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STATE OF THE LAW**

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## I. INDIVIDUAL LIABILITY

*Joliet v. Pitoniak*, 475 Mich. 30; 715 N.W.2d 60 (2006). While employed as a data processing manager, Plaintiff alleged “she was subjected to continual sexist remarks and derogatory treatment because of her age” by the Executive Director of Public Works. When other women complained of sexual harassment by the executive director he was suspended and quit in October, 1998. On August 31, 1998, the city hired a younger male as the new director of information systems. He took over many of plaintiff’s prior job duties resulting in a reduction of her overtime. In the fall of 1998, plaintiff became concerned about her continued employment with the city and requested meetings with the mayor to discuss her concerns. Plaintiff alleged that the mayor avoided meeting with her and would not discuss the possibility of the plaintiff leaving her position with severance pay. On November 30, 1998, plaintiff offered her resignation, effective December 1, 1998, including a request for severance pay.

Plaintiff brought claims against the city, the former executive director and the mayor alleging violations of the Elliott-Larsen Civil Rights Act (“CRA”), MCL 37.2101 *et seq.*, breach of contract, and misrepresentation. Plaintiff claimed *quid pro quo* and hostile environment sex harassment and age discrimination.

Defendants filed a motion for summary disposition, asserting plaintiff’s claims were barred by the three year period of limitations, MCL 600.5805(9). The trial court denied this motion, holding that although the alleged discriminatory acts may have occurred outside this three year period, plaintiff’s last day of work fell within the period of limitations. Thus, based on a theory of constructive discharge, “that plaintiff had three years from the last day she worked . . . to file suit.” The Court of Appeals affirmed this denial of defendant’s motion for summary disposition based on similar reasoning.

The Michigan Supreme Court reversed the denial of defendant’s motion for summary disposition, and remanded the case to Wayne Circuit Court for entry of an order granting the summary disposition motion. The court recognized a conflict between *Jacobs v. Parda Fed. Credit Union*, 457 Mich. 318; 577 N.W.2d 881 (1998), the case on which the lower courts relied in denying summary disposition, and *Magee v. Daimler Chrysler Corp.*, 472 Mich. 108; 693 N.W.2d 166 (2005). In *Jacobs*, the Court held in a case under the Whistleblowers’ Protection Act, that although the plaintiff had voluntarily resigned, her “resignation was compelled by discriminatory acts that had occurred more than 90 days *before* filing her lawsuit.” Because she was compelled to resign, the court held that the *Jacobs* plaintiff had been constructively discharged and her claim was thus timely filed. In *Magee*, a later Michigan Supreme Court case, the Court “recognized that the basic question to answer when analyzing the accrual date of a claim under the CRA is when did the ‘injury’ or ‘wrong’ take place.” The Court resolved the conflict between *Jacobs* and *Magee* by “overrull[ing] the accrual analysis of *Jacobson* because it was inconsistent with [the Court’s] opinion in *Magee* and with the plain language of the statute of limitations under the WPA and CRA.”

After determining that the period of limitations accrued not on the plaintiff’s last day of work

but rather on the date of the last discriminatory incident or misrepresentation, the Court examined whether any incident or misrepresentation took place within the three year period of limitation. The court found that no discriminatory conduct by the executive director occurred within the period of limitations since he did not work for the city after September 1998 and plaintiff did not allege any harassment by him after this date. With regards to the mayor, the Court held that the alleged discriminatory act of hiring a younger man fell outside the period of limitation. Plaintiff's claim of disparate pay because of a reduction in overtime was "not in and of itself discriminatory" and thus could not sustain a cause of action. Additionally, the Court held that the failure to respond to plaintiff's request for severance pay was not discriminatory because only employees terminated by the city without cause were entitled to severance and she had resigned voluntarily. As to plaintiff's claims of breach of contract and misrepresentation, the court found that any misrepresentations took place prior to the three year period of limitations.

As none of the alleged discriminatory incidents or misrepresentations occurred within the three year period of limitations, the court reversed the denial of summary disposition and remanded the case for an entry of an order granting defendant's motion for summary disposition.

In dissent, Justice Kelly stated that the majority's decision to overrule *Jacobson* was "gratuitous and unnecessary." She additionally found "[the mayor's] act of shunning plaintiff constituted a specific incident of discriminatory conduct that occurred on every day leading up to and including plaintiff's last day of work." For this reason, Justice Kelly believed plaintiff's complaint was timely filed and the denial of summary disposition proper.

*Elezovic v Ford Motor Co*, 472 Mich 408 (2005). "We hold that an agent may be individually sued under § 37.2202(1)(a) of the CRA. Thus, we overrule *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 485 (2002), because it held to the contrary...."

*Chambers v Tretco, Inc*, 463 Mich 297 (2000), construed the inclusion of the term "agent" in the definition of "employer" to confer vicarious liability on the agent's employer, but "our discussion did not limit it to that function." "Accordingly, we reject the argument that including 'agent' within the definition of 'employer' serves only to provide vicarious liability for the agent's employer and we conclude that it also serves to create individual liability for an employer's agent." "[F]ederal decisions construing Title VII should not be followed because it would lead to a result contrary to the text of our CRA and ... the amendment history of the CRA does not preclude a finding of individual liability...."

The Court also held that, "notwithstanding Ford's policy requiring supervisors to report the information to human resources...", the plaintiff did not put the employer on notice when she told two "low-level supervisors" about alleged harassment in confidence. "It must be recalled that, if an employee is sexually harassed in the workplace, it is that employee's choice whether to pursue the matter. In other words, the victim of harassment 'owns the

right' whether to notify the company and start the process of investigation. Until the employee takes appropriate steps to start the process, it is not started.... Thus, when an employee requests confidentiality in discussing workplace harassment, and the request for confidentiality is honored, such a request is properly considered a waiver of the right to give notice.”

Finally, the Court held that letters from the plaintiff’s psychologist and son-in-law/attorney mentioning “harassment” and “hostile work environment” did not constitute notice of sex harassment, “[T]he mentioning of the word ‘harassment’ or the phrase ‘hostile environment’ in the letters was insufficient to give Ford notice that *sexual* harassment was being claimed.”

## II. LIMITATIONS PERIODS

***Garg v Macomb County Community Mental Health Services***, 427 Mich 646 (2005). Jury verdict of \$250,000 reversed. Plaintiff claimed retaliation for opposing sex harassment and complaining of national origin discrimination. The plaintiff claimed that she engaged in two separate forms of alleged protected activity: (1) she hit a supervisor after he touched her from behind; (2) in 1987, 8 years prior to filing her lawsuit and 11 years prior to trial, she filed a union grievance alleging national origin discrimination. Plaintiff alleged she was retaliated against by being denied 18 promotional opportunities over the next 11 years, receiving poor evaluations and being treated poorly.

The Court held that the plaintiff did not engage in protected activity by hitting the supervisor immediately after he allegedly touched her. The assault was not protected opposition because: (1) the plaintiff admitted the person she hit was not sexually harassing her at the time she hit him; (2) there was no evidence that the plaintiff cast her conduct as opposition to harassment until the lawsuit was filed; and (3) the plaintiff testified that she did not know at the time she landed the blow whether the person she hit was the person who touched her. “Moreover, ... even if plaintiff were indisputably responding to past sexual harassment by hitting Habkirk, we are not prepared to conclude that *any* response to conduct prohibited by the Civil Rights Act, no matter how excessive or inappropriate the response, including assaultive behavior, falls within the act’s protections. An employee is not immunized for any type of responsive conduct, no matter how outrageous or disproportionate, simply because it is connected with opposition to discrimination.”

Even if the activity was “protected,” the claim still failed because the plaintiff “failed to show that *defendant knew* that she was engaged in such activity. “Since plaintiff failed to communicate her “supposed purpose” to management or anyone else, defendant could not be aware of her protected activity in order to retaliate.

With regard to the plaintiff’s claim that defendant retaliated against her after she filed the grievance in 1985, the plaintiff asserted that the retaliatory conduct took place over an 11-year period, all the way up to trial in 1997. The lower court allowed the plaintiff to recover

for acts which occurred more than three years prior to the filing of her complaint in 1992 under the “continuing violations” theory. The Court reversed. “[W]e overrule the ‘continuing violation’ doctrine of *Sumner v. Goodyear Tire & Rubber Co*, 427 Mich 505 (1986)] as inconsistent with the language of the [ELCRA] statute of limitations. . . . [A] person must file a claim under the Civil Rights Act within three years of the date his or her cause of action accrues, as required by §5805 (10). That is, ‘three years’ means three years. An employee is not permitted to bring a lawsuit for employment acts that accrue beyond this period, because the Legislature has determined that such claims should not be permitted.”

The Court held the alleged retaliatory acts occurring more than three years prior to filing were not actionable and *could not be considered* by the trier of fact. “[O]nce evidence of acts that occurred outside the statute of limitations period is removed from consideration, there was insufficient evidence of retaliation. . . .” The remaining actionable acts occurred between 5 and 11 years after the plaintiff filed her grievance. The Court found that this temporal gap defeated the “causal connection” requirement. “In light of this gap, there is insufficient evidence to allow a reasonable juror to find a causal link between the 1987 grievance and the discriminatory acts falling within the limitations period.”

Moreover, a causation showing requires “more than merely a coincidence in time,” and the plaintiff failed to produce evidence that the adverse employment actions—repeated denials of promotion requests—happened because of her protected activity. On the contrary, five supervisors who knew nothing about the plaintiff’s protected activity made the same decisions with respect to plaintiff’s request, and imposed the same employment demands, as the one supervisor who was aware of it.

*Magee v Daimler Chrysler Corp*, 427 Mich 108 (2005). The plaintiff filed her discrimination and harassment suit within three years of the date she resigned, but more than three years after the last day she actually worked. The claims were untimely. The applicable limitations period is three years “from the date of injury.” The plaintiff based her claims on “alleged discriminatory conduct that occurred before her leave of absence,” not on discriminatory termination.

*Clark v Daimler Chrysler Corp*, 268 Mich App 138; 96 FEP Cases 945 (2005). The Court rejected the plaintiff’s reasonableness challenge to the six month limitations period in his signed employment application and affirmed summary disposition for the employer because the plaintiff failed to file his age discrimination suit within six months. “The Michigan Supreme Court overruled the previously used ‘reasonableness’ test” in *Rory v Continental Insurance Co*, 473 Mich 457 (2005), and held that courts must enforce contractual provisions “as written unless it is contrary to law or public policy, or otherwise unenforceable under recognized traditional contract defenses.”

“Because there are no statutes explicitly prohibiting the contractual modification of limitation periods in the employment context, the contract provision is not contrary to law.” Moreover,

the plaintiff did not establish the agreement was unconscionable because, although the parties' bargaining power may have been unequal, the plaintiff presented no proof "that he had no realistic alternative to employment with defendant" and "the six-month period of limitation is neither inherently unreasonable nor so extreme that it shocks the conscience."

***Hicks v EPI Printers, Inc***, 267 Mich App 79 (2005). The trial court properly dismissed the plaintiff's sexual harassment suit because it was not filed within the one-year limitations period contained in a compulsory arbitration provisions in an employee handbook. The agreement was a binding contract, even though it was contained in an at will employee manual that the employer retained the right to modify. Unlike in *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 413 (1996), the handbook "contains no express language stating that its terms are not intended to create an enforceable agreement." On the contrary, the manual stated that it provided answers concerning the employer's benefit programs, policies, procedures and employee responsibilities. Moreover, the plaintiff signed a receipt that reaffirmed her duty to arbitrate employment disputes.

The court affirmed the clause in the manual requiring the plaintiff to commence the arbitration process within one year. "A one-year period of limitations for plaintiff's sexual harassment claim is reasonable. By its very nature, sexual harassment is a claim of which a plaintiff must be aware at an early stage." The plaintiff was clearly aware of the harassment when she allegedly felt compelled to resign, and she failed to show that the one-year limitations period "would somehow impose a hardship on her ability to bring a claim."

***Waller v Daimler Chrysler Corp***, 391 F Supp2d 594 (ED Mich, 2005). Judge Zatkoff ruled that the plaintiff failed to invoke the continuing violations doctrine, even though his EEOC charge described the allegedly discriminatory act in the present tense by stating: "I am constantly accused of not performing my job." Plaintiffs can pursue the continuing violations theory if they fail to check the "Continuing Action" box on their EEOC charge, but only if the charge contains allegations and predicate facts sufficient to show the theory is being alleged. The plaintiff failed to accomplish this where in addition to failing to mark the "Continuing Action" box, his charge stated that the last discriminatory act occurred on a date outside the statutory filing period and used the same narrative language to describe the alleged discrimination that he used in a different EEOC charge filed a year earlier.

***Wineman v Durkee Lakes Hunting & Fishing Club, Inc***, 352 F Supp2d 815 (ED Mich, 2005)(Lawson). Public policy "prevents an agreement to shorten the statute of limitations for FLSA claims..." A six-month limitations provision in the plaintiffs' employment contract was reasonable and enforceable, however, as to their common law breach of contract claims for overtime and unused vacation pay. This held true even though the plaintiffs kept working for the employer after their written employment contracts expired, which would have forced them to sue for unpaid benefits while they still worked for the employer. "Although lawsuits generally do not advance good relations between employees and employers, it is not uncommon for employees to bring ... [claims] against their current

employers” and “the law prohibiting retaliation by employers exists to address just such a situation.”

*Mayes v Daimler Chrysler*, 2005 WL 2562780 (ED Mich, 2005). Judge Borman rejected the plaintiff’s “unfounded” reasonableness challenge to the six month limitations period contained in her signed employment application. The Michigan Supreme Court “abandoned the previously used ‘reasonableness’ test” in *Rory v Continental Insurance Co*, 473 Mich 457 (2005), and held that courts should not invalidate contractual provisions through “‘subjective *post hoc* judicial determinations of reasonableness.’” Courts must enforce unambiguous contract language “‘unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies....’”

*Duncan v Manager, Department of Safety, City and County of Denver*, 397 F3d 1300 (CA 10, 2005). Allegedly hostile actions that occurred eighteen years ago, that were perpetrated by a different supervisor while the plaintiff worked in a different patrol district, or that were circumstantially and logically distinct from the harassment which occurred during the limitations period, could not constitute part of the same hostile environment under *National Railroad Passenger Corp v Morgan*, 536 US 101 (2002).

“*Morgan* emphasizes that there must be a relationship between acts alleged after the beginning of the filing period and the acts alleged before the filing period...” and “advises looking at the type of these acts, the frequency of the acts, and the perpetrator of the acts.” Under this standard, alleged harassment which began when the plaintiff was transferred to a certain police district and continued into the filing period were within the scope of her hostile environment claim. However, alleged hostile actions that occurred before the plaintiff’s transfer, were perpetrated by different individuals and had a completely different flavor could not be included as part of the same hostile environment.

*Mabry v The Western & Southern Life Ins Co*, 16 AD Cases 1302 (MD NC, 2005). Employment contract requiring the plaintiff to bring suit within six months did not bar her ADA action. The claim was properly brought by filing an EEOC charge within 180 days, and by filing suit within 90 days of the date the plaintiff received her right-to-sue letter. Cases validating contractual limitations provisions involve state law claims, only. Contractual limitations periods cannot be used to thwart the ADA administrative process. “Under Defendants’ interpretation of the Agreement, an aggrieved employee would be required not only to file an EEOC charge, but to actually bring a civil suit within six months of his or her termination. However, if the employee filed an EEOC charge on or after the employee’s termination, the six-month limitations period contained in the agreement would expire while the employee was still waiting to receive his or her right to sue letter from the EEOC.”

### III. HARASSMENT

#### A. SEX HARASSMENT

*Randolph v. Ohio Dept. of Youth Svcs.*, \_\_\_ F.3d \_\_\_; 6th Cir. No. 04-3468 (6th Cir. 2006). Female plaintiff's evidence that she was sexually assaulted on two separate occasions; made the subject of sexual teasing and rumors; and was the victim of nonsexual physical assault "easily presented sufficient evidence" to show that plaintiff was subjected to unwelcome sexual harassment. Plaintiff was employed as a food service worker in a maximum security youth detention facility. Plaintiff was sexually assaulted twice by an inmate, who then physically threatened her with a knife if she reported the incidents. Other inmates in the facility repeatedly teased the plaintiff about the incidents and spread sexual rumors about the plaintiff's other sexual activities. Plaintiff initially reported only an incident where the inmate choked her, which was dismissed by the defendant-department as horseplay. After learning of the sexual incidents, defendant-department engaged in an internal investigation which determined that plaintiff's sexual activities with the inmate were consensual. Upon learning the results of the investigation, plaintiff became suicidal and was institutionalized. She requested a postponement of her pre-disciplinary meeting upon the advice of her psychiatrist, but the meeting occurred without her. Plaintiff was subsequently terminated.

Plaintiff brought claims alleging hostile-work-environment sexual harassment and retaliation in violation of Title VII. The district court granted defendant summary judgment. The district court reasoned that plaintiff failed to exhaust her administrative remedies because she stated in her EEOC charge that the earliest date of discrimination was May 1, 2006. However, in the district court, plaintiff claimed that a hostile work environment existed before this date.

The Sixth Circuit reversed the district court's judgment on all claims. The Court held that "[t]he district court's holding that [plaintiff] failed to exhaust her claims prior to May 1, 1996, was improper because [plaintiff] is not making a separate claim for actions prior to that date. . . . [Plaintiff]'s allegations are not bounded by discrete temporal boundaries, but rather describe an escalating progression of harassment."

The Sixth Circuit also held that the district court erred in finding that plaintiff failed to raise a genuine issue of material fact about whether she was subjected to a hostile work environment. Plaintiff's allegations demonstrated that the conduct was severe and pervasive both objectively and subjectively. Finally, the district court erred in determining that plaintiff failed to show employer liability. The Court held that although the inmate was removed from kitchen duty after plaintiff was attacked, plaintiff continued to be verbally harassed by other inmates. When plaintiff and other food service workers complained about this harassment, they were told to "stop complaining." Thus, sufficient evidence suggested that defendant-department had actual notice of the hostile work environment.

With regards to plaintiff's retaliation claim, the Sixth Circuit also reversed the summary judgment dismissal. The district court erred in determining that because she was given 70% back pay, plaintiff had not suffered an adverse employment action when she was placed on administrative leave and subsequently terminated. Citing *Burlington Northern*, 548 U.S. \_\_\_\_ Slip Op. at 13, the court held that going without pay for a period of time can be a hardship sufficient to constitute an adverse employment action. This, coupled with the investigations into allegations of inappropriate sexual activity by the plaintiff, and the fact that she was subjected to rumors by inmates, were sufficient to overcome summary judgment on the retaliation claim.

***Myers v Todd's Hydroseeding & Landscaping, LLC***, 368 F Supp2d 808 (ED Mich, 2005). Judge Fiekens ruled that the following seven incidents, which occurred over an 18-month period, combined with a supervisor's alleged request for sex, were neither severe nor pervasive enough to sustain a Title VII sexual harassment claim: "(1) references in Plaintiff's presence to 'big boobs,' 'panty lines,' and 'G-strings' as part of sexual statements or jokes; (2) reference in Plaintiff's presence to the size of genitals as part of a sexual joke; (3) touching of Plaintiff on the shoulders by employee Mike Butler; (4) three comments made by [the plaintiff's manager]: 'you have aged well,' 'you are very pretty,' and 'you have a nice figure'; (5) [the manager's] directions to Plaintiff to call him from her home, and his directions to take a call in a conference room instead of at her desk; (6) [the manager] massaging the shoulders of another female employee in Plaintiff's sight; and (7) [the manager] asking another employee to come to his house when his girlfriend was away." Judge Fiekens reasoned that the alleged incidents were less severe than the circumstances alleged in *Morris v Oldham County Fiscal Ct*, 201 F3d 784 (CA 6, 2004), which were deemed insufficient to sustain a harassment claim.

Judge Fiekens also rejected the plaintiff's constructive discharge theory, and hence her disparate treatment sex discrimination claim, because her supervisor's single request for sex would not make a reasonable person feel that continued employment was intolerable. The request was not a *quid pro quo* proposition, was not repeated after the plaintiff said "no," and the plaintiff quit before giving the employer an opportunity to take corrective action.

Judge Borman then ruled that the plaintiff presented a triable sexual harassment claim by alleging that her supervisor, *inter alia*, repeatedly asked her to engage in a sexual relationship, gave her shoulder massages, booked a single room for the two of them at a work-related seminar, repeatedly asked the plaintiff about her romantic life, and frequently suggested that the two of them go away together for weekends or vacations. This alleged conduct was "inherently sexual" because it was based on a romantic interest, and an average person would find it "severely hostile." The employer could be held liable for such conduct because the plaintiff claimed that it culminated in her termination.

***Moser v Indiana Department of Corrections***, 406 F3d 895 (CA 7, 2005). Particularly where some of the comments were "second hand," the following "handful" of sexual comments by

the plaintiff's supervisor, made "apparently in the context of heedless jokes, as opposed to serious or threatening conduct, simply do not rise to the level of harassment our court has held actionable:" he "spoke down to" the plaintiff and other women; referred to the plaintiff's "tits;" told new male employees to watch out for the plaintiff because she liked good looking men; commented on female job applicants' physical appearance; asked the plaintiff if she had gotten a new set of legs; used profanity in the office; told a joke about a boy's anatomy; made an innuendo about penis size; told others (outside the plaintiff's presence) that one of the plaintiff's female co-workers ran a whorehouse; and said that a different female co-worker "just needed a good f\*\*\*."

***Venezia v Gottlieb Memorial Hospital, Inc***, 421 F3d 468 (CA 7, 2005). Married co-plaintiffs could proceed with their sexual harassment suits against the same employer. The so-called "equal opportunity harasser" concept did not apply because the plaintiffs worked in separate departments and were allegedly harassed by different people.

***Peterson v Scott County***, 406 F3d 515 (CA 8, 2005). Supervisor's regular references to "old ladies," decision not to let the age-protected plaintiff participate in training because it is "too hard to train old ladies," and statement that the plaintiff "did not have the right parts" to fill in for certain shifts at the jail, combined with a co-worker's comment that women were lazy and not needed for jail work, "appear to be the type of isolated incidents, teasing and offhand comments which, while offensive, do not reach the level of [sex or age] harassment."

***Hesse v Avis Rent A Car System, Inc***, 394 F3d 624 (CA 8, 2005). Male supervisor's alleged conduct (kicking the plaintiff's desk, pushing her chair, yelling at her, and loudly clapping his hands and squeaking his shoe to get her attention) was not severe or pervasive enough to sustain a hostile environment claim. Moreover, the conduct was not sex-based because it was directed at men and women, alike.

Regardless, the employer was not liable for the alleged harassment because it immediately acted to stop the conduct after the plaintiff complained, the plaintiff never characterized it as sexual harassment, and the plaintiff did not complain about the few post-complaint incidents despite her admitted awareness of the employer's harassment policy and toll-free number.

***Prince v Cablevision Systems Corp***, 95 FEP Cases 1305 (SD NY, 2005). Despite her allegation that the employer created a "sexualized atmosphere" in which skaters were reduced to "objects of sexual desire," the court granted a *12(b)(6)* motion and dismissed a hostile environment complaint filed by the former captain of the New York Rangers' on-ice cheerleaders. The plaintiff's first allegation— that a manager tried to kiss her at a bar and then asked her to have sex with him in a restroom — was insufficient as a matter of law because "[c]ourts have held that conduct far more egregious than that alleged here was insufficient as a matter of law to establish a hostile work environment, even when such conduct occurred in the workplace." The second allegation — that other, unidentified

managers routinely engaged in “sex talk” with unidentified skaters on unspecified occasions — was legally deficient because “[s]ex talk” is far from a term of art and fails to establish a pervasive and hostile environment.” The “sexualized atmosphere” allegation is particularly weak since the plaintiff did not allege facts to support it, and the plaintiff was present for and/or affected by only one inappropriate incident.

*Anderson v England*, 359 FSupp2d 213 (D Conn, 2005). A reasonable jury could conclude that two male subordinates were subjected to a sex-based hostile work environment, even though the employer’s investigation concluded that the female supervisor’s inappropriate and harassing conduct “affects all who must work around her,” including women. “Though equal opportunity harassment is not actionable under Title VII,” the plaintiffs presented sufficient evidence that the harassment was sex-based. “Among other lewd and vulgar statements,” the offending supervisor allegedly questioned one male plaintiff about the sexual relations he had with his wife, once while staring at his crotch. Another male plaintiff testified that the female supervisor continually called him “fat, stupid, and lazy” and repeatedly made statements like: “all men are liars, all men are worthless, all men cheat, you’ll cheat, you are a liar, you are a fucking idiot.”

*Miller v Dept of Corrections*, 30 Cal Rptr3d 797 (Cal Sup Ct, 2005). The plaintiff, who was not personally targeted by any offensive behavior or sexual advances, could sustain a hostile environment suit by showing that “widespread sexual favoritism” was severe or pervasive enough to affect her working conditions. The plaintiff raised a triable question on this point by alleging that the warden showed favoritism toward the three subordinate women with whom he had sexual affairs. The favoritism implicitly conveyed the impression that the warden viewed female employees as “sexual playthings.”

*Psychiatric Institute of Washington v Dist of Columbia Commission on Human Rights*, 871 A2d 1146 (DC Ct App, 2005). Although the plaintiff failed to prove a case of illegal retaliation, the Commission on Human Rights correctly used non-sexual retaliatory conduct as a partial basis for awarding damages for hostile environment sexual harassment. Conduct does not need to be “sexual” to contribute to a hostile environment sexual harassment claim. “Rather, all adverse conduct is relevant so long as it would not have taken place but for the gender of the alleged victim.” Moreover, “conduct retaliatory in nature is relevant to a hostile work environment claim whether or not it would support a separate statutory retaliation claim, so long as the claimant does not recover under both claims for the same conduct.”

## **B. SAME SEX HARASSMENT**

*Wolshon v American Communications Network, Inc*, 2005 WL 1838611 (ED Mich, 2005). The plaintiff openly engaged in sexual discussions and jokes with the same female coworkers she accused of sexually harassing her. Noting that the “welcomeness” issue is particularly difficult to resolve on summary judgment, Judge Tarnow ruled that the plaintiff’s testimony

that she engaged in sexual conversations, innuendo and jokes simply to avoid looking like a “social outcast” or an “oddball” created a factual question whether she truly “welcomed” such behavior. The plaintiff’s failure to complain about the behavior does not conclusively establish that she welcomed it. In addition, the plaintiff’s failure to complain is excused because some high-level female supervisors participated in the alleged harassment.

***Lavack v Owen’s World Wide Enterprise Network, Inc***, 2005 WL 2417441 (ED Mich, 2005). The male plaintiff alleged that his male supervisor: (1) showed the plaintiff two photographs of himself in pajamas, one which showed him with a tampon clenched in his buttocks and one which showed him with a tampon in his mouth; (2) touched the plaintiff’s upper thigh; (3) slapped the plaintiff’s genitals with a ruler once or twice; (4) asked the plaintiff whether he wore boxers or briefs; (5) showed the plaintiff a photograph of his nephew (who had participated in and won a bodybuilding competition) in a “Speedo”; and (6) once asked the plaintiff whether he wanted to go camping after he responded “no” to the question whether he would tell anyone “if you and I went camping in the woods, and I had anal sex with you...” Judge Steeh ruled that the conduct was inactionable “crude male horseplay” because the plaintiff failed to show that it was motivated by sexual desire, hostility to the plaintiff’s male sex, or that it was severe or pervasive enough to sustain a hostile environment claim.

***Dick v Phone Directories Co, Inc***, 397 F3d 1256 (CA 8, 2005). The female plaintiff did not need to establish that her female harasser is homosexual, but did need to show that the alleged harassment was motivated by sexual desire. “[W]hile the fact that the harasser is homosexual may support a finding that her conduct was motivated by sexual desire, we do not read *Oncale* to require a plaintiff to demonstrate, in every first-evidentiary-route case, such a fact.”

The court then reversed the district court’s decision to grant summary judgment to the employer. Although there was evidence to suggest that much of the conduct was motivated by dislike, “we cannot agree that, as a matter of law, Ms. Dick was harassed out of sheer dislike.... Ms. Hinkle touched, on more than one occasion, one of the most intimate parts of Ms. Dick’s body [pinching her breast] – an act seldom carried out without some sort of sexual motivation. Second, Ms. Hinkle and Ms. Bills engaged in same sex conduct with other people in the workplace. Here, Ms. Hinkle allegedly rubbed Ms. Bills’ crotch while asking Ms. Bills if she liked it. Ms. Dick also alleges that Ms. Bills locked herself in a room at the office with an openly gay coworker, which a jury might find indicates Ms. Bills tolerates sexually motivated conduct in the workplace. Finally, while the shoving of a [penis-shaped] sex toy into Ms. Dick’s face could be viewed as an immature pun on her last name, we do not think that the record mandates this finding.” Combined with other allegedly harassing acts by female coworkers, including repeated sexual references, simulated sex acts, “foul language,” and references to the plaintiff as “Ivanna Dick” and “Granny Dick,” this evidence could support a finding that the plaintiff was subjected to hostile environment sexual harassment.

***Pedroza v Cintas Corporation No. 2***, 397 F3d 1063 (CA 8, 2005). Female-against-female harassment will be evaluated with the same standard as male-on-male harassment. The court rejected the plaintiff's contention that female-against-female harassment should be evaluated differently because vulgar language and behavior is less acceptable among women. The plaintiff proffered no evidence to support this view, and "we do not find it appropriate in the context of Title VII to establish dual standards for the 'based on sex' showing required in male and female same-sex harassment cases."

The court expressly disagreed with the employer's contention that evidence that the alleged harasser had given birth to five children during a former marriage and was currently involved in a long-term, live-in, heterosexual relationship proved that she was not sexually attracted to the plaintiff. "These facts tend to prove only that Straw was not strictly homosexual. They do not preclude a jury from finding that Straw was motivated by some degree of homosexual desire towards Pedroza. It would be naive and artificial for us to conclude otherwise."

Nevertheless, the court held that a reasonable jury could not find that the following conduct by a female coworker was based on sex or sexual desire: (1) asking the plaintiff "you want me to kiss you, honey?" and then holding the plaintiff's face while attempting to give her a "wet kiss" on the lips; (2) stating "you love it honey" after kissing the plaintiff's cheek; (3) asking the plaintiff whether she got "a piece of ass last night" and then responding to the plaintiff's retort, "go home to your husband," by saying she didn't have a husband and, "I want you, honey;" (4) kissing the plaintiff on the cheek and saying "I love ya honey"; (5) blowing kisses at the plaintiff; and (6) pointing to her buttocks while saying "kiss it," and "kiss my ass" to the plaintiff.

***Chavez v Thomas & Betts Corp***, 396 F3d 1088 (CA 10, 2005). There was sufficient evidence to sustain the jury's finding that a female supervisor harassed the female plaintiff because of sex. Evidence showed that the harasser was congenial with men but appeared bitter around and regularly directed sexually charged, humiliating and hostile actions at women.

***LeGrand v Area Resources for Community and Human Services***, 394 F3d 1098 (CA 8, 2005). The following "crass," "churlish" and "manifestly inappropriate" incidents by a male board member, which occurred over a three-month period, were isolated, not "physically violent or overtly threatening" and not sufficiently severe or pervasive to sustain a same-sex hostile environment harassment: (1) he asked the plaintiff to watch pornographic movies and "jerk off with him;" (2) he suggested on a different occasion that the plaintiff would advance in the company if he "jerk[ed]" the board member's "dick off;" (3) he kissed the plaintiff on the mouth while grabbing his buttocks, and then brushed his hand against the plaintiff's crotch because, according to the board member, "it seemed that [the plaintiff] was stimulated by the hug" and; (4) he briefly gripped the plaintiff's thigh while they were seated at a table during a meeting.

