.

unreasonably failed to take advantage of the employer's preventive and corrective complaint procedures.

In addition, an employer should incorporate its discrimination and harassment training into its orientation programs for all new employees. With each new hire, an employer has an opportunity to establish a record of taking reasonable care to prevent discrimination and harassment. By distributing the employer's policy and by incorporating discrimination and harassment prevention training into new hire orientation, employers may reduce discrimination and harassment claims and enhance their defenses if such claims are brought.

A conscientious employer will audit its existing training programs for effectiveness, deficiencies, changes in the law and policies, and other elements. Only qualified instructors should conduct the training. The FAA case discussed earlier clearly demonstrates training should not contain controversial role play, interaction or other conduct giving rise to a claim of harassment. Because judicial and statutory standards are constantly evolving in the employment area and the demand for training is increasing, legal departments should always be consulted to assist and ensure the material is appropriate and compliant with the law.

It is important to note illegal harassment or discrimination will not disappear simply because proper training is completed. Having signed documentation employees attended a training session is not enough. The employer must ensure the training is effective, clearly understood and implemented throughout the organization. When examined under oath during a deposition or at trial, employees, supervisors and managers should be able to demonstrate a comprehensive understanding of the concepts outlined in the training. Consistent audits and follow-up training, as well as periodic communications to staff, will help ensure the training is effective and fully-implemented within the organization.

As always, the success of any preventive employee training program depends on the commitment and creativity of managers and supervisors. It must be tailored to an employer's culture and resources. This preventive approach, individually tailored to each organization's needs, will help management preempt the filing of charges or lawsuits and avoid their costly defense and unproductive diversion of time and energy.

III. ARBITRATION AGREEMENTS AFTER *CIRCUIT CITY*

The U.S. Supreme Court has made it easier for employers to resolve workplace disputes through the use of arbitration procedures rather than the courts. Ruling in March, 2001, employment agreements containing arbitration provisions are enforceable under federal law, the Supreme Court settled conflicting opinions among the lower courts as to whether employers could require employees to submit disputes to arbitration rather than file lawsuits. The decision gives broad protection to arbitration agreements under the Federal Arbitration Act and provides employers with good reasons to consider instituting mandatory arbitration programs. Employers now have a reliable alternative to courtroom litigation as a means to redress employee complaints. [Circuit City Stores, Inc. v. Adams, 532 U.S. -(2001).]

On behalf of the Society for Human Resource Management, Jackson Lewis filed one of the "friend of the court" briefs, which helped convince a majority of the justices to rule in favor of arbitration. In an unusual gesture, the Court specifically referred to these briefs in its decision.

A. The Facts Before the Court

The plaintiff worked as a sales counselor for the employer in one of its California retail stores. When hired, he was required to sign an employment application that contained the following provision:

> *I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment and/or cessation of employment with Circuit City exclusively by final and binding arbitration before a neutral Arbitrator. . . .*

Two years after he was hired, the plaintiff filed a civil complaint in California state court against the employer alleging discrimination under the California Fair Employment and Housing Act, among other claims. In response, the employer sought to enforce the arbitration agreement in a California federal court under the Federal Arbitration Act. The federal trial court ordered arbitration, however, the U. S. Court of Appeals for the Ninth Circuit reversed the lower court's decision and found the FAA did not apply to employment contracts. The employer then appealed to the U. S. Supreme Court.

The Supreme Court decided the FAA indeed applies to all employment contracts, except those relating to employees working in interstate transportation, such as seamen and railroad employees. Since the plaintiff was not involved in transportation, the Court ruled the FAA applied and the arbitration agreement he entered into was valid and enforceable.

B. The Effect of the Supreme Court's Decision

While the Supreme Court left open many questions about mandatory arbitration of workplace disputes, the Circuit City case certainly enhances the enforceability of agreements to arbitrate between employers and employees. Under the FAA, enforcement of agreements is

streamlined and awards are confirmed. Additionally, the FAA authorizes a court to suspend a lawsuit when an issue in the case is subject to arbitration. Finally, and perhaps most importantly, the FAA preempts state laws aimed at limiting or restricting arbitration agreements. For example, the Supreme Court previously has ruled that the FAA preempted a Montana law requiring arbitration clauses in contracts to appear on the first page of the agreement and in underlined capital letters.

