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I. SUPREME COURT DECISIONS

A. Age Discrimination in Employment Act

1. Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (June 12, 2000).

The Supreme Court unanimously held that a McDonnell Douglas-Burdine *prima facie* case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's asserted legitimate, nondiscriminatory reason for its decision, may be adequate to sustain a finding of liability for intentional discrimination. In this case, the Fifth Circuit erred by disregarding critical evidence and failing to draw all reasonable inferences in favor of the plaintiff when it held that the employer was entitled to judgment as a matter of law under Rule 50, Fed.R.Civ.P.¹

Plaintiff Roger Reeves was fired at the age of 57 after working for 40 years for Sanderson Plumbing Products. At the time of his termination, he was told by Powe Chestnut, the director of manufacturing and the husband of Sanderson's president, that his discharge from his job as a supervisor in the Hinge Room was due to his failure to report the absence of a single employee for two days. At trial, however, the employer presented evidence that Reeves was fired for "shoddy record keeping" (including incorrectly recording the absences and hours of several employees over a period of time), failing to discipline infractions of work rules, and intentionally falsifying company pay records.

Reeves made a "substantial showing" that the employer's explanation was false. He offered evidence that he had properly maintained attendance records and that he was not responsible for any failure to discipline late and absent employees. Reeves also presented evidence that Chestnut, the actual decision-maker behind his firing, told him that he "was so old [he] must have come over on the Mayflower" and that he "was too damn old to do [his] job," and treated him differently than an

¹Reeves is the latest in a string of unanimous Supreme Court decisions reversing appellate courts, most often the Fourth and Sixth Circuits, that have rendered opinions interpreting rights protected by the fair employment laws in a narrow and hostile manner. See Wright v. Universal Maritime Service Corp., 118 S.Ct. 391 (1998) (a general arbitration clause in a collective bargaining agreement was not sufficiently clear and specific to bar plaintiff's ADA suit) (reversing 4th Circuit); Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (former employee may sue under Title VII for retaliation that occurred after termination of employment) (reversing 4th Circuit); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) (an inference of discrimination is established when an employee who replaces another employee is "substantially younger," even if the replacement employee is also within the protected age group) (reversing 4th Circuit); McKenna v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) (after-acquired evidence of wrongdoing by plaintiff does not bar a finding of liability and the award of some remedy) (reversing 6th Circuit); Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (to be actionable, a hostile environment is not required to seriously affect plaintiff's psychological well-being).

otherwise comparable employee in his mid-thirties.

The district court instructed the jury that the plaintiff was required to show "by a preponderance of the evidence that his age was a determining and motivating factor" in the employer's decision to terminate him. The court also instructed the jury that, in order to establish that the employer's explanation was a pretext for discrimination, the plaintiff had to demonstrate: "1, that the stated reasons were not the real reasons for plaintiff's discharge; and 2, that age discrimination was the real reason"

The jury returned a verdict in the plaintiff's favor, awarding him \$35,000 in compensatory damages, and found that the violation was willful. The district court accordingly entered a judgment for the plaintiff in the amount of \$70,000, plus \$28,490 in front pay, and denied the employer's Rule 50 motions for judgment as a matter of law. The Fifth Circuit reversed, holding that the plaintiff had not introduced sufficient evidence that he was discharged because of his age.

The Supreme Court granted certiorari to resolve a conflict between the "pretext only" circuits (3d, 6th, 7th, 9th, 10th, and 11th) and the "pretext plus" circuits (1st, 2d, 4th, and 5th), and to further refine the McDonnell Douglas-Burdine framework for analyzing intentional discrimination claims based on circumstantial evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

The Fifth Circuit, like the other "pretext plus" circuits, "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." Citing St. Mary's Honor Center, the Supreme Court reiterated that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." The Court explained:

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. ... In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. ... Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. ... Thus, a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

The Court states that evidence establishing a *prima facie* case plus evidence of the falsity of the employer's asserted justification will not always be adequate to sustain a jury's finding of liability. Justice Ginsburg's concurrence, however, notes that such evidence "ordinarily" will be sufficient, and that taking the ultimate question of liability away from the jury in such cases should be "uncommon."

The employer in Reeves was not entitled to judgment as a matter of law. The Fifth Circuit misapplied the standard of review under Rule 50 by disregarding critical evidence and by failing to draw all reasonable inferences in favor of the plaintiff, thereby impermissibly substituting its judgment concerning the weight of the evidence for the jury's.

2. Kimel v. Florida Board of Regents, 120 S.Ct. 631 (Jan. 11, 2000).

Congress has the power under § 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity. The ADEA contains a clear statement that Congress intended to exercise this power, but the attempted abrogation exceeded Congress' authority because the ADEA is not "appropriate legislation" to enforce the provisions of the Fourteenth Amendment.

The Court previously held that the ADEA constitutes a valid exercise of Congress' Commerce Clause power under Article I, § 8 of the Constitution, and that it does not violate the Tenth Amendment. EEOC v. Wyoming, 460 U.S. 226 (1983). But, applying its recent decisions in Seminole Tribe v. Florida, 517 U.S. 44 (1996), Alden v. Maine, 527 U.S. 706 (1999), College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999), and Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999), the Court majority now holds that Congress does not have the power to authorize private individuals to bring ADEA suits against states or state agencies in either federal or state court.

Under § 5 of the Fourteenth Amendment, Congress has the power to go beyond parroting the precise wording of the Amendment; it has "the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." But Congress cannot "decree the substance of the Fourteenth Amendment's restrictions on the States. ... It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation." (Quoting City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (emphasis added)).