### C. RACE/NATIONAL ORIGIN HARASSMENT

*Badiee v Brighton Area Schools*, 265 Mich App 343 (2005). Contractual indemnification did not require contractor to indemnify a construction manager for the construction manager's alleged ethnic discrimination. The clause did not indemnify for claims unrelated to contract work. The clause only indemnified the construction manager for acts of the contractor. The trial court also properly excluded evidence of slurs that plaintiff did not hear. "We agree with defendants and the trial court that evidence of ethnic slurs that Badiee neither witnessed nor knew about is not relevant to his claim that defendants created a hostile workplace in violation of the CRA. Moreover, Badiee was able to testify before the jury that Auch employees used ethnic slurs to refer to him in his presence, and that he was made aware of other instances in which Auch employees allegedly used ethnic slurs to refer to him. Thus, the evidence excluded was cumulative. Any error resulting from the exclusion of cumulative evidence is harmless."

*Scales v Bob Evans Restaurant, Inc*, 2005 WL 1701908 (ED Mich, 2005). Despite a number of racially derogatory comments by the plaintiff's one-time supervisor, Judge Zatkoff dismissed the plaintiff's racial discrimination and harassment claims because the employer reasonably responded to complaints and imposed no adverse employment action. The employer responded to the plaintiff's first complaint, which came three days after his termination, by immediately reinstating him and transferring him to a different location, away from the alleged harasser. When the plaintiff provided more detail about the harassment, the harasser apologized to the plaintiff and was disciplined. The employer also rescinded the potentially harassment-related write-ups the harassing supervisor had placed in the plaintiff's file.

Although the transfer resulted in a slightly longer commute to work, it was not materially adverse because the plaintiff did not object to it and sustained no loss in pay, benefits, job responsibilities or status. The plaintiff's constructive discharge claim was belied by the fact that management explicitly informed him that there was no desire to terminate him and, other than requiring him to continue performing his job well, imposed no unusual threats or ultimatums.

*Walker v Mueller Industries*, 408 F3d 328 (CA 7, 2005). The white plaintiff could not premise a hostile environment case on allegations that he was forced to observe his employer direct racially animated harassment at black co-workers. Assuming the conduct made the workplace hostile for the targeted black employees and that this disturbed the plaintiff, the plaintiff was a bystander who "made no attempt to establish that the conduct was so offensive to him as a third party as to render the workplace hostile not only for him but for any reasonable employee who likewise was a bystander rather than a target of the harassment."

*Eliserio v United Steelworkers of America Local 310*, 398 F3d 1071 (CA 8, 2005). A union

could be liable for national origin harassment based on evidence that it supported a campaign of insults and graffiti that demeaned the national origin of a Hispanic plaintiff who crossed a picket line. “A union has no affirmative duty under Title VII to investigate and take steps to remedy employer discrimination. On the other hand, a union may be held liable under Title VII if ‘the [u]nion *itself* instigated or actively supported the discriminatory acts.’”

#### **D. DISABILITY HARASSMENT**

***Mannie v Potter***, 394 F3d 977 (CA 7, 2005). The schizophrenic plaintiff failed to present a jury submissible hostile environment claim with evidence that: (1) supervisors called her “crazy” and discussed her mental condition with other employees; (2) supervisors paged the plaintiff to get her to return from cigarette breaks and “regularly” told her to go home; (3) a female co-worker hugged the plaintiff in an effort to “smell” her; (4) co-workers engaged in behavior they knew was offensive to the plaintiff, such as wearing tight-fitting clothing and “strutting” in front of her; and (5) co-workers placed two allegedly derogatory letters in the plaintiff’s locker. The plaintiff “barely addressed” critical factors, such as the “frequency, severity, and threatening or humiliating nature of the discriminatory conduct and whether it unreasonably interfere[d] with [her] work performance.” Moreover, “most of the conduct that forms the basis of her claim consists of derogatory statements made by supervisors or co-workers out of her hearing. The remaining incidents that Mannie describes, to the extent there is any record support for them, are isolated and not particularly severe....”

***Pantzes v Jackson***, 366 F Supp2d 57 (DDC, 2005). A federal agency’s unreasonable delay in providing a visually impaired employee with reasonable accommodation, and a complete failure to provide certain other allegedly reasonable accommodations, could support a hostile environment harassment claim under the Rehabilitation Act.

***Balonze v Town Fair Tire Centers, Inc***, 16 AD Cases 1258 (D Conn, 2005). “[O]ffensive name-calling,” such as when the plaintiff’s supervisor repeatedly called her “gimpy” and “useless” after she underwent surgery and rehabilitative therapy for acute tenosynovitis in her index finger, combined with “humiliating” comments questioning why the plaintiff was attending physical therapy during work hours, were not severe or pervasive enough to take a disability harassment claim to trial.

***Spencer v Wal-Mart Stores, Inc***, 16 AD Cases 1010 (D Del, 2005). A hearing impaired employee presented a jury-submissible disability-based harassment case with evidence that: (1) the employer lacked properly trained interpreters; (2) the plaintiff’s supervisor became hostile whenever the plaintiff requested an interpreter, yelled at her for doing so, supervised the plaintiff more closely than other employees, watched the plaintiff constantly, followed the plaintiff into the bathroom, called her stupid and ignored her complaints about the poor treatment she was receiving; (3) the plaintiff’s supervisor and other employees refused to write notes to aid communication with the plaintiff, became annoyed by simple questions and refused to learn simple signs to help them communicate with the plaintiff, (4) a co-worker

was “very mean” to the plaintiff; and (5) the plaintiff was not given an assistant when she was assigned to a new department.

#### **E. AGE-BASED HARASSMENT**

*Racicot v Wal-Mart Stores, Inc*, 414 F3d 675 (CA 7, 2005). Allegations that co-workers cursed and yelled at the plaintiff, periodically used vulgar language in her presence, and made isolated comments about older workers “are more reflective of run of the mill uncouth behavior than an atmosphere permeated with discriminatory ridicule and insult.” The district court was therefore correct in granting summary judgment on the basis that the plaintiff was not subjected to severe or pervasive harassment.

#### **F. RETALIATORY HARASSMENT**

*Noviello v City of Boston*, 398 F3d 76 (CA 2, 2005). The plaintiff could proceed with a harassment-based retaliation claim even though the underlying sexual harassment claim was untimely. “Even when retaliation is derivative of a particular act of harassment, it normally does not stem from the same animus. Most often, retaliation is a distinct and independent act of discrimination motivated by a discrete intention to punish a person who has rocked the boat by complaining about an unlawful employment practice. This is a different animus than the sexual animus that drove the original harassment.”

Workplace harassment can constitute illegal retaliation. The EEOC has correctly observed that anti-retaliation statutes are designed to “prohibit *any* discrimination that is reasonably likely to deter protected activity.” However, because the “very act of filing a charge against a coworker will invariably cause tension and result in a less agreeable workplace,” a claim of retaliatory harassment requires “a more nuanced analysis.” “The target of the complaint will likely have coworker-friends who come to his defense, while other coworkers will seek to steer clear of trouble by avoiding both the complainant and the target. Although admittedly a source of unpleasantness in the workplace, such behavior should not be seen as contributing to a retaliatory hostile environment. After all, there is nothing inherently wrong either with supporting a friend or with striving to avoid controversy. We think it follows that those actions that are hurtful to a complainant only because coworkers do not take her side in a work-related dispute may not be considered as contributing to a retaliatory hostile work environment. It is only those actions, directed at the complainant, that stem from retaliatory animus which may be factored into the hostile work environment calculus.”

Applying these standards, the court held that the plaintiff presented a viable retaliation claim with evidence that co-workers harassed and taunted her, called her a “rat,” interfered with her ability to perform her job, falsely accused her of misconduct shortly after her sexual harassment complaint resulted in the termination of a favored supervisor, for whom plaintiff’s co-workers took up a collection.

## **G. STUDENT AGAINST TEACHER**

*Plaza-Torres v Rey*, 376 F Supp2d 171 (D PR, 2005). Student-on-teacher sexual harassment is cognizable under Title VII. “[W]e refuse to hold that the availability of a cause of action for sex discrimination in employment under Title IX preempts a cause of action under Title VII.” Moreover, “absent clear directive from the U.S. Supreme Court or the First Circuit Court, we will not limit the reach of Title VII liability by closing the door on student-on-teacher harassment. After all, Title VII seeks to eliminate all forms of sex discrimination in all work environments.”

The school district is responsible for the conduct of the student and, similar to customer-on-employee harassment cases, can be liable if it either (a) provided no reasonable avenue to complain, or (b) knew or reasonably should have known about the harassment and failed to take reasonable steps to stop it.

## **H. EMPLOYER LIABILITY**

*Pennsylvania State Police v Suders*, 124 SCt 2342 (2004). The Supreme Court reversed the Third Circuit’s holding that the *Faragher/ Ellerth* affirmative defense is never available when the alleged harassment results in a constructive discharge. “To establish hostile work environment, plaintiffs like Suders must show harassing behavior ‘sufficiently severe or pervasive to alter the conditions of [their] employment.’ ... Beyond that, we hold, to establish ‘constructive discharge,’ the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.”

*McClements v Ford Motor Co*, 473 Mich 373 (2005). “[T]here is no common-law claim for negligent retention in the context of workplace sexual harassment.” The plaintiff was therefore incapable of sustaining her theory that Ford was liable for negligently retaining a supervisor with a known propensity to harass women. Michigan courts have held employers liable for an employee’s known propensities when the employee commits the common law tort of assault. Sexual harassment, however, is a statutorily-based tort that did not exist at common law, and does not exist outside the civil rights act. Consequently, “the CRA provides the exclusive remedy for a claim based on sexual harassment. . .” and “Plaintiff’s remedy ... for any act of sexual harassment is limited to those provided by the CRA.”

The court also held that Ford could not be liable for the sexual harassment the plaintiff, a non-Ford employee, sustained while working for AVIFood Systems, a separate entity, in a cafeteria at a Ford plant. “We hold that a worker is entitled to bring an action against a non-employer defendant if the worker can establish that the defendant affected or controlled a term, condition, or privilege of the worker’s employment.” Plaintiff failed to accomplish this. She was hired, placed, paid, and subject to discipline by AVI. Although she was placed at a cafeteria located in a Ford plant, and harassed by a Ford employee, the cafeteria was run by AVI and Ford had no right to affect or control the terms, conditions or location of her work.

***Clark v United Parcel Serv, Inc***, 400 F3d 341 (CA 6), *reh’g en banc denied* (2005). It was error to dismiss a sexual harassment claim simply because the plaintiff failed to utilize the corrective measures contained in the employer’s detailed, well-publicized anti-harassment policy.

Summary judgment for the employer should not be granted if managers who were supposed to administer the anti-harassment policy saw harassing conduct and did nothing to stop it. The court rejected the employer’s contention that the employer should not be liable because the managers who allegedly saw the harassment did not supervise the plaintiffs, “were not high enough in the company hierarchy and had no authority to control [the alleged harasser].” “This argument might have merit but for the fact that UPS itself has, through its sexual harassment policy, placed a duty on *all* supervisors to ‘report[] incidents of sexual harassment to the appropriate management people. Therefore, the supervisors at issue here were among those designated to implement the policy. Consequently, we must consider whether, as implementors of UPS’s sexual harassment policy, the supervisors here acted reasonably — in response to what they observed — to prevent sexual harassment.”

“While there is no exact formula for what constitutes a ‘reasonable’ sexual harassment policy, an effective policy should at least: (1) require supervisors to report incidents of sexual harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy.”

***McCombs v Meijer, Inc***, 395 F3d 346 (CA 6), *reh’g en banc denied* (2005). In a two-to-one decision, the Sixth Circuit held that the facts outlined below supported a jury finding that Meijer responded “both indifferently and unreasonably” to the plaintiff’s harassment complaints, and that there was “clear and convincing evidence” that Meijer “acted with conscious disregard for McCombs’s safety and would be liable for actual malice.”

The plaintiff began working in the meat department in May, 1997. That month, a co-worker named Pound who worked in the grocery department told the plaintiff that he had informed his wife that he was having an affair with the plaintiff, and that his wife may beat her up. The plaintiff did not complain about this comment.

Approximately two months later, Pound was transferred to the meat department and became friends with plaintiff. During “Fall” 1997, Pound allegedly told the plaintiff that he had sexual fantasies about her, that he liked her “ass” and breasts, and that he wanted to have a “threesome” with her. Plaintiff testified that she verbally informed various employees and her direct supervisor about Pound’s behavior, as well as the department that handles sexual harassment complaints.

On November 25, 1997, the plaintiff submitted a written complaint alleging that Pound had touched her buttocks. Pound was interviewed by an investigator the next day, but was sent back to work. When he returned from the interview, he kicked the work area door open with a “karate kick.” The plaintiff verbally complained about this behavior. After the holiday weekend, on December 1, Meijer responded by warning Pound that he could be terminated if the conduct continued. The next day Pound and plaintiff worked together, plaintiff complained in writing that Pound continued to look at her and come into her work area. This second written complaint on December 2, referenced previous actions by Pound, including a statement that he “wanted to kiss her all over and that he could hardly control himself.”

On December 3, plaintiff filed a third written complaint alleging that Pound came over to her work area and stared at her while he wiped a bloody knife. That day, Meijer removed Pound from the meat department. Two days later, Meijer suspended Pound, who never returned to work, was formally terminated on December 10, 1997.

*Cheshewalla v Rand & Son Construction Co*, 415 F3d 847 (CA 8, 2005). A foreman who allegedly harassed the plaintiff was a “co-worker,” not a “supervisor,” for the purpose of establishing employer liability. Although the plaintiff believed the harassing foreman possessed supervisory authority and the foreman may have consulted with the project manager on disciplinary matters, the foreman could not hire, fire, promote or re-assign laborers. The employer could therefore be liable only if it knew about the foreman’s allegedly harassing conduct and failed to reasonably respond.

The district court correctly ruled at summary judgment that the employer reasonably responded to the harassment, once it was reported, by: reassigning the foreman; investigating; informing female employees they could contact the investigator at home; encouraging the plaintiff to speak with the investigator; and promising the plaintiff that she would not be retaliated against for complaining.

Summary judgment was also properly granted for the employer on the plaintiff’s retaliation claim. The fact that the plaintiff was laid off exactly one month after she reported the alleged harassment is, by itself, insufficient to establish causation. That is particularly true where two significant events occurred between the protected activity and the plaintiff’s termination: (1) the plaintiff missed several days of work, and (2) the employer began laying people off due to reduced work availability.

***Fairbrother v Morrison***, 412 F3d 39 (CA 2, 2005). The district court erred in granting the employer’s post-trial JMOL motion. “[T]he employer failed to affirmatively prove that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer....”

The employer introduced its written anti-harassment policy, which required victimized employees to complain to “the Affirmative Action Office or a Personnel Director.” “Because the defendants bore the burden of proof on this issue, at the very least, DMHAS would have had to identify all of the Affirmative Action Officers and Personnel Directors to whom Fairbrother might have complained and show conclusively that she did not.” The employer failed to do this, and the plaintiff’s admission that she did not complain to the Affirmative Action Office before mid-February 2000 leaves open the possibility that she complained to the Affirmative Action Office after that.

***Tatum v Arkansas Department of Health***, 411 F3d 955 (CA 8, 2005). Because she sustained no further harassment after she complained, the plaintiff failed to show that the employer did not promptly investigate her allegations of sexual harassment against a co-worker. This held true even though the post-complaint investigation took two weeks to commence, eight weeks to complete and the alleged harasser was allowed to continue working with the plaintiff.

***Roebuck v Washington***, 408 F3d 790 (CA DC, 2005). The plaintiff’s supervisor’s decision to change the locks on his office door (an alleged reaction to the plaintiff’s harassment complaint against him) was not a “tangible employment action” that prevented the employer from advancing the *Faragher-Ellerth* affirmative defense. “[I]n defining ‘tangible employment action,’ the Court could hardly have been more clear that it is not ‘the fact of the official action,’ as Roebuck would have it, but its effect upon the plaintiff that matters. Because Roebuck points to no effect, let alone a significant effect, that Corbett’s changing the locks had upon her employment status, her work, or her benefits, we conclude it was not a tangible employment action.”

***Williams v Missouri Department of Mental Health***, 407 F3d 972 (CA 8, 2005). Even if the plaintiffs were shamed, shocked and humiliated by their supervisor’s harassing behavior (such as repeatedly exposing himself; fondling his exposed penis in the plaintiffs’ presence; asking the plaintiffs inappropriate, sexually-charged questions such as whether they would like to stroke his exposed penis; pulling open one of their blouses; and offensively touching one plaintiff’s breasts, buttocks and crotch area on numerous occasions), the plaintiffs’ failure to report the alleged harassment to management barred their Title VII hostile environment claims.

The employer had a well-publicized “zero-tolerance” anti-harassment policy that permitted victims to skip steps in the chain-of-command and report the harassment to various individuals. The policy also contained a strict non-retaliation clause. The plaintiffs had also

received anti-harassment training and an orientation concerning the company's anti-harassment policy and complaint provisions.

The plaintiffs unreasonably delayed their decision to utilize the policy and report the harassment. They admitted that they knew from the beginning that the supervisor's conduct was inappropriate, and "an employee's subjective fears of confrontation, unpleasantness[] or retaliation does not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." Finally, the employer took prompt, effective remedial action upon learning of the supervisor's alleged conduct.

***Dunn v Washington County Hospital***, \_\_\_ F3d \_\_\_; 96 FEP Cases 1647 (CA 7, 2005). The plaintiff, a nurse claimed that a doctor who had privileges at the hospital sexually harassed her. The lower court found that the hospital was not liable for third party harassment of its employees. On appeal, the court found that an employer was responsible for hostile environments in the work place. The court stated, "Because liability is direct rather than derivative, it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer."

***Cerros v Steel Technologies, Inc***, 398 F3d 944 (CA 7, 2005). The second element of the *Faragher/Ellerth* affirmative defense is not satisfied simply because the employee failed to follow the employer's suggested reporting procedure to the letter. The Supreme "Court made clear that compliance with an employer's designated complaint procedure is not the sole means by which an employee can fulfill her 'coordinate duty to avoid or mitigate harm.'"

"At bottom, the employer's knowledge of the misconduct is what is critical, not how the employer came to have that knowledge. The relevant inquiry is therefore whether the employee adequately alerted her employer to the harassment, thereby satisfying her obligation to avoid the harm, not whether she followed the letter of the reporting procedures set out in the employer's harassment policy.... Thus, on remand, the court must determine whether Cerros followed Steel's reporting procedures *or* otherwise brought the harassment she suffered to Steel's attention."

The district court also erred by using the terms of the employer's anti-harassment policy as a principal basis for judging the employer's response to reported harassment. The issue at this point is not whether the employer took steps to prevent harassment from occurring in the first place, but whether the employer's response was reasonably calculated to terminate the harassment that occurred.

***Loughman v Malnati Organization, Inc***, 395 F3d 404 (CA 7), *reh'g and reh'g en banc denied* (2005). A jury could conclude that the employer failed to reasonably respond to the alleged sexual harassment, even though management repeatedly spoke with workers, verbally warned a man who tried to kiss the plaintiff, fired a man who tried to put his hands down the plaintiff's pants, and transferred the man who slid his hands up the plaintiff's shirt.

“Considering the severity of the incidents, a reasonable jury could determine that simply talking to the people involved in the first two aggressive incidents was not a sufficient response.”

Moreover, a supervisor’s testimony that she spoke with workers “between 10 and 20 times about how to treat female employees” could work against the employer. “While a reasonable jury could view such diligence as evidence of Malnati’s commitment to preventing harassment, it might also think the frequency of the discussions suggests that a different approach was needed. A jury could determine that, at some point, the management at Malnati’s needed to stop merely issuing warnings and start taking disciplinary action against the offending employees.”

*Glenn v Horgan Brothers, Inc*, 95 FEP Cases 1817 (ED PA, 2005). Employer that lacked a formal anti-harassment policy was not liable for co-worker harassment because it immediately investigated the plaintiff’s harassment complaint, disciplined the offender, and promptly established a written anti-harassment policy. The plaintiff’s attacks against the quality of the employer’s investigation were not well-taken because “the focus should be on whether the remedial action taken by the employer was adequate, not necessarily whether the investigation into Glenn’s complaint was adequate.”

#### **IV. SEX DISCRIMINATION**

##### **A. IN GENERAL**

*Wright v. Murray Guard, Inc*, \_\_\_ F3d \_\_\_ ; 6th Cir. No. 05-5301 (CA 6 2006). Plaintiff, a male African-American, was employed as a security guard for Defendant. After allegations of sexual harassment against the plaintiff by a female co-worker and the results of a subsequent investigation, defendant terminated plaintiff based on “(1) the sexual harassment allegations made against him, (2) job performance issues, and (3) his failure to follow procedures.” Plaintiff brought charges against defendant, alleging that his termination was the result of sex and racial discrimination by defendant. Plaintiff’s claims were based on both single- and mixed-motive theories. The district court granted summary judgment in favor of defendant on all claims, which plaintiff appealed to the Sixth Circuit.

The Sixth Circuit affirmed summary judgment on the single-motive, sex discrimination charge. Plaintiff claimed that he was treated differently than women with regard to the disciplinary process at employer. He claimed that a female co-worker who was discharged for misconduct was allowed to refute the allegations against her (allowing unauthorized access to a facility and spreading rumors), and that defendant changed its decision to terminate her. Plaintiff failed to make out a *prima facie* case of sex discrimination because he was unable to show that he and his co-worker were similarly situated. “[T]heir alleged acts of misconduct are of a very different nature, and there are legitimate reasons why [defendant] would treat them differently.”

With regards to plaintiff's mixed-motive claims, the Court held that plaintiff failed to demonstrate that a protected characteristic, sex or race, "was a motivating factor" in defendant's decision to terminate him. "At most, [plaintiff] has presented evidence as to why the allegations of sexual harassment made against him might not be credible, but he has presented no evidence that [defendant] did not honestly believe they were true or that [defendant] relied on unlawful motives in termination [plaintiff]." Because sex or race was not shown to be a motivating factor in termination, the Sixth Circuit affirmed the district court's grant of summary judgment on plaintiff's mixed-motive claim.

***Overly v. Covenant Transp. Inc.***, \_\_\_ F.3d \_\_\_; 17 AD Cases 1753 (6th Cir. 2006). Plaintiff's meeting to plan a trust to oversee her mentally-challenged daughter's long term care, along with routine activities plaintiff performed for her daughter such as doing laundry or checking on her condition "do not qualify as 'physical or psychological care' under the FMLA." For this reason, the Sixth Circuit affirmed the district court's decision that plaintiff's termination due to an unexcused absence did not violate the FMLA. The court also affirmed dismissal on summary judgment of plaintiff's additional claims of sexual discrimination under Title VII and under the ADA. The court ruled the Title VII claims were not properly supported because plaintiff's unexcused absence meant that she was not qualified for her position and no evidence suggested similarly-situated males were treated better. The dismissal of the ADA claim was proper since "an employer is not required to reasonably accommodate an employee based on her association with a disabled person." "An employee who cannot meet the attendance requirements of her job is not protected by [the ADA]."

***McClain v. NorthWest Community Correctional Center***, \_\_\_ F3d \_\_\_; 97 FEP Cases 1148 (CA 6, 2006). When Plaintiff, a black female, discovered that she was paid less than white males doing the same work, she complained. Three weeks later she was terminated. She brought an action alleging gender and race discrimination and retaliation.

Reversing the lower court's order granting summary judgment, the court found that the plaintiff had raised material questions of fact regarding pretext. The plaintiff produced evidence to dispute defendant's reasons for paying the male employee more where he had no additional computer duties and that the male employees prior experience may not have been the actual reason he was paid more.\*\*\* Plaintiff's supervisor was angry and lied when confronted with plaintiff's knowledge of the pay differential.

***White v Columbus Metropolitan Housing Authority***, 429 F3d 232 (CA 6, 2005). Summary judgment affirmed. Decision maker's alleged statement that he chose the successful male candidate because he "wanted a grass roots guy," combined with evidence that another decision maker encouraged the successful male candidate to apply because he "didn't want to hold a good man back," "do not constitute "direct evidence" of sex discrimination. The "fairly innocuous" "grass roots guy" comment "appears to be a description of Walker himself" that "could easily be understood as one reason that Walker was particularly suited

to fill the position.” The “good man” comment is a “relatively common phrase.” Neither comment establishes that the interview committee was “biased toward men or unwilling to consider a female to fill the position.” Neither establishes without inference that gender was a factor “at the moment” the employment decision was made.

The court declined to follow *Farmer v Cleveland Public Power*, 295 F3d 593 (CA 6, 2002) and *Roh v Lakeshore Estates, Inc*, 241 F3d 491 (CA 6, 2001), which held that a plaintiff in a failure to promote case must prove, as part of her *prima facie* case, that she was “more qualified” than the successful applicant. “We hold that in order to satisfy the fourth prong of the *prima facie* burden in a failure to promote case, it is incumbent upon the plaintiff to establish that she and the non-protected person who ultimately was hired for the desired position had similar qualifications.” The plaintiff could not sustain this *prima facie* burden, because the evidence showed that the successful candidate had “superior experience in material and relevant respects.”

The plaintiff contended that the employer’s superior qualification explanation was false because, apparently, the plaintiff’s application was rejected before the successful candidate’s application was received. The court noted that it rejected a similar argument in *Williams v Columbus Metropolitan Housing Authority*, 90 Fed Appx 870 (CA 6, 2004), and “even assuming that White and Walker were not under consideration at the same time, it was reasonable for CMHA to conclude that while White was minimally qualified, her qualifications did not rise to the level of quality ... for which CMHA was searching in a new Manager....”

***Logan v Liberty Healthcare Corp***, 416 F3d 877 (CA 8, 2005). The plaintiff “misplaced the burden of proof” by contending that pretext was shown because the employer could not prove that other employees were fired for the reason the plaintiff was. It is the plaintiff’s burden to prove disparity, not the employer’s burden to prove a lack of it.

***McMillan v Castro***, 405 F3d 405 (CA 6, 2005). “[T]he requirement that a plaintiff and her comparator ‘must have dealt with the same supervisor’ to be considered similarly situated does not automatically apply in every employment discrimination case. Whether that criterion is relevant depends upon the facts and circumstances of each individual case.”

It would be more appropriate to use the phrase “ultimate decision maker,” instead of the phrase “same supervisor,” when issuing a similarly-situated instruction in a case where the contested promotion decision was made by the EEOC’s Regional Director, not the candidates’ distinct supervisors. The use of the term “supervisor” was not reversible error, however, because the term did not limit analysis to the candidates’ individual supervisors, and was broad enough to cover the Regional Director who made the contested employment decision.

***Williams v Eau Claire Public Schools***, 397 F3d 441 (CA 6, 2005). Although “Williams’s

proposed instructions correctly state that if the jury does not believe Eau Claire’s asserted non-discriminatory reasons, it *may* infer that those reasons are a cover-up for intentional discrimination,” they improperly failed to “inform the jury that such an inference is permissible only if the evidence *also* supports a finding that Eau Claire intentionally discriminated against Williams on the basis of a prohibited criterion, the ultimate issue in the case and the issue on which Williams bears the burden of proof.” Jury instructions do not, however, need to use the “pretext” term or outline the *McDonnell Douglas* shifting burdens framework.

***Speer v Home Depot USA, Inc***, 2005 WL 1027589 (ED Mich, 2005). The plaintiff’s testimony that her supervisor became “rude and cold” after she rejected his sexual advances, combined with evidence of pretext, raised a triable question whether discriminatory animus motivated the plaintiff’s discharge.

***Plotke v White***, 405 F3d 1092 (CA 10, 2005). Where an employer contends that the plaintiff was discharged for poor performance, as opposed to the elimination of her position, the status of the employee’s former position after her termination is irrelevant. “While we have held that *one way* a plaintiff may establish a prima facie case is to include evidence that her job was not eliminated after discharge, we have also noted that “[t]he elimination of the position ... does not necessarily eviscerate a plaintiff’s claim that her discharge was ... motivated” by discrimination. “The critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred ‘under circumstances which give rise to an inference of unlawful discrimination.’”

Additionally, a plaintiff may show pretext by revealing “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence.”

***Mondero v Salt River Project***, 400 F3d 1207 (CA 9, 2005). Foreman’s comment, “[t]hey bring a woman to do a man’s job,” was not direct evidence of sex discrimination. There was no evidence that the decision maker was influenced by, or even aware of, this alleged bias and the alleged comment did not relate to the specific employment decision in question.

***Jordan v City of Gary, Indiana***, 396 F3d 825 (CA 7, 2005). Mistreatment of other age-protected women — such as forcing women who did not like each other to work together, rearranging their workspace without informing them beforehand, and denying them budgeted wage increases — was “suspect” and “under other conditions may induce a finding of discriminatory intent.” The “distasteful” conduct “did not occur in a vacuum,” however, and could not support the plaintiff’s age and sex discrimination claims because it took place during departmental and managerial restructuring which “frustrated and confused a number of employees,” including younger employees.

*Jespersen v Harrah's Operating Co, Inc. (en banc)*, \_\_\_ F3d \_\_\_; 97 FEP Cases 1473 (CA9, 2006). Defendant had a "Personal Best" dress code which required both male and female bartenders to wear the same uniform. However the policy required female bartenders to wear make-up. Plaintiff quit when the defendant refused to waive the make-up requirement for her. On appeal from an order granting summary judgement, the plaintiff argued that sex based differences in appearance standards alone would create a *prima facie* case of sex discrimination. The court rejected the argument stating, "While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory." Plaintiff's failure to submit any evidence to support the relative cost and time required to comply with the make-up requirement prevented her from demonstrating that there was a material issue of fact as to whether the make-up requirement created an unequal burden on females.

## **B. REVERSE SEX DISCRIMINATION**

*Preston v Wisconsin Health Fund*, 397 F3d 539 (CA 7, 2005). "Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination." Consequently, a male plaintiff cannot sustain a reverse sex discrimination claim by alleging that he was replaced by a woman because she was the CEO's paramour. "A male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman. Such favoritism is not based on a belief that women are better workers, or otherwise deserve to be treated better, than men; indeed, it is entirely consistent with the opposite opinion. The effect on the composition of the workplace is likely to be nil, especially since the disadvantaged competitor is as likely to be another woman as a man."

## **C. PREGNANCY**

*Reeves v. Swift Transp. Co.*, 446 F.3d 637; 98 FEP Cases 97 (6th Cir. 2006). Employer's pregnancy-blind policy which denied light-duty work to employees who were not injured on the job was inadequate to sustain plaintiff's pregnancy discrimination claim based on a theory of disparate treatment. Employee worked as an over-the-road truck driver, a position which required occasional heavy lifting. After becoming pregnant and upon the advice of her doctor, employee requested she be assigned to light duty work only; the request was denied because of employer's policy which precluded such assignments for medical conditions occurring outside the workplace.

In affirming the District Court's grant of summary judgment, the Sixth Circuit held that the employer's "policy is indisputably pregnancy-blind." "It simply does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions." The court held that plaintiff presented no direct evidence of discrimination and "neither alleged nor supported with circumstantial evidence the notion that [her employer] terminated her with

discriminatory intent or that [employer]’s policy is a pretext for discrimination. Employee’s claim that the policy constituted a “per se violation” was rejected by the court because “challenging [policies] as tools of discrimination requires evidence and inference beyond such policies’ direct terms.”