The Circuit City decision does not guarantee the enforceability of all pre-dispute arbitration agreements. Until there is further clarification of the decision, there is room for exceptions depending upon the way the arbitration agreement is drafted and the process is handled. Furthermore, in states under the jurisdiction of the Ninth Circuit, discrimination claims under Title VII of the Civil Rights Act of 1964 still may be exempt. Also, the FAA expressly provides that arbitration agreements must be subject to the same defenses as other contracts and may be voided based on unconscionability, fraud, and duress.

C. What Employers Should Do Now

Employers now should be evaluating the pros and cons of arbitration to decide whether it is right for their workplace. The following points favor arbitration over courtroom litigation:

1. disputes may be resolved more quickly and efficiently;
2. proceeding through arbitration is generally less costly ;
3. arbitrators are believed to be "expert" decision-makers bringing specific knowledge and experience to the table, as opposed to lay jurors;
4. arbitration may provide a "user friendly" vehicle for both employee and employer ;

5. arbitration may provide a system that insures fairness and due process.

Among the concerns an employer may have about arbitration are:

1. a fear of proliferation of employee disputes;
2. the difficulty of overturning an arbitrator's unfavorable decision;
3. a tendency among arbitrators to "split the baby" to resolve the dispute;
4. inclusion of evidence that normally would be excluded from a court proceeding.

Although the Supreme Court now has said arbitration agreements are enforceable, it did not address the practical issues regarding implementation, and employers must make certain their arbitration provisions are carefully drafted. Also, relevant case law in each jurisdiction should be researched to determine to what extent arbitration provisions have been scrutinized by the courts and what standards, if any, have been established.

IV. MANAGING REDUCTIONS IN FORCE IN DIFFICULT ECONOMIC TIMES

With economic indicators continuing to point toward a recession, many employers are forced to take measures to reduce costs and increase operational efficiency. Reducing labor costs is one of the measures available to employers. Unfortunately, this often involves a reduction in the size of the workforce, or "RIF." Especially in light of the tragedies caused by the World Trade Center and Pentagon attacks, this is a particularly difficult decision for a company to make. However, if a company must face this challenge, it must be carefully planned and executed to minimize the risks of incurring additional liability in the form of employee lawsuits. While disputes arising in the context of workforce reductions present numerous labor law issues and challenges for employers, with proper planning and advice, employment claims can be either avoided or managed appropriately.

A. Recent Increase In Number Of Layoffs

The number of layoffs in recent months has increased significantly - a sobering development likely to continue for the near future at the very least. The number of unemployed persons was seven million, according to the figures for September 2001, released October 5, 2001, by the U.S. Bureau of Labor Statistics. The unemployment rate remained at 4.9 percent, seasonally adjusted. In addition, the BLS reported on August 22, 2001 that the number of mass layoffs lasting at least 30 days totaled 1,911 in the second quarter of 2001 and resulted in a job loss for 371,708 workers. Sixteen percent of these mass layoffs involved the permanent closure of worksites, and affected 78,452 workers, up from 43,948 workers in the second quarter of 2000. Of the 1,911 mass layoffs occurring in the second quarter of this year, 37 involved the termination of 1,000 or more employees. For the entire first half of 2001, the number of worker separations totaled 712,488, up from 513,254 during the same period in 2000.

As a result of events on September 11, 2001, the travel industry, and in particular domestic airlines, have announced layoffs nearing 100,000, coinciding with announced mass layoffs in the hotel industry. Some commentators have predicted additional layoffs approaching 500,000 people in the months to come.

B. Alternatives To Layoffs May Reduce The Risk Of Claims

Although employers are capable of realizing short-term savings through RIFs, large layoffs may cause companies to incur hidden costs. For example, economically-driven RIFs may require the involuntary termination of good workers. Such adverse employment actions impact negatively on morale, affecting both the employees who leave the company and those who remain. In addition, large scale terminations can eliminate disproportionate numbers of older, female and minority employees. This creates the potential for class action and

individual wrongful discharge lawsuits. In the absence of proper documentation, an employer may find it difficult to convince a court, administrative agency or other third party of the true reasons for its actions. Finally, and particularly with large layoffs, often employers must recall laid off employees soon after the layoff because of poor planning or other factors.