The Court has adopted a "congruence and proportionality" test to determine whether legislation constitutes appropriate legislation to enforce the Fourteenth Amendment or an impermissible substantive redefinition of Fourteenth Amendment rights. The ADEA is not "appropriate legislation" under this test. First, the substantive requirements of the ADEA are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act. Unlike race or gender, age is not a "suspect classification" subject to either "strict scrutiny" or "intermediate scrutiny" under the Equal Protection Clause. Instead, the Court has upheld age classifications where they are rationally related to a legitimate state interest. Under the Fourteenth Amendment, a state may rely on age (but not race or gender) "as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," and age classification is "presumptively rational." Under the ADEA, on the other hand, an employer "cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." (Quoting Hazen Paper v. Biggens, 507 U.S. 604, 611

(1993)). The ADEA, in other words, "has effectively elevated the standard for analyzing age discrimination to heightened scrutiny."

Second, the ADEA's legislative record indicates that Congress' 1974 extension of the Act to the states was "an unwarranted response to a perhaps inconsequential problem." Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age, and no reason to believe that broad prophylactic legislation was necessary in this field.

After its decision in Kimel, the Court vacated and remanded two Equal Pay Act cases for reconsideration in light of Kimel. State Univ. of New York v. Anderson, 120 S.Ct. 929 (2000); Illinois State Univ. v. Varner, 120 S.Ct. 928 (2000). The Court has also granted certiorari in three ADA Eleventh Amendment cases, two of which subsequently settled. Dickson v. Florida Dept. of Corrections, 139 F.3d 1426 (11th Cir. 1998), cert. granted, No. 98-829 (Jan. 21, 2000), cert. dismissed, 120 S.Ct. 1236 (Feb. 23, 2000); Alsbrook v. Maumelle, 13 BNA EDR 186 (8th Cir. 1999), cert. granted, No. 99-423 (Jan. 25, 2000), cert. dismissed, 120 S.Ct. 1265 (March 1, 2000); Garrett v. Univ. of Alabama, 193 F.3d 1214 (11th Cir. 1999), cert. granted, 120 S.Ct. 1669 (April 17, 2000). The Court's actions in these cases raise questions about whether the Kimel analysis applies to statutes which prohibit gender and disability discrimination.

B. Restraints on Federal Enforcement Powers

1. Kimel v. Florida Board of Regents, 120 S.Ct. 631 (Jan. 11, 2000), supra (Eleventh Amendment).
2. United States v. Morrison, 120 S.Ct. 1740 (May 15, 2000).

In enacting 42 U.S.C. § 13981, a section of the Violence Against Women Act of 1994 which provides a federal civil remedy for the victims of gender-motivated violence, Congress exceeded its authority under the Commerce Clause. Gender-motivated crimes of violence are not "economic activity," and Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Cf. United States v. Lopez, 514 U.S. 549 (1995).

Section 13981 also cannot be sustained under § 5 of the Fourteenth Amendment. The Court concedes that Congress compiled a "voluminous congressional record" demonstrating the existence of "pervasive bias in various state justice systems against victims of gender-motivated violence." But this was not enough to save the statute. The "Fourteenth Amendment, by its very terms, prohibits only state action." See United States v. Harris, 106 U.S. 629 (1883); Civil Rights Cases, 109 U.S. 3 (1883). Although Congress has the authority under § 5 to prohibit conduct which is not itself unconstitutional, such prophylactic legislation "must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" See Kimel, supra. Section 13981 does

not pass the "congruence and proportionality" test because it "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." Additionally, § 13981 is not limited to the states in which Congress found there was a problem, but instead applies uniformly throughout the nation.

The Court did not suggest that it was backing away from its prior decisions holding that Congress had the constitutional authority, at least under § 2 of the Thirteenth Amendment, to enact 42 U.S.C. §§ 1981 and 1982, prohibiting racial discrimination by private persons in the making and enforcement of contracts and in the sale or rental of property. See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (§§ 1981 and 1982); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) (§§ 1981 and 1982); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (§ 1981); Runyon v. McCrary, 427 U.S. 160 (1976) (§ 1981); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (§ 1981). Nor did the Court question the continued validity of its prior decisions holding that Congress had the power under the Commerce Clause to enact Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations by private persons. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

3. Christensen v. Harris County, 120 S.Ct. 1655 (May 1, 2000).

Nothing in the Fair Labor Standards Act or its implementing regulations prohibits a public employer from compelling employees to use their accrued compensatory time in order to avoid paying the employees in cash for that time. A Department of Labor opinion letter taking a contrary position is not entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). While an agency's regulation containing a reasonable interpretation of an ambiguous statute is entitled to such deference, "[i]nterpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference." Instead, such interpretations are "entitled to respect," Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), only to the extent that they have the "power to persuade." Id.

4. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S.Ct. 1858 (May 22, 2000).

A private individual has Article III standing to bring a *qui tam* action in federal court on behalf of the United States under the False Claims Act. But a state is not a "person" subject to *qui tam* liability under the Act. Therefore, the False Claims Act does not subject states or state agencies to liability in federal-court suits by private individuals on behalf of the federal government. The Court expressed "serious doubt" as to whether such an action would be barred by the Eleventh Amendment, but did not resolve the issue.

5. But cf. Geier v. American Honda Motor Co., 120 S.Ct. 1913 (May 22, 2000).

Pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, the Department of Transportation in 1984 promulgated Federal Motor Vehicle Safety Standard 208, which required automobile manufacturers to gradually phase-in passive restraint systems, starting with a 10% requirement for 1987 vehicles. Plaintiff, injured in an accident while driving a 1987 Honda Accord, sued under District of Columbia tort law, claiming that Honda was negligent in not equipping the car with a driver's side airbag. The Court held that plaintiff's "no airbag" lawsuit conflicts with the objectives of FMVSS 208 and is therefore pre-empted by the Act.