***Saroli v Automation & Modular Components, Inc***, 405 F3d 446 (CA 6), *reh’g and reh’g en banc denied* (2005). Employer’s threat that it would “probably” demote the plaintiff after her maternity leave is, itself, insufficient to sustain a constructive discharge claim. However, the threat creates a jury-submissible claim when combined with evidence that the employer: (1) caused the plaintiff “a lot of stress” and made it “exceedingly difficult” for her to obtain maternity leave by refusing to say how much leave time she had, indicating displeasure with her exercise of her right to take FMLA leave, and suggesting that maternity leave should be treated differently than other FMLA-covered leave; (2) told the plaintiff the day after she submitted her leave request that she must now report to the owner’s son, a person with whom she had several unpleasant interactions in the past; and (3) implied that it neither expected nor wanted her to return from leave by failing to tell her she needed a doctor’s note to return to work, failing to timely reactivate her computer account and removing work from her desk.

***Kocak v Community Health Partners of Ohio, Inc***, 400 F3d 466 (CA 6), *reh’g and reh’g en banc denied* (2005). The plaintiff was protected by the Pregnancy Discrimination Act even though she was not pregnant at the time she applied for re-hire, bore no children during the application period, and had no pregnancy-related medical conditions. “The Supreme Court has held that the PDA prohibits an employer from discriminating against a woman ‘because of her capacity to become pregnant....’”

“In an analogous context, we have held that an employer violates the PDA if it terminates an employee because the employee is contemplating an abortion. It stands to reason that if, under the PDA, an employee may not be terminated on the basis of her potential to have an abortion, then Kocak cannot be refused employment on the basis of her potential pregnancy.”

The court affirmed summary judgment for the employer, however, because the plaintiff proffered no circumstantial evidence of discrimination and a manager’s question whether she was pregnant or planned to have more children was not “direct evidence” of discrimination. As inappropriate and unprofessional as it was, the question is not direct evidence of discrimination “because it does not compel a reasonable fact finder to conclude that Kocak was not hired for discriminatory reasons.”

#### **D. EQUAL PAY ACT**

***Beck-Wilson v. Principi***, \_\_\_ F3d \_\_\_; 97 FEP Cases 1121 (CA6, 2006). The female plaintiffs were employed by the Veterans Administration as nurse practitioners. They were paid less than physician assistants. The NPs were predominately female while the PAs were predominately male. They did similar work and the NPs had more education. On appeal

from summary judgment for the defendant, the court found that the plaintiffs had established a *prima facie* case of discrimination under the Equal Pay Act, 29 USC §206(d)(1). The two positions were fungible. The court also held that complete diversity between the plaintiffs and comparators was not necessary to establish a *prima facie* case. Turning to whether the comparators were proper, the court noted that “Because the comparison at the *prima facie* stage is of the jobs and not the employees, ‘only the skills and qualifications actually needed to perform the jobs are considered.’” Each plaintiff identified a male PA who was paid more for doing the same work. Likewise, the plaintiffs produce statistical evidence that the predominately male PAs were paid more than the predominately female NPs.

The court reversed the lower court finding that a material issue of fact existed on whether the pay differential was justified by “factor other than sex.” The court found that defendant failed to establish that there was no issue of material fact that the more highly paid PAs had greater experience, qualifications or responsibilities.

***Balmer v HCA, Inc***, 423 F3d 606 (CA 6, 2005). Summary judgment properly granted against the plaintiff’s Equal Pay Act claim, where the employer presented substantial evidence that the higher-paid male requested more money, had a higher salary history with other employers, and had more industry experience. The plaintiff’s statistical analysis was flawed because “she relies on an extremely small sample size; she attempts to compare long time female employees to much more recently hired male employees; and she fails to take into account the employees’ overall qualifications.”

The district court wrongfully awarded attorney fees to the employer, however. Although many of the plaintiff’s claims were “frivolous, unreasonable, or without foundation,” the plaintiff did advance one non-frivolous claim.

#### **E. SEX STEREOTYPING**

***Vickers v Fairfield Med Ctr***, \_\_\_ F3d \_\_\_; 6th Cir. No. 04-3776 (CA 6 2006). Plaintiff, employed as a private police officer, allegedly was subject to teasing, ridicule, name-calling, and lewd actions by co-workers and his police chief. The comments and actions focused on plaintiff engaging in homosexual activities. Plaintiff did not report any harassment to his employer, but rather retained an attorney who brought it to the employer’s attention. After the employer received notice of the harassment, an investigation commenced and co-workers and chief were suspended. The employer requested that plaintiff attend a disciplinary meeting, which he refused to attend because he thought it was merely a means to discredit him in any future litigation he may have against the employer. He resigned from his position and brought, *inter alia*, claims of sex discrimination, sexual harassment, and retaliation in violation of Title VII.

The district court dismissed all of plaintiff’s federal claims on summary judgment “based on the fact that Title VII does not protect individuals from discrimination based on sexual

orientation and that Supreme Court and Sixth Circuit case law do not recognize [plaintiff]'s claims of harassment based on being perceived as homosexual as violations of Title VII. The Sixth Circuit affirmed the district court's grant of summary judgment, holding "[w]hile the harassment alleged by [plaintiff] reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, [plaintiff]'s claim does not fit within the prohibitions of law." Plaintiff argued that he was harassed and discriminated against because of "gender nonconformity" and sex stereotyping, and that his situation was analogous to that in the Supreme Court case *Waterhouse v. Hopkins*, 490 US 228 (1989). The Court rejected Plaintiff's attempt to "bootstrap" his sexual orientation claims through the use of gender stereotyping claims. "In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."

*Smith v City of Salem, Ohio*, 378 F3d 566 (CA 6, 2004). The Sixth Circuit read *Price Waterhouse v Hopkins*, 490 US 228 (1989), to support the proposition that a male with gender identity disorder can pursue a "sex stereotyping" claim — *i.e.*, a claim that his employer discriminated against him because it believed his behavior and mannerisms did not conform to the appropriate male stereotype.

"By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.... After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."

The court also reversed the lower court's ruling that the plaintiff's 24-hour suspension was not an adverse employment action.

*Barnes v City of Cincinnati*, 401 F3d 729 (CA 6, 2005). Relying on *Smith v City of Salem, Ohio*, 378 F3d 566 (CA 6, 2004), the court held that a pre-operative male-to-female transsexual police officer could sustain a sex discrimination action by alleging that "his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions...." Evidence that the employer's explanation for discharge was false, combined with proof that the plaintiff was the only police sergeant to fail probation in seven years and evidence that another sergeant with lower probationary scores passed probation, was sufficient to sustain a jury's verdict that the plaintiff was discharged due to illegal sex stereotyping.

***Jespersen v Harrah's Operating Co, Inc. (en banc)***, \_\_\_ F3d \_\_\_; 97 FEP Cases 1473 (CA9, 2006). Defendant had a "Personal Best" dress code which required both male and female bartenders to wear the same uniform. However the policy required female bartenders to wear make-up. Plaintiff quit when the defendant refused to waive the make-up requirement for her. On appeal, she claimed that she was terminated because she did not comply with the stereotype of a woman when she refused to wear make-up. Analyzing *Price Waterhouse v Hopkins*, 490 US 228 (1989), the court noted that the stereotyping in that case interfered with the plaintiff's ability to perform her work. In this case, the defendant's "Personal Best" policy was, for the most part, unisex. Plaintiff failed to present any evidence that the policy was adopted to make female employees conform to a sexual stereotype. Moreover, there was no record evidence that the policy would inhibit a woman's ability to do the job. However, the court recognized that a plaintiff could establish a case of sex stereotyping based on a dress code if there was record evidence of stereotypical motivation in the adoption of the policy or that the policy effects the employee's ability to perform her job.

***Schroer v Billington***, 97 FEP Cases 1506 (DC DC, 2006). Plaintiff, a retired military officer with extensive experience in anti-terrorism, applied for a position as a terrorism research analyst with the Congressional Research Service. Plaintiff suffered from gender dysphoria and was about to begin the first stage of treatment which required that he present himself full time as a woman. When he interviewed for the job with CRS, he presented himself as a man. After he was offered the job, he revealed that he was undergoing treatment for gender dysphoria. He assured CRS that he would dress appropriately as a woman and presented pictures of himself dressed in traditional female workplace attire. CRS withdrew its offer and the plaintiff brought an action alleging sex discrimination. Defendant moved to dismiss the action alleging the complaint failed to state a claim.

The plaintiff argued that he was a victim of sexual stereotyping which under *Price Waterhouse v Hopkins* violates Title VII. Addressing the plaintiff's sexual stereotyping claim, the court noted that several courts had found that transsexual did state a cause of action under *Price Waterhouse* for sexual stereotyping. However, the court reasoned that these court missed the key analysis in *Price Waterhouse*. The court stated, "Neither the logic nor the language of *Price Waterhouse* establishes a cause of action for sex discrimination in every case of sex stereotyping, however. What the Supreme Court recognized is a Title VII action for disparate treatment based on sex stereotyping. Sex stereotyping that does not produce *disparate treatment* does not violate Title VII."

The court rejected the plaintiff's stereotyping claim. The court reasoned, "In other words, it creates space for people of both sexes to express their sexual identity in non-conforming ways. Protection against sex stereotyping is different, not in degree, but in kind, from protecting men, whether effeminate or not, who seek to present themselves *as* women, or women, whether masculine or not, who present themselves *as* men." While not ruling out the possibility that a transsexual could state a claim for stereotyping, the court found that the

plaintiff had not met his burden.

However, the court, relying on the reasoning of Judge Grady in *Ulane v Eastern Airlines, Inc.*, 581 F Supp 821 (ND Ill, 1983); *vacated*, 742 F2d 1081 (7<sup>th</sup> Cir, 1984), believed it was time to revisit Judge Grady's conclusion that "discrimination against transsexual *because they are transsexuals* is 'literally' discrimination 'because of ... sex.'" The court refused to dismiss the case giving time for the plaintiff to develop a record that reflected the scientific basis of sexual identity in general and gender dysphoria in particular.

***Etsitty v Utah Transit Authority***, 95 FEP Cases 1836 (D Utah, 2005). The court expressly disagreed with the Sixth Circuit's decision in *Smith v City of Salem*, 378 F3d 566 (2004), and held that Title VII does not protect pre-operative male transsexuals who want to come to work dressed like women. "There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes."

"Taken to the extreme, the theory in the *Smith* case would mean that if an employer cannot bar a transsexual male from dressing and appearing as a woman (because it would be sex stereotyping under *Price Waterhouse*), then a non-transsexual male must also be allowed to dress and appear as a woman. In fact, if something as drastic as a man's attempt to dress and appear as a woman is simply a failure to conform to the male stereotype, and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress as a woman, appear and act as a woman, and use the women's restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII. *Price Waterhouse* did not go that far." Nor did Congress contemplate the complete rejection of sex-related conventions.

Regardless, the evidence could not support the conclusion that the plaintiff was discharged because of his failure to conform to a sexual stereotype. The evidence showed that the plaintiff was treated respectfully, never ridiculed, and was terminated only out of concern for liability based on the plaintiff's expressed intent to use public women's restrooms while working. "[N]o study is necessary to conclude that many women would be upset, embarrassed, and even concerned for their safety if a man used the public restroom designated exclusively for women. Concerns about privacy, safety and propriety are the reason that gender specific restrooms are universally accepted in our society."

***Medina v Income Support Division***, 413 F3d 1131 (CA 10, 2005). Female plaintiff who claimed she was harassed by lesbian co-workers and supervisors because she was heterosexual failed to state an actionable claim of sex harassment. "Ms. Medina ... argues that Ms. Baca harassed her because of her failure to comport with gender stereotypes. Here, however, there is no evidence — and no claim — that Ms. Medina did not dress or behave

like a stereotypical woman. Instead, Ms. Medina apparently argues that she was punished for not acting like a stereotypical woman *who worked at ISD* — which, according to her, is a lesbian. We construe Ms. Medina’s argument as alleging she was discriminated against because she is a heterosexual. Title VII’s protections, however, do not extend to harassment due to a person’s sexuality.”

***Dawson v Bumble & Bumble***, 398 F3d 211 (CA 2, 2005). The plaintiff claimed she was terminated because she was openly lesbian and did not conform to typical female stereotype noting that “a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII,’” the court affirmed summary disposition in favor of the lesbian plaintiff’s employer. The employer was an “avant garde” hair salon that “extols the unconventional” and regularly employed sexually “non-stereotypical individuals,” including a female-to-male transsexual, an open bisexual, numerous openly gay and lesbian employees and a lesbian with “very androgynous looks.” The decision to terminate the plaintiff was made by a “pre-surgery male-to-female transsexual” who, at the time in question, “was transitioning from appearing male to appearing female.” Against this backdrop, and where the plaintiff admitted that the employer employed “nonconformists” other than herself, the court found no evidence that the plaintiff was subjected to adverse employment action as a result of her failure to conform her appearance or behavior to a feminine stereotype.

***Back v Hastings on Hudson Union Free School District***, 365 F3d 107 (CA 2, 2004). A female school psychologist could sustain a §1983 sex stereotyping claim with evidence that the decision to deny of her tenure application was based on a perception that women with young children could not devote adequate time to the job. The employer’s contention that the alleged stereotype was not exclusively gender-based, but was instead a “gender plus parenthood” stereotype, did not undermine the claim because: (1) “plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against;” and (2) “the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based.”

The district court erroneously granted summary judgment for the employer because: (1) the decision maker’s alleged comments about a woman’s inability to combine work and motherhood constitute direct evidence of discrimination; (2) the plaintiff’s failure to proffer evidence concerning the employer’s treatment of male administrators with young children is not fatal because it is the treatment of the individual plaintiff, not the relative treatment of different groups within the workplace, that matters; and (3) statistical evidence showing that 85% of the employees the allegedly biased decision maker hired were women, and that 71% of those women had children, was not-dispositive because the evidence did not establish what percentage of those employees were administrators.

## V. RACE/NATIONAL ORIGIN DISCRIMINATION

*Ash v Tyson Foods*, \_\_\_ US \_\_\_; 97 FEP Cases 641 (2005). The Court reversed and remanded to the Eleventh Circuit. The Court found that the Eleventh Circuit erred when it held that Tyson's plant manager's referring to the plaintiffs as "boy" was not evidence of discriminatory animus because it was not qualified by descriptive words like black. The court stated, "Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous."

The Court also remanded because the Eleventh Circuit erred in articulating the standard for determining whether the asserted nondiscriminatory reasons for Tyson's hiring decisions were pretextual. The Court of Appeals, in finding petitioners' evidence of pretext was insufficient, cited one of its earlier precedents and stated: "Pretext can be established through comparing qualifications only when `the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'" The Court recognized that qualification evidence might be sufficient to show pretext. The Court found the Court of Appeals standard to be imprecise and unhelpful. The court remanded the cause with instructions "The Court of Appeals should determine in the first instance whether the two aspects of its decision here determined to have been mistaken were essential to its holding. On these premises, certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion."

*Michigan Department of Civil Rights v Fashion Bug of Detroit*, 473 Mich 863 (2005). The employer was entitled to summary disposition because the black plaintiff failed to establish that she was treated differently from a white employee whose employment situation was "nearly identical" to hers. The store manager who acted discourteously to a customer was not comparable to the plaintiff who acted dishonestly for personal gain. Although the person who reported the plaintiff's misconduct said "you people" when referencing either the plaintiff or the primarily African-American-staffed store where the plaintiff worked, the plaintiff failed to establish that the ultimate decision maker harbored any racial animus.

*Jordan v City of Cleveland*, \_\_\_ F3 \_\_\_; 98 FEP Cases 682 (CA 6 2006). African-American firefighter alleged he was the subject of racial discrimination, racial and retaliatory harassment, and retaliation in violation of Title VII while working in the fire department of a large city. Plaintiff was subjected to racially offensive jokes, racist graffiti, teasing, name-calling, was assigned additional duties, was denied opportunities for additional pay, and was assigned to segregated shifts, all while being transferred to several different stations. The district court granted defendant's motion for summary judgment only with respect to the racial discrimination claims, and allowed all remaining claims to proceed to trial. The jury

found in favor of plaintiff on claims of retaliation, racial harassment and retaliatory harassment by both co-workers and supervisors.

On appeal, the Sixth Circuit affirmed the district court's denial of defendant's FRCP Rule 50 motion, finding that the retaliatory harassment was sufficiently severe or pervasive, that both a reasonable person would and that the plaintiff had found the work environment abusive, and that the denial of opportunities for additional pay was a materially adverse action. The rejection of defendant's objection to jury instructions was also affirmed. The district court's judgment on attorney's fees was reversed, as a deduction based on a "failed" failure-to-promote claim never actually asserted by plaintiff was "plainly an abuse of discretion." Plaintiff's failure on two of his several racial harassment claims did not merit the district court's fortypercent reduction in attorney's fees for failure to prevail on all claims when plaintiff's results were "nothing short of exemplary" and Title VII cases are "often difficult to prove." Finally, the district court's denial of a fee multiplier could not stand because it was based on an erroneous Rule 26(a)(1) motion that had been made inapplicable by order and was subsequently ignored by the defendant on appeal. For these reasons, the case was remanded on the issue of attorney's fees.

***Amini v. Oberlin College***, \_\_\_ F3d \_\_\_ : 97 FEP Cases 1046 (CA 6, 2006). The plaintiff brought a §1981 action alleging race discrimination when he was not hired as a professor at Oberlin College. The lower court granted defendant summary judgment. On appeal, the plaintiff argued that the record contained direct evidence of discrimination where the college never hired an African American or Mid-Eastern faculty member. The court affirmed the lower court's order finding that there was no direct evidence of discrimination. According to the court, "direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's action.... Direct evidence does not require the fact finder to draw any inferences to reach that conclusion." Turning to plaintiff's argument, the court found that "the racial makeup of the Oberlin faculty does not lead ineluctably to the conclusion that the college considered race when eliminating the plaintiff from consideration for the position for which he applied." The court also rejected the plaintiff's argument that he had shown pretext and established a circumstantial case of discrimination. The court rejected the argument that the fact that the successful candidate's father taught at Oberlin and that the candidate graduated from Oberlin were evidence of discriminatory intent.

***Wright v. Murray Guard, Inc***, \_\_\_ F3d \_\_\_ ; 6th Cir. No. 05-5301 (CA 6 2006). Plaintiff, a male African-American, was employed as a security guard for Defendant. After allegations of sexual harassment against the plaintiff by a female co-worker and the results of a subsequent investigation, defendant terminated plaintiff based on "(1) the sexual harassment allegations made against him, (2) job performance issues, and (3) his failure to follow procedures." Plaintiff brought charges against defendant, alleging that his termination was the result of sex and racial discrimination by defendant. Plaintiff's claims were based on both single- and mixed-motive theories. The district court granted summary judgment

in favor of defendant on all claims, which plaintiff appealed to the Sixth Circuit. The Court held that plaintiff was unable to demonstrate a *prima facie* case of racial discrimination, since he was unable to show that defendant's legitimate, non-discriminatory reasons, (1)-(3) *supra*, for termination were pretextual. Plaintiff failed to offer any evidence contrary to defendant's contention that it made its decision to terminate "based on a honestly held belief in a nondiscriminatory reason supported by particularized facts after a reasonably thorough investigation." Thus, summary judgment on plaintiff's single-motive, racial discrimination charge was affirmed.

With regards to plaintiff's mixed-motive claims, the Court held that plaintiff failed to demonstrate that a protected characteristic, sex or race, "was a motivating factor" in defendant's decision to terminate him. "At most, [plaintiff] has presented evidence as to why the allegations of sexual harassment made against him might not be credible, but he has presented no evidence that [defendant] did not honestly believe they were true or that [defendant] relied on unlawful motives in termination [plaintiff]." Because sex or race was not shown to be a motivating factor in termination, the Sixth Circuit affirmed the district courts grant of summary judgment on plaintiff's mixed-motive claim.

***Phillips v Cohen***, 400 F3d 388 (CA 6, 2005). The district court engaged in improper fact-finding at the summary judgment stage of a disparate impact case by accepting the employer's "constructed pools" analysis because it took employee qualification into account, and rejecting the plaintiff's statistical analysis because it did not. Case law questions both "constructed pools" approach and the relevance of candidate qualification in a disparate impact case. While both expert reports may contain flaws, flaws go to the weight, not the admissibility of the evidence. Analytical flaws may also have been unavoidable, due to the employer's practice of destroying promotions data every two years.

Moreover, the following non-statistical evidence, which was "largely statistically insignificant," "compensate[d] to some degree for plaintiffs' failure to demonstrate conclusively that [African-American employees] are promoted at lower rates than white employees" and was sufficient to raise a material factual question of disparate impact for trial: (1) promotions to the two top grades were almost always done by "appointment," instead of by the merit promotion and/or application process; (2) 82% of surveyed employees "perceive career advancement opportunities to be unfavorable due to favoritism, pre-selection, nepotism, racism and now downsizing;" and (3) "[t]here is evidence of inequity toward African-Americans in the distribution of awards, high performance reviews, and disciplinary actions, all of which are mandatory factors in merit promotion decisions."

***Barner v Pilkington N.A., Inc***, 399 F3d 745 (CA 6, 2005). The district court properly prevented one of the plaintiff's co-workers from testifying about what two black former employees had told him about the allegedly discriminatory way the employer assigned work. The hearsay statements were not admissions against interest because they were not made by managers, and were not uttered in the scope of employment. Rather, "the two former African

American employees made their alleged statements solely to advance their own interests. The scope of their employment did not include work assignments.”

***Grandberry v. Judson Ctr.***, 2006 WL 250060 (E.D. Mich. 2006). Plaintiff’s direct and circumstantial evidence was insufficient to sustain her claims of race discrimination and hostile work environment harassment. The court rejected plaintiff’s argument that her employer’s failure to point out her work deficiencies until after her injury and her filing of an EEOC complaint, and the fact that she was the only employee disciplined for leaving work early on a particular day were direct evidence of discrimination. The court held that a supervisor’s statement asking her if she was trying to get fired, along with alleged harassment “by imposing exacting requirements with respect to company policy” were insufficient as circumstantial evidence to show that the employee was terminated because of her race. “In fact, it is difficult even to infer such a conclusion from the evidence cited by the plaintiff.” “[T]he Court is at a loss to determine how the timing of defendant’s criticism of the plaintiff’s performance, particularly in relation to an injury, bears on the question of racial discrimination.” Accordingly, all claims were dismissed on summary judgment.

***Betts v Costco Wholesale Corp.***, 2005 WL 256962 (ED Mich). Judge Cook ruled that a warehouse manager’s arguably “racist” comments were not “direct evidence” of race discrimination. Some were not initially perceived as “racist,” most were subject to “multiple interpretations,” and none established without inference that plaintiffs were discharged because of their race. However, when combined with evidence that similarly situated Caucasian employees were treated differently, the comments (and the racially charged atmosphere they helped foster) “could arguably give rise to an inference of an unlawful racial animus which adversely affected their employment status with the Company” and presented triable circumstantial race discrimination and hostile environment claims.

In reaching this result, Judge Cook ruled: that the employer cannot use the discharge justification as a basis for establishing that the plaintiffs were not qualified for the position; that the similarly-situated requirement does not require plaintiffs to establish an “exact correlation” between themselves and their comparitors; that offensive racial comments need “not be ‘directed at’ plaintiffs in order to constitute an act of harassment;” that plaintiffs “need not even hear the offensive remarks or witness the unwarranted behavior first-hand in order to allege that these statements or acts contributed to a hostile work environment;” that conduct that is “race-neutral may be considered as evidence of harassment when evaluated in the totality of the circumstances;” and that one plaintiff satisfactorily “reported or attempted to report evidence of harassment” to management by telling a store manager she wanted to be transferred because “[she] was tired of the harassment” and telling a regional vice president that “there is some racist \_\_\_\_ going on at the store and that I’m tired of it.”

***Young v Oakland County***, e-journal No. 25737, *rel’d* 12/29/04(ED Mich). Although it was not a listed job requirement, the plaintiff’s lack of “criminal justice experience” rendered him less qualified than, and not similarly situated to the successful candidate. Judge Gadola

reached this result by evaluating the job description for the sought after Chief Community Corrections Field Operations Manager position, a “great portion” of which “dealt with the criminal justice system.” Judge Gadola added that the decision maker’s deposition testimony “clearly demonstrated that Defendant believed [the successful candidate] to be a better choice than Plaintiff, not because of his race, but because of his experience [in the criminal justice system].” The plaintiff was therefore unable to prove his *prima facie* or pretext burdens, even though he was one of the 29 candidates initially placed on the “Top Five” list, and was among the 23 candidates who met the express qualifications for the position.

Additionally, “Plaintiff’s contention that Defendant could not know whether Mr. Gatt was more qualified than Plaintiff without interviewing Plaintiff lacks merit. The application procedures prior to the interview stage provided ample opportunity to discover the type of work experience possessed by each candidate.”

***Simpson v UAW Local 6000***, 2005 WL 1593444 (ED Mich, 2005). Judge Zatkoff used the RIF construct to evaluate the African-American plaintiff’s race discrimination claim because the plaintiff was not replaced and her duties were assumed by an existing employee. Judge Zatkoff also ruled that the plaintiff’s claim was belied, in part, by the fact that the board members who recommended adverse employment action were also African-American. “Although the Supreme Court has rejected a ‘conclusive presumption’ that an employer will not discriminate against members of his or her own race, the fact that two African-Americans helped orchestrate the RIF is certainly relevant to Plaintiff’s claim that the RIF was nothing more than a ruse to eliminate African-Americans.”

Judge Zatkoff also reasoned that an affidavit stating that a board member who supported the plaintiff’s termination had opposed the layoff of another African-American employee because she thought the layoff was racially motivated tended to belie, not support, the plaintiff’s pretext argument. “If Defendant Ettinger was so sensitive to the plight of Ms. Myles that she told her the Board action eliminating her position was racially motivated, it seems highly unlikely that she would be in favor of [the alleged adverse employment action against the plaintiff] if that decision was also based on race.”

***Alfaro v Dana Container, Inc***, 2005 WL 1459167 (ED Mich, 2005). Judge Feikens ruled that the plaintiff’s “self-serving” testimony that two supervisors said he was “nothing but a f-ing spic and wetback” is not direct evidence of race and national origin discrimination. The testimony was unsupported by other evidence and contradicted by the supervisors’ “equally plausible” testimony. Moreover, “racial slurs and comments” are “not employment actions” capable of sustaining the adverse employment action element of a circumstantial evidence case.

***Somerville v William Beaumont Hospital***, 2005 WL 1389254 (ED Mich, 2005). Judge Gadola ruled that the black plaintiff could not establish pretext simply by disagreeing with the basis of his termination and showing that all the decision makers were white.

**Hague v. Thompson Distribution Co.** \_\_\_ F3d \_\_\_; 97 FEP Cases 545 (CA 7, 2006). An African American purchased a plumbing supply company's assets at an auction and began his own business. Defendant hired five white employees that formerly worked for the company whose assets were purchased by defendant. Several months later, defendant discharged the five white employees and replaced them with four African Americans. The five discharged employees brought an action alleging in part that their discharge violated §1981. The lower court granted defendant summary judgment.

On appeal, the court noted that in reverse discrimination cases white plaintiffs had to show as part of their *prima facie* case "background circumstances sufficient to demonstrate that the particular employer has reason or inclination to discriminate invidiously against whites or evidence that there is something fishy about the facts at hand." The court found that the plaintiffs' had met this burden by showing that their African American "boss" fired five white employees and replaced four of them with black employees. The court believed that these circumstances created the same inference as would a normal race case.

Turning to whether the plaintiffs had demonstrated pretext, the court found that plaintiffs had failed to demonstrate that defendant lied about the reasons for its decision to discharge them. The plaintiffs admitted to their performance deficiencies but attempted to rationalize their deficiencies. The court held that this was insufficient to prove pretext. The plaintiffs had to show that the defendant did not honestly believe the reasons asserted for plaintiffs' discharges. The court also rejected plaintiffs' argument that the failure of defendant to produce documentary evidence to support the performance issues demonstrated pretext. The court noted that unlike large business, where one would expect documentation of employment decisions, "one would not expect the owner [of a small business] to spend the time, or incur the expense, to document individual employment decisions." Moreover, the court found that the lack of documentation did not show pretext stating, "This is because in complaining about the lack of documentation, the plaintiffs are not really challenging the veracity of Thompson Distribution's proffered reason, but are rather attempting to impermissibly increase Thompson Distribution's burden from a burden of production to a burden of proof. This is impermissible."

The court also found that the failure to provide written job descriptions, conduct performance reviews, tell employees specific reasons why they did not fit in did not prove pretext. Finally, the evidence showed that the employer discharge six black employees and hired several white employees.

**Walker v Abbott Laboratories**, 416 F3d 641 (CA 7, 2005). The black plaintiff, who admitted that the white male who received the position was more qualified, could not establish race discrimination by showing the successful candidate failed to satisfy one of the posted job requirements, a bachelor's degree. Plaintiff asserted that since the successful candidate did not meet the employer's required qualifications, the reason for selection must have therefore been discriminatory. "A plaintiff cannot be permitted to manufacture a case

merely by showing that the employer does not follow its employment rules with Prussian rigidity.”

“Unless a rule is part of the company’s contract with its employees, the company is free to create exceptions to it at will. Rules by definition do not make a perfect fit with all the circumstances to which they apply; if they did, they would not be rules, but standards. A rule abstracts from particular circumstances, and if one of the excluded circumstances is salient in a particular case there is pressure to recognize an exception. A well-managed company will not make exceptions to its personnel rules promiscuously because that will generate ill will among the employees; they will feel they’re being subjected to arbitrary treatment, which nobody likes. But neither will a well-managed company adhere to its personnel rules with a rigidity blind to circumstances that may make the rule occasionally wholly inapt. ‘People in supervisory positions are not doing their best for the company if they are content to administer rules. Fairness, consistency, and demonstrated interest in employee problems are the backbone of supervisory morale building.... [N]o set of written policies should become a straitjacket on management thinking.’”

*El-Hakem v BJJ, Inc*, 415 F3d 1068 (CA 9, 2005). The employer’s CEO created a racially hostile work environment by repeatedly referring to the Arabic plaintiff as “Manny” and “Hank,” non-Arabic or “Western” forms of the plaintiff’s given names, “Mamdouh” and “Hakem.” The fact that “Manny” is not a racial epithet lacks consequence because “[n]ames are often a proxy for race and ethnicity” and “anti-discrimination laws reach beyond “genetically determined characteristics such as skin color.” The jury had evidence to conclude that the CEO’s Americanized references to the plaintiff were based on discriminatory animus because he admitted that he believed the “Western” references would increase the plaintiff’s chances for success and be more acceptable to the employer’s clients.

*Rozskowiak v Village of Arlington Heights*, 415 F3d 608 (CA 7, 2005). The district court properly held that the following comments, both from supervisors who had some influence over the contested employment decision, did not constitute direct evidence of national origin discrimination: a Sergeant repeatedly told the plaintiff that he “would probably be losing [his] job because [he] was a stupid Polack” and a Commander stated that he was not cut out to be a policeman in Arlington Heights because he was Polish. Neither comment was related directly to the decision to terminate the plaintiff’s employment, and neither speaker had singular influence over the decision to terminate.

“Derogatory statements made by someone who is not involved in making the employment decision at issue are not evidence that the decision was discriminatory. However, if the person who made the derogatory remarks provided input into the employment decision — and the remarks were made around the time of and in reference to that decision — it *may* be possible to infer that the decision makers were influenced by those [discriminatory] feelings. Discriminatory remarks are actionable only if they injure the plaintiff; ‘there must be a real link between the bigotry and an adverse employment action.’”