Therefore, before planning a reduction in force, employers should consider whether other options are available, including: (1) hiring freezes; (2) wage freezes; (3) postponement of wage increases; (4) reducing fringe benefits, including employee sharing of insurance premiums, increased insurance deductibles and limited benefit eligibility for newer employees; (5) work furloughs; (6) reducing work hours with proportionate pay cuts; (7) assessing expected job attrition; (8) allowing affected employees to transfer to other vacant positions within the organization; (9) job sharing; (10) terminating employees with substantial performance problems; (11) terminating recent hires within their introductory periods; and (12) discontinuing the use of temporary and part-time employees and redistributing their work. Some employers look to early retirement programs, while others ask for volunteers by offering enhanced severance benefits. While less severe than involuntary layoffs, these measures still require sensitivity to the manner in which they are communicated and the effect on employee morale.

Explaining the company's financial position can enlist employee support rather than resentment. Management should seek a team approach to problem solving and increasing productivity, without making unrealistic promises of job security.

C. Proper Planning When Layoffs Are Unavoidable

Once a determination is made a reduction is necessary, the task generally falls to legal counsel, operations, and human resources functions to devise a plan which accomplishes

the economic objectives with the least amount of workforce disruption while minimizing the risks of litigation. The following outline summarizes some of the steps which should be considered before any adverse employment actions are taken:

1. Planning the RIF

a. Document the financial conditions necessitating the RIF.

b. Identify the goals of the staff reduction, in terms of labor costs to be eliminated and/or the number of employees by which the organization is overstaffed.

c. Identify the job functions and/or skills essential to successful operations after the RIF.

d. Eliminate and/or consolidate unnecessary jobs.

e. Set a timetable for carrying out the RIF. (Unless business conditions require a series of reductions, attempt to act quickly and decisively in an effort to minimize morale problems.)

f. Be careful of cases where an employee can show he was laid off close to the time he would have qualified for a benefit (e.g., pension vesting rights, retirement eligibility). Even if technically lawful, these cases can appear so inequitable a judge might be tempted to stretch the law.

g. Do not use a layoff as a substitute for terminating an employee based upon poor performance.

h. Check state laws regarding: payment of wages, insurance benefit continuation, severance benefits, letters of recommendation, personnel record access, and the like. Many states have specific requirements applicable to involuntary terminations.

i. Investigate whether the layoff will trigger vesting in pension or benefit plans for employees laid off. Also determine whether the layoff is a partial termination of a pension or benefit plan, requiring a reportable event under ERISA.

j. Check to be sure that the terminations do not constitute withdrawal from a multi-employer pension plan, which can result in substantial liability.

k. Avoid the use of form letters when denying benefits to benefit plan participants.

l. Deliver news of layoff decision very carefully to the employee affected. Inappropriate or poorly communicated notification can result in claims of emotional distress.

m. Be prepared when notifying employees about a layoff; have answers ready for potential inquiries and avoid the appearance the decision was poorly or hastily made.

n. Consider the timing of the layoffs under the federal plant closing law ("WARN") or under applicable state laws (see below).

o. Determine what notices are required under ERISA (e.g., Summary Annual Reports, Summary Plan Descriptions) and ensure the employees receive all notices required.

p. Assess limitations or liabilities created by collective bargaining agreements, employment contracts, and the like.

q. Establish eligibility for severance benefits very specifically, and do not preclude retiring employees from severance pay eligibility.

r. Determine whether a de facto severance pay plan already exists for employees involuntarily terminated. Such plans may require compliance with ERISA reporting requirements and may already bind the employer to provide a benefit to all affected employees.

s. Avoid discriminatory transfer policies. Workers should have the same transfer opportunities regardless of age, or other protected categories.

t. Do not use age as a distinction in early retirement benefits provided as a result of a workforce reduction. For example, do not offer different benefits to employees under age 60 than those age 60 or older.

u. Do not make layoff decisions solely on the basis of payroll dollars saved; this could be deemed age discrimination.