C. Fourteenth and Fifteenth Amendments

1. Village of Willowbrook v. Olech, 120 S.Ct. 1073 (Feb. 23, 2000).

A claim may be brought under the Equal Protection Clause on behalf of a "class of one," where the plaintiff alleges that she has been intentionally treated differently from other similarly situated persons and that there is no rational basis for the difference in treatment. The purpose of the Equal Protection Clause is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination" The number of individuals in a class is immaterial for equal protection analysis.

2. Rice v. Cayetano, 120 S.Ct. 1044 (Feb. 23, 2000).

A provision of the Hawaiian Constitution, limiting the right to vote for trustees in a statewide election to persons of native Hawaiian ancestry, violates the Fifteenth Amendment. Ancestry, as used here, is a proxy for race. The classification constitutes racial discrimination because it singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." Cf. Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (§ 1981); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (§ 1982).

D. Evidence and Procedure

1. Ohler v. United States, 120 S.Ct. 1851 (May 22, 2000).

A party who preemptively introduces evidence of a prior conviction on direct examination after losing on a motion *in limine* to exclude the evidence may not challenge the *in limine* ruling on appeal. Therefore, in order to appeal the *in limine* ruling, such a party must forgo the tactical advantage of "inoculating" the jury by introducing evidence of his or her own conviction.

2. Weisgram v. Marley Co., 120 S.Ct. 1011 (Feb. 22, 2000).

Rule 50, Fed.R.Civ.P., permits an appellate court to direct the entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining, properly admitted, evidence is insufficient to constitute a submissible case. Cf. Reeves v. Sanderson Plumbing Products, Inc., supra.

E. ERISA

1. Harris Trust and Savings Bank v. Salomon Smith Barney Inc., 120 S.Ct. 2180 (June 12, 2000).

Section 502(a)(3) of the Employment Retirement Income Security Act of 1974 (ERISA) authorizes a plan "participant, beneficiary, or fiduciary" to bring a civil action for "appropriate equitable relief" to redress violations of ERISA Title I. A § 502(a)(3) action may be brought against a nonfiduciary "party in interest" to a prohibited transaction barred by § 406(a) of ERISA.

2. Pegram v. Herdrich, 120 S.Ct. 2143 (June 12, 2000).

Plaintiff's husband's employer contracted with a physician-owned HMO to provide prepaid medical services to its employees and their families. After an HMO doctor required plaintiff to wait eight days for an ultrasound examination of her inflamed abdomen, her appendix ruptured, causing peritonitis. Plaintiff sued the HMO and the doctor, alleging that they breached ERISA fiduciary duties by providing medical services under an incentive scheme which rewarded the HMO's physician-owners for providing less care to patients. The Court held that mixed treatment and eligibility decisions (*i.e.*, decisions relying on medical judgments to make plan coverage determinations) by HMO physicians are not fiduciary decisions under ERISA, and that plaintiff therefore did not state an ERISA claim.

F. Other Decisions

1. Boy Scouts of America v. Dale, 120 S.Ct. ____, No. 99-699 (June 28, 2000).

The Boy Scouts revoked plaintiff's adult membership and terminated his position as an assistant scoutmaster when it learned that he was "an avowed homosexual and gay rights activist." Plaintiff sued under the New Jersey public accommodations law, which prohibits discrimination on the basis of sexual orientation in places of public accommodation. The New Jersey Supreme Court held that the statute required the Boy Scouts to admit the plaintiff. The U.S. Supreme Court reversed, holding that applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association.

The Boy Scouts is a private, nonprofit, membership organization whose general mission is to instill values in young people. It "sincerely holds th[e] view" that homosexual conduct is inconsistent with

its core values. Requiring the Boy Scouts to retain the plaintiff as an assistant scoutmaster would "significantly burden" its desire not to "promote homosexual conduct as a legitimate form of behavior." Therefore, the Boy Scouts is an "expressive association," and the forced inclusion of the plaintiff would "significantly affect its expression."

"As the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." The Court has previously recognized that states have a "compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express." See Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987). In the present case, on the other hand, "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' right to freedom of expressive association."

2. Rotella v. Wood, 120 S.Ct. 1075 (Feb. 23, 2000).

The four-year period of limitations for claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) begins when the plaintiff knew or should have known of his injury, not when he discovered or should have discovered both the injury and the requisite pattern of racketeering activity.

3. Beck v. Prupis, 120 S.Ct. 1608 (April 26, 2000).

Plaintiff, the former president and CEO of a company, sued other former officers and directors of the company under RICO. He alleged that, after he discovered that defendants were conspiring to engage in acts of racketeering and reported this fact to regulators, defendants terminated his employment. Plaintiff asserted that he stated a conspiracy claim under RICO because his injury was proximately caused by an overt act (the termination of his employment) done in furtherance of the conspiracy. The Court held that, in order to state a civil conspiracy claim under RICO, the plaintiff's injury must be caused by an overt act of racketeering or an act of a "tortious character" that is independently wrongful under RICO. Because the termination of plaintiff's employment was not itself an act of racketeering and was not independently wrongful under any substantive provision of the statute, plaintiff did not have a cause of action for conspiracy under RICO.

4. International Precious Metals Corp. v. Waters, 120 S.Ct. 2237 (June 5, 2000), denying cert. to 190 F.3d 1291 (11th Cir. 1999).

In this settlement of a securities class action, defendants agreed to create a \$40 million "reversionary fund" for the class. Under the terms of the settlement, the portion of the fund not claimed

by class members and not paid as attorney's fees and expenses to class counsel was to revert to the defendants. The district court approved an attorney's fee award of \$13,333,333 (one-third of the reversionary fund), even though the actual distribution to class members later turned out to be approximately \$6.5 million. Thus, the fee award approved by the district court was more than twice the amount actually recovered by the class. The Eleventh Circuit affirmed the award on appeal, and the Supreme Court denied certiorari.