***Blise v Antaramian***, 409 F3d 861 (CA 7, 2005). In affirming summary judgment for the employer, the court rejected the unsuccessful black job applicant’s contention that the subjective interview process was discriminatory because the interviewers asked each applicant different questions and did not employ an “objective criteria” in scoring each candidate.

“There is no legal requirement that an interviewer ask all job applicants the exact same questions. Applicants for a job typically come to the process with diverse professional backgrounds. Exploring these backgrounds may require an interviewer to ask different questions of different applicants. Job interviews are often a give-and-take process. An applicant’s answer to one question may prompt the interviewer to ask a follow-up question that the interviewer might not need to ask of another applicant.”

Moreover, “[t]his court has never held that a job interview must be scored according to some sort of objective criteria. A job interview will often involve ‘fleshing out’ an applicant’s resume (for instance, an interviewer may ask an applicant to explain the work a previous job involved). While this function, we suppose, *may* be reduced to objective criteria, there is no doubt that an interview also allows an interviewer to get a sense of the applicant’s personality, poise, and manners. These are all traits that are in the eye of the beholder and all traits that any employer would surely like to have a sense of before making a hiring decision. It is difficult to see how such traits could be measured by any objective criteria. A subjective analysis of the varying traits of each applicant is entirely appropriate.”

***Akouri v State of Florida Department of Transportation***, 408 F3d 1338 (CA 11, 2005). Decision maker’s explanation that the plaintiff was passed over for promotion because there were no black or hispanic employees in the relevant department, and that the white employees were “not going to take orders from you, especially if you have an accent,” constituted direct evidence of national origin discrimination sufficient to sustain a jury verdict for the plaintiff. “There is no mere suggestion or need for inferences because the statement relates directly to the DOT’s decision to promote Atkins instead of Akouri as Assistant Maintenance Engineer and blatantly states that the reason he was passed over for promotion was his ethnicity.”

***Waite v Board of Trustees of Illinois Community College District No 508***, 408 F3d 339 (CA 7, 2005). African-American supervisor’s comment that the Jamaican-American plaintiff had a “plantation mentality” — the only record evidence of potential discriminatory intent — created a material factual question whether the plaintiff was suspended because of her Jamaican national origin. The African-American supervisor did not rebut the plaintiff’s testimony that the remark referred to the plaintiff’s Jamaican national origin “because usually it was said that Jamaicans in particular and Caribbean folks in general thought they were white and treated African-Americans like slaves.”

***George v Leavitt***, 407 F3d 405 (CA DC, 2005). The court held that: (1) a plaintiff can establish a prima facie discriminatory discharge case by showing that the discharge was not

attributable to the two most common legitimate reasons for discharge, unsatisfactory performance and position elimination; (2) the district court erroneously ruled that the plaintiff had to show that she was replaced by someone from outside the protected class who was of an equal or lesser ability; (3) “an employer’s reason need not be false in order to be pretextual;” and (4) a plaintiff may establish pretext simply by showing that similarly situated employees outside her protected class were treated better after committing similar offenses. The court then reversed the district court’s decision to grant summary judgment for the employer, ruling that the employer’s claim that the plaintiff was not performing satisfactorily was inconsistent with her positive performance evaluations, the plaintiff’s non- “fanciful” testimony that she was performing well, and co-worker claims that the plaintiff was a good employee and that the plaintiff’s supervisors were at fault for certain confrontations.

***Keelan v Majesco Software, Inc***, 407 F3d 332 (CA 5, 2005). The Supreme Court’s opinion in *Desert Palace, Inc v Costa*, 539 US 90 (2003), which clarified that direct evidence is not a mandatory prerequisite for a “mixed motive” instruction, “had no effect on pretext cases under *McDonnell Douglas*.” The district court properly declined to analyze the national origin discrimination case under the “mixed motive” theory — *i.e.*, whether the employer had a legitimate and an illegitimate motive for terminating the plaintiffs — because it found no evidence that the employer had an illegitimate motive.

***Pope v ESA Services, Inc***, 406 F3d 1001 (CA 8), *reh’g and reh’g en banc denied* (2005). Allegation that the plaintiff’s manager “treated only white managers to lunch and refused to socialize with any black managers” did not establish pretext in a failure-to-promote case because: (1) the “refused to socialize” allegation was unsupported by record evidence; (2) the record did not show that the manager “treated” anyone to lunch, and the fact that he went out to lunch with other white managers at a conference does not raise an inference of discrimination; (3) the record established that the manager’s decision not to promote the plaintiff was influenced “primarily” by a different individual; and (4) the plaintiff produced no evidence that racial discrimination was the true reason he was not promoted.

***Anderson v Westinghouse Savannah River Co***, 406 F3d 248 (CA 4, 2005). The district court properly dismissed the African-American plaintiff’s claim that the employer’s two-stage hiring process had a disparate impact against blacks. The claim was premised on an “expert” study which used the percentage of black employees on the job site to conclude that the number of blacks who received promotions was unusually low. The study was flawed, because it failed to account for significant factors such as education, experience, interview demeanor and demonstrated ability. Moreover, the plaintiff’s reliance on case law wherein the interviewers had unfettered discretion to make employment decisions was misplaced because the interviewers in this case had to evaluate specific core competencies. The plaintiff also failed to proffer any evidence to support her conclusion that she deserved a higher rating.

With respect to the plaintiff’s disparate treatment claim, the court discounted the plaintiff’s

allegation that a supervisor may have preselected a particular employee for promotion. The allegation, if true, does not prove pretext because “[i]f one employee was unfairly preselected for the position, the preselection would work to the detriment of all applicants for the job, black and white alike.”

The court also discounted the plaintiff’s showing that the interview panel’s evaluation of her was worse than a recent performance evaluation. “We cannot require that different supervisors within the same organization must reach the same conclusion on an employee’s qualification and abilities.” “Furthermore, the performance evaluation is a review of an employee’s performance in her current position, while the process of selecting a person for a promotion involves a consideration of how that employee will perform in a different position. In other words, the performance evaluation and the interview selection stage, which involves an analysis of how the applicant meets the core and functional competencies for the position that is open, are not interchangeable.”

***Abarca v Metropolitan Transit Authority***, 404 F3d 938 (CA 5, 2005). A man who was terminated for refusing to sign a reinstatement agreement was not treated differently than similarly-situated employees, even though not all reinstated employees were forced to sign such agreements. Approximately half of all reinstated employees were forced to sign agreements similar to the one the plaintiff was asked to sign, and the plaintiff failed to point to any employee who was treated more favorably after committing the same misconduct.

***Ronda-Perez v Banco Bilbao Vizcaya Argentaria***, 404 F3d 42 (CA 1, 2005). A plaintiff cannot sustain an age discrimination claim by simply denying misconduct, offering evidence to refute the employer’s charges and alleging procedural irregularities in the employer’s investigative and decision-making process. Particularly where the plaintiff admitted some of the conduct in question, “the dozen perceived chinks in appellee’s reasons for terminating plaintiff let in no light as to any true reason, do not add up to the slightest suggestion of an effort to deceive or cover up a hidden motive, and obviously fail to indicate that there is a viable issue of age-related discrimination to bring before a trier of fact.”

***Torlowei v Target***, 401 F3d 933 (CA 8, 2005). The district court erroneously concluded that *Desert Palace v Costa*, 539 US 90 (2003), altered the traditional burden-shifting analysis. “*Desert Palace* is applicable only to post-trial jury instruction, and not to the analysis performed at summary judgment.” The language in *Desert Palace* that seems to impact the traditional *McDonnell Douglas* framework refers only to the traditional understanding that direct evidence is an alternative method for defeating a employer’s summary judgment motion.

***Obrey v Johnson***, 400 F3d 691 (CA 9, 2005). “[O]bjections to a study’s completeness generally go to ‘the weight, not the admissibility of the statistical evidence.’” Although Rule 702 permits a district court to exclude studies which contain “serious methodological flaws,” “so long as the evidence is relevant and the methods employed are sound, neither the

usefulness nor the strength of statistical proof determines admissibility under Rule 702.” The district court thus erred in refusing to admit statistical evidence because it failed to account for the relative qualifications of the applicant pool.

The district court also abused its discretion in excluding evidence from three other individuals who, like the plaintiff, claimed they were not promoted to supervisory positions because of their race. “Like statistical evidence, anecdotal evidence of past discrimination can be used to establish a general discriminatory pattern in an employer’s hiring or promotion practices. While such evidence might prove inadmissible in a typical case of individual discrimination, in a case involving a claim of discriminatory pattern or practice ‘the combination of convincing anecdotal and statistical evidence is potent.’” The court acknowledged the district court’s concern that the evidence would essentially require three abbreviated employment discrimination trials. However, the district court should have addressed these concerns “through other, less restrictive means.”

## **VI. REVERSE DISCRIMINATION/AFFIRMATIVE ACTION**

*Plumb v Potter*, 2005 WL 2739328 (ED Mich, 2005). Judge Zatkoff ruled that a decision maker’s statement, “we need more diversity, we don’t have enough women around here,” is not “direct evidence” of “reverse” sex discrimination. The statement does not “require” the conclusion that the plaintiff’s male sex played a role in the employer’s decision to promote a woman. The trier of fact would have to infer that the decision maker’s “personal preference for female employees causes her to generally discriminate against males in violation of federal law” and that “this general tendency caused her to discriminate against Plaintiff.” Judge Zatkoff also ruled that the comment was not circumstantial evidence of discrimination because it was “abstract, made in a group and not directed at Plaintiff.”

*Blossom v Ford Motor Co*, 2005 WL 1529735 (ED Mich, 2005). Judge Cohn ruled that evidence showing that the employer encourages workplace “diversity” is, by itself, insufficient to sustain a “reverse” discrimination claim. Plaintiffs must go further and show that the employer utilized illegal “diversity quotas.”

*Bryant v Compass Group USA, Inc*, 413 F3d 471 (CA 5), *reh’g denied* (2005). The district court should have granted the employer’s post-trial motion for JMOL, since the following does not establish that the employer illegally discriminated against the Caucasian plaintiff: (1) testimony and evidence that the plaintiff did not commit the conduct (stealing money) for which he was terminated; (2) proof that Hispanic employees conspired to frame the plaintiff; and (3) evidence that the employer failed to properly investigate before firing him. “[E]vidence that the employer’s investigation merely came to an incorrect conclusion does not establish a racial motivation behind an adverse employment decision. Management does not have to make proper decisions, only non-discriminatory ones.”

*Vessels v Atlanta Independent School System*, 408 F3d 763 (CA 11, 2005). To demonstrate

that he was qualified at the prima facie stage for the sought after school psychologist position, the plaintiff must only show that he satisfied the employer's objective qualifications. "While AISS argues that he was unqualified because he lacked the leadership style they preferred and could not provide a seamless transition, such subjective criteria have no place in the plaintiff's initial prima facie case.... If we were to hold an employer's subjective evaluations sufficient to defeat the prima facie case, the court's inquiry would end, and the plaintiff would be given no opportunity to demonstrate that the subjective evaluation was pretextual. Such a blind acceptance of subjective evaluations is at odds with the intent that underlies the *McDonnell Douglas* framework. This is particularly important because we have emphasized that subjective criteria can be a ready vehicle for race-based decisions. Furthermore, we cannot reconcile a rule that would essentially require a plaintiff to prove pretext as part of his prima facie case at the summary judgment stage with the Supreme Court's instruction that the plaintiff's prima facie burden is not onerous."

The caucasian plaintiff proffered sufficient evidence to sustain a pretext finding with evidence that: (1) decision makers talked of the desirability of having black employees in a school system serving a predominately black population and suggested that black school psychologists performed better with black children; (2) the plaintiff had a number of objective qualifications (some of which were listed on the job posting as mandatory) that the successful black candidate lacked, such as state leadership certification, a doctoral degree, published works and a demonstrated understanding of psychological theory; and (3) the employer failed to follow its own personnel procedure in selecting the successful black candidate. "Admittedly, our precedent makes clear that where an employee seeks to prove pretext through qualifications alone, the difference in qualifications must be so glaring that no reasonable impartial person could have chosen the candidate selected for the promotion in question over the plaintiff. However, where the qualifications disparity is not the *sole* basis for arguing pretext, the disparity need not be so dramatic to support an inference of pretext."

## VII. AGE DISCRIMINATION

*Smith v City of Jackson, Mississippi*, 125 S Ct 1536 (2005). The ADEA authorizes recovery in disparate impact cases comparable to *Griggs v Duke Power Co*, 401 US 424 (1971). Except for substituting of the term "age" for the terms "race, color, religion, sex, or national origin," the language of § 4(a)(2) and Title VII § 703(a)(2) are identical. Moreover, "the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, have consistently interpreted the ADEA to authorize relief on a disparate-impact theory."

Unlike Title VII, however, the ADEA significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age." "Congress' decision to limit the coverage of the ADEA [in this way] is consistent with the fact that age, unlike race or other classifications protected by Title VII, not

uncommonly has relevance to an individual's capacity to engage in certain types of employment. ... Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." Accordingly, and where the plaintiffs failed to identify any specific test, requirement or practice within the pay plan that has an adverse impact on older workers, "the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a 'reasonable factor other than age' that responded to the city's legitimate goal of retaining police officers."

***Jones v. City of Cortland Police Dep't***, 448 F.3d 369; 97 FEP Cases 1844 (6th Cir. 2006). Plaintiff brought claims for age discrimination under the ADEA, Ohio Revised Code, and Ohio Common Law, as well as breach of contract based upon a conditional offer of employment, which was later revoked because plaintiff was over thirty-five years old. Ohio law limited appointments of new police officers to those under age thirty-five. The Sixth Circuit affirmed the district court's determination finding that the Ohio law was part of a "bona fide hiring plan" under the ADEA and was thus permissible. Plaintiff's argument that police department had a *de facto* policy of granting new appointments to officers over thirty-five lacked factual support. Plaintiff failed to demonstrate a *prima facie* case of age discrimination. With regards to plaintiff's breach of contract claim, the court determined that his employment offer "was contingent upon a successful background investigation, which he failed due to [his] age." For these reasons, the Sixth Circuit affirmed the district court's grant of summary judgment and dismissal of all claims.

***Browning v. Department of the Army***, \_\_\_ F3d \_\_\_; 97 FEP Cases 486 (CA 6, 2006). The employer used a matrix to determine which of five candidates to promote to an open position. Plaintiff brought an action alleging that he was not promoted because of his age. On appeal from a grant of summary judgment, the court found that plaintiff had failed to prove pretext. The court rejected plaintiff's argument that the flexibility in applying the matrix allowed the decision maker to discriminate against him because of his age. The court noted that both the job description and the matrix notified candidates that administrative/managerial experience was a necessary requirement of the position. The court also noted that employers are not rigidly bound by the job description and are allowed great flexibility in choosing among qualified candidates. The fact that the decision maker gave greater weight to administrative/managerial experience than the job description indicated did not establish pretext. Finally, the fact that plaintiff disagreed with the scoring method or thought he was more qualified than the successful candidate was irrelevant to the age discrimination inquiry.

***EEOC v Jefferson County Sheriff's Dept***, 424 F3d 467 (CA 6, 2005). The employer did not violate the ADEA by implementing a retirement plan that gives younger employees who become disabled before standard retirement age credit for years of service they did not work, such that younger employees could under certain circumstances have greater disability retirement benefits than older employees with identical final or average salaries. The use of

age in the plan is indistinguishable from the use of age in the early retirement system addressed in *Lyon v Ohio Education Asso and Professional Staff Union*, 53 F3d 135 (CA 6, 1995). The EEOC produced no evidence that the employer intended to discriminate because of age, and the employer could have a legitimate desire to assure employees that a “working life’s worth” of pay will be accumulated even if the employee becomes disabled during his or her employment.

***Minadeo v ICI Paints***, 398 F3d 751 (CA 6, 2005). Supervisor’s comment to the plaintiff, “I understand you’re forty-seven years old. It’s unbelievable,” “does not even approach the standard required for a plaintiff to successfully present direct evidence of an employer’s discriminatory motive.”

***King v. Red Roof Inn***, 2006 WL 572710 (W.D. Mich 2006). Sixty-one-year-old African-American plaintiff’s claims alleging age discrimination under the ADEA, and age and racial discrimination under the Michigan Elliot-Larsen Civil Rights Act were dismissed because plaintiff failed to establish the fourth prong of her *prima facie* discrimination claim. No burden was put on employer to provide a legitimate, non-discriminatory reason for her termination. Plaintiff was employed as a housekeeper at defendant’s motel. She was terminated for failing to clean rooms on two separate occasions. No replacement was hired following her termination, but plaintiff’s assigned rooms were divided among the remaining housekeepers, including a younger white employee. The court held that this did not constitute a “replacement” of plaintiff, based on the Sixth Circuit’s holding in *Lilley v. BTM Corp.*, 958 F.2d 746 (6th Cir. 1992). For this reason, plaintiff was unable to establish *prima facie* discrimination claims based on either race or age because she had not been replaced by younger person outside the protected class.

***Blair v Henry Filters, Inc***, 2005 WL 2346469 (ED Mich, 2005). Judge Edmunds ruled that a supervisor’s references to plaintiff as “old man” and “the old guy on the sales force,” statement that plaintiff was “too old to be calling on Ford staff people,” and suggestion that one way to get rid of an older worker is to expand his territory and force him into retirement was not “direct evidence” of age discrimination. The comments were not related to the contested RIF and, hence, required an inference to demonstrate that the animus they reflect played a role in the decision. Moreover, plaintiff’s testimony that the supervisor who made these statements had boasted that he was “The Terminator,” and had the authority to fire people, was not “direct evidence” that he was a decision maker because the evidence requires one to infer both that the supervisor used this authority as to other employees, and that he was involved in the decision to include plaintiff in the RIF.

Judge Edmunds also ruled that co-worker testimony alleging that a decision maker made ageist comments, such as suggesting that the sales staff was “too old,” stating that he “wanted a younger sales force” and saying that plaintiff was “too old to be on my management team,” was inadmissible hearsay. Regardless, the comments were not “direct evidence” because an inference was needed to show that the age bias reflected therein played

a role in the adverse employment decision.

Finally, Judge Edmunds ruled that all the comments, taken together, could not sustain a circumstantial case because there was “no evidence that these comments were related to the decisional process” and, consequently, “are insufficient to allow a reasonable inference that Plaintiff was selected for termination because of his age.” Plaintiff also failed to establish that a comparable, non-protected employee was treated better and proffered no evidence to refute the legitimacy of the RIF.

***Burnett v Quest Diagnostic, Inc.***, 2005 WL 1862342 (ED Mich, 2005). JMOL denied. Judge O’Meara ruled that the protected age plaintiff’s testimony that his supervisors commented on his age, called him “senior citizen” and asked him whether he was “getting too old for this” constituted “direct evidence” of age discrimination sufficient to satisfy plaintiff’s *prima facie* burden.

***Hess v Canteen Vending Service***, 2005 WL 1684144 (ED Mich, 2005). Judge Steeh ruled on summary judgment that the employer established its RIF defense even though the plaintiff, the oldest employee in the Detroit office, was the only individual laid off. Evidence showed that the employer lost its largest customer and a significant amount of business, that the plaintiff was not replaced, and that the plaintiff’s duties were distributed among two preexisting employees. A non-decision maker’s statement that he was surprised the plaintiff returned to work after medical leave instead of retiring, which was made at least 15 months before plaintiff’s termination, was a “stray remark” that is “too vague and temporally remote to constitute evidence of age discrimination.”

***Woodman v WWOR-TV, Inc.***, 411 F3d 69 (CA 2, 2005). “We ... join our sister circuits in concluding that a defendant’s discriminatory intent cannot be inferred, even at the *prima facie* stage, from circumstances unknown to the defendant. Thus, in an ADEA case where a plaintiff relies on a substantial age discrepancy between herself and her replacement, she must adduce some evidence indicating defendants’ knowledge as to that discrepancy to support the inference of discriminatory intent required by the fourth *prima facie* factor. In cases where such knowledge is undisputed, which we expect to be most ADEA cases, a court need not specifically address this point; rather it may be assumed in considering whether the circumstances presented indicate intentional discrimination. But, where a defendant asserts that the record fails to indicate the requisite awareness, a plaintiff must adduce some evidence, whether direct or indirect, indicating a defendant’s knowledge as to the relative ages of the persons compared.” Proof that the employer knew plaintiff was over 40 is insufficient.

***Fasold v Justice***, 409 F3d 178 (CA 3, 2005). Over a strong dissent, the majority held that proof of a simple *prima facie* case — a matter that was uncontested because the protected age plaintiff was discharged and replaced by someone younger — combined with a factual dispute concerning the circumstances giving rise to the plaintiff’s termination is sufficient to create a triable age discrimination claim. “No affirmative or direct evidence of

discrimination is required....”

*Stidham v Minnesota Mining and Manufacturing, Inc*, 399 F3d 935 (CA 8), *reh’g and reh’g en banc denied* (2005). Statistic that 15 of 16 salaried employees laid off in a RIF were over 40 was not significant “when you consider that the great majority of salaried employees at 3M Columbia were over age forty,” and the RIF resulted in just a 4% overall decline in the over-forty workforce.

*Machinchick v PB Power, Inc*, 398 F3d 345 (CA 5, 2005). Indirect references to an employee’s age, such as a statement that the protected age plaintiff was unwilling to “adapt” to change, can support an inference of discrimination. Also, questions about retirement, though “potentially innocuous,” constitute some evidence giving rise to an inference of discriminatory motivation....” Consequently, the following conduct by a vice president raised a material factual question whether the protected age plaintiff’s age played a role in the discharge decision: (1) sending an e-mail discussing his intent to go forward with a plan to “strategically hire some younger engineers and designers;” (2) making “age stereotyping remarks” in reference to the plaintiff, such as claiming that he had a “[l]ow motivation to adapt” to change and claiming in a deposition that the plaintiff was “inflexible,” “not adaptable” and possessed a “business-as-usual attitude”; and (3) asking the plaintiff when he planned to retire.

*Sims v Chezik/Sayers Iowa, Inc*, 361 F Supp2d 926 (SD Ia, 2005). In explaining his reason for promoting Hicks, a man in his mid-twenties, instead of the protected-age plaintiff, the decision maker said, “I have to look to the future of this company. I think that this young man will provide ... a better service for this dealership in the years to come, so you’re out and he’s in.” This alleged statement was insufficient to present a triable age discrimination case, because “[d]escribing Hicks, a man who was in his mid-twenties at the time the comment was allegedly made, as a ‘young man’ is an accurate description with amounts to nothing more than a stray remark.”

*Jacob v Nock Mutual Ins Co*, 693 NW2d 604 (ND Sup Ct, 2005). Summary judgment was compelled by the protected age employees’ admissions during their depositions that, aside from a subjective belief that they were they were terminated because of their age, they had no documents or evidence that they were discriminated against because of their age.

## VIII. DISABILITY DISCRIMINATION

### A. IN GENERAL

*Overly v. Covenant Transp. Inc.*, \_\_\_ F.3d \_\_\_; 17 AD Cases 1753 (6th Cir. 2006). Plaintiff’s meeting to plan trust to oversee her mentally-challenged daughter’s long term care, along with routine activities plaintiff performed for her daughter such as doing laundry or checking on her condition “do not qualify as ‘physical or psychological care’ under the

FMLA. For this reason, the Sixth Circuit affirmed the district court's decision that plaintiff's termination due to an unexcused absence did not violate the FMLA. The court also affirmed dismissal on summary judgment of plaintiff's additional claims of sexual discrimination under Title VII and under the ADA. The court ruled the Title VII claims was not properly supported because plaintiff's unexcused absence meant that she was not qualified for her position and no evidence suggested similarly-situated males were treated better. The dismissal of the ADA claim was proper since "an employer is not required to reasonably accommodate an employee based on her association with a disabled person." "An employee who cannot meet the attendance requirements of her job is not protected by [the ADA]."

***Opsteen v Keller Structures, Inc***, 408 F3d 390 (CA 7, 2005). Although "receipt of Social Security disability benefits does not automatically disqualify a person from making a claim under the" ADA, the plaintiff could not sustain an ADA claim because he claimed on his application for SSDI benefits and submitted medical documentation to prove that he could no longer work, even with reasonable accommodation.

***Henderson v Ford Motor Co***, 402 F3d 1026 (CA 8, 2005). Allegations that the employer had discriminated against and failed to accommodate the ADA plaintiff in the distant past were not related to, and did not undermine the legitimacy of the employer's nondiscriminatory explanation for terminating the plaintiff. This dated evidence, combined with the fact that the plaintiff had a contentious history with her employer, does "not raise a genuine issue of fact as to whether Ford's reason for terminating her is not legitimate, or, in the words of the Seventh Circuit, 'phony.'"

***Conner v Nicholson***, \_\_\_ F Supp \_\_\_; WD Mich No. 4:04-CV-100 (WD Mich 2006). Plaintiff, a former VA nurse, proceeding *pro se*, brought claims of discrimination on the basis of race, color, and sex and sexual harassment, in violation of Title VII, age discrimination, in violation of the ADEA, and disability discrimination, in violation of the Rehabilitation Act. Plaintiff pled guilty to charges of Social Security fraud and was sentenced to five years probation and ordered to pay restitution. Upon learning of her conviction her employer, a VA Hospital, provided Plaintiff with a letter notifying her of its proposed decision to discharge her based upon her conviction. The same day she received this letter, Plaintiff allegedly slipped on ice in the hospital's parking lot and injured her head. Plaintiff then filed for workers compensation benefits, which were subsequently denied. After the hospital requested that she undergo an independent medical evaluation, plaintiff's doctor certified her to return to work, with light duty restrictions. The hospital accommodated this restriction by reassigning her to an administrative position. Four days after she started in this new position, Plaintiff was notified that she would be terminated within seven days and would be placed on administrative leave until that date. She was then escorted from the premises.

Plaintiff filed two complaints with the EEOC, alleging discrimination based on disability, color, race, and age. An administrative judge granted summary judgment in favor of

defendant on all claims. Plaintiff then filed this case, in which Defendant moved for summary judgment on all claims. The District Court first denied Plaintiff's motion to strike several declarations, finding her arguments meritless. The Court dismissed the harassment claims because she had not presented them during the administrative process, and therefore had not exhausted her administrative remedies. Plaintiff's discrimination claims under Title VII, the ADEA, and Rehabilitation Act were dismissed because Plaintiff failed to show "that she was subjected to an adverse employment action or that a similarly situated employee outside the protected class was treated differently. Plaintiff did not contest her termination, but rather argued that her reassignment to the administrative position and her denial of workers compensation benefits were adverse employment actions. The Court held that her reassignment was not adverse because it was in response to a request for accommodation of her "disability." The hospital's decision to contest Plaintiff's request for workers compensation benefits was not an adverse employment action because of the temporal proximity of her proposed discharge and her "injury." Finally, the Court granted summary judgment in favor of Defendant on the Rehabilitation Act claim on the basis that Plaintiff had not shown that she was disabled under the ADA definitions. Plaintiff failed to address her retaliation claim in her brief, so it was not considered by the Court. For these reasons, summary judgment was granted in favor of Defendant on all claims.

*Goodman v LA Weight Loss Centers, Inc*, 16 AD Cases 732 (ED Pa, 2005). Based on the pleadings alone, the court ruled that the employer — a weight loss center — could not possibly have violated the ADA when it refused to hire the morbidly obese plaintiff for a sales counselor position. "[I]t is well established that an employer is permitted to make hiring decisions based on certain physical characteristics. The mere fact that Defendant was aware of Plaintiff's weight and rejected his application for fear that his appearance did not accord with the company image is not improper." Moreover, the plaintiff's complaint does not allege that the plaintiff was unable, or that the employer regarded her as being unable to work a wide range of jobs.

#### **B. "REGARDED AS" DISABLED**

*Todd v. City of Cincinnati*, \_\_\_ F3d \_\_\_; 17 AD Cases 865 (CA 6, 2006). The plaintiff, who was granted a disability pension from the police department because of a back injury, brought an action alleging disability discrimination when the department failed to hire him as a firearms instructor. The lower court dismissed his action finding the decision makers did not "regard him as having an impairment." The Sixth Circuit reversed finding that a question of fact existed where the two decision makers made statements about their concern that plaintiff's back problems would prevent him from performing the duties of a firearm instructor. The court also rejected the city's argument that summary judgment was proper because plaintiff's disability was not the "sole reason" for the adverse action. The court noted that this was a direct evidence case, and that plaintiff had met his burden. The court remanded it to the lower court for further proceedings.

*Nese v Julian Nordic Construction Co*, 405 F3d 638 (CA 7, 2005). The plaintiff, an epileptic, argued that a “whited out” evaluation form leading to his discharge was evidence of pretext for perceived disability discrimination. The court rejected the Sixth Circuit’s holding in *Ross v Campbell Soup Co*, 237 F3d 701 (CA 6, 2001), and held that evidence of pretext, by itself, is insufficient to show that the plaintiff was terminated because the employer regarded him as disabled. “An employer is not guilty of discrimination every time it takes an employment action for one reason, but provides a different explanation to the employee. For example, perhaps the employer terminates an employee simply because her supervisor does not get along with her. That might not be a reason the employer wants to admit openly, so, instead, work deficiencies – real or imagined – are cited as the basis for the action. Even though we could wish such shenanigans never happened, we suspect they do, and they do not violate the employment laws unless, for instance, the real reason the supervisor dislikes the employee is based on some protected characteristic. ... In other words, to say the employer was less than perfectly frank does not prove that the employer acted as it did for discriminatory reasons.” There must be some evidentiary basis to leap from evidence of pretext to a finding of disability discrimination. No such evidence existed in this case, and a finding of disability discrimination was belied by the same actor inference.

*Moorer v Baptist Memorial Healthcare Sys*, 398 F3d 469 (CA 6, 2005). Evidence that the decision making supervisor believed the plaintiff’s performance problems were caused by his alcoholism, combined with questions regarding whether the supervisor had discovered all the plaintiff’s alleged performance problems before deciding to terminate him, supported a district court’s decision to award over \$1 million to a discharged hospital administrator.

There was substantial evidence that the plaintiff’s supervisor, who required the plaintiff to take a fitness-for-duty-examination and recommended that he undergo in-patient substance abuse treatment after she smelled alcohol on his breath before a meeting, “linked her perception of Moorer’s alcoholism to his inability to perform his job as a hospital administrator.” This evidence included a counseling memorandum stating that the plaintiff failed to eliminate the “root causes” of his performance problems, the fact that some of the plaintiff’s performance problems were discovered while he was undergoing in-house substance abuse treatment, and a supervisor’s alleged statement that alcoholism caused the plaintiff’s performance problems. Evidence that the employer decided to terminate the plaintiff before it discovered all of the performance issues it cited as the basis for terminating him showed that it was the plaintiff’s perceived alcoholism, not necessarily the performance problems, that inspired the employer to discharge him.

The court then used the fact that the plaintiff’s “job duties were diverse, requiring general skills that could be used in a broad range of fields” to support the conclusion that the employer perceived the plaintiff as being unable to perform a “broad range” of jobs. “The fact that Baptist believed that Moorer’s alcoholism made him unable to perform his hospital administrator job, which required a broad range of managerial skills, permits the reasonable inference that Baptist believed that Moorer’s alcoholism rendered him incapable of

performing a substantial number of managerial jobs. This inference is buttressed by Hill's apparent belief ... that Moorer had a drinking problem that in the short-term would preclude him from working at all for four weeks and that in the long-term would kill him. Indeed, Hill's belief that Moorer's incurable alcoholism would inevitably result in his death permitted the inference that Hill regarded Moorer as substantially limited in his ability to perform any life activity at all, let alone the major life activity of working."