2. Making key policy decisions - - how to select among employees

a. By length of service/seniority;

b. By identifying and eliminating unnecessary job classifications;

c. By classes of employees, e.g., eliminating all temporary, part-time or contract workers initially, and

d. By strict use of pre-existing job appraisal data.

i. Initially select employees who have been disciplined for severe or persistent performance problems;

ii. Thereafter, select from remaining employees by evaluating and comparing their ability to perform the essential job duties remaining after the RIF is completed.

3. Comparing job qualifications and skills

a. Consider the use of a RIF Committee;

b. Prior to implementation, selection decisions should be evaluated to see whether individuals in protected classes are disproportionately affected by the proposed RIF;

c. If a disparate impact exists, and cannot be justified by business necessity, alternate selections should be made; and

d. In analyzing the comparative performance of employees, emphasis should be placed on comparing the job functions and skills remaining to be performed after the RIF is completed.

i. Wherever possible, performance comparisons should be made on the basis of ratings given on prior performance appraisals;

ii. New performance appraisals should be conducted for any employee who has not been evaluated within a reasonable period of time preceding the RIF.

4. Factors militating against selection of certain employees

a. Can employees be transferred into existing vacancies?

b. Is special high-level management review warranted for certain highly-paid or long-term employees?

c. Are older, minority or female employees disproportionately affected by the company's initial selection procedures?

i. If so, can the selection of these individuals be justified by business necessity?

ii. If not, consider alternative selections of individuals outside such protected classifications should be considered.

5. Consider providing outplacement services for displaced individuals

6. Advising employees in a professional and supportive manner

a. If possible, two members of management should meet with affected employees individually;

b. The communicators should be brief, direct and firm as to the company's decision;

c. The communicators should be able to briefly explain the basis for the decision, if asked;

d. The communicators should also explain:

i. Recall/rehire rights, if any;

ii. Severance benefits (if any), health insurance conversion rights and other monetary issues; and

iii. Outplacement or other transitional services being offered, if any.

e. The communicators should be prepared to cope with employee shock, surprise and inability to absorb the information being imparted.

7. Post-RIF considerations for remaining employees

a. Often, RIFs are not isolated events. Business conditions may require a series of RIFs before budgetary or manpower goals are satisfied;

b. To the extent possible, consecutive RIFs should be scheduled in close proximity to each other;

c. Remaining employees should be provided with prompt and accurate information about the desired goals and anticipated timetables associated with the RIF(s), and

d. If possible, remaining employees can be provided with modest economic, or non-economic incentives for increased productivity.

8. Opportunities for reorganizing and streamlining operations

a. To maximize the cost savings effected through staff reductions, existing workflows and/or operating procedures should be redesigned to improve efficiency and to eliminate the duplication of effort and expense.

i. Cross-training allows fewer individuals to perform a greater number of job functions;

ii. Reporting relationships can be restructured to avoid unnecessary layers of supervision or management.

b. Existing business practices should also be re-evaluated with an eye toward reducing hidden costs.

i. Travel and entertainment expenses and/or budgets can be scaled back;

ii. Recruitment efforts and expenses can be curtailed if not eliminated. Wherever possible, post-RIF job vacancies should be filled by transferring or promoting qualified individuals from within the company.

D. Legal Requirements for Negotiating Severance Agreements Containing a Waiver Clause

Under the Older Workers' Benefit Protection Act, many procedural requirements must be satisfied before an employee's release or waiver of federal age discrimination claims will be considered enforceable.

1. Releases waiving claims or rights under the federal Age Discrimination in Employment Act must be knowingly and voluntarily executed

a. The waiver must be written in easily understandable terms.

b. The waiver must specifically refer to rights and claims existing under the ADEA.

c. The waiver cannot extend to rights or claims that may arise after the date the release is executed.

d. The consideration offered in return for the waiver must be unrelated and in addition to whatever the individual is entitled to upon termination under existing company policies. (e.g., If company policy provides for the payment of accrued but unused vacation days upon termination, such sums are not additional consideration capable of supporting a waiver of ADEA rights and claims.)

e. The individual must be advised in writing of his or her right to consult with legal counsel prior to executing the release.