Justice O'Connor issued a statement in which she agreed with the Court's decision to deny certiorari in this particular case. But she expressed the opinion that such an award, "by any measure, is extraordinary," and that the Court, in an appropriate case, should address "whether there must at least be some rational connection between the fee award and the amount of the actual distribution to the class." In her view, arrangements such as that approved here "decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery"; they "potentially undermine the underlying purposes of class actions by providing defendants with a powerful means [of] enticing class counsel to settle lawsuits in a manner detrimental to the class"; and they "could encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be minimal."

G. Pending Cases

1. Garrett v. Univ. of Alabama, 193 F.3d 1214 (11th Cir. 1999), cert. granted, 120 S.Ct. 1669 (April 17, 2000): Whether the Eleventh Circuit erred in holding that Congress has the power to abrogate the states' Eleventh Amendment immunity from private suits under Titles I and II of the ADA.
2. Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), cert. granted, 120 S.Ct. 2004 (May 22, 2000): Whether the Ninth Circuit erred in holding that the Federal Arbitration Act does not apply to contracts of employment.

II. LOWER COURT DECISIONS

A. Procedure and Timeliness

1. Thomas v. Eastman Kodak Co., 183 F.3d 38 (1st Cir., July 15, 1999).

After 10 years of receiving positive performance evaluations, awards, bonuses, promotions, and salary increases, the African-American plaintiff was assigned to a new white supervisor who gave her low scores on her performance appraisals in 1990, 1991, and 1992. Plaintiff complained to the supervisor and others within Kodak and refused to sign two of the appraisals. However, fearing retaliation, she did not file a formal charge. In 1993, Kodak used the performance appraisal scores from the preceding three years as the basis for laying her off. Plaintiff filed an EEOC charge within 300 days of the layoff, but far more than 300 days after the appraisals were completed.

The court held that plaintiff's EEOC charge was timely. Title VII's statute of limitations is not triggered by "notice of bias," but by "notice of harm." The period for filing a charge begins to run when the implications of a negative job evaluation "have crystallized" and "some tangible effects of the discrimination" are apparent to the plaintiff.

2. Anderson v. Reno, 190 F.3d 930 (9th Cir., Sept. 8, 1999).

Plaintiff, a female FBI agent, claimed that she was sexually harassed and subjected to a hostile work environment for a period of 11 years. The district court excluded evidence of all but four of the incidents alleged by plaintiff as time-barred because they occurred outside of the 45-day period before plaintiff initiated informal EEO counseling. The district court then dismissed her Title VII suit for lack of evidence.

The Ninth Circuit reversed, holding that plaintiff's claims were timely under the continuing violation theory. Plaintiff alleged that she "regularly endured a host of sexually harassing incidents between 1986 and 1994," and that those incidents "are part of a pattern that started years ago and that had continued to the time she first made a timely complaint, and even beyond." The various incidents, "whenever they occurred, are neither isolated nor different in kind." See Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998).

3. Novitsky v. American Consulting Engineers, 196 F.3d 699 (7th Cir., Oct. 26, 1999).

Plaintiff's EEOC charge alleged that she was subjected to anti-Semitic comments at work and then discharged based on her age and religion. The only issue she raised on appeal, however, was a claim that the employer failed to accommodate her religious beliefs by not giving her the day off to observe Yom Kippur. The Seventh Circuit held that this claim was not within the scope of a reasonable

investigation of her EEOC charge and was therefore properly dismissed.

4. Anjelino v. The New York Times Co., 200 F.3d 73 (3d Cir., Dec. 2, 1999).

Male former employees in the New York Times' mail room had standing to sue under Title VII to redress harm caused by the newspaper's alleged discrimination against female employees. The men, hired as "extras" from a list of union workers, claimed that they were denied shift work opportunities and seniority because they were "sandwiched" between women on the list. The newspaper allegedly stopped hiring anyone from the list in the white male-dominated mail room once it reached women's names.

The court held "that indirect victims of sex-based discrimination have standing to assert claims under Title VII if they allege colorable claims of injury-in-fact that are fairly traceable to acts or omissions by defendants that are unlawful under the statute. That the injury at issue is characterized as indirect is immaterial, as long as it is traceable to the defendant's unlawful acts or omissions."

5. Martini v. Federal National Mortgage Ass'n, 178 F.3d 1336 (D.C. Cir., June 18, 1999).

A jury awarded plaintiff nearly \$7 million in damages on her claims for sexual harassment and retaliation under Title VII and the D.C. Human Rights Act. On remittitur, the district court reduced the damages to \$903,500.

The D.C. Circuit reversed the judgment and remanded with instructions to dismiss the suit as untimely, holding that "Title VII requires complainants to wait 180 days before suing in federal court so that the Commission may informally resolve as many charges as possible"

Pursuant to 29 C.F.R. § 1601.28(a)(2), plaintiff had requested and obtained a right-to-sue letter 21 days after filing her charge with the EEOC. She filed her suit 101 days after filing her EEOC charge. The "precise question at issue," according to the D.C. Circuit, was whether 42 U.S.C. § 2000e-5(f)(1)² "specif[ies] the exclusive conditions under which Title VII complainants may bring private lawsuits in federal court." The court answered this question in the affirmative by examining §

²"If a charge filed with the Commission ... is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge ... the Commission has not filed a civil action ... or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge" 42 U.S.C. § 2000e-5(f)(1).

³The Commission "shall" investigate the charge and "shall" make a reasonable cause determination "as

2000e-5(b),³ which shows that "Congress clearly intended to prohibit private suits within 180 days after charges are filed."

The court concluded that "the EEOC's power to authorize private suits within 180 days undermines its express statutory duty to investigate every charge filed, as well as Congress's unambiguous policy of encouraging informal resolution of charges up to the 180th day. We thus hold that Title VII complainants must wait 180 days after filing charges with the EEOC before they may sue in federal court."