The court then reversed the district court's decision to dismiss the plaintiff's FMLA interference claim because: "The fact that Hill based Moorer's termination on [his allegedly alcohol-related] deficiencies, among others, but did not decide to effectuate the termination until Moorer took leave, could lead a fact finder to infer that Moorer would not have been fired absent his actual taking of that FMLA leave." Over a dissenting opinion that questioned how the employer could fire the plaintiff because of his perceived disability and also retaliate against him for taking an FMLA leave it recommended, the majority reasoned that: "There is nothing remarkable about an employer wrongfully discharging an employee on grounds that are illegal under more than one statute. ... And, in this case, a fact finder would be permitted to infer that Baptist harbored a disability animus toward Moorer, but was unwilling to act on that animus (by firing him in violation of the ADA) until he was on FMLA leave."

***Wenzel v Missouri-American Water Co***, 404 F3d 1038 (CA 8, 2005). An employer's mistaken belief (based on a misreading of the plaintiff's doctor's work restrictions) that the plaintiff could not perform an essential function of one job cannot, by itself, prove that the employer regarded the plaintiff as disabled. "Employers are free to make decisions based upon mistaken evaluations, 'except to the extent that those judgments involve intentional discrimination.'" Regardless, "[a] lifting restriction, without more, is not a disability" and the mistaken belief pertained to the plaintiff's ability to perform a single job, only. "Employers are free to decide that individuals with some limiting, but not *substantially* limiting, impairments are less than ideally suited for a particular job."

***Knutson v AG Processing, Inc***, 394 F3d 1047 (CA 8, 2005). Verdict for the plaintiff reversed. The employer's allegedly erroneous belief that the plaintiff was physically incapable of performing his boiler operator job does not establish that it regarded him as unable to perform a broad range of jobs. The major life activity of working "does not mean working at a particular job of [one's] choice."

***Tribuani v MBNA America Bank NA***, 16 AD Cases 1167 (D Del, 2005). Statements during a transcribed meeting concerning the potential re-hire of a former employee with bipolar disorder, which commented on the plaintiff's prior absenteeism and questioned whether the plaintiff had complied with her medical treatment plans during her extended leaves, created a factual question whether the employer regarded her as being disabled. A jury could base a pretext finding on the comment, as well as the fact that the employer considered her past absenteeism without crediting the "excellent" performance reviews she received before she

began taking lengthy leaves of absence.

### C. ESSENTIAL FUNCTION

*Hammel v Eau Galle Cheese Factory*, 407 F3d 852 (CA 7), *reh'g en banc denied* (2005). The district court properly considered “non-disability-related” evidence, such as the plaintiff’s bad attitude, carelessness and deficient work performance in concluding that the blind plaintiff was not a “qualified individual” capable of performing the essential functions of his job. “[T]he ADA does not shelter disabled individuals from adverse employment actions if the individual, *for reasons unrelated to his disability* (such as a poor work ethic, carelessness, bad attitude, insubordination or unprofessional demeanor), is *not qualified* for the job or is *unable to perform* the job’s essential functions or fulfill the requirements of the position as prescribed by the employer or fails to meet his employer’s expectations.”

Moreover, “it is irrelevant ... whether it was [the plaintiff’s] vision impairment or his refusal to take the proper care” that caused him to perform poorly, because “[w]hatever the cause he has demonstrated his inability to perform the essential tasks of his job” and “the employer need not isolate the disability-related causes for an employee’s inferior performance from problems that stem from a poor attitude, insubordination, carelessness, or outright disregard for the safety of himself and his co-workers.” Summary judgement was also proper as to the plaintiff’s failure-to-accommodate claim, because “[n]o accommodation would make a difference for an employee unwilling to exercise care, accept instruction or take responsibility for getting his work done properly.”

### D. SUBSTANTIAL LIMITATION

*James v Daimler Chrysler Corp*, 2005 WL 2033538 (ED Mich, 2005). The plaintiff could not establish that he was substantially limited in the major life activity of working, even though he experienced some discomfort and was advised to avoid “long periods of sitting” after suffering an on-the-job injury. Plaintiff returned to work without restriction one month after his accident, “felt pretty good” at work, and was consistently able to work regular eight-hour shifts, plus overtime.

*Norkowski v Singh Management, LLC*, 2005 WL 1861927 (ED Mich, 2005). Judge Edmunds ruled that the plaintiff was not substantially limited in her ability to walk, despite a congenital defect affecting the bone in her ankle that prevents her from jogging or walking for more than 30 minutes. The plaintiff admitted that she could grocery shop, do household chores, climb stairs, travel, mountain bike and perform her job duties without difficulty.

*MacKenzie v Denver*, 414 F3d 1266 (CA 10, 2005). “[T]he major life activity of working cannot be ‘substantially impaired’ if a plaintiff cannot work under a certain supervisor because of the stress and anxiety it causes.” The court also rejected the plaintiff’s claim that “physical exertion” constitutes a major life activity. “Mere physical exertion (except to the

extent it affects one's ability to work) does not constitute a major life activity under the ADA.”

The court also rejected the plaintiff's failure-to-promote claim, which was based on a slight disparity in the candidates' qualifications, by stating: “Unless the disparity in employees' qualifications are obvious, ‘we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.’”

***Head v Glacier Northwest, Inc***, 413 F3d 1053 (CA 9, 2005). Although conclusory declarations are insufficient, “Ninth Circuit precedent does not require comparative or medical evidence to establish a genuine issue of material fact regarding the impairment of a major life activity at the summary judgment stage. Rather, our precedent supports the principle that a plaintiff's testimony may suffice to establish a genuine issue of material fact.” Consequently, the plaintiff's testimony was itself sufficient to raise material factual questions whether his bipolar disorder substantially restricted his ability to engage in the major life activities of sleeping, interacting with others, thinking and reading.

The court then held that the district court committed prejudicial error in issuing a “because of” instruction for the plaintiff's ADA claim, instead of the more appropriate “motivating factor” instruction. “[T]he ADA outlaws adverse employment decisions motivated, even in part, by animus based on a plaintiff's disability or request for an accommodation — a motivating factor standard.”

***Emory v Astrazeneca Pharmaceuticals, LP***, 401 F3d 174 (CA 3, 2005). The district court erroneously focused the “substantially limited” analysis on what the plaintiff could do, instead of on what the plaintiff's cerebral palsy kept him from doing. “While evidence of tasks he has mastered might seem to serve as a natural counterpoint when evaluating disability, the paramount inquiry remains — does Emory have an impairment that prevents or severely restricts [him] from doing activities that are of central importance to most people's daily lives? ... So while the District Court stressed that Emory could ‘operate a cleaning business, perform as a clown, counsel families as a mediator, and assist his community as a firefighter,’ it ignored evidence that Emory cannot tie his shoes or necktie, open a jar, cut his nails, perform various household chores and repairs, remove heavy dishes from the oven, change a diaper, carry his children up the stairs, or cut his own meat with a knife and fork.”

***Singh v George Washington University***, 368 F Supp2d 58 (D DC, 2005). Former medical student who performed well academically before medical school raised a genuine factual question whether her dyslexia substantially limited her ability to learn, making the school potentially liable for expelling her for poor academic performance. “[W]hether test-taking is itself a major life activity or a crucial component of the major life activity of learning, the court concludes that a plaintiff with an impairment that substantially limits her ability to

perform on tests has an actionable ADA claim.”

The court then rejected the university’s contention that the plaintiff’s prior academic success proves that she is not substantially limited when compared to the general population. “The plain text of the ADA never speaks of making a comparison; it speaks of substantial limitation. To determine whether an individual is limited no doubt requires some comparison, but the comparison ought to be meaningful and possible. Medical students, while in medical school, can only compare their test scores to their fellow students and comparing them to members of the general population would be meaningless if it could be achieved.”

Moreover, because the law should focus on the “more specific” comparator, “an ADA plaintiff can be substantially limited in the major life activity of learning based on comparisons of her success to others of comparable age and educational background.” Consequently, “the mere fact the plaintiff was, before medical school, generally successful as compared to all of America is not the important question. Rather, the important question is whether this record demonstrates that plaintiff is not substantially limited in her ability to learn.”

***Worster v Carlson Wagon Lit Travel, Inc***, 353 FSupp2d 257 (D Conn, 2005). The HIV-positive employee failed to present a triable question whether he was substantially limited in the major life activities of reproduction or sexual activity. He testified that he had no plans to reproduce, and there was no evidence that his condition affected his ability to do so. “To the extent that a jury could infer from his assertions that his HIV positive status restricted his ability to engage in unprotected sex, no reasonable jury could find from the evidence that his restriction rose to the level of a substantial restriction.”

Moreover, the plaintiff failed to show that the employer’s asserted reason for discharging him — working a second job while on FMLA leave — was pretextual. Although the employer had previously allowed the plaintiff to work a second job while on personal leave, the plaintiff agreed, as a condition of FMLA leave, not to engage in gainful employment. The employer’s generosity in its personal leave policy does not preclude it from enforcing its FMLA policy during a fully paid leave of absence.

***Bell v Gonzales***, 16 AD Cases 1039 (D DC, 2005). The ability to interact with others is a major life activity, but the plaintiff’s Tourette’s syndrome did not substantially limit him in that regard. The plaintiff’s visible and audible tics caused people to avoid or ridicule him, and made it difficult for others to understand him. He was regarded as “strange” and coworkers frequently misinterpreted his words, gestures and behaviors as rude, dismissive, aggressive, nasty or controlling. He also had to expend considerable energy and effort restraining his behavior during social interaction. It was undisputed, however, that the plaintiff provided eight hours of understandable deposition testimony, regularly interacted with prosecuting attorneys and other workers, operated his own photography business during

which he interacted with clients, can communicate on the telephone and has never hired anyone to assist him in communicating with others. “Although the challenges described by plaintiff are burdensome and may lead to inappropriate and unsuccessful social interactions, the undisputed facts support only one conclusion – that plaintiff has the basic ability to communicate and interact with others in an objective mechanical sense.”

Noting that the “difficulty sleeping is extremely widespread,” the court added that the plaintiff’s claimed sleeping problems were not substantially limiting when compared to the general population. “To the extent the record does describe the limitations on plaintiff’s ability to sleep, the sleep interruptions appear to be variable, not permanent, and subject to extended periods of abatement when plaintiff is taking medication and following the advice of his doctor.”

*Ukofia v American Financial Printing, Inc*, 16 AD Cases 1113 (D Minn, 2005). A depression-related sleeping problem, which made it difficult or impossible for the plaintiff to sleep more than 3 to 5 hours per night for approximately three months, was not a substantial limitation on the major life activity of sleeping. “Ukofia’s sleeping difficulties were only of a very limited duration, and he has not identified that his depression substantially limited his sleeping as compared to the general population.”

#### **E. ACCOMMODATIONS/INTERACTIVE PROCESS**

*Waller v Ford Motor Co*, 2005 WL 2173576 (ED Mich, 2005). Judge Cook dismissed the *pro se* plaintiff’s disability discrimination claims because she proffered no evidence that she could perform her assigned job tasks, and “the law does not require Ford Motor to accommodate Waller by changing her job title and assigning her to a lesser demanding form of work ....”

*Kelly v Metallics West, Inc*, 410 F3d 670 (CA 10), *reh’g and reh’g en banc denied* (2005). Employees who are regarded or perceived as disabled are entitled to reasonable accommodation in the same way as those who are actually disabled. The ADA protects individuals who are regarded as disabled, and the definition of “reasonable accommodation” makes no distinction between employees who are actually disabled and those who are merely regarded as disabled. “[A]n employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee’s abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions.”

*Hall v Wal-Mart Associates, Inc*, 373 F Supp2d 1267 (MD Ala, 2005). The mentally retarded plaintiff’s accommodation request — that the employer tolerate his dishonesty — would impose an undue hardship. The policy prohibiting dishonesty is an integral aspect of the store’s operations.

*Stamey v NYP Holdings, Inc*, 358 FSupp2d 317 (SD NY, 2005). A physician's note, which stated that the disabled plaintiff would not need to stay on medical leave indefinitely but did not state when the plaintiff could return to work, amounts to a request for indefinite medical leave, which employers are not obliged to grant.

#### **F. MEDICAL RECORDS/TESTS**

*Karraker v Rent-A-Center, Inc*, 411 F3d 831 (CA 7, 2005). The Minnesota Multiphasic Personality Inventory test constitutes a medical examination under the ADA. "Because it is designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability, we think the MMPI is best categorized as a medical examination." Consequently, the employer violated the ADA by requiring promotion candidates to take the examination.

*Leonel v American Airlines, Inc*, 400 F3d 702 (CA 9, 2005). An employer may not require a medical examination before making a "real" job offer. Relying principally on EEOC guidelines, the court held that an offer is 'real' if the employer has "completed all non-medical components of its application process or [can] demonstrate that it could not reasonably have done so before issuing the offer."

The employer violated this principle, and hence the ADA, by requiring the plaintiffs to undergo medical examinations before competing background checks. This holds true even though the employer did not evaluate the plaintiffs' medical information until after the background checks were complete. "Whether or not it looked at the medical information it obtained from the appellants, American was not entitled to get the information at all until it had completed the background checks, unless it can demonstrate it could not reasonably have done so before initiating the medical examination process."

*Gajda v Manhattan and Bronx Surface Transit Operating Authority*, 396 F3d 187 (CA 2, 2005). Employer's request to see the HIV-positive plaintiff employee's laboratory tests was "consistent with business necessity," and thus permissible under the ADA. The plaintiff's application for FMLA leave indicated that he was unable to perform any work due to his health condition, which gave the employer legitimate reason to doubt whether the plaintiff could safely perform his duties.

*Giaccio v City of New York*, 16 AD Cases 653 (SD NY, 2005). The plaintiff could sustain a claim that his employer violated the ADA by failing to maintain the confidentiality of his drug test, even though the ADA specifically provides that "[f]or purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination." A drug test may be an inquiry into the plaintiff's ability to perform job-related functions or fall within the definition of "other medical monitoring," which must be kept confidential according to EEOC regulations. Moreover, the employer failed to cite to any case authority to support the contention that questions concerning illegal drug use are outside the scope of

relevant ADA confidentiality requirements.

#### **G. DIRECT THREAT**

*Kiely v Heartland Rehabilitation Services, Inc.*, 360 F Supp2d 851 (ED Mich, 2005). Although the employer presented a “formidable” argument that the plaintiff, a legally blind physical therapy assistant, posed a direct threat to patients and co-workers, the plaintiff raised a material factual question on this point by showing that his employer knew about his impairment when it hired him, gave him several positive performance reviews, and did “not address their concerns regarding Plaintiff’s abilities on a detailed evaluation form specifically used to evaluate an employee’s abilities.”

*Darnell v Thermafiber, Inc.*, 417 F3d 657 (CA 7), *reh’g and reh’g en banc denied* (2005). The employer reasonably concluded that the plaintiffs “uncontrolled” diabetes posed a “direct threat” to workplace safety. A glucose test and the plaintiff’s remarks at an employment physical suggested that the plaintiff had done little to treat and was “unmotivated to control his diabetes.” The resulting fluctuations in the plaintiff’s blood sugar could cause unconsciousness, confusion and impaired judgment that might result in serious injury given job requirements of climbing ladders and operating dangerous machinery in high-heat conditions. The fact that the plaintiff had worked at the plant for 10 months without incident was immaterial because “an employee with a health conditions who has experienced no on-the-job episodes can still pose a direct threat to workplace safety.”

*EEOC v EI Du Pont De Nemours & Co.*, 16 AD Cases 1487 (ED La, 2005). A jury had sufficient evidence to conclude that the plaintiff, a disabled woman who walked at half speed and had trouble standing, did not pose a direct threat to herself or others. The employer contended that she posed a direct threat because she may have difficulty evacuating the plant in an emergency. But the evidence showed that the likelihood of an emergency evacuation was slim, that the plaintiff had worked there for 18 years without having to evacuate, and that she could safely evacuate by walking out of the plant.

#### **IX. FAMILY MEDICAL LEAVE ACT**

*Overly v. Covenant Transp. Inc.*, \_\_\_ F.3d \_\_\_; 17 AD Cases 1753 (CA 6, 2006). Plaintiff’s meeting to plan trust to oversee her mentally challenged daughter’s long term care, along with routine activities plaintiff performed for her daughter such as doing laundry or checking on her condition “do not qualify as ‘physical or psychological care’ under the FMLA. For this reason, the Sixth Circuit affirmed the district court’s decision that plaintiff’s termination due to an unexcused absence did not violate the FMLA. The court also affirmed dismissal on summary judgment of plaintiff’s additional claims of sexual discrimination under Title VII and under the ADA. The court ruled the Title VII claims was not properly supported because plaintiff’s unexcused absence meant that she was not qualified for her position and no evidence suggested similarly-situated males were treated better. The dismissal of the

ADA claim was proper since “an employer is not required to reasonably accommodate an employee based on her association with a disabled person.” “An employee who cannot meet the attendance requirements of her job is not protected by [the ADA].”

**Cobb v. Contract Transp. Inc.**, 452 F.3d 543; 11 WH Cases 2d 961 (6th Cir. 2006). Plaintiff drove a consistent interstate route for a company contracted to transport mail. When this mail transport contract came up for renewal, the plaintiff’s original employer was outbid by the defendant-company. Defendant-company hired many of the employees of the previous transportation company to cover the same routes they had driven before. After six months of employment with the defendant-company, plaintiff began experiencing severe stomach pains and requested FMLA leave. In response to this request, defendant-company sent plaintiff paperwork for short term disability and a memorandum terminating his employment. “Defendant contended that Plaintiff was not an ‘eligible employee’ because he had worked for Defendant for less than twelve months and because his ‘worksites’ was located [at a truck stop.]” The district court granted defendant’s motion for summary judgment, declining to apply the doctrine of successor liability to include the three years plaintiff had spent driving the same route for his previous employer. The court concluded that since there was no “continuity of ownership or control” between the previous employer and the defendant-company, no predecessor-successor relationship could exist.

On appeal, the Sixth Circuit found that the concept of successor-in-interest liability from labor law has been adopted for FMLA purposes, based on a balancing of defendant’s interests, plaintiff’s interests, and federal policy. “The nine-factors listed in [*EEOC v. MacMillan [Bloedel Containers, Inc.]*, 503 F.2d 1086] and subsequently adopted in 29 C.F.R. § 825.107, are not in themselves the test for successor liability. Instead, the nine factors are simply factors courts have considered when applying the three prong balancing approach.”

The court held “that a merger or asset transfer is [*not*] always a precondition to the imposition of successor liability under the FMLA.” The federal policy embodied in the FMLA weighed in favor of holding that Defendant is a successor in interest [to previous employer] for the purpose of providing Plaintiff with sick leave under the FMLA. “In reality, it as if Plaintiff works for the [postal service] and not for one particular trucking company. Only the management, not the job has changed.” With regards to the FMLA’s worksite requirement of 50 or more employees, Plaintiff’s worksite was the defendant-company’s headquarters, and not a truck stop where Plaintiff picked up his truck from another driver, thus Plaintiff was an “eligible employee” for purposes of the FMLA.

**Edgar v. JAC Products, Inc.**, \_\_\_ F3d \_\_\_; 11 WH Cases2d 635 (CA 6, 2006). Plaintiff took FMLA leave for her serious health condition. When she failed to return the Certification of Health Care Provider form within the time set by her employer, she was discharged. Her doctors did not release her for work until 15 months after her FMLA leave would have expired. When she was discharged, she brought a FMLA action. Citing *Cehrs v Northeast Ohio Alzheimer’s Research Center*, 155 F3d 775 (Ca 6, 1998), the lower court

dismissed the action because plaintiff could not have returned to work at the end of her 12 week FMLA leave.

On appeal, the court explained that there are two types of actions under the FMLA. Under the “entitlement theory,” “the issue is simply whether the employer provided its employee with the entitlement set forth in the FMLA.” The employer’s intent is not relevant in an “entitlement theory” case. The employer may also show that it had a legitimate reason unrelated to the employee’s exercise of her FMLA rights for engaging in the challenged conduct.

The second type of FMLA action is a retaliation claim. This occurs when the employer discriminates or retaliates against an employee for exercising her rights under the FMLA. In these types of claims the employer’s motive is relevant. In analyzing these claims, the courts use the *McDonnell Douglas Corp. v Green*, 411 US 792 (1973) shifting burden of proof.

Plaintiff argued that since the decision to discharge her occurred before it was apparent that she could not return to work within 12 weeks, her claim should not have been dismissed. The court analyzed the plaintiff’s claim under both theories. It concluded, “(1) in entitlement cases, *Cehrs* and the DOL regulation provide a defense to liability, regardless of whether the medical evidence revealing the employee’s inability to return to work is available before or after the termination decision; (2) in retaliation cases where the medical information known to the employer prior to the termination decision shows that the employee could not return within 12 weeks, *Cehrs* and the DOL regulation can be invoked by employers as a legitimate, nondiscriminatory reason for discharging the employee, i.e., to rebut the employee’s prima facie case of discrimination; and (3) in retaliation cases where the employer learns of the employee’s inability to return to work only after the termination decision, *Cehrs* and the DOL regulation will not provide a defense to liability, but may limit the relief to which the employee is entitled in accordance with the after-acquired-evidence rule articulated in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352(1995).” Because plaintiff brought her claim under the “entitlement theory,” the first rule applied, and her claim was properly dismissed.

The plaintiff also argued that the discharge exacerbated her condition preventing her from returning within the 12 weeks. The court rejected this stating, “We instead conclude that the exacerbation theory is not a valid theory of liability under the FMLA and does not alter the analytical framework for deciding entitlement and retaliation claims thereunder.” The court reasoned that 20 CFR §825.214(b) was not concerned about how a serious health condition occurred, but whether the condition prevented the employee from performing an essential function of her job at the end of the leave period.

***Frazier v Honda of America Mfg, Inc***, \_\_\_ F3d \_\_\_ (CA 6, 2005). The district court correctly dismissed the plaintiff’s FMLA interference claim on summary judgment because the plaintiff failed to timely submit the employer-requested medical certification form.

***Brumbalough v Camelot Care Centers, Inc***, 429 F3d 996 (CA 6, 2005). Employer could lawfully require the plaintiff, under threat of termination, to submit a “fitness-for-duty recertification” if she was unable to return to work after two months of FMLA leave. The plaintiff refused, so she lost her FMLA protection and could not claim that she was unlawfully terminated during FMLA coverage.

Summary judgment was improperly granted to the employer, however, due to evidence that before her FMLA period expired, the plaintiff submitted a doctor’s note stating that she could return to work. Although the employer exercised its right to request more information, regulations state that a “simple statement of an employee’s ability to return” triggers the employer’s duty to reinstate and “the employer cannot delay reinstating the employee simply because the employer is obtaining further information or clarification from the employee’s health care provider.”

The district court properly denied the plaintiff’s claim for emotional distress damages because “damages for emotional distress are not allowed under the FMLA....”

***Walton v Ford Motor Co***, 424 F3d 481 (CA 6, 2005). Summary judgment was properly granted because the plaintiff failed to sufficiently notify his employer of the FMLA-qualifying nature of his request for leave. The plaintiff informed his supervisor that he planned to have his “twisted ... knee” evaluated at the plant medical department. The plaintiff visited the medical department, but never said he would need time off. On the contrary, he returned to work after receiving an ice pack and ibuprofen. The plaintiff never requested leave as a result of his knee injury.

Although the plaintiff called security to say he needed a “sick day,” this cannot qualify as notice under *Calvin v Honda of America Mfg, Inc*, 346 F3d 713 (CA 6, 2003), because: (1) the plaintiff never explained the extent of his problem or why he needed to miss work; (2) Visteon’s policies differ from Honda’s in that Visteon employees are expressly told not to make FMLA requests through security; and (3) the security guards at the plant are independent contractors, not Visteon employees.

***Touvell v Ohio Dept of Mental Retardation and Developmental Disabilities***, 422 F3d 392 (CA 6, 2005). “[W]e agree with the Tenth Circuit that the Supreme Court’s holding in [*Nevada Dept of Human Resources v Hibbs* [538 US 721 (2003),] does not apply to the self-care provision of the FMLA, and that private suits for damages may not be brought against states for alleged violations of the Act arising from claimed entitlement to leave under § 2612(a)(1)(D).” Unlike the family care provision of the FMLA, which was adopted to combat longstanding gender discrimination, there was no similar discrimination against people taking leave because of their own medical problems.

***Sorrell v Rinker Materials Corp***, 395 F3d 332 (CA 6, 2005). The court remanded an FMLA interference case for a decision whether the employer’s unconditional approval of the

plaintiff's FMLA leave request and failure to challenge the sufficiency of the plaintiff's medical certification estopped it from contesting the plaintiff's eligibility for FMLA leave. "Although we are unaware of any cases issued by this Court that are dispositive of this issue, several of our sister circuits have held that, under the right circumstances, an employer may be equitably estopped from challenging an employee's entitlement to such leave.... We are primarily concerned with Sorrell's argument concerning Rinker's alleged failure to comply with 19 CFR §825.305(d) because that provision ... imposes an affirmative duty on an employer that finds a medical certification incomplete...."

**Hoffman v Professional Med Team**, 394 F3d 414 (CA 6, 2005). "Whether or not Hoffman was entitled to FMLA leave, the district court did not err in concluding that PMT neither knowingly nor recklessly violated the FMLA by rejecting Hoffman's [seemingly contradictory medical] certification." The employer initially granted the plaintiff's request for intermittent leave but refused to grant additional leave unless she corrected her medical certification, which appeared contradictory because it stated that she needed intermittent short-term leave but answered "no" to the question whether she needed to work less than a full schedule. The DOL regulations were "confusingly worded," and the fact that the employer met with counsel in an attempt to understand its obligations and gave the plaintiff a chance to cure her certification belied a conclusion that the employer willfully violated the FMLA.

**Hemenway v. Albion Pub. Schs.**, 11 WH Cases2d 320 (W.D. Mich. 2006). Defendant's failure to request Plaintiff to certify her depression and situational anxiety while reviewing plaintiff's request for FMLA leave did not prohibit defendant from later seeking a second opinion pursuant to FMLA section 2613(c) or Federal Rule of Civil Procedure 35. Plaintiff alleged defendant terminated her employment following her request for FMLA leave. Defendant contends the termination resulted from plaintiff's failure to report to work for three consecutive days without excuse. Because "plaintiff placed her medical condition in controversy . . . . Defendant has shown good cause and can require Plaintiff to submit to a medical examination under Rule 35 even though she has been terminated by Defendant."

**Rodriguez v Ford Motor Co**, 382 F Supp2d 928 (ED Mich, 2005). The plaintiff raised a material factual question whether he sufficiently notified his employer about his need to take time off due to a FMLA-covered "serious health condition," even though he never requested FMLA leave, where "(1) Defendant Ford knew Plaintiff was injured at work and required hospitalization, (2) Plaintiff left work after twice requesting leave for his condition, (3) Plaintiff's treating physician faxed Defendant Ford an off work slip, and (4) Plaintiff's treating physician told Ford's physician that Plaintiff was unable to work."

Judge Gadola added that these facts could sustain a finding that Ford recklessly disregarded plaintiff's FMLA rights, which lengthens the applicable statute of limitations and made the plaintiff's lawsuit timely.

*Smith v ACO, Inc*, 368 F Supp2d 721 (ED Mich, 2005). Judge Cleland granted summary judgment to the employer based on evidence that the decision maker decided to terminate the plaintiff shortly before she successfully requested and took FMLA leave. Such evidence defeats the causation element as a matter of law, and is not undermined by either temporal proximity or the fact that the plaintiff was not terminated until the day he returned from leave.

“Under the facts presented in this case, the employer was in a proverbial ‘catch 22.’ Once Plaintiff informed it that he was injured and once he requested FMLA leave, the Defendant’s determination [to terminate plaintiff for various performance problems] could not be executed without falling close in time to Plaintiff’s FMLA leave request. No matter when the decision to release Plaintiff was executed, it almost certainly would be called into doubt by Plaintiff. Defendant’s choices included discharging Plaintiff as planned on the same day he requested FMLA leave or delaying the execution of his firing for at least some period of time. In either event, firing Plaintiff was certain to take place after he had requested FMLA. As such, the employer’s decision in this context does not permit an inference that its three employees are lying about the timing of Plaintiff’s discharge.”

*Heard v SBC Ameritech Corp*, 2005 WL 1802086 (ED Mich, 2005). 29 CFR § 825.305(d) requires employers to notify employees seeking FMLA leave if the requested medical certification they submit is deemed incomplete, and to then provide time to cure. Judge Cleland ruled that this regulation does not require employers to “provide notice and an additional 15-day period to cure when an employee fails to provide timely certification in the first instance.” “If ‘a certification’ is not timely provided by an employee requesting FMLA leave, there is no certification for the employer to find incomplete, inadequate, unfinished, or lacking a part.” Judge Cleland was also persuaded by a Fifth Circuit decision, which reasoned under similar facts that requiring employers to notify employees about a failure to timely submit requested documentation would extend the 15-day deadline *ad infinitum* and prevent employers from setting real deadlines.

*Love v County of Wayne*, 2005 WL 1529603 (ED Mich, 2005). Judge Steeh ruled that a jury should decide whether an employer was equitably estopped from rejecting an FMLA leave request premised on medical documentation the employer previously deemed sufficient. A jury could conclude that the employer, in effect, misrepresented that the documentation was sufficient when it accepted it the first time, and then failed to provide the plaintiff sufficient time to cure the deficiency when it rejected the same documentation the second time. On the other hand, reasonable jurors could conclude that the employer forewarned the plaintiff that her documentation lacked required detail.

*House v LA-Z-Boy, Inc*, 2005 WL 1529685 (ED Mich, 2005). Evidence that the plaintiff performed well before taking FMLA leave, that the plaintiff’s job was the only one eliminated in a so-called RIF, and an allegation that a decision maker told the plaintiff that her new position would be “less stressful” presented triable FMLA interference and

retaliation claims. Further, because the issue in a failure-to-promote case is the candidates' respective "qualification for the job, not their similar situations," the plaintiff is not obliged to show that the successful candidate was similarly situated. Finally, there are cases where the employer's "business judgment" is so lacking in merit that its genuineness can be questioned. Such was the case where the plaintiff had vastly more experience than the successful candidate and there were questions about the successful candidate's supervisory capability.

*Stanford v Blue Cross Blue Shield of Michigan*, 2005 WL 1345455 (ED Mich, 2005). Judge Steeh ruled that the plaintiff failed to meet the "continuing treatment" criteria for FMLA coverage because she was treated for her condition only one time during her employment. Her second treatment occurred after she was terminated for unscheduled absenteeism.

*Collier v Target Stores Corp*, 16 AD Cases 1319 (D Del, 2005). A manager's "derogatory" comments about the plaintiff, such as calling her "psycho" and "mental," were made "disparagingly" and do not demonstrate that he regarded the plaintiff as disabled. Viewed in a light most favorable to the plaintiff, the evidence merely shows that the manager was frustrated and angry that the plaintiff was taking FMLA leave and getting paid to sit at home during the holiday season while other employees had to work, and because he thought that plaintiff was abusing the system for reasons that had nothing to do with a valid medical condition.

The comments did, however, help raise a material question whether the plaintiff was constructively discharged for taking FMLA leave. Also significant was record evidence that the employer lowered the plaintiff's performance evaluation and changed her job responsibilities, in part, because she had taken a lengthy leave of absence.

## **X. RELIGIOUS DISCRIMINATION**

*Klyuch v Freightmasters, Inc*, 95 FEP Cases 461 (D Minn, 2005). Derogatory "stray remarks" about the plaintiff's religion and national origin could not constitute "direct evidence" of discrimination because the plaintiff could not identify when they were made or establish a causal link between the statements and his termination. The statements were admissible, however, to circumstantially show the decision maker's bias or animus.