2. If the individual considering the waiver has not filed any administrative charges of age discrimination with the EEOC, or a lawsuit alleging a violation of the ADEA, the following notice requirements must be observed:

a. The individual must be given at least 45 days to consider the release, and an additional 7 days after execution to revoke the agreement. (Note: In individual termination situations where no EEOC charge or ADEA lawsuit has been filed, the employee must be allowed to consider the release for 21 days, and afforded an additional 7 days after execution to revoke the agreement.)

b. The company must notify the individual, in easily understandable written terms, of any eligibility requirements for participating in the employment termination program and all time limits applicable to the program.

c. The individual must also be informed, in easily understandable written terms, of the job titles and ages of all individuals who are eligible or being selected for the termination program, and the ages of all individuals in the same job classification or organizational unit who are ineligible or not being selected for the program.

3. If the individual has filed an age discrimination charge with the EEOC, or a lawsuit alleging a violation of the ADEA, the company must provide him or her with a "reasonable" period of time to consider the execution of a waiver of ADEA rights and claims.

4. An individual cannot waive his or her right to file a discrimination charge with the EEOC, or to participate in an EEOC investigation.

It is an open question whether, under a separation or settlement agreement, the individual can be prevented from receiving any personal benefit from such a filing or investigation.

E. Notice Requirements Under The Worker Adjustment And Retraining Notification Act

The number of employees to be laid off also may trigger the implications of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. Sections 2101-2109, or possibly a state plant closing statute. The following outline summarizes the general requirements of the WARN act:

1. WARN applies to employers with, nationwide:

a. 100 or more employees (excluding part-timers); or

b. 100 or more employees (including part-timers) whose total weekly work hours (excluding overtime) are at least 4,000 hours per week.

2. WARN requires an employer to give 60 days written notice, as described by the Act and Department of Labor regulations, of a "plant closing" or "mass layoff" to:

a. All affected employees (including supervisors), OR if the employees are represented by a labor organization, the international body of the union; AND

b. The State dislocated workers unit and the chief elected official of the local governmental unit where the affected facility is located.

3. A “plant closing" is defined as:

a. A permanent or temporary shutdown of a single site of employment, or of one or more facilities or operating units within a single site of employment; IF

b. The shutdown results in an employment loss at the single site of employment during any 30-day period (this period is extended by WARN and the Department of Labor Regulations to 90 days) for 50 or more employees (excluding any part-timers and employees who have not suffered an employment loss);

c. An "employment loss” is defined as:

i. An employment termination, other than a discharge for cause, voluntary departure, or retirement;

ii. A layoff exceeding 6 months; OR

iii. A reduction in an individual's working hours of more than 50% during each month of any 6-month period.

4. A "mass layoff" is defined as a reduction in the workforce which is not the result of a plant closing; AND

a. Which results in an employment loss at a single site of employment during any 30-day period (this period is extended by WARN and the Department of Labor Regulations to 90 days), for at least 50 employees (excluding part-timers and employees who have not suffered an employment loss), if they comprise at least one-third of the workforce at the single site of employment; OR

b. Which results in an employment loss at a single site of employment during any 30-day period (this period is extended by WARN and the Department of Labor Regulations to 90 days), for at least 500 employees (excluding part-timers and employees who have not suffered an employment loss).

5. The Act provides limited exceptions which may permit employers to provide less than 60 days notice of a plant closing or mass layoff if the failure to provide the requisite 60 days notice is due to:

a. Unforeseeable business circumstances;

b. A faltering company (in plant closing situations only); OR

c. A natural disaster.

6. State and local notice requirements

The requirements of WARN supplement those contained in personnel policies, employment contracts or any other statute. States with statutes which may have an impact on plant closings or relocations include: Hawaii, Maine, Maryland, Massachusetts, Michigan, Oregon, South Carolina, Tennessee and Wisconsin. In addition, some cities and municipalities have enacted plant closing ordinances.