This holding conflicts with the decisions of at least two other circuits. See Sims v. Trus Joist Macmillan, 22 F.3d 1059, 1061 (11th Cir. 1994); Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984). Cf. Weise v. Syracuse Univ., 522 F.2d 397, 412 (2d Cir. 1975).

In the year since Martini was decided, some district courts have followed the D.C. Circuit's decision (E.D.N.Y.), but many have not (D. Md., D.N.J., N.D. Ill., D.N.H., S.D.N.Y.). The latter courts have adopted a practical approach to the problem, upholding the EEOC early right-to-sue regulation as a permissible reading of Title VII and a reasonable means of dealing with the agency's heavy caseload and limited resources.

B. Class Actions

1. Blair v. Equifax Check Services, Inc., 181 F.3d 832 (7th Cir., June 22, 1999).

New Rule 23(f), Fed.R.Civ.P., provides that a court of appeals "may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule." In Blair, a case brought under the Fair Debt Collection Practices Act, the Seventh Circuit adopted some guidelines for the appellate courts to use in exercising this discretion. The court identified three categories of cases that may warrant interlocutory appeal: (1) cases in which the denial of class certification sounds the "death knell" of the litigation because the named plaintiff's claim is too small to justify individual litigation; (2) cases in which the grant of class certification puts "considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight"; and (3) cases in which an appeal "may facilitate the development of the law."

The court also noted that filing a request for permission to appeal under Rule 23(f) does not stop the litigation unless the district court or the court of appeals issues a stay. "Because stays will be

promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." 42 U.S.C. § 2000e-5(b).

infrequent, interlocutory appeals under Rule 23(f) should not unduly retard the pace of litigation."

2. Rutstein v. Avis Rent- A-Car Systems, Inc., 211 F.3d 1228 (11th Cir., May 11, 2000).

Plaintiffs brought a class action seeking compensatory and punitive damages under 42 U.S.C. § 1981, alleging that Avis had an official corporate policy and practice of discriminating against Jewish customers. The district court granted class certification under Rule 23(b)(3), and Avis took an interlocutory appeal pursuant to Rule 23(f).

The Eleventh Circuit reversed, holding that individual issues would predominate over common issues because, even if plaintiffs succeeded in establishing that Avis maintained a policy or practice of discrimination, each individual class member would still need to prove "that the defendant had an intent to treat him or her less favorably because of the plaintiff's Jewish ethnicity." See Jackson v. motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1999). "Whether Avis maintains a policy or practice of discrimination may be relevant in a given case, but it certainly cannot establish that the company intentionally discriminated against every member of the putative class." Numerous individual issues "will have to be addressed in one way or another in order for each plaintiff to demonstrate a *prima facie* case of intentional discrimination."

The court denied that its decision is inconsistent with International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Teamsters continues to permit the certification of disparate-treatment class actions in employment discrimination cases where the plaintiffs seek equitable relief such as back pay and seniority. But it does not permit the certification of class actions in other kinds of civil rights cases in which each individual class member must establish an actual intent to discriminate against him or her personally, or in cases in which the plaintiffs seek compensatory and punitive damages. However, the Rutstein decision "does not represent the end of the disparate treatment class action in the Eleventh Circuit."

3. Caridad v. Metro-North Commuter Railroad, 191 F.3d 283 (2d Cir., July 30, 1999).

African-American plaintiffs satisfied the commonality and typicality requirements of Rule 23(a) in a disparate-treatment and disparate-impact Title VII case challenging company-wide policies and procedures delegating to supervisors the authority to make subjective decisions regarding employee discipline and promotion. Plaintiffs' statistical and anecdotal evidence of discrimination resulting from the policy of "overdelegation," while perhaps not sufficient to prove their case on the merits, was adequate to demonstrate commonality and typicality under Rule 23(a). The district court abused its discretion in denying class certification on these grounds.

4. Jefferson v. Ingersoll International, Inc., 195 F.3d 894 (7th Cir., Oct. 25, 1999).

In an interlocutory appeal under Rule 23(f), the Seventh Circuit -- citing Allison v. Citgo

Petroleum Corp., 151 F.3d 402 (5th Cir. 1998),⁴ and Ortiz v. Fibreboard Corp., 119 S.Ct. 2295 (1999) -- held that class members in a Title VII action seeking compensatory and punitive damages are entitled to notice and an opportunity to opt out with respect to damage claims that are not incidental to claims for equitable relief. A court may certify such actions under Rule 23(b)(3); or the court may certify the injunctive aspects under (b)(2) and the damages aspects under (b)(3), trying the damages claims first to preserve the right to jury trial; or the court may certify the action under (b)(2) but exercise its discretionary authority to provide notice and an opportunity to opt out under Rule 23(d)(2).

5. Lemon v. International Union of Operating Engineers, Local 139, 83 FEP Cases 63 (7th Cir., June 9, 2000).

Following and expanding on Jefferson v. Ingersoll, the Seventh Circuit held that the district court abused its discretion in certifying a Title VII class under Rule 23(b)(2), without notice or an opportunity to opt out, when the plaintiffs sought monetary damages that were not "incidental" to equitable relief.

"Incidental" damages are "damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief"; they "do not depend 'in any significant way on the intangible, subjective differences of each class member's circumstances'"; and they "do not 'require additional hearings to resolve the disparate merits of each individual's case.'" (Quoting Allison v. Citgo, 151 F.3d at 425). Compensatory and punitive damages under Title VII are not "incidental." Deciding compensatory damage claims "depends on an individualized analysis of each class member's circumstances and requires additional hearings to resolve the disparate merits of each individual's case." "Similarly, to win punitive damages, an individual plaintiff must establish that the defendant possessed a reckless indifference to the plaintiff's federal rights -- a fact-specific inquiry into that plaintiff's circumstances."