## **XI. RETALIATION**

*Burlington N & Santa Fe Ry v White*, 548 U.S. \_\_\_\_ (2006). The female plaintiff was employed as a "track laborer" with defendant. Because of her prior experience, plaintiff was assigned to operate a forklift. Plaintiff's supervisor was suspended after plaintiff complained about sexist statements made by him. At the same time as plaintiff was notified of her supervisor's suspension, she was also removed from forklift duty and assigned to perform

laborer tasks. The proffered reason for this reassignment was “that, in fairness, a ‘more senior man’ should have the ‘less arduous and cleaner job’ of forklift operator.” Because of her reassignment, plaintiff filed a complaint with the EEOC alleging that “the reassignment of her duties amounted to unlawful gender-based discrimination and retaliation for her having earlier complained about [her supervisor].” Two months later, plaintiff filed another retaliation complaint, which alleged that another supervisor “had placed her under surveillance and was monitoring her daily activities.”

After an incident involving a third supervisor, plaintiff was suspended without pay for 37 days for insubordination. Internal grievance procedures concluded that plaintiff had not been insubordinate and she was given backpay. She then filed another retaliation charge with the EEOC based on her suspension. After exhausting her administrative remedies, plaintiff brought claims in federal court for retaliation in violation of Title VII premised on the change in her job responsibilities and her 37 day suspension without pay.

The District Court found in favor of the plaintiff, with the jury awarding compensatory damages on both claims of retaliation. On appeal, a divided Sixth Circuit panel reversed the judgment and found in favor of defendant-railway. The majority of the panel held “that a plaintiff must show an adverse employment action, which is defined as a materially adverse change in the terms and conditions of employment.” However, the full Sixth Circuit appeals vacated the panel’s decision and affirmed the District Court’s judgment in Plaintiff’s favor *en banc*. In granting certiorari, the Supreme Court recognized varying interpretations of “whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.” Certiorari was granted to resolve this disagreement among the circuits.

The Supreme Court noted Title VII’s anti-discrimination provision, § 703(a) specifically protects an individual only from employment-related discrimination. Such limiting language is not present in the anti-retaliation provision, § 704(a). The Court reasoned that the Sixth Circuit’s more limited reading of the two provisions *in pari materia* would do nothing to prevent an employer from “effectively retaliat[ing] against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. To prevent these types of retaliation the Court held “[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”

The Court then addressed the severity of retaliatory acts necessary to state a claim. The Court stated that “[t]he anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.” “In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” The Court noted that Title VII does not “immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience.” In deciding whether a particular act violates the

anti-retaliation provision, “[c]ontext matters” because “the significance of any given act of retaliation will often depend upon the particular circumstances.”

The Court found that under its newly adopted standards, Plaintiff’s reassignment to more arduous duties would be sufficient to dissuade a reasonable employee from filing a discrimination complaint. Similarly, the prospect of a 37 day suspension without pay would likely lead to a reasonable employee not filing a discrimination complaint. The Court rejected Defendant’s argument that this injury to Plaintiff was mitigated by backpay for the period of the suspension. The Court held that “reasonable employees would find a month without a paycheck to be a serious hardship. For these reasons, the Court affirmed the Sixth Circuit’s judgment in favor of Plaintiff’s two retaliation claims under Title VII.

In his opinion concurring in judgment, Justice Alito stated that he favored an interpretation that reads Title VII’s anti-discrimination and the anti-retaliation provisions together. This reading leads to the conclusion that prohibited retaliation must be related to “compensation, terms, conditions, or privileges of employment.” However, even under his preferred reading of Title VII, Justice Alito would affirm the Sixth Circuit’s judgment in favor of the Plaintiff.

***Jackson v Birmingham Bd of Ed***, 125 S Ct 1497 (2005). The private right of action stemming from Title IX’s prohibition against discrimination “on the basis of sex” encompasses claims by individuals who were retaliated against for complaining about perceived sex discrimination. Retaliation against a person because the person complained of sex discrimination is another form of intentional sex discrimination.

“The Court of Appeals’ conclusion that Title IX does not prohibit retaliation because the ‘statute makes no mention of retaliation,’ ignores the import of our repeated holdings construing ‘discrimination’ under Title IX broadly. ... ‘Discrimination’ is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.” Moreover, “[b]ecause Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.”

The plaintiff, who was allegedly terminated in retaliation for his protests about alleged discrimination against girls’ team funding, equipment and facilities could pursue a claim even though he was not the direct victim of the discrimination he protested. “The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.” Where the retaliation occurs because the victim speaks out about sex discrimination, the statute’s “on the basis of sex” requirement is satisfied.

***Jensen v. Potter***, \_\_\_ F3d \_\_\_; 95 FEP Cases 555 (CA 3, 2006). Plaintiff’s sex harassment complaint against Waters resulted in Waters’s termination. Plaintiff’s branch manager transferred plaintiff to Waters’s former department where she was subjected to frequent

insults by one of the department employees. She complained to the branch manger who stated he would talk to the employee. The insults continued and plaintiff was subjected to offensive comments, rumors of Waters's return, physical threats, and vandalism to her car from two employees in the department. Despite plaintiff's continued complaints, this behavior continued for 19 months until she complained to her new supervisor. At that point, the branch manager spoke with the two employees and the harassment stopped. Plaintiff brought an action alleging sex discrimination and retaliation.

On appeal from a order granting summary judgement to the defendant, the court first examined whether an employer could be liable for harassment by co-workers under the anti-retaliation provision of Section 704(a) of Title VII, 42 U.S.C. §§2000e-3(a). The court relying on decisions from other circuits and its own retaliation cases found that retaliatory harassment did violate the statute. While recognizing that co-workers' expression of their opinion against the discharge of Waters and their use of the "silent treatment" could not support a finding of harassment, the court noted that 19 months of insults, threats and vandalism raised a material issues of fact on whether plaintiff was harassed.

Addressing plaintiff's discrimination clam, the court recognized that "retaliation against a person based on the person's complaint about sexual harassment is not necessarily discrimination based on the person's sex." However, the court held, "In reality, however, when a woman who complains about sexual harassment is thereafter subjected to harassment based on that complaint, a claim that the harassment constituted sex discrimination (because a man who made such a complaint would not have been subjected to similar harassment) will almost always present a question that must be presented to the trier of fact. In such a situation, the evidence will almost always be sufficient to give rise to a reasonable inference that the harassment would not have occurred if the person making the complaint were a man. The difficult task of determining whether to draw such an inference in a particular case is best left to trial." The court reversed the lower court and remanded the matter for further proceedings.

*Tisdale v Federal Express Corp*, 415 F3d 516 (CA 6, 2005). Evidence supported the jury's finding that the black plaintiff was discharged in retaliation for his complaints about racially discriminatory treatment, despite evidence that he was terminated for selling the employer's pallets. The jury could have concluded that the employer's discharge explanation was "not credible" under all three methods of proving pretext because: there was no evidence that the plaintiff kept any money from the alleged sales; the plaintiff had previously received kudos for his work with the pallet recycling program; the employer's investigator admitted that her goal was to get plaintiff to admit he sold the pallets; the investigator used "manipulative interrogation techniques" to coerce the plaintiff into agreeing that a mistake may have occurred and then reported this concession as a confession to theft; the investigation into the stolen pallets began three days after the plaintiff's protected activity; no other employee was investigated, even though there was evidence that another employee kept the proceeds from a pallet sale; and there was evidence that the employer had discarded pallets in the past.

This, coupled with the fact that plaintiff was a long and vocal critic of defendant's treatment of black workers, supported the jury's finding that defendant intentionally retaliated against the plaintiff.

The plaintiff's failure to check the retaliation box on his EEOC complaint form did not compel dismissal because the retaliation claim contained the same "common core of operative facts" as his discrimination claim and put defendant on notice. Both claims basically contended that the plaintiff was terminated after he publically complained about the treatment of black employees.

***Hoffman v Professional Med Team***, 394 F3d 414 (CA 6, 2005). The district court properly found after a bench trial that the employer did not illegally retaliate against the plaintiff when it fired her for using profanity in a heated argument with a supervisor. "Disruptive conduct, even when it occurs in the context of employee protest, is widely viewed by courts as a legitimate ground for termination.... The district court did not err in refusing to consider whether PMT's work rules and collective bargaining agreement justified its decision to discharge Hoffman; this is an irrelevant inquiry, since it does not address whether Hoffman's use of profanity sincerely motivated PMT's decision."

***Lahar v Oakland County***, 2005 WL 2837365 (ED Mich, 2005). "[T]here is nothing in the express language of the [ADEA's] anti-retaliation statute that suggests that the opposition required to bring a claim under the statute cannot take the form of a lawsuit based on state law." Judge Roberts thus allowed the plaintiff to premise a federal retaliation claim on the theory that her employer retaliated against her for filing an unsuccessful state law age discrimination suit. Judge Roberts also rejected the employer's contention that *res judicata* barred the retaliation claim simply because the earlier age discrimination claim failed. "Proof of actual discrimination is not an element of a retaliation claim" and "a majority of circuits have expressly found that proof of actual discrimination is not a prerequisite to a retaliation claim."

***Abbs v Con-Way Central Express, Inc***, 2005 WL 2417632 (ED Mich, 2005). Judge Battani ruled that taking a "safety break" is unrelated to age or any civil right, and cannot constitute protected activity under Title VII or the ADEA. Moreover, plaintiff could not establish a *prima facie* case of retaliation where he testified that the non-decision making supervisor he allegedly complained to "did not comply with company policy to report charges of age discrimination" and where the plaintiff proffered no evidence that the actual decision makers knew about his age discrimination complaints.

***Lacy v Doorstep Shelter***, 2005 WL 2334281 (ED Mich, 2005). Judge Cleland ruled that the existence of a letter referring to the plaintiff's termination, written after the plaintiff engaged in protected activity but before he committed the conduct the employer cited as the basis for his termination, could establish pretext and raised a material factual dispute on the plaintiff's retaliation claim.

***Scott v Total Rental Care, Inc***, 2005 WL 1680677 (ED Mich, 2005). Even if the adverse action occurred shortly after the protected activity, a retaliation plaintiff must proffer evidence to prove that she was fired because of the protected activity. This cannot be done without proof that the employer was aware of the activity.

Judge Edmunds also ruled that the plaintiff's public policy discharge claim was preempted by the WPA, even though the WPA claim was factually unsustainable. "Contrary to Plaintiff's arguments here, the test is not whether the plaintiff can successfully prove the elements of her WPA claim. Rather, it is whether the alleged underlying conduct, if proven, falls within the protection of the WPA."

***Dixon v Gonzalez***, 2005 WL 1678018 (ED Mich, 2005). Judge Feikens ruled that a plaintiff cannot prove retaliation simply by showing that he sustained adverse employment action ten years after engaging in protected activity.

***Culver v Gorman & Co***, 416 F3d 540 (CA 7, 2005). "[A]n employer's sudden dissatisfaction with an employee's performance after that employee engaged in a protected activity may constitute circumstantial evidence of causation." Consequently, the district court erroneously dismissed the plaintiff's retaliation claim, where the plaintiff was fired 72-hours after complaining about allegedly discriminatory treatment, had received a meets or exceeds performance evaluation shortly before the protected activity was informed that the discussion during which she complained was "ill advised," and was told upon termination that "we have tried this for six months and it hasn't worked out"

The court found that one could reasonably question whether the employer honestly believed its nondiscriminatory explanation where the employer gave a vague explanation for discharge, there was no contemporaneous documentation to evidence the plaintiff's claimed "insubordination," the employer did not fully explain its rationale for terminating plaintiff until filing its summary judgment brief, a supervisor did not mention plaintiff's allegedly insubordinate conduct during her deposition, and the employer's vague explanation for discharge seems inconsistent with the positive performance evaluation filed shortly before discharge.

***Wallace v Sparks Health System***, 415 F3d 853 (CA 8, 2005). Employer's mild criticism of the plaintiff and statement after a successful EEOC mediation that the plaintiff should stop causing trouble do not create a triable retaliation claim. The "comments on their face do not establish any link between Wallace's EEOC complaint and the decision to eliminate his position during the RIF" one year later. "The fact that Sparks's management personnel were irritated by Wallace's EEOC complaint, which they felt was baseless and which was never determined to be valid, would not establish retaliation without some showing that this irritation was linked to Wallace's discharge."

***Zhuang v Datacard Corp***, 414 F3d 849 (CA 8, 2005). The fact that the plaintiff's recently-

filed EEOC charge was mentioned during the meeting to determine who to include in a large layoff does not establish causation sufficient to sustain a prima facie retaliation claim. “We conclude that Nelson and Goodland’s discussion of Zhuang’s EEOC claim is not probative of retaliation in this case. There is no evidence that their discussion was marked by retaliatory animus, and thus any finding of retaliation would necessarily be based upon mere conjecture and would amount to a determination that an employee can insulate herself from an otherwise valid termination by filing an EEOC complaint.”

The court also held that the employer’s decision to cite the Chinese-born plaintiff’s poor communication skills, along with a reference to the plaintiff as being “different,” was insufficient to establish an inference of national origin discrimination. It would be unreasonable to equate such comments with a finding of discrimination. “No doubt many native English speakers could be cited for such problems, and many employees besides Zhuang, including several white males from Zhuang’s particular work group, were also terminated.”

***Haas v Kelly Services, Inc***, 409 F3d 1030 (CA 8), *reh’g and reh’g en banc denied* (2005). Record evidence suggesting that the employer decided to terminate the plaintiff after her protected activity, but before the event the employer used as the legitimate reason for her termination, combined with evidence that the employer failed to let the plaintiff explain her conduct raised a legitimate factual question on the plaintiff’s retaliation claim.

However, absent evidence that the plaintiff’s age motivated any employment decision, the employer’s failure to follow its own personnel policy when deciding to terminate plaintiff did not present a triable age discrimination claim. “We do not ‘sit as a super-personnel department ... [and] second-guess [] ... business decisions.’ Kelly ‘can certainly choose how to run its business,’ including not to follow its own personnel policies regarding termination of an employee or handling claims of discrimination, ‘as long as it does not unlawfully discriminate in doing so.’”

***Septimus v Univ of Houston***, 399 F3d 601 (CA 5, 2005). It is “fundamental error” to instruct the jury in a retaliation case that it could find for the plaintiff if her complaints of discrimination were a “motivating factor” in the adverse employment action. The Fifth Circuit has consistently required “but for” causation in retaliation cases.

***Flowers v Columbia College Chicago***, 397 F3d 532 (CA 7, 2005). “No employer may retaliate against someone who makes or supports a charge of discrimination against *any* employer.” Consequently, the plaintiff may base a retaliation claim on the theory that he was terminated for complaining about discrimination practiced by the school district in which the plaintiff’s employer assigned him to work.

***Shanklin v Fitzgerald***, 397 F3d 596 (CA 8), *reh’d denied* (2005). “Ten months elapsed between the date Shanklin filed her EEOC charge and the date the Board discharged

Shanklin. With this lengthy delay, any causal nexus inference tends to evaporate.”

*MacIntosh v Building Owners and Managers Association Int’l*, 355 F Supp2d 223 (DC DC, 2005). The caucasian male plaintiff could pursue a §1981 claim on the theory that his employer retaliated against him for protesting the treatment of black female employees. Courts have “roundly rejected” the theory that an employee alleging retaliation must be a member of a racial minority. The “best approach to allegations of racially motivated retaliatory action is that the race-based element must lie in the protected activity, not the race of the plaintiff.”

*Bell v Gonzales*, 16 AD Cases 1039 (D DC, 2005). “Initiation of EEO counseling to explore whether an employee has a basis for alleging discrimination constitutes protected activity, even in the absence of an unequivocal allegation of discrimination.... Here ... a reasonable trier of fact could conclude that plaintiff attempted to explore the issue of disability discrimination with the EEO counselor, was discouraged by the EEO counselor from alleging discrimination, and followed the counselor’s suggestion of initially pursuing his grievances with Hildebrand instead of pursuing an EEO claim. That initial involvement in the EEO process, the Court concludes, is statutorily protected activity under the broad language of the participation clause (‘participated in any manner’).”

The court also ruled that “a lost opportunity for overtime (assuming plaintiff has proven there were opportunities to work overtime) is only an adverse employment action where the trier of fact could reasonably conclude that plaintiff in the past sought opportunities for overtime pay or it was otherwise known to defendant that plaintiff desired such opportunities.” The plaintiff established a triable factual question in this regard by producing evidence that he worked substantially more overtime in the position from which he was allegedly transferred after engaging in protected activity.

## **XII. ARBITRATION**

*Wold Architects and Engineers v Thomas Strat*, \_\_\_ Mich \_\_\_; **e-Journal Number:** 31669 (May 4, 2006). Wold purchased the Strat’s company and entered into an asset purchase agreement and an employment agreement with Strat. The employment agreement contained an agreement to arbitrate any disputes arising under the agreement but failed to state that any arbitration decision could be enforced by a circuit court. When a dispute arose under the asset purchase agreement, Strat filed a demand for arbitration under the arbitration agreement contained in the employment agreement. The American Arbitration Association notified the parties that the rules for commercial arbitration would be used rather than the employment dispute rules. Wold filed a counter demand for arbitration and a hearing date was set. Prior to the hearing, Wold revoked its agreement to arbitrate and filed an action to prevent arbitration. The judge refused to enjoin the arbitration hearing. After the arbitrator issued an award in favor Strat, the circuit court issued an order enforcing the award. On appeal, the Court of Appeals reversed finding the agreement was a common law agreement to arbitrate

which Wold could revoke.

On appeal, the Supreme Court held, “We hold that common-law arbitration is not preempted by the Michigan arbitration act, MCL 600.5001 *et seq.*, and that common-law arbitration continues to exist in Michigan jurisprudence. Parties wishing to conform their agreements to MCL 600.5001(2) must put their agreements in writing and require that a circuit court may enforce them. Otherwise, their agreements will be treated as agreements for common-law arbitration. In addition, common-law arbitration agreements continue to be unilaterally revocable before an arbitration award is made.”

The Court also found that the parties, by their actions, did not convert the common law arbitration into a statutory arbitration. The Court reasoned that the agreement to arbitrate the dispute under AAA’s commercial dispute rules, which did provide that a circuit court could enforce any award, was never put in writing and did not meet the requirements of the Michigan arbitration act.

***Scovill v WSYX/ABC***, 425 F3d 1012 (CA 6), *reh’g denied* (2005). The district court did not misconstrue Ohio law in deciding that it could sever three unenforceable provisions from the parties’ compulsory arbitration agreement, instead of using the provisions to invalidate the entire agreement. The existence of two severability clauses “clearly indicates a preference for severance,” and the contested provisions do not “taint” the entire agreement.

The overall agreement is not “substantively unconscionable” where the plaintiff is a college-educated, experienced broadcaster who has signed similar agreements in the past, read the agreement before signing it, knew he could discuss the agreement and even negotiated certain terms.

The district court correctly invalidated a loser pays cost-shifting provision because it would deter a substantial number of litigants in the plaintiff’s position from enforcing their statutory rights. It erred, however, in invalidating before arbitration a provision which provides that “if the arbitrator is satisfied that employee did engage in the conduct complained of ... the Arbitrator must uphold the action taken by the Employer.” Although the provision could alter the evidentiary standard by preventing the plaintiff from showing pretext, it should not be preemptively invalidated because the “employer may well have included the provision only to guarantee that the specific disciplinary action the employer imposed would be upheld” and “the arbitrator may interpret this provision in such as way as to avoid infringing upon the Plaintiff’s rights.”

***Walker v Ryan’s Family Steak House, Inc***, 400 F3d 370 (CA 6, 2005). The district court correctly refused to enforce employment agreements that arguably compelled the plaintiffs’ to arbitrate their FLSA claims. First, the compulsory arbitration clauses lacked sufficient consideration because the contractually mandated arbitration service could modify or amend its program “without providing Plaintiffs the right to insist on the rules in effect at the time

they executed their respective agreements.” Second, the arbitration service (“Employment Dispute Services, Inc.”) was biased for the employer, which provided 42% of its business and could effectively control the pool of arbitrators. Third, the agreements were not knowingly and voluntarily signed because the plaintiffs were poorly educated, low-income workers in dire financial circumstances who were hired on the spot; told to immediately sign a series of documents on a non-negotiable take-it-or-leave-it basis; provided either no or misleading explanations as to what they were signing; and (contrary to the text of the agreement) were not given the opportunity to contact an attorney. Fourth, the arbitral process was procedurally deficient due to lack of protocol, the lack of minimum educational or experiential requirements for the arbitrators and limited discovery that unfairly allowed just one deposition per party.

***Howell v Rivergate Toyota, Inc.***, 16 AD Cases 1714 (CA 6, 2005). An arbitration agreement containing a 180-day limitations period and a provision limiting discovery to materials that are admissible under the Federal Rules of Evidence was not so narrow that it rendered the arbitral forum inadequate to vindicate statutory rights. Moreover, a fee-splitting agreement and an unusual provision requiring the parties to apply to an out-of-state court for appointment of the arbitrator do not, without more, establish that the agreement impermissibly deters employees from pursuing their statutory rights. The plaintiff proffered “no evidence of a typical arbitrator’s fees, no evidence of the costs of applying to a Texas court for appointment of an arbitrator, ... no evidence of how such fees and costs compare to the costs of litigation ... [and] no evidence of the impact the arbitral costs might have on a person with a ‘job description and socioeconomic background similar to his.’”

***McLaughlin v Innovative Logistics Group, Inc.***, 2005 WL 2346418 (ED Mich, 2005). Judge Cohn refused to enforce an arbitration clause that required the plaintiff to arbitrate, but gave the employer the option whether to arbitrate. The Sixth Circuit has consistently refused to enforce arbitration agreements that lack mutuality of obligation.

***Panepucci v Honigman Miller Schwartz and Cohn, LLP***, 2005 WL 1981717 (ED Mich, 2005). The plaintiff signed a partnership agreement that required her to arbitrate all controversies “arising under or related to this Agreement.” Although the Agreement did not prohibit discrimination or reference the firm’s equal opportunity policy, Judge Steeh compelled the parties to arbitrate the plaintiff’s sex and pregnancy discrimination claims because they “related to” plaintiff’s relationship with her partners.

Judge Steeh declined to decide, prior to completion of discovery, whether the plaintiff, a “percentage partner,” was a firm employee or a *bona fide* partner who could not bring a claim under a federal anti-discrimination statute. The parties disputed each *Clackamus* factor in competing affidavits and the answers to the material questions raised could not be resolved without discovery concerning the plaintiff’s role with the firm.

***National Association of Broadcast Employees and Technicians v Meredith Corp.***, 2005 WL

1606582 (ED Mich, 2005). Judge Lawson ruled that an arbitrator had authority to reinstate an employee who was terminated without “just cause.” Particularly where work rules do not mandate discharge under specific circumstances or forbid arbitrators from reinstating employees, an arbitrator’s authority to interpret a “just cause” provision is not negated by express work rules or employer policies. Moreover, absent an indication that the parties agreed upon “an expanded standard of review of arbitral decisions,” contractual language making an arbitrator’s award “subject to judicial review by either party” does not authorize courts to evaluate the merits of the arbitrator’s just cause determination.

***Campbell v General Dynamics Government Systems Corporation***, 407 F3d 546 (CA 1, 2005). “[A]n e-mail, properly couched, can be an appropriate medium for forming an arbitration agreement.” However, even if e-mail was the most common method of intra-company communication, the specific e-mail in question would not put a reasonable employee on notice that the employer was adopting a mandatory arbitration policy. Nor would the e-mail put a reasonable person on notice that employees who continued their employment were automatically entering into arbitration contracts and waiving their right to a judicial forum.

First, the employer failed to establish that it had previously used the e-mail format to introduce a major term of employment, let alone a contractual term. Second, although these might not be requirements, the employer failed to set the e-mail “apart from the crowd” by using the “response required” format or requiring employees to check an acknowledgment box. Third, the e-mail undersold the significance of the new policy by, *inter alia*, failing to directly state that the policy contained an arbitration agreement whereby employees were agreeing to waive a judicial forum, downplaying the significance and contractual nature of the policy, and neglecting to mention that arbitration would be an employee’s exclusive remedy.

***Marie v Allied Home Mortgage Corp***, 402 F3d 1 (CA 1, 2005). The employer did not waive its contractual right to arbitrate by failing to demand arbitration during the pendency of EEOC proceedings and/or failing to file for arbitration after the EEOC proceeding concluded with a “no discrimination” finding. “If the EEOC’s investigation of an employer cannot be stopped by invoking an arbitration agreement, then forcing the employee and employer to begin an arbitration proceeding during the pendency of that investigation will automatically result in two adjudications involving the same issue at the same time: (1) the EEOC investigation of the employer at the employee’s urging and (2) the arbitration between the employer and the employee that the employer initiated. This is quite inefficient. Further, the EEOC investigation might definitively resolve the claim.... Thus, forcing employers to bring arbitration during the pendency of EEOC investigations is a waste of resources and is contrary to the general purposes of the FAA.”

***Simon v Pfizer, Inc***, 398 F3d 765 (CA 6, 2005). Arbitration provisions contained in the employer’s severance plan, which required arbitration of disputes dealing with constructive

terminations and terminations for just cause, did not encompass the plaintiff's ERISA claim that he was terminated for attempting to determine his rights and benefits under the plan. Nor did it encompass a claim that the employer failed to timely notify him of his COBRA rights. The arbitration provisions are specific, do not mention ERISA or COBRA, and there is no general provision under which the parties agreed to arbitrate all disputes arising under the agreement.

### **XIII. MISCELLANEOUS**

#### **A. COVERAGE**

*Arbaugh v Y&H Corp*, 122 S Ct 2246 (2005). The Supreme Court granted *certiorari* to resolve a conflict between the circuits as to whether the 15-employee minimum is jurisdictional, such that it could be raised at any point during the litigation, or merely a substantive element of the claim which can be waived.

The Fifth Circuit had ruled in *Arbaugh v Y&H Corp*, 380 F3d 219 (CA 5, 2004), that drivers who delivered food to the defendant restaurant's customers were independent contractors, not "employees" as the term is defined by Title VII. Factors weighing in favor of "employee" status under the "economic realities test" were that the restaurant paid the drivers \$4.00 per hour, helped set the drivers' schedules, and required the drivers to record their time, prepare salads and condiments for the orders they delivered and clean their workstations. These factors were outweighed by the fact that the restaurant permitted the drivers to retain all their tips and did not withhold taxes from the drivers' paychecks, pay their social security taxes or cover their mileage or automobile expenses. The conclusion that the drivers were not employees meant the employer did not employ 15 or more employees, which was fatal to the plaintiffs' Title VII-based harassment claim.

*Nichols v All Points Transport Corporation of Michigan, Inc*, 364 F Supp2d 621 (ED Mich, 2005). Despite identifying 57 individuals as "active drivers," the defendant fell beneath the FMLA's 50-employee jurisdictional threshold because it never paid more than 33 drivers in a given week and had only 11 full-time employees. Regardless, Judge Cleland applied the "common law agency test" to conclude that the truck drivers were independent contractors, not employees. Although the drivers had an exclusive agreement with the company, displayed company placards on their trucks and were integral to the defendant's business, they were terminable at will, responsible for making capital investments in and maintaining the trucks they drove, able to hire assistants, operated with entrepreneurial risk, controlled the method of performance, paid their own taxes, and had to pay for all vehicle repairs, tolls, fuel, taxes, permits, licences and expenses.

*Shah v Deaconess Hospital*, 355 F3d 496 (CA 6, 2004). A general surgeon with surgical privileges was not a hospital "employee," meaning that the district court properly dismissed his age and national origin discrimination claims. Applying the common law agency test,

the Sixth Circuit noted that the hospital did not pay plaintiff for his services or provide him with a Form W-2, and the plaintiff performed approximately 45 percent of his surgeries at other hospitals. Moreover, the plaintiff admitted during his deposition that he was “not [an] employee technically,” and there was no evidence the defendant had a right to control the manner and means of the plaintiff’s performance.

***Solon v Kaplan***, 398 F3d 629 (CA 7, 2005). General partner in four-member law firm was not an “employee” entitled to sue for retaliation under Title VII. Applying the test created in *Clackamus Gastroenterology Assocs v Wells*, 538 US 440 (2003), the court noted that the plaintiff had previously served as managing partner, had a sizable capital contribution in the firm, received a share of the firm’s income, attended compensation meetings, and was privy to the firm’s cash reports and sensitive financial information. Also, with a full quarter of the voting power, the plaintiff had significant input in firm matters, including profit distribution, salaries and membership issues.

***Tawes v Frankford Volunteer Fire Company***, 16 AD Cases 660 (D Del, 2005). Volunteer firefighters are not employees for purposes of determining whether employers satisfy the 15-employee minimum in Title I of the ADA. “Numerous courts have held that volunteers are not employees for purposes of employment discrimination,” and the line-of-duty insurance and limited pension benefits volunteers receive are minimal when compared to other, full-time workers.

## **B. ADVERSE EMPLOYMENT ACTION**

***Keeton v Flying J, Inc***, 429 F3d 259 (CA 6, 2005). The jury, which found the employer liable for “supervisor sexual harassment,” could not reasonably have concluded that the plaintiff sustained a “tangible employment” action when he was fired, but then re-hired the same day. “We have decided that when an employer imposes an employment action that would be an adverse employment action but then quickly reverses the action, the employee has not suffered an adverse employment action.... Likewise, in *Bowman* we determined that a temporary removal of responsibilities was not an adverse action.” However, although a lateral transfer to an identical position at a different facility is not a “tangible employment action” or a “constructive discharge,” it can constitute an “adverse employment action” for purposes of supporting the hostile environment verdict because the transfer lengthened the plaintiff’s commute to work.

***Banks v Principi***, 386 FSupp2d 921 (ED Mich, 2005). Judge Feikens ruled that the plaintiff did not sustain adverse employment action when she was assigned work on a holiday weekend, marked AWOL, and reassigned to a different nursing unit. Negative performance evaluations and “scheduling matters typically are not adverse employment actions,” and the plaintiff failed to sustain her burden of showing that the contested actions adversely affected her salary, total hours, duties or terms of employment.

***Reynolds v Lear Corp***, 2005 WL 1684127 (ED Mich, 2005). Judge Borman ruled that a retired employee who periodically returned to perform temporary work assignments sustained no adverse employment action when the last assignment ended by its terms. Adverse action and constructive discharge findings were also rejected because the employer gave the plaintiff a legitimate offer of continued employment. “[P]resenting an employee with legitimate options for continued employment precludes a finding of constructive discharge, even if the offer of employment is for a less prestigious position.

***Tolbert v Potter***, 2005 WL 1348986 (ED Mich, 2005). Judge Edmunds ruled that a supervisor’s “rude and intimidating” conduct could not sustain the adverse employment action element of the plaintiff’s prima facie case. Moreover, allegations that the employer revised the plaintiff’s route, watched her closely, required her to undergo numerous fitness for duty examinations and made rude, derogatory and “intimidating” comments toward her were, taken together, not severe or pervasive enough to sustain a retaliatory harassment claim.

***Washington v Illinois Department of Revenue***, 420 F3d 658 (CA 7, 2005). Plaintiffs alleging retaliation need only prove that the challenged action would have been “material to a reasonable employee,” not that they sustained “adverse employment actions” that affected essential terms and conditions of employment. Consequently, the plaintiff raised a material factual question by alleging the employer retaliated against her by transferring her to a position that was largely equivalent, but that precluded her from using previously-approved flex time and leaving at 3:00 p.m. to care for her disabled son.