As in Jefferson, the Seventh Circuit directed the district courts to consider at least three alternatives for handling such a case: (1) certifying the class under Rule 23(b)(3) for all purposes; (2)

⁴The Fifth Circuit's initial opinion in Allison, 151 F.3d 402, concluded that a Title VII class action for compensatory and punitive damages could not be certified under Rule 23(b)(2) where the monetary relief was not "incidental" to the equitable relief, and that it could not be certified under Rule 23(b)(3) because individual questions predominated over common questions. Arguably, this decision was withdrawn or limited when the court issued the following statement denying plaintiffs' petition for rehearing (151 F.3d at 434):

... In denying rehearing, the panel majority makes the following observations: The trial court utilized consolidation under Rule 42 rather than class certification under Rule 23 to manage this case. We review that decision for abuse of discretion and we find no abuse in this case. We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability issues that are common to the class and to certify for class determination those discrete liability issues....

certifying a (b)(2) class for the portion of the case addressing equitable relief and a (b)(3) class for the portion of the case addressing damages; and (3) certifying the class under (b)(3) for both monetary and equitable remedies, but exercising its Rule 23(d) authority to provide class members with notice and an opportunity to opt out.

6. District Court Decisions

In decisions rendered after Allison, several district courts have held that classes may continue to be certified in employment discrimination cases seeking compensatory and punitive damages. See Hoffman v. Honda of America, Inc., 191 F.R.D. 530 (S.D. Ohio 1999) (class may be certified under Rule 23(b)(2) where plaintiffs seek compensatory and punitive damages); Warnell v. Ford Motor Co., 189 F.R.D. 383 (N.D. Ill. 1999) (it is "difficult to imagine that a bright-line rule applies to deny a district court the discretion to grant class certification under Rule 23(b)(3) in every Title VII case in which the plaintiffs seek compensatory and punitive damages") (quoting Carter v. West Publishing Co., 79 BNA FEP Cases 1494 (M.D. Fla. 1999), appeal pending, No. 99-11959-E (11th Cir.)); Smith v. Texaco, Inc., 88 F. Supp. 2d 663 (E.D. Tex. 2000) (distinguishing Allison, citing Jefferson, and certifying equitable claims under Rule 23(b)(2) and damage claims under Rule 23(b)(3) for a class of approximately 200 salaried African-American employees in an adverse impact and disparate treatment pattern-or-practice case involving subjective decisionmaking in evaluations, promotions, and compensation); Beckmann v. CBS, Inc., No. CV 3-96-1172 DWF/AJB (D. Minn., March 31, 2000), appeal pending, No. 008008 (8th Cir.) (certifying classes of female technicians, operators, and engineers seeking compensatory damages and injunctive relief in Title VII case alleging sex discrimination in salary, overtime compensation, training, and promotion, as well as hostile-environment sexual harassment). Contra: Faulk v. Home Oil Co., 184 F.R.D. 645 (M.D. Ala. 1999).

C. Elements of Proof

1. Dobbs-Weinstein v. Vanderbilt University, 185 F.3d 542 (6th Cir., July 7, 1999).

To establish a Title VII *prima facie* case under the McDonnell Douglas-Burdine framework, plaintiff must show that she was a member of a protected class, was qualified for the position in question, and suffered an adverse employment action. Where the dean's interim decision to deny plaintiff tenure ultimately was reversed as the result of a grievance and internal appeal process (through which plaintiff received retroactive promotion, tenure, and back pay), the dean's decision did not constitute an adverse employment action. Plaintiff did not suffer a sufficiently adverse employment action even though her contract expired, she was forced to seek other employment, and her academic reputation suffered during the 18-month internal review process.

2. Simpson v. Borg-Warner Automotive, Inc., 196 F.3d 873 (7th Cir., Nov. 18, 1999).

To establish a violation of Title VII, plaintiff must show that she was a member of a protected

class, was qualified for the job and meeting her supervisor's expectations, suffered an adverse employment action, and was treated less favorably than similarly situated persons not in the protected class. Plaintiff here did not establish that she suffered an adverse employment action where she sought a "voluntary" downgrade from supervisor to a production line position to escape allegedly hostile, sex-based working conditions. Plaintiff did not prove the "intolerable working conditions" that are necessary to establish a "constructive demotion."

3. Brown v. Brody, 199 F.3d 446 (D.C. Cir., Dec. 21, 1999).

Federal employees, like private sector employees, must show that they suffered an adverse employment action in order to establish a violation of Title VII. Plaintiff's involuntary lateral reassignment, lower performance evaluation, and denial of transfer were not adverse employment actions because plaintiff did not suffer "objectively tangible harm" from them.

"[A] plaintiff who is made to undertake or who is denied a lateral transfer -- that is, one in which she suffers no diminution in pay or benefits -- does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm. Mere idiosyncrasies of personal preference are not sufficient to state an injury."

4. Gabalya v. New York City Board of Education, 202 F.3d 636 (2d Cir., Feb. 7, 2000).

The "purely lateral" transfer of a teacher from special education keyboarding classes in junior high school to mainstream keyboarding classes in high school did not constitute an adverse employment action under the ADEA. To be "materially adverse," a transfer or other change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." Such a change "might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation.'" Plaintiff here did not show that his transfer was "to an assignment that was materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement."

5. LePique v. Hove, 82 FEP Cases 1807 (8th Cir., May 31, 2000).

Plaintiff testified before a Senate committee that sexual harassment was rampant in the Resolution Trust Corporation's California office. She alleged that the RTC subsequently refused to grant her request to transfer to from the California office to the Kansas City office in retaliation for her Senate testimony. The Eighth Circuit held that the denial of transfer was not a sufficiently adverse employment action to establish a violation of Title VII. Judge Heaney, concurring, agreed that this result was dictated by the court's prior decision in Spears v. Missouri Dep't of Correction & Human Services,

No. 99-2239 (8th Cir. 2000), but stated his view that Spears is "simply wrong."

6. Perry v. Woodward, 199 F.3d 1126 (10th Cir., Dec. 20, 1999).

A discharged Hispanic female employee who was replaced by another Hispanic female may state a McDonnell Douglas-Burdine *prima facie* case under 42 U.S.C. § 1981. Plaintiffs in such cases are not required to show that they were replaced by someone outside of their protected class. Instead, "the termination of a qualified minority employee raises the rebuttable inference of discrimination in every case in which the position is not eliminated."

A contrary rule "would preclude suits against employers who replace a terminated employee with an individual who shares her protected attribute only in an attempt to avert a lawsuit." And it "would preclude suits against employers who hire and fire minority employees in an attempt to prevent them from vesting in employment benefits or developing a track record to qualify for promotion. It would also preclude a suit against an employer who terminates a woman it negatively perceives as a 'feminist' and replaces her with a woman who is willing to be subordinate to her male co-workers or replaces an African-American with an African-American who is perceived to 'know his place.'"

D. Jury Instructions and Verdicts

1. Scamardo v. Scott County, 189 F.3d 707 (8th Cir., Aug. 25, 1999).

The Eighth Circuit vacated a \$58,700 retaliation judgment (reduced by the trial court from the jury's original verdict of \$233,700) because the trial judge refused to give a "business judgment" instruction. The requested instruction stated: "You may not return a verdict for plaintiff just because you might disagree with defendant's decision or believe it to be harsh or unreasonable." Plaintiff did not object to the instruction, but the trial judge nevertheless refused to give it. Such an instruction is "crucial" in an employment discrimination or retaliation case, and "the district court must offer it whenever it is proffered by the defendant."

2. Freeman v. Chicago Park District, 189 F.3d 613 (7th Cir., Sept. 1, 1999).

The trial court vacated a \$45,000 jury award in a racial harassment case due to inconsistent verdicts and entered judgment for the defendant. The jury had answered "yes" to a special verdict question asking whether the plaintiff had been harassed, but "no" to the question asking whether the harassment was due to her race, and then answered that she had sustained \$45,000 in damages as a result of the defendant's actions. The Seventh Circuit held that the district court erred in finding the verdicts inconsistent, but affirmed the judgment for the defendant anyway. "[T]he term 'damages' in the context of a special verdict has more limited meaning than in a general verdict; it refers only to the loss

suffered by the plaintiff, a question of fact. The legal conclusion, that the defendant is liable for the amount of the loss, will depend on the judge's application of the law to the facts as they are found by the jury."

3. Allen v. Entergy Corp., 193 F.3d 1010 (8th Cir., Oct. 8, 1999).

The district court in an ADEA disparate-impact case instructed the jury that the employer had the burden of showing only that it had an adequate business justification for using an evaluation ranking system that had an adverse impact on older workers (as under Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)), not that it had the burden of proving that its system was job-related and justified by business necessity (as under the Civil Rights Act of 1991). While the 1991 Act expressly overrules Wards Cove with respect to Title VII, it "does not prescribe a departure from Wards Cove for purposes of the ADEA." Because plaintiffs failed to make a sufficiently specific objection to the instruction at trial, the Eighth Circuit reviewed the instruction only for "plain error," and it affirmed under that standard.

4. Savino v. C.P. Hall Co., 199 F.3d 925 (7th Cir., Dec. 14, 1999).

In a case alleging sexual harassment by a supervisor, the employer introduced evidence that it had an anti-harassment policy in place, that plaintiff had successfully used the policy once in the past, and that the employer had then acted promptly to correct and prevent the behavior about which she had complained. The trial court, over plaintiff's objection, instructed the jury that the employer had an affirmative defense under Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and the jury returned a verdict for the employer.

The Seventh Circuit held that, 'to merit an instruction on the *Faragher/Ellerth* affirmative defense the employer must show that: (1) the plaintiff endured no tangible employment action; (2) there is some evidence that the employer reasonably attempted to correct and prevent sexual harassment; and (3) there is some evidence that the employee unreasonably failed to utilize the avenues presented to prevent or correct the harassment." These requirements were satisfied here. The trial court's instruction properly allocated the burdens of proof and properly stated the law that "[i]f the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if

⁵The instruction at issue stated:

If you find that the plaintiff, Karen Savino, has established her claim of sexual harassment, then you may consider whether defendant, The C.P. Hall Company, has established an affirmative defense to plaintiff's established case of sexual harassment.

The burden of proof is on the employer, The C.P. Hall Company, to prove this affirmative

damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided."⁵

5. Watson v. Southeastern Pennsylvania Transportation Authority, 207 F.3d 207 (3d Cir., March 20, 2000).

The plaintiff in a sex discrimination case challenged a standard jury instruction requiring her to show that "sex was a determining factor" in the adverse employment action or that, "but for plaintiff's sex, the adverse employment action would not have occurred." Plaintiff argued that this instruction was inconsistent with § 107(a) of the Civil Rights Act of 1991, which partially overruled Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Third Circuit rejected this contention, holding that § 107(a) changed the standard of causation for Price Waterhouse "mixed-motive" cases, but not for McDonnell Douglas "pretext" cases. Section 107(a) does not alter the part of Price Waterhouse which held that "only plaintiffs who 'demonstrate[]' with 'sufficiently direct' evidence that an impermissible factor was a motivating factor are entitled to the shift in the burden of persuasion" to the employer.

The trial court did err in failing to instruct the jury that they could find for the plaintiff if she established a *prima facie* case and if they disbelieved the employer's explanation. But plaintiff failed to preserve an objection on this ground.