***Fasold v Justice***, 409 F3d 178 (CA 3, 2005). The employer’s denial of the plaintiff’s Level II grievance — a grievance filed to contest his termination, which had been denied at Level I — constituted adverse employment action sufficient to sustain a prima facie case of retaliation. The district court’s reasoning that the Level II denial was “merely a reassertion of the prior decision to terminate” is incorrect because “even if Defendants were justified in firing Fasold and denying his Level I grievance, they would not be free from liability if they denied Fasold’s Level II grievance because he had filed an administrative complaint” alleging age discrimination shortly before the Level II grievance was denied.

The dissent argued that an employer cannot commit adverse employment action against a person who has ceased to be an employee; suggested that it is “quite a stretch to conclude that a denial of a second request for reconsideration was caused by anything outside of the factors that had already gone into the initial decision and evidence presented at the first grievance proceeding;” and charged that the majority “woefully overestimates the likelihood of Fasold being reinstated as a result of his second request for reconsideration.”

***Gillis v Georgia Department of Corrections***, 400 F3d 883 (CA 11, 2005). The African-American plaintiff established the adverse employment action element of her prima facie case by showing that she received a three percent “met expectations” raise, rather than the

five percent raise (an extra \$912 per year) she would have earned with an “exceed expectations” rating. Compensation was “inextricably intertwined” with the evaluation.

*Ezell v Potter*, 400 F3d 1041 (CA 7, 2005). A termination letter which, due to a successful grievance, was withdrawn before it took effect constituted adverse employment action sufficient to sustain the plaintiff’s discrimination claims. The letter damaged the plaintiff from the time it was issued until the time it was expunged.

The court also found that an affidavit stating that a supervisor made ageist comments “on a regular basis” could mean almost anything and did not establish the requisite frequency to sustain a hostile environment claim. However, the plaintiff’s claim that her supervisor made disparaging comments about older workers, stated that older employees worked too slowly, and said that she planned to replace older workers with younger employees constituted direct evidence of discriminatory age discrimination.

*Orkuhlik v University of Arkansas*, 395 F3d 872 (CA 8, 2005). Negative reviews from a dean and the personnel committee, which recommended the denial of the plaintiff tenure application, was not an “adverse employment decision.” The plaintiff’s failed to exhaust the university appeals process.

“The academic setting and complex nature of tenure decisions ... distinguishes them from employment decisions generally.... We do not want to turn the tenure process into potentially endless litigation over each intermediate step, and believe that a university should have the opportunity to correct errors through its complete internal appeals process that precedes its final decision.... A candidate may only challenge the entire process once she has utilized the prescribed process of tenure review and obtained a final university decision.” The court thus affirmed the lower court’s decision to grant judgement as a matter of law to the university following a jury verdict in the plaintiff’s favor.

#### **C. CONSTRUCTIVE DISCHARGE**

*Levenstein v Salafsky*, 414 F3d 767 (CA 7), *reh’g and reh’g en banc denied* (2005). “We conclude that a person who is on leave with pay, with a temporary (though unsatisfying) reassignment pending an investigation of serious job misconduct, who resigns rather than waits for the conclusion of reasonable prescribed due process procedures of the institution, has not from an objective standpoint been constructively discharged.”

#### **D. WHISTLEBLOWER ACTS**

*Brown v Mayor of Detroit*, Mich Ct App No. 259911 (Mich Ct App 2006). Plaintiffs were a former deputy police chief and a police officer assigned to a city mayor’s Executive Protection Unit (EPU). Both were involved in investigations examining alleged illegal or wrongful conduct by other EPU officers. During the course of these investigations, potentially embarrassing information about the mayor and his wife was discovered, as was

evidence of an EPU cover-up. After reporting the results of their investigations in a memo to the police chief, the former deputy chief was removed from his position and the police officer's identity was divulged to local media. Plaintiffs filed this action against the mayor and the city, alleging violations of the Whistleblower's Protection Act (WPA).

With regards to the plaintiff-police officer's WPA claim, the Court of Appeals affirmed the trial court's denial of the city's motion for summary disposition. The lower court's grant of summary disposition in favor of plaintiff on claims against the mayor was reversed. The Court held that the disclosure of his identity to the media as well as the mayor's subsequent comments were sufficient to show that plaintiff had suffered an adverse employment action as a result of his whistleblowing activities. "[T]here is little doubt that the release of [police officer]'s identity by the mayor's office was tantamount to a career-ending blow to [police officer]. Further, in his television interview, [the mayor] . . . in essence, expressed satisfaction that his administration had exposed [police officer] as a whistleblower." The police officer's WPA claims against both the city and mayor were remanded for trial.

The Court rejected defendants' argument that plaintiffs were not covered by the WPA since their actions were not protected activities since they were required by their job duties and that reports protected to the WPA must be made to a "higher authority." Disagreeing with the Court's earlier decision in *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 486 (2005), the Court held that "as long the report is made to a 'public body' . . . , it need not be made to a 'higher authority' or to a body different than the plaintiff's employer." Deputy police chief's WPA claim that he was terminated in retaliation for engaging in WPA activities was remanded. Finally, the mayor was absolutely immune from police officer's claim of slander based on the mayor's statements to a television reporter that the police officer told lies, that he was a liar, and that he hoped the officer's wife and children were watching the broadcast. The Court found that such remarks were made within the scope of the mayor's authority in responding to questions about personnel and city issues and thus were protected.

***Heckmann v Detroit Chief of Police***, 267 Mich App 480 (2005). Requiring a plaintiff to exhaust the union grievance process before filing a whistleblowers' claim would frustrate the statutory provision requiring such claims to be filed in court within 90 days. "Nowhere in the statute has the Legislature either expressly or impliedly limited its protection to whistleblowers who have exhausted other possible remedies, whether those possible remedies are statutory, contractual, or administrative."

An allegation that the chief of police told the plaintiff to start looking for a job elsewhere if he kept "making waves" and wasting his time could sustain the adverse employment action element of his whistleblowers' claim. "[T]he trial court erred as a matter of law by implicitly ruling that plaintiff must show that he was fired, demoted, or transferred in order to state a viable WPA claim and that other bases, such as not getting a promotion or being threatened with employment action including discharge, were not sufficient."

The court also found that the plaintiff sustained the report-to-a-public-body element by sending a copy of his letter of complaint to the Mayor. “Although the mayor is the chief executive officer of the city, of which the police department is a party, the mayor’s office and the police department are separate ‘public bodies’ as that term is defined in the WPA. Thus, a report to the mayor of wrongdoing within the police department constitutes a report to a ‘higher authority’ under *Dickson-Dudewicz* and satisfies the statutory definition of ‘public body.’”

*Nair v. Oakland County Community Mental Health Authority*, 443 F3d 469 (CA 6, 2006). Plaintiff, defendant’s former medical director, was terminated when he wrote a letter to the county authority complaining of a reduction in his responsibilities and schedule. The court rejected his whistleblower claim where the only evidence he relied on to support his claim was his letter to the board. Nothing in the letter suggested a violation of the law, and he did not suggest that he was about to report a violation or suspected violation of the law.

*Sass v United States Department of Labor*, 409 F3d 773 (CA 6, 2005). Whistleblower provisions of the Clean Air Act, Solid Waste Disposal Act and Clean Water Act do not protect an Assistant United States Attorney who participated in the investigation and prosecution of environmental crimes while performing his assigned duties for the Department of Justice. “By their plain language, these whistleblower provisions protect employees who risk their job security by taking steps to protect the public good. Sasse’s job as an [assistant US attorney] included the investigation and prosecution of environmental crimes, and he therefore had a fiduciary duty to carry out those investigations and prosecutions.... Sasse cannot be said to have risked his personal job security by performing the duties required of him in that job. We therefore hold that in performing these duties, Sasse was not engaging in protected activities.”

*Serrin-Brandel v Pier 1 Imports (US), Inc*, 2005 WL 852642 (ED Mich, 2005). Judge Lawson ruled that an employer’s internal report, which mentioned the plaintiff’s “conscious decision to circumvent HR” by reporting a co-worker’s alleged conduct to the police and subsequent failure to inform management that she had done so, was not direct evidence that the plaintiff was fired for lodging a police report. The language was contained in a report which registered displeasure with the plaintiff’s conduct toward human resources, failure to provide truthful information during an investigation, and attempt to “circumvent” an ongoing company investigation by using the police to compromise its target. The mere mention of the protected activity, which was “only incidental” to an overall description of the plaintiff’s conduct, “does not provide an inferential link to an illegal motive” sufficient to support the plaintiff’s WPA claim, and does not belie evidence that the employer terminated the plaintiff for conduct that pre-existed her protected activity.

#### **E. ECONOMIC DAMAGES**

*Akouri v State of Florida Department of Transportation*, 408 F3d 1338 (CA 11, 2005).

The trial court correctly reduced the jury's \$700,000 damages award to nominal damages because the plaintiff failed to proffer sufficient evidence of either compensatory or emotional distress damages. The compensatory element was properly reduced due to "Akouri's failure to provide any evidence whatsoever of his *actual earnings* while employed with the DOT. While the record contains evidence of a salary range indicating the amount Akouri would have earned had he received the promotion, the record is devoid of any evidence of his actual salary at the time he was employed by the DOT. Thus, there was no figure from which the jury could have reasonably calculated net lost wages (the difference between what Akouri was earning and what he could have earned if promoted). It is *elementary* that a plaintiff must, at a minimum, show his earnings during his employment before the jury can begin a reasonable calculation of a back-pay award. This could have easily been accomplished by asking one question to Akouri or introducing into evidence a pay stub."

The emotional distress element was also properly reduced, because the plaintiff made no attempt to describe any kind of mental or emotional harm arising from the discrimination. Testimony that the plaintiff was rejected three times for promotions he thought he deserved did not satisfy the requirement to show an actual injury.

***Broadnax v City of New Haven***, 415 F3d 265 (CA 2, 2005). The plaintiff's failure to introduce evidence that she affirmatively looked for a job after her termination, combined with her statement at trial that she has been "in limbo" and didn't know what she would do next, did not entitle the employer to a JMOL on damages. The employer cannot sustain *its* burden to prove a failure to mitigate simply by pointing to the *plaintiff's* failure to affirmatively show that she sought alternative employment.

Moreover, although the front and back pay issues are equitable determinations for the court, the trial court did not error in submitting the issue to the jury (without objection from the employer) because "having juries calculate lost wages requires no special competence or authority belonging solely to the court."

#### **F. ADMINISTRATIVE PRACTICE**

***Venetian Casino Resort, LLC v EEOC***, 409 F3d 359 (CA DC, 2005). Employer alleged that, by allowing charging parties and their attorneys to review case files, the EEOC unlawfully releases subpoenaed, potentially confidential or "trade secret" information without notice to the employer. The EEOC argued that the claim was not ripe because its case handling manual had recently been changed and its current policy regarding the release of potentially confidential subpoenaed information "has yet to 'crystallize' through implementation in a concrete factual setting." "The case is fit for review because it presents a clear-cut legal question, *i.e.*, whether the Commission's disclosure policy is inconsistent with the Trade Secrets Act, FOIA, or the APA. Resolution of this question turns on an analysis of the pertinent statutes and their construction by relevant case law. There is nothing to be gained by deferring such considerations."

*Parisi v The Boeing Co*, 400 F3d 583 (CA 8, 2005), and *Shelton v The Boeing Co*, 399 F3d 909 (CA 8, 2005). EEOC complaints contesting allegedly discriminatory layoffs do not exhaust administrative remedies regarding allegedly discriminatory failures to rehire. Layoffs and failures to hire are discrete employment actions. Charges contesting layoffs would not reasonably inspire the EEOC to investigate post-layoff failures to rehire.

*EEOC v Seafarers International Union*, 394 F3d 197 (CA 4, 2005). The EEOC did not exceed its authority under the ADEA by promulgating a regulation that extends the statute to cover apprenticeship programs. Congress invested the EEOC with broad power to issue rules and regulations that the agency considers necessary; the regulation is consistent with the statutory scheme; apprenticeship programs are not listed among the various “safe harbor” provisions Congress expressly exempted from regulation; and the statute’s explicit reference to “employers,” “employment agenc[ies]” and “labor organizations” do not imply a preclusion of apprenticeship programs.

#### **G. ASSOCIATION**

*Beecham v Henderson County*, 422 F3d 372 (CA 6, 2005). The First Amendment right to association does not protect “adulterous” relationships. However, absent record evidence that the underlying relationship contained a “sexual aspect,” there is a material question whether the relationship the plaintiff was fired for engaging in was, in fact, adulterous.

Assuming, however, that the “romantic relationship” in question was non sexual and, hence, non-adulterous, the public employer’s decision to terminate the plaintiff on the basis of this “intimate association” is subject only to “rational basis scrutiny.” The employer satisfied this relaxed standard, because “Henderson County Courthouse officials, deciding that it was unacceptably disruptive to the workplace for a woman employed in the office of one of the county’s courts to be openly and ‘deeply involved in a romantic relationship’ with a man still married to a woman employed in the other county court down the hall, acted upon a ‘plausible policy reason.’”

*Ineichen v Ameritech*, 410 F3d 956 (CA 7, 2005). Assuming Title VII countenances such a claim, no reasonable juror could conclude that the white plaintiff was fired because she was dating a black co-worker. Plaintiff proffered evidence that: (1) her supervisor said the relationship was “causing problems in the office ... and that it didn’t seem like Ineichen was doing her job...;” (2) supervisors warned plaintiff to separate her personal life from her business life; (3) supervisors told her to stop spending so much time with her boyfriend at work; and (4) a co-worker’s opinion that “people ... didn’t like the relationship.” Both the plaintiff and the co-worker admitted, however, that plaintiff’s supervisors never commented on the fact that Jones was black and Ineichen was white. “At most, this shows that some coworkers disapproved of the relationship. Neither statement, however, shows that the decision makers harbored an animus against Ineichen because she was white and Jones was black. Moreover, neither of these comments demonstrates a connection between Ineichen’s

firing and her interracial relationship with Jones.”

*Hudson v Craven*, 403 F3d 691 (CA 9, 2005). Community college did not violate the First Amendment rights of an economics instructor when it discharged her for attending and taking some of her students to the notorious Seattle demonstrations against the World Trade Organization. The instructor’s associational interests were outweighed by the college’s interests in student safety during predicted rioting, and in maintaining political neutrality as an educational institution. The fact that the students did not even see the rioting misses the point, because “[t]he court is not called upon to make a retrospective analysis of the College’s position, but instead to assess whether the stated justification for limiting Hudson’s association was reasonable at the time.”

*Strate v Midwest Bankcentre, Inc*, 398 F3d 1011 (CA 8, 2005). “*Desert Palace* really has no direct impact in the summary judgment context.” Regardless, “the Supreme Court’s decision in *Desert Palace*, to the extent relevant, merely reaffirms our prior holdings by indicating that a plaintiff bringing an employment discrimination claim may succeed in resisting a motion for summary judgment where the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for the adverse employment action (i.e., a motivation based upon a protected characteristic), even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation.”

The court then held that the plaintiff, who was terminated approximately two months after giving birth, presented a material dispute whether she was terminated because of her association with and decision to seek employer-sponsored health benefits for her newborn child, who had Down’s Syndrome. Temporal proximity, combined with the plaintiff’s “apparently unblemished employment history with the Bank, spanning more than a decade of work, casts genuine doubt upon the Bank’s stated reason for terminating her.” This holds particularly true where the plaintiff was discouraged from applying for a job she was qualified to perform, and that was created by the reorganization.

## **H. FIRST AMENDMENT SPEECH**

*Garcetti v. Ceballos*, 547 U.S. \_\_\_\_; 24 IER Cases 737 (2006). Plaintiff was employed as a deputy district attorney. He was asked by a defense attorney to investigate inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case. After investigating the alleged inaccuracies, plaintiff “determined the affidavit contained serious misrepresentations.” Plaintiff met with his supervisors and drafted a memo informing them of his concerns with the affidavit used to obtain the search warrant. His superiors decided to proceed with the prosecution of the case anyway. At the criminal trial, plaintiff “was called by the defense and recounted his observations about the affidavit.” Plaintiff alleged that he was the subject of a series of retaliatory employment actions because of his memo questioning the accuracy of the affidavit and his testimony. Such actions included

reassignment from his position to a perceived lower position, transfer to another courthouse, and denial of a promotion. Plaintiff brought an action alleging that defendants' conduct violated his First Amendment rights. The district court granted defendants summary judgment, but the Ninth Circuit reversed finding that his memo and testimony were protected speech.

Justice Kennedy, writing the majority opinion, held that the Ninth Circuit Court of Appeals had erred in applying the First Amendment balancing test analysis in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). The Court held that the *Pickering/Connick* balancing test is only appropriate when individuals are speaking as citizens and not as public employees. Neither the fact that respondent expressed his views inside his office rather than publicly, nor the fact that the memo concerned the subject matter of respondent's employment were dispositive. Rather, the controlling factor in this case was that respondent made his expressions pursuant to his duties as a district attorney. Justice Kennedy wrote, "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. . . . When he went to work and performed the tasks he was paid to perform, [respondent] acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance."

The Court did suggest that expression in an academic environment may not be as insulated from First Amendment protection. "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."

Justice Souter, in a dissenting opinion joined by Justices Stevens and Ginsburg, expressed concern at the idea of "categorically separating the citizen's interest from the employee's interest." He argued that the "interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy. [Public] employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection."

Justice Stevens, in a separate dissenting opinion, wrote that "it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description."

Justice Breyer, in a dissenting opinion, argued that certain types of professional speech are "subject to the independent regulation by canons of the profession . . . [which] provide an obligation to speak in certain instances." Additionally, Justice Breyer argued the Constitution itself imposes obligations on government employees to speak. He then provides the example of a prosecutor's "constitutional obligation to learn of, to preserve, and to

communicate with the defense about exculpatory and impeachment evidence in the government's possession." In such cases, there is an "augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs."

*Nair v. Oakland County Community Mental Health Authority*, 443 F3d 469 (CA 6, 2006). Plaintiff, defendant's former medical director, was terminated when he wrote a letter to the county authority complaining of a reduction in his responsibilities and schedule. The court found that his speech concerned his hours and job responsibilities which were not matters of public concern. The court also rejected the argument that the public dialog sparked by his letter turned his letter into a matter of public concern. The dialog concerned the administration of the Authority and did not mention public health.

*Silberstein v. City of Dayton*, 440 F.3d 306; 24 IER Cases 153 (6th Cir. 2006). A city employee's comments in disapproval over implementation of a diversity plan were not protected by the First Amendment since they were made as "a policymaking employee commenting upon matters of policy" and therefore defendant-city's interest outweighed plaintiff's First Amendment interests. Because no First Amendment violation occurred, the Sixth Circuit reversed the district court's denial of defendants' motion for summary judgment.

*Montle v Westwood Heights Sch Dist*, \_\_\_ F Supp \_\_\_; ED Mich No. 05-10137-BC (ED Mich 2006). Plaintiff was employed as a high school teacher by defendant-school district. After his contract was not renewed after a four-year probationary term, plaintiff brought claims alleging race and age discrimination, as well as retaliation by the school principle and superintendent for expressions protected by the First Amendment. All claims, except one, were either dismissed on summary judgment or proceeded to the jury, which returned verdicts in favor of defendants. With regards to the First Amendment Claim, the jury returned a verdict against a defendant in his individual capacity and awarded compensatory and punitive damages to plaintiff. The jury also rendered special verdicts on two questions: (1) "Did the plaintiff's act of wearing a t-shirt during school hours that stated that teachers' union members were working without a contract cause, or could it have caused, disharmony at the Hamady High School?" The jury returned a "yes" answer on this question. (2) "Did the plaintiff's act of wearing a T-shirt during school hours that stated that teachers' union members were working without a contract impair the plaintiff's ability to perform his duties?" To which the jury returned a "no" answer.

After directing the parties to file briefs on the question of how to reconcile the jury's responses with their determination of liability in light of the *Pickering* balancing test, the Court determined the plaintiff's right to wear a t-shirt protesting his union's lack of a contract with the district "must be subjugated to his employer's interest in maintaining order in the workplace." Plaintiff demonstrated that he "was subjected to adverse action" and that his speech was "a substantial or motivating factor in the adverse action.," thus two out of three

elements of his First Amendment claim were shown. However, plaintiff failed to show that he had engaged in constitutionally protected speech. In making this determination, the court found that plaintiff's actions (wearing the t-shirt) addressed a matter of public concern, since "[t]he absence of union contracts is a matter of great concern to parents and students, if not all citizens interested in public education." However, plaintiff failed to show that his interests in commenting on matters of public concern outweighed his employer's interest in promoting the efficiency of the public service it performs. In finding this failure, the court stated that the t-shirt's message that teachers were working without a contract was not much of a revelation, since the situation had been going on for over a year and was known to most of the community. Plaintiff often confronted co-workers when they failed to wear identical t-shirts, to the point where "his confrontational behavior actually prompted complaints." The Court determined that the balancing of interests in this case weighed in favor of its finding that plaintiff's speech was not protected by the First Amendment. "[T]he school district's interest in ensuring professional demeanor and good relations among its faculty has been recognized as an interest that outweighs the right to speech during the workday."

***Hughes v. Region VII Area Agency on Aging***, No. 04-10355-BC (E.D. Mich. 2006). Plaintiff brought claims alleging violations of her First Amendment rights pursuant to § 1983 stemming from her termination allegedly based on her comments of public concern. Defendant-employer, a regional council on aging, filed a motion for summary judgment on these claims, arguing that it was not a state actor and thus claims under § 1983 could not be pursued against it. The agency argued that it was a private entity because it was originally incorporated by private individuals and its actions were "not intertwined with state activity." This argument was accepted by the magistrate judge in his report and recommendation for summary judgment, but was rejected by the district court. The court held although the agency was not formed by any governmental bodies, its entire membership now consisted of the City of Saginaw and ten Michigan counties. Even if the agency's status as a legal entity was insufficient to make it a state actor, the agency was entwined with Michigan state and local governments because it was designated by a state commission as an area agency on aging, and received funding from both state and local governments, thus making it a state actor. The defendant's motion for summary judgment on plaintiff's § 1983 claims was denied based upon the determination that the agency was a state actor for purposes of § 1983.

***Schroeder v City of Vassar***, 371 F Supp2d 882 (ED Mich, 2005). Judge Lawson ruled that a "private motive" will not disqualify speech from satisfying the "public concern" element of a First Amendment retaliation claim. Consequently, a public employee's allegation that a female co-worker violated the city's sexual harassment policy by making lewd comments — a statement on a matter of public concern — can support a First Amendment retaliation claim even though the statement was uttered in defense of harassment allegations that had been levied against the plaintiff.

***Jackson v Alabama State Tenure Commission***, 405 F3d 1276 (CA 11, 2005). Black school teacher could not sustain a First Amendment retaliation or race discrimination claim with

evidence that he was terminated for sending inflammatory letters to the superintendent and certain members. There was no evidence to sustain a conclusion that the plaintiff was terminated because of his race, as opposed to his prolonged practice of sending abusive, disrespectful letters to board members and supervisors — such as a letter describing a board member as a “grand wizard of the Ku Klux Klan” and a “selfish, no-business minded, insulting, disgusting person,” and another letter describing the assistant superintendent as a “black overseer with his whip.” Evidence supported a conclusion that the employer had a strong interest in prohibiting the plaintiff’s speech because it “could cause serious disciplinary problems, undermine employee morale, and impair harmony among co-workers.”

*Baca v Sklar*, 398 F3d 1210 (CA 10, 2005). Because the “record demonstrates that Baca raised allegations of discrimination and retaliation to undermine [a co-worker’s] accusations against Baca, and not to publicly disclose illegal behavior” by his publicly employed co-worker, “Baca’s statements regarding discrimination and retaliation pertained to a ‘personal dispute[ ] and grievance[ ] unrelated to the public interest,’ and therefore do not merit First Amendment protection.”

#### **I. FOURTH AMENDMENT**

*Greenawalt v Indiana Dept of Corrections*, 397 F3d 587 (CA 7, 2005). Government employer did not violate the plaintiff’s Fourth Amendment right to be protected from unreasonable searches when, as a condition of employment, it required her to take a two-hour psychological examination that went into details about her personal life. “[W]e do not think that the Fourth Amendment should be interpreted to reach the putting of questions to a person, even when the questions are skillfully designed to elicit what most people would regard as highly personal private information.”

#### **J. HOSPITAL PEER REVIEW IMMUNITY**

*Feyz v Mercy Memorial Hospital*, 264 Mich App 699 (2005). Statutory peer review immunity and the doctrine that isolates private hospital staffing decisions from judicial review do not operate to preclude a physician from pursuing civil rights and invasion of privacy claims against a private hospital. “It is not within the scope of a peer review committee to violate someone’s civil rights. There is no indication in the various civil rights acts at issue here that peer review committees were excluded from the scope of those acts, nor is there any indication that the peer review statute intended to exclude peer review committees from compliance with the various civil rights acts.” Moreover, “private hospitals are capable of committing torts and, when they do, are as subject to be held liable as any other private corporation.”

However, because the non-reviewability doctrine was designed to address attempts to hold hospitals to a higher standard than other private corporations, the trial court correctly

dismissed the plaintiff's "breach of fiduciary and public duties" count.

#### **K. CONTRACTUAL AND COMMISSIONS ISSUES**

*Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83 (2005). A special panel of the Court of Appeals reversed *Environair, Inc v Steelcase, Inc*, 190 Mich App 289 (1991), which had held that damages arising out of or related to the allegedly wrongful termination of an at-will contract are speculative as a matter of law in all cases. Although "remote, contingent, and speculative damages cannot be recovered in Michigan" damages are "not speculative simply because they cannot be ascertained with mathematical precision." "[A] blanket rule limiting recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts is not legally sound as there may exist factual scenario in which there is a tangible basis upon which future damages may be assessed that is not overly speculative despite the at-will nature of the underlying contract." "We do think it would suffice if a plaintiff presents documentary evidence in which the party who terminated an at-will contract specifically indicates that it was completely satisfied with the plaintiff's services under the contract and would have continued the contract indefinitely but for the wrongful interference."

*Everton v. Williams*, 715 N.W.2d 320; 270 Mich. App. 348 (2006). Trial court erred in its determination that recovery based on a plaintiff's claim for tortious interference with his business expectancy of continued employment was limited to nominal damages because his employment was at-will. The trial court based this determination on holdings in *Feaheny v. Caldwell*, 437 N.W.2d 358; 175 Mich. App. 291 (1989) and *Sepanske v. Bendix Corp.*, 384 N.W.2d 54; 147 Mich. App. 819 (1985). The Court of Appeals held "[the] law limiting recovery to nominal damages in actions involving at-will contracts was overruled by *Health Call of Detroit v. Atrium Home & Health Care Services, Inc.* . . . , 706 N.W.2d 843; 268 Mich. App. 83 (2005)." The court, quoting *Health Call*: "[t]here may exist factual scenarios in which there is a tangible basis on which future damages may be assessed that are not overly speculative despite the at-will nature of the underlying contract."

*Everton v. Williams*, \_\_\_ Mich App \_\_\_; 2006 WL 787927 (2006). Relying on *Health Call of Detroit*, the court held that an at-will employee-plaintiff was not limited to nominal damages in his action for intentional interference with a contractual relationship.

*Linsall v Applied Handling Inc*, 266 Mich App 1 (2005). Once the parties agreed that they had an oral contract regarding sales commissions, the jury was responsible for determining the disputed terms of the contract. The court also addressed whether the plaintiff was entitled to the double damages provided by the Sales Commission Recovery Act, MCL §600.2961(5)(b), on each commission. The court held, "damages pursuant to the penalty provision in MCL 600.2961(5)(b) are limited to a single award of double the amount of commissions due but unpaid, or \$100,000, whichever is less."

*Kelly-Stehney & Associates, Inc v Macdonald's Industrial Products, Inc*, 265 Mich App 105 (2005). Commission checks, commission reports, and letters between the parties satisfied the statute of frauds with respect to an alleged verbal agreement to modify the plaintiff's written commission agreement. The writings did not articulate all the details, but the letters indicated that a new deal had been reached and the 36 commission reports that came with the plaintiff's commission checks reflected the new, agreed upon rate. The plaintiff affirmatively waived the non-modification clause in the original agreement and accepted the oral modification by cashing checks and signing commission statements that reflected the new, reduced commission.

#### **L. DUE PROCESS**

*Miller v. Admin. Office of the Cts.*, 448 F.3d 887; 24 IER Cases 1016 (6th Cir. 2006). A court employee's claims against a county judge and a court administrator alleging deprivation of due process prior to her termination were properly dismissed based upon qualified immunity grounds. A genuine issue of material fact did exist regarding whether plaintiff was a tenured employee and thus had a property interest in her job under Kentucky law. However, evidence showed that the judge and administrator took reasonable steps prior to plaintiff's termination to determine plaintiff's tenure-status and requisite pre-termination procedures. Upon advice of a court director, attorney, and personnel director, the judge and administrator determined plaintiff was non-tenured and terminated her without procedure reserved exclusively for tenured employees. This decision "was simply not 'objectively unreasonable' based on the information [the administrator] and [the judge] had received."

Plaintiff's First Amendment free speech violation claim stemmed from her complaints of "fraud, waste, and mismanagement" by the court administration, which she alleged was the true reason for her termination. The district court's dismissal of this claim based on qualified immunity since plaintiff's claims did not touch on a public concern. Plaintiff's claim under the Kentucky Whistleblower Act was properly dismissed due to a recent Kentucky Supreme Court holding that the act does not impose individual civil liability.

*Silberstein v. City of Dayton*, 440 F.3d 306; 24 IER Cases 153 (6th Cir. 2006). The city's refusal to provide plaintiff with any process prior to termination violated her due process rights and thus defendants were not entitled to summary judgment on the basis of qualified immunity on plaintiff's Fourteenth Amendment claim. In affirming the district court's decision, the Sixth Circuit held that since plaintiff's termination "was not a random, unauthorized deprivation," she was entitled to a pre-deprivation hearing.

*Dimitroff v Michigan*, \_\_\_ F Supp \_\_\_; WD Mich No. 5:05-CV-115 (WD Mich 2006). After his position as director of human resources for a state agency was eliminated during a departmental reorganization, Plaintiff brought a grievance before the Michigan Civil Service Commission alleging that "his position was terminated for reasons other than administrative efficiency." As he prepared his grievance for presentation before the

commission, plaintiff learned of a confidential memo concerning the reorganization. The floppy disk containing the memo file and the only printed copy had been destroyed. Plaintiff then brought a claim under § 1983 in federal court against the State of Michigan, the state agency, and high-level agency administrators, alleging that through their destruction of the disk and paper versions of the memo, he had been denied access to the courts and procedural due process.

Defendants sought summary judgment based on the theories that: “(1) the Court should abstain from exercising jurisdiction in light of Plaintiff’s state grievance proceeding; (2) Plaintiff has failed to state a valid access-to-the courts claim; (3) Plaintiff has failed to articulate a proper deprivation of due process claim.” The District Court declined to abstain from decision based on the Supreme Court’s ruling in *Younger v Harris*, 401 US 37 (1971). Because there was no ongoing state administrative proceeding and because ruling on this case would not constitute duplicative parallel litigation, abstention was unwarranted. The Court did find that the Plaintiff failed to articulate a valid access-to-the-courts claims because his state remedy (with the commission) had not been rendered ineffective by the destruction of the confidential reorganization memo. With regards to his deprivation of due process claim, “Plaintiff essentially makes the same access-to-the-courts claim, this time couched as a deprivation of due process.” His argument that the destruction of the memo made his post-termination grievance proceeding constitutionally inadequate was rejected by the Court. Because Plaintiff still had an “effective post-deprivation remedy before the Michigan Civil Services Commission, the Court believes he will [be] afforded all the process he is due in that proceeding. For these reasons, the Court granted summary judgment in favor of the Defendants on all claims.

*Dean v. City of Bay City*, 2005 WL 3579177 (E.D. Mich 2005), *recons. denied*, 415 F. Supp. 2d 755 (E.D. Mich. 2006). Plaintiff was terminated from his position as director of defendant-city’s electric department. He alleged that he was terminated in retaliation for speaking out on matters of public concern in violation of the First Amendment under § 1983. Plaintiff also alleged that the pre- and post-termination procedures afforded to him were constitutionally inadequate under the Due Process Clause. Plaintiff failed to answer the arguments presented in defendant’s motion for summary judgment on the First Amendment claim. “Even if the Court were to give the plaintiff the benefit of the doubt by concluding that his various comments in the press concerning his disagreement with the city commission [were protected speech] . . ., the Court cannot find evidence that any of these comments played the slightest role in the plaintiff’s termination.”

After finding that the plaintiff was a just-cause employee, the district court found that the pre-termination procedures were constitutionally adequate because they provided “detailed notice of his job performance deficiencies” and plaintiff “was encouraged to respond in writing.” With regards to post-termination procedures, the court held that a city rule providing for optional post-termination arbitration was sufficient even though plaintiff chose not to pursue it. “When [plaintiff] chose not to participate in post-termination arbitration,

he waived whatever remained of his procedural due process claim.

*Ziem v Zehnder*, 2005 WL 1563329 (ED Mich, 2005). Judge Cleland ruled that a public employer's merit rule, which provides that "demotion" will not occur absent just cause, does not create a property interest in, or a reasonable expectation that the employee will maintain, specific titles or job duties. Consequently, the merit rule did not require the employer to extend procedural Due Process before transferring the plaintiff to a different, but identically paying position within the same department.

#### **M. LITIGATION/DISCOVERY**

*Cabrera v Ekema*, 265 Mich App 402 (2005). The trial court abused its discretion in ordering the plaintiffs to produce their social security numbers and immigration documents in an action for the recovery of wages. The information was not relevant to the matter in dispute because: (1) it is the duty of the employer, not the employee, to report earned wages to the federal Wage and Hour Division; (2) the amount of wages the plaintiffs earned would have been reported by and should be in the possession of the employer; and (3) the employees' immigration status — an issue which the employer is duty-bound to assess before employment begins — is not relevant to claims under the FLSA for work actually performed.

The court acknowledged *Hoffman Plastic Compounds, Inc v National Labor Relations Board*, 535 US 137 (2002), wherein the Supreme Court held that awarding back pay to an undocumented alien "for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud" ran contrary to federal immigration policy. The case was irrelevant to the plaintiffs' claims, however, because the plaintiffs were trying to recover for work actually performed. The court also found that Ekema's discovery request was designed to intimidate the plaintiffs into dropping their action.

*Sallis v University of Minnesota*, 408 F3d 470 (CA 8, 2005). The district court did not abuse its discretion in ruling that a discovery request seeking information concerning all discrimination complaints against the university, in any department without temporal limitation, was overly broad and unduly burdensome. It was proper to limit the discovery request to information in the Parking and Transportation Services Department — the department where the plaintiff spent the last 10 years of his employment, and the department where the supervisors he claimed discriminated against him worked.

*Rozell v. Ross-Holst*, 97 FEP Cases 1104 (DC SNY, 2006). Defendant-employer paid for plaintiff's AOL e-mail account as a back-up to defendant's e-mail system. After the employer terminated plaintiff, the employer hacked into the plaintiff's e-mail account and took 400 e-mail messages. The plaintiff brought an action claiming sex harassment, retaliation, violation of New York's electronic privacy act and computer trespass. The plaintiff refused to produce all of the e-mail in her AOL account. The magistrate found that

the 400 e-mails that were obtained by hacking were relevant to the plaintiff's claim that the employer illegally accessed her electronic mail. However, the magistrate refused to order the production of non-intercepted e-mail finding that it was not relevant to either her sex harassment claim or the emotional damages she was seeking.

#### **N. RELEASES**

*Thomforde v International Business Machines Corp*, 406 F3d 500 (CA 8), *reh'g and reh'g en banc denied* (2005). The protected age plaintiff could proceed with his ADEA claim, even though he signed an agreement containing a general release and a covenant-not-to-sue. The "release" part of the agreement stated that the discharged, protected-age plaintiff released his employer from all claims. However, the "covenant-not-to-sue" portion stated that "this covenant not to sue does not apply to actions based solely under the [ADEA]." Although the employer intended the release to be separate from the covenant-not-to-sue, and designed the agreement to be a release of the plaintiff's substantive claims under the ADEA with a clause preserving the plaintiff's statutory right to challenge the validity of the agreement, a lay person could plausibly read the covenant-not-to-sue section as an exception to the general release. The plaintiff therefore did not "knowingly and voluntarily" release his ADEA claim, as required by the OWBPA.

#### **O. PUBLIC POLICY**

*Eastman v Marine Mechanical Corporation*, 438 F3d 544 (CA 6, 2006). The plaintiff brought an action in Ohio state court alleging public policy discharge based upon public policy stated in federal law. The defendant removed it to federal court. The district court refused to grant plaintiff's motion to remand and after discovery dismissed the action. On appeal, the court held, "plaintiff's state-law employment claim alleging wrongful discharge in violation of federal public policy does not raise a substantial federal question over which federal courts may exercise original or removal jurisdiction, because accepting such cases would be [in]consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of §1331."

*Jermer v Siemens Energy & Automation, Inc*, 395 F3d 655 (CA 6, 2005). Neither the plaintiff's "off the cuff" statement, "I still think there's issues," which he made after the employer tested some equipment in response to air quality complaints, nor his request for an air filter in his personal workspace constitute "complaints about workplace safety" sufficient to sustain a public policy discharge claim. The quoted statement, made while the plaintiff was discussing outstanding projects, was vague and did nothing but indicate a preference. The air filter request is akin to adjusting the temperature or opening the window for fresh air. Neither statement clearly connected the employer's conduct to any government policy relating to employee health.

**P. MINISTERIAL EXCEPTION**

*Pardue v The Center City Consortium Schools of the Archdiocese of Washington, Inc*, 95 FEP Cases 1753 (CA DC, 2005). The ministerial exception applies to preclude a white principal at a Catholic elementary school from claiming that she was forced to resign during a campaign to replace white principals with less-qualified black principals. Organizational documents, which state that a principal’s role is to “‘communicate the school’s message’ — one rooted in religious belief — ‘to the faculty, staff, student, and parents,’” establish that religious functions “‘are inextricably intertwined in the school’s mission and in the principal’s role in fulfilling it.”

**Q. ESTOPPEL**

*Love v County of Wayne*, 2005 WL 1529603 (ED Mich, 2005). Judge Steeh ruled that a jury should decide whether an employer was equitably estopped from rejecting an FMLA leave request premised on medical documentation the employer previously accepted and deemed sufficient. A jury could conclude that the employer, in effect, misrepresented that the documentation was sufficient when it accepted it the first time, and that it failed to provide the plaintiff sufficient time to cure the deficiency when it rejected the same documentation the second time. On the other hand, reasonable jurors could conclude that the employer forewarned the plaintiff that her documentation lacked required detail.

*Collins v Snow*, 2005 WL 1342979 (ED Mich, 2005). Judge Edmunds ruled that the plaintiff’s decision to prosecute his discrimination claim through a contractual grievance procedure estopped him from filing an identical complaint with the EEOC. “Plaintiff initially elected to pursue this matter through the negotiated grievance process. He is thus bound by that irrevocable election of remedies and cannot now pursue the sex discrimination claims asserted in this subsequent action.”

*Vines v University of Louisiana at Monroe*, 398 F3d 700 (CA 5, 2005). The federal court enjoined two university professors from prosecuting in state court the same age discrimination claim the EEOC had unsuccessfully tried on their behalf. Although the plaintiff’s were not parties to the prior lawsuit and lacked control over the litigation, the EEOC sought “make whole” relief which the plaintiffs would have unquestionably accepted. The EEOC’s decision not to appeal does not render the representation so inadequate that *res judicata* should not apply.

**R. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND EMPLOYMENT TORTS**

*Baker v. Couchman*, Mich. Ct. App. No. 264914, May 30 2006, (Mich. Ct. App. 2006). Plaintiff, a deputy with the Livingston County Sheriff Department, was assigned as a School Resource Officer (“SRO”) for Pinckney Community Schools. Defendant was the superintendent of the Pinckney Community Schools. Plaintiff brought an action alleging violations of the Whistleblower’s Protection Act and intentional interference with a

contractual relationship. The lower court granted defendant's motion for summary disposition on both counts.

Plaintiff did not appeal the dismissal of his Whistleblower claim. Citing MCL 691.1407(5), the Court of Appeals held that defendant-superintendent was the highest appointed executive official of a school district and was therefore entitled to tort immunity provided his acts fell within the scope of his executive authority. Closely monitoring plaintiff's activities as SRO, expressing his concerns about the plaintiff's performance, and petitioning to have plaintiff removed from his SRO position were all held to have been acts within the scope of defendant-superintendent's executive authority. The court also held that this scope of authority also included setting "boundaries on the nature and extent of plaintiff's law enforcement activities while acting as SRO."

Although some of the defendant-superintendent's acts allegedly constituting tortious interference were held to have been appropriate and within the scope of executive authority, others were found by the Court of Appeals to have been "decidedly outside" this scope and were therefore not protected from tort liability by governmental immunity. Such acts included interfering with the collection of evidence, directing witnesses not to cooperate with plaintiff's investigations, actively facilitating third-party complaints against the plaintiff (by driving complainants to the sheriff's department), and even preventing police investigations by plaintiff. All of these activities were alleged by plaintiff to have resulted in the ultimate removal of plaintiff from his position as SRO and subsequent reassignment to patrol duty.

The Court of Appeals affirmed the district court's denial of defendant's motion for summary disposition based on governmental immunity on the claim of tortious interference with a business relationship. It held a jury could conclude that defendant-superintendent's acts falling outside the scope of his executive authority "were either *per se* wrongful, or, if lawful, done with malice and unjustified in the law" and were the ultimate cause of plaintiff's transfer.

In Judge O'Connell's partial concurrence and partial dissent, he expressed concern that the majority's narrow construction of the term scope of authority would "expose[] all public officials to civil liability for an inartful statement or an alleged wrongful decision." He argued plaintiff essentially became an employee of the school district, ultimately under the supervision and direction of defendant-superintendent. Additionally, Judge O'Connell stated he would have reversed the denial of summary disposition on the claim of tortious interference because he believed plaintiff had not demonstrated any injury as a result of his transfer from SRO to patrol duty.

***Pollard v EI DuPont de Nemours Co***, 412 F3d 657 (CA 6, 2005). Although management did not deliberately set out to harm the plaintiff, the district court properly found after a bench trial that the employer intentionally inflicted emotional distress on the plaintiff by making "no real effort to intervene to stop the [sexual] harassment that had been brought to

their attention on numerous occasions.” Under Tennessee law, a corporate body may be liable for intentional infliction of emotional distress if its corporate supervisors and officials recklessly disregard outrageous conduct. Moreover, the plaintiff’s immediate supervisor attended a party celebrating the plaintiff’s departure, which “raises a strong inference of the intent to cause emotional distress....”

*EEOC v Wolverine Bronze Co*, 2005 WL 1047299 (ED Mich, 2005). In granting the intervening plaintiff’s motion to sue his former employer for intentional infliction of emotional distress, Judge Steeh ruled that the plaintiff could establish that his former employer is vicariously liable for the conduct of a part owner, a plant foreman, the plaintiff’s direct supervisor and some coworkers. This was particularly true where the employer took no corrective action in response to the plaintiff’s complaints and where plaintiff alleged, *inter alia*, that a part-owner: “told Plaintiff he was surprised he would complain about racial harassment after lending him money;” “told Plaintiff that as long as Kowalke and Wutkie were signing his paychecks, he was not to worry about their conduct”; “told Plaintiff nobody was ‘shackled’ there and if he did not like it he could leave”; “told Plaintiff that the police did not question him about his dark tinted windows because he was not ‘the wrong color’”; “told Plaintiff he should not speak with other employees if Plaintiff was only going to complain about racial slurs and harassment;” “followed Plaintiff around the plant, throwing metal bolts at him, and kicking or tripping Plaintiff while he was trying to work”; and “pulled a plastic garbage bag over Plaintiff’s head and torso, telling him ‘We were going to have a blanket party for you.’”

#### **S. ASSAULT AND BATTERY/EXCLUSIVE REMEDY CLAUSE**

*Kennedy v RWC, Inc*, 359 F Supp 2d 636 (ED Mich, 2005). The exclusive remedy clause of the Michigan Workers Disability Compensation Act does not prevent the plaintiff from pursuing an assault and battery claim against five co-workers, provided the plaintiff amends his complaint to allege that they intended to injure him.

The plaintiff alleged that five male co-workers repeatedly groped his genital region and buttocks at work, causing him to “jerk upright” and re-injure his surgically repaired back. Although these co-workers could not be individually liable for sexual harassment under state or federal law, Judge Lawson ruled that they could be liable for intentional torts such as assault and battery. “[A]lthough an employee may maintain a workers’ compensation action for on-the-job injuries resulting from ‘horseplay,’ that action is not his exclusive remedy — and he may also sue his co-workers for their ‘horseplay’ — if that conduct also amounts to ‘intentional torts,’ as that term has been defined by the Michigan legislature. In other words, ‘horseplay’ can be both compensable under the Act and an intentional tort within the Act’s definition that could be prosecuted in the traditional manner, so that the Act’s provisions would provide the injured worker *a* remedy, but not his *sole* remedy.”

## **T. NON-COMPETE AND CONFIDENTIALITY AGREEMENTS**

*St. Clair Medical, P.C. v. Borgiel*, \_\_\_ Mich App \_\_\_; 2006 WL 141714 (2006). Defendant, a doctor, signed a covenant not to compete with the plaintiff. The covenant restricted his ability to engage in a medical practice within seven miles of defendant's two clinics for one year after he left defendant's employment. There was a \$40,000 liquidated damages clause in the covenant not to compete. When defendant quit and set up an office within seven miles of one of plaintiff's clinics, plaintiff brought an action to collect the liquidated damages. On appeal from an order granting summary disposition to plaintiff, defendant argued that since he did not perform any services at the clinic that was seven miles from his new office, he did not violate the covenant. The court rejected this argument holding that the covenant not to compete unambiguously stated that it applied to both clinic and did not limit its provision to the clinic where defendant worked. The court also found that the plaintiff had an interest in retaining its patients so as to regain goodwill with them. The court also found the seven mile restriction from both clinics was reasonable and protected the plaintiff's interest in retaining patient good will. Plaintiff argued that the covenant violated the "Principles of Medical Ethics" issued by the American Medical Association. The court found that the AMA's ethical rules "merely reflected the common law rule of reasonableness and states that restrictive covenants are unethical only if they are excessive in geographical scope or duration." Affirming the summary disposition, the court also found that the \$40,000 liquidated damages were reasonable in relation to the possible injury plaintiff might suffer.

*American Communications Network, Inc v Steuben Associates*, 2005 WL 1355070 (ED Mich). A former employee who published disparaging information about his former employer on the Internet can be liable for violating the confidentiality clause in a settlement agreement. Liability was proper even if the employer published the information first, because "there is no provision in the confidentiality provision that a breach by a party relieves the other party of the duty to maintain confidentiality." Also, the truth or falsity of the information is irrelevant, since the settlement agreement prevented disclosure of "any" information.

## **U. INJUNCTIVE RELIEF**

*McNeill v Wayne County*, 2005 WL 1981292 (ED Mich, 2005). Judge Rosen refused to grant a pre-trial motion to enjoin an allegedly discriminatory transfer. Civil rights laws authorize relief that can make an employee whole, so courts are "understandably reluctant to undertake the fact-intensive assessment that would be necessary to make a threshold determination of the likelihood of success on the merits of a Title VII or ADEA claim ... based only on a plaintiff's allegations and largely speculative beliefs advanced before the parties have engaged in any sort of discovery." This is particularly true where plaintiff filed a 27-page complaint with almost 60 exhibits, had pending union grievances regarding the contested internal transfer to a different job site, and failed to factually support her claim that the transfer was incompatible with her medical restrictions.

*EEOC v El Du Pont De Nemours and Co*, 16 AD Cases 604 (ED La, 2005). Even though it prevailed on the underlying ADA claim, the EEOC was not entitled to an injunction requiring the employer to provide ADA training. Charging party did not seek reemployment, did not purport to represent a class of individuals who may experience similar discrimination, and did not establish that the company was likely to discriminate against her again. Nor is the EEOC entitled to an injunction prohibiting retaliation against testifying witnesses. None of the plaintiff's witnesses currently work for Du Pont, and nobody testified that they would likely face retaliation from Du Pont.

## V. SAME ACTOR INFERENCE

*Coghlan v American Seafoods Co, LLC*, 413 F3d 1090 (CA 9, 2005). Same actor inference, which applied because the decision maker made a favorable decision for plaintiff one year before making the contested negative decision, creates a "strong inference" against discrimination "that a court must take into account on a summary judgment motion." "The point ... is simply that when the allegedly discriminatory actor is someone who has previously selected the plaintiff for favorable treatment, that is very strong evidence that the actor holds no discriminatory animus, and the plaintiff must present correspondingly stronger evidence of bias in order to prevail." Allegation that three years elapsed between the favorable treatment and the contested demotion "would be significant only had Caughlan proffered evidence suggesting that Andreassen developed a bias against non-Norwegians during that period...."

*Peterson v Scott County*, 406 F3d 515 (CA 8, 2005). The same actor inference did not apply where the decision maker hired the protected age plaintiff, not for the position she sought, but for a less desirable interim position. "Evidence of this type of hiring may show discriminatory intent rather than raising a presumption against discrimination."

*Salami v North Carolina Agricultural & Technical State Univ*, 394 F Supp2d 696 (MD NC, 2005). Two factors worked against the application of the same actor inference in a case of alleged national origin and religious discrimination brought by an Islamic Iranian. First, the temporal gap between the hiring and firing was 18 months, instead of the 6 month gap that existed in *Proud v Stone*, 945 F2d 796 (CA 4, 1991). Second, and more importantly, a discrete event that happened shortly before the plaintiff's termination — the September 11, 2001 attacks — may have influenced the decision maker's opinion. The fact that the decision maker "resumed hiring Iranians in 2003 does not necessarily preclude the inference that [he] suffered a discriminatory animus during the time period of 2001-2002."

## W. PREEMPTION

*Roddy v Grand Trunk Western Railroad, Inc*, 395 F3d 318 (CA 6, 2005). The Railway Labor Act, 45 USC §151, *et seq*, does not have the extraordinary preemptive force necessary to create federal removal jurisdiction over the plaintiff's state law civil rights claim.

*Brown v American Axle & Mfg, Inc*, 396 F Supp 810 (ED Mich, 2005). Judge Duggan rejected the employer's preemption theory, which was based on the argument that its employment decision was dictated by or consistent with the terms of the CBA. "[T]he Sixth Circuit has consistently ... held that a defendant's defense that certain treatment was permitted or required by a CBA does not support removal to federal court."

## X. FLSA

*Adair v Charter County of Wayne*, \_\_\_ F.3d \_\_\_; 11 WH Cases2d 985 (6th Cir. 2006). Plaintiffs alleged that defendant-county's policy, which required them to carry a pager at all times, was a burden so onerous that it prevented employees from effectively using their time for personal pursuits. Plaintiffs also alleged that a requirement that they live within 30 minutes driving distance of the airport and a temporary order that they stay at home to wait for calls during the month after September 11, 2001 were burdensome enough to require overtime compensation under the FLSA. The Sixth Circuit affirmed the district court's grant of summary judgment in favor of defendant-county, holding that the policy's only requirement was that the police officers carry the pagers at all times and not that they were required to respond to all pager calls. While the Plaintiffs were required to live within a certain proximity of the airport, they were permitted to travel anywhere in Michigan as long as they also carried their pager. The temporary order requiring officers to stay at home shortly after September 11th did not restrict their activities in anyway because they were called on only a few occasions. These findings supported the Court's holding that the burdens imposed on the officers were insufficient to require that overtime be paid under the FLSA.

After the original complaint had been filed, defendant-county required that all airport authority police officers return their pagers. Plaintiffs then amended their complaint to include claims of retaliation in violation of the FLSA and § 1983. The Court also affirmed summary judgment on these claims in favor of defendant-county, since Plaintiffs failed to show that the request to return the pagers was a materially adverse employment action because the premise of their initial FLSA overtime claim was that they were dissatisfied with carrying their pagers, and no change in wages, benefits, or responsibilities had occurred.

*Acs v Detroit Edison Co.*, \_\_\_ F3d \_\_\_; 11 WH Cases2d 623 (CA6, 2006). Plaintiffs were classified as salary exempt employees under the FLSA. Defendant paid them a annual salary in 26 biweekly payments. Under defendant's pay system, the plaintiff's were required to input their hours each week. Defendant's payroll system had a number of safe guards to insure that the employees would be paid for 40 hours a week. However, due to employees' errors, there were some instances of plaintiffs occasionally receiving less than their 26<sup>th</sup> share of salary. Plaintiffs brought this action alleging that defendant's failure to pay a 26<sup>th</sup> share of their salary resulted in the loss of their exempt status requiring defendant to pay them overtime. On appeal from the district court's order granting summary judgment to the defendant, the court, relying on Wage and Hour Div., Opinion Letter (July 9, 2003), held

“Because Detroit Edison has established that the plaintiffs “regularly receive[ ] ... a predetermined amount constituting all or part of” their compensation, 29 C.F.R. §§541.118(a), and because that amount was “not subject to reduction because of variations in the quality or quantity of work performed,” *id.*, the company satisfied the Act's salary-basis exemption. And because [a]n employee's time-entry error or omission ...that results in an initial payment by the Company to an employee of less than”the predetermined amount “is not an unlawful ‘docking’ or deduction,” pay variations caused by sporadic under-reporting of plaintiffs' hours do not alter their exempt status.”

***Casto v. Royal Oak Indus., Inc., Bronson Precision Prods. Div.***, 2006 WL 322485 (W.D. Mich. 2006). Plaintiff's inaccurate resume, which “grossly overstated his educational record, exaggerated his military experience, and misrepresented his work experience,” did not persuade the court that plaintiff should be estopped from claiming he was a non-exempt employee for purposes of the FLSA. For this reason, plaintiff was allowed to seek recovery of overtime compensation. “To hold otherwise would place primary importance on what duties Defendant expected Plaintiff to perform, rather than what he *actually* performed.” “Such a holding would run contrary to the regulations since it is the work that Plaintiff *actually* performed that controls the Court's exemption inquiry (*i.e.*, a duties test), not the work Defendant perceived Plaintiff was performing.”

***Finke v Kirtland Community College Bd of Trustees***, 359 F Supp2d 593 (ED Mich, 2005). Actions for contribution or indemnity are “not allowed under the FLSA.” The college was therefore unable to seek contribution or indemnification from an administrator who could be considered a co-employer under the FLSA, but whom plaintiff chose not to sue.

***Beauchamp v Flex-N-Gate LLC***, 357 F Supp2d 1010 (ED Mich, 2005). Judge Rosen ruled that a production supervisor was “employed in a bona fide executive capacity,” and therefore exempt from FLSA overtime requirements. Cautious not to focus merely on the plaintiff's job title, Judge Rosen noted that the documentary and testimonial evidence showed that the plaintiff was paid at least \$37,000 per year, assigned employees work, handled employee complaints, recommended changes in work procedures and production methods, enforced company policy, disciplined employees, trained and evaluated employees, reviewed employees' performance and supervised as many as twenty subordinates. Although some of the plaintiff's authority was limited by internal and external constraints, “nothing in the governing regulations or relevant case law requires that a supervisor must have unfettered discretion in the performance of his management duties in order to be deemed an ‘executive.’”

## **Y. BANKRUPTCY DISCRIMINATION**

***White v Kentuckiana Livestock Market, Inc.***, 397 F3d 420 (CA 6, 2005). The word “solely,” as used in the section of the Bankruptcy Code which prohibits employers from discriminating against employees “solely” because they sought bankruptcy protection, should be given its

plain meaning. Consequently, unlike Title VII actions where the plaintiff must show only that their prohibited characteristic was one factor in the adverse employment action, a plaintiff under the Bankruptcy Code must show that the bankruptcy filing was the only reason for the adverse action, and that no other factor played a role in the employer's decision.

## **Z. STATISTICAL EVIDENCE**

*Isabel v City of Memphis*, 404 F3d 404 (CA 6, 2005). The district court did not abuse its discretion in admitting statistical evidence that did not employ the EEOC's four-fifths rule in a disparate impact case. Case law does not forbid reliance on alternative statistical analysis in Title VII cases. It requires only that the evidence is "relevant."

## **AA. ISSUE PRESERVATION**

*Miller v EBY Realty Group, LLC*, 396 F3d 1105 (CA 10, 2005). A motion challenging the sufficiency of evidence in support of the plaintiff's age discrimination claim does not preserve an employer's challenge to a claim that it "willfully" violated the ADEA. "While it might be argued that a sufficiency challenge to finding willful discrimination is encompassed in a challenge to finding age discrimination in general, we find this position in error. To prove willful discrimination the plaintiff must establish that the 'employer either knew or showed reckless disregard' as to whether its conduct violated the ADEA. This evidentiary showing is distinct from the prima facie case and pretext standards discussed above. Therefore, by failing to challenge willfulness directly, EBY did not alert Mr. Miller as to a possible evidentiary deficiency on this issue, and Mr. Miller was not afforded an opportunity to correct such problem before the case was submitted to the jury, if one existed. ... As such, Eby is barred from raising this issue on appeal."

## **BB. JURY DEMAND**

*Lutz v Glendale Union High School*, 403 F3d 1061 (CA 9, 2005). The district court erred in submitting an ADA claim to the jury, where the plaintiff's complaint requested a jury trial on damages issues, but not on liability. Rule 38 gives litigants a choice: "either list specific issues for the jury to consider, or make a general demand which will be deemed to cover all issues triable to a jury." "Because Lutz's complaint asked for a jury on some issues [*i.e.*, back pay and emotional damages] but not others [*i.e.*, liability], a careful reader would not reasonably conclude that Lutz wanted a jury on all issues presented in the complaint."

The district court also erred in permitting the jury to decide the proper amount of back pay. "[T]here is no right to have a jury determine the appropriate amount of back pay under Title VII, and thus the ADA, even after the Civil Rights Act of 1991. Instead, back pay remains an equitable remedy to be awarded by the district court in its discretion." The court thus vacated the verdict for the plaintiff and remanded the case with instructions that the district

court decide liability and, if necessary, back pay.

## CC. CLASS ACTION SUITS

*Comer v Wal-Mart Stores, Inc.*, \_\_\_ F3d \_\_\_; 6th Cir No. 05-1761 (CA 6 2006). Plaintiffs were former Assistant Store Managers (ASMs) at Defendant's retail stores. As provided by FLSA provisions, Plaintiffs filed an action on their own behalf and for "similarly situated" persons, alleging that they were entitled to overtime back pay because Defendant had improperly classified them as exempt employees under the FLSA's executive exemption. Plaintiffs' belief that they did not fall within the executive exemption was based on, among other reasons, that they "continuously . . . perform the same tasks as hourly employees." The district court gave "conditional" approval of Plaintiffs' notice of rights and consent to be sent to ASMs employed within the preceding three years in Michigan, Northern Indiana, and Northern Ohio. An order was issued that the notice be sent to 1,200 current and former ASMs, but allowed Defendant to object to Plaintiffs' proposed notification document or to submit an alternative document for review.

On appeal, the Sixth Circuit held that it did not have jurisdiction to hear Defendant's appeal regarding the notification document. The Court based its decision on the test for collateral order review as set forth by the Supreme Court in *Cohen v Beneficial Indus Loan Corp*, 337 US 541 (1949). The Sixth Circuit found that the first *Cohen* element had been satisfied ("[the order] conclusively determines a disputed question") had been met, since after notice was given to ASMs pursuant to the district court's order, the ASMs could not later be "denoticed." The second element ("that question is separate from the merits of the action") was also satisfied, since the order involves notice to potential plaintiffs, not the merits of claims they may later pursue. Only through the Defendant's "proposed highly constrained lens" could the third element ("the matters decided in the order at issue will be effectively unreviewable on appeal from a final judgment") be satisfied. Finally, the fourth element ("[the order] is not tentative, informal, or incomplete") was not met because the district court issued its order "conditionally," that is, it allowed Defendant an opportunity to object to the proposed notification and submit its own document. This conditional order was therefore "tentative." For these reasons, under the *Cohen* test the Court found that it did not have jurisdiction to hear Defendants' appeal. The Court held that the correct inquiry on appeal should have focused on "whether the notified persons will ultimately be viewed as properly notified," instead of Defendants' "suggested focus on the fact of notice." Under this more properly focused inquiry, the Court held that applying *Cohen* made it even more clear that the Court did not have jurisdiction to hear the appeal.

*Jackson v Wal-Mart Stores, Inc.*, 2005 WL 3191394 (Mich App). The trial court did not clearly err in denying the plaintiffs' petition for class certification in a case alleging that the employer improperly required employees in Michigan stores to perform "off the clock" work, without compensation. The trial court must not "examine the merits of the case" and must "accept as true the allegations made in support of the request for certification" when

evaluating the class certification petition. However, it must conduct a “rigorous analysis” to evaluate whether the prerequisites for class certification are satisfied and should not “blindly rely on conclusory allegations’ that merely ‘parrot’ the requirements for class certification.”

To establish “numerosity,” the “plaintiffs were required to provide some evidence reasonably estimating or otherwise showing the number of proposed class members who suffered actual injury.” The plaintiffs’ submission estimating the total number of Wal-Mart employees in Michigan during the relevant time period was insufficient, since the “plaintiffs offered no proof or estimate of the size of the actual proposed class, i.e., those employees who were forced to work off the clock or forgo rest and meal breaks during that period.”

The “commonality” and “typicality” requirements were lacking because the plaintiffs based their claim on breach of implied contracts and unjust enrichment — claims that require the plaintiff to establish inequity resulting from “a particular employee having performed work off the clock or miss[ing] a break” — and “many of the claims will stand or fall, not on the answer to the question whether Wal-Mart, as the result of a policy or practice that caused its employees not to report all time worked or to forgo required rest and meal breaks, received a benefit, but on the resolution of the highly individualized question whether it would be inequitable for Wal-Mart to retain that benefit without compensation....” This held particularly true where “the evidence presented by the parties indicated that while some potential class members were expressly required by their supervisors to work off the clock or forgo a break, others had either never performed off the clock or simply chose to do so for a number of personal reasons,” including “forgetfulness and mere convenience.” “Indeed, a named plaintiff who proves his or her claim will not necessarily have proven the claim of any other member of the proposed class....”

The “adequacy of representation” factor could not be satisfied, due to the “inherent conflict” between the named plaintiffs and the “hourly department managers” in the proposed class. “[S]uch managers may in fact be the cause of another class member’s complaint.” The plaintiffs’ claim that the policy in question was on the “corporate level” instead of the “department level” ignored and was inconsistent with testimony that some proposed class representatives were asked by managers to perform work off the clock.

Finally, the “superiority” factor, which looks at the manageability of the proposed class action, worked against class certification. “Here, the problems inherent in managing the proposed class action include the involvement of more than 96,000 potential plaintiffs spread across the state, who have worked or are currently working in more than forty different departments of eighty-five stores over a period of six years. Given these factors, we cannot conclude that the trial court clearly erred in finding that this matter would [be] unmanageable and, therefore, not superior, as a class action suit.”