6. Arnold v. Department of the Interior, 213 F.3d 193 (5th Cir., May 25, 2000).

Three white male employees challenged the promotion of an Asian-American woman to a position that all three sought. When the woman was later transferred, the agency promoted one of the three men to the disputed position. At a pre-trial hearing, the district court ruled that the promotion of one plaintiff precluded the other two plaintiffs from proving that they would have been promoted "but for" discrimination, and therefore barred them from presenting evidence supporting their claims for compensatory damages. The jury ultimately found in favor of all three plaintiffs and awarded the one who had been promoted \$300,000 in compensatory damages. The jury also issued a "special finding" that the agency would have promoted the other two plaintiffs if gender had not been a motivating factor.

defense by a preponderance of the evidence in the case by establishing the following elements: First: that the C.P. Hall Company exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and Second: that the plaintiff, Ms. Savino, unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to prevent harm otherwise.

If you find that the plaintiff has established her claim of sexual harassment by a preponderance of the evidence, and that the defendant has not established its affirmative defense by a preponderance of the evidence, then your verdict should be for the plaintiff. On the other hand, if you find that the defendant has established its affirmative defense by a preponderance of the evidence, you may eliminate the defendant's liability or, alternatively, reduce the plaintiff's damages from the date you find the affirmative defense was established by the defendant.

The Fifth Circuit affirmed the district court's decision preventing the other two plaintiffs from receiving compensatory damages. On these facts, the agency was entitled to the "mixed-motive" defense established by § 107(b) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g)(B)(ii), which states: "On a claim in which ... the respondent demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court ... shall not award damages" The jury's "pronouncement on an issue no longer in the case is of no effect."

E. Remedies: Injunctive Relief, Back Pay, and Front Pay

1. Aguilar v. Avis Rent A Car System, Inc., No. S054561, 80 FEP Cases 643 (Cal. S. Ct., Aug. 2, 1999).

By a vote of 4-3, the California Supreme Court held that an injunction barring a supervisor from directing racial epithets at Hispanic employees, following a jury verdict holding the employer liable for racial harassment, did not violate the supervisor's free speech rights under the First Amendment or the California Constitution. A three-justice plurality held "that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination." A fourth justice concurred in the result, analogizing the injunction to a permissible "time, place, and manner" restriction on nonpublic fora. Three justices viewed the injunction as an unconstitutional infringement on free speech.

2. Gotthardt v. National Railroad Passenger Corp., d/b/a Amtrak, 191 F.3d 1148 (9th Cir., Sept. 14, 1999).

The Ninth Circuit has joined the Eighth, Tenth, and D.C. Circuits in holding that front pay is equitable relief and therefore is not subject to the damages cap imposed by the Civil Rights Act of 1991. The Sixth Circuit has reached the opposite conclusion.

A jury found that plaintiff had been subjected to sexual harassment and awarded her \$350,000 in compensatory damages, which the trial court reduced to \$300,000 to conform to the damages cap. The judge subsequently awarded her \$124,000 in back pay plus prejudgment interest, and -- finding that PTSD resulting from the sexual harassment rendered her unable to return to Amtrak -- over \$600,000 in front pay, representing the next eleven years' salary she would have earned as an engineer. The Ninth Circuit affirmed the awards, holding that the damages cap applies only to compensatory and

punitive damages, and does not affect equitable relief (including front pay) that courts could award prior to the passage of the 1991 Act.

3. Greene v. Safeway Stores, Inc., 210 F.3d 1237 (10th Cir., April 28, 2000).

A jury found that Safeway violated the ADEA in terminating the plaintiff from his job as a divisional manager, and awarded him a total of \$6.7 million in damages (\$600,000 for loss of salary, bonuses, and health insurance; \$1.7 million for loss of retirement benefits; and \$4.4 million for unrealized stock option appreciation). Finding that the violation was willful, the trial judge added \$810,786 in liquidated damages equal to part of the jury's award, but declined to double the stock option award.

Both sides appealed, and the Tenth Circuit affirmed. With respect to the \$4.4 million stock option award, the court stated that the purpose of ADEA remedies "is to make a plaintiff whole -- to put the plaintiff, as nearly as possible, into the position he or she would have been in absent the discriminatory conduct," and that the stock options "were a component of his compensation package." When Safeway terminated the plaintiff, "it forced him to exercise his stock options sooner than he had planned The difference in the value of the options at the time Greene was forced to exercise them, and their value when he otherwise would have exercised them, is contingent compensation Greene would have received but for his termination. Failure to compensate Greene for his unrealized stock option appreciation would be a failure to 'return[] him as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct.'"

Plaintiff was not, however, entitled to liquidated damages on the amount awarded for the unrealized stock option appreciation. Liquidated damages under the ADEA may be awarded on "amounts owing," 29 U.S.C. § 626(b), but not on other forms of relief, including front pay. The stock option award in this case "is more like front pay than it is like back pay," and therefore cannot be characterized as an "amount owing" at the time of trial.

F. Remedies: Punitive Damages⁶

1. Introduction. Under 42 U.S.C. § 1981a(b)(1), punitive damages are allowable in cases brought under Title VII and the ADA where the employer has engaged in intentional discrimination and has moreover acted "with malice or with reckless indifference to the federally protected rights of an

⁶This section of the presentation relies upon an analysis prepared by Joseph A. Yablonski and Daniel B. Edelman, Yablonski, Both & Edelman, Washington, D.C. Chip Yablonski and Dan Edelman represented the plaintiff in Kolstad v. American Dental Association, 119 S.Ct. 2118 (1999).

⁷Punitive damages are subject to caps under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, based upon the size of the employer's workforce. Punitive damages are not capped under 42 U.S.C. §§ 1981 and 1983, or under many state statutes and city ordinances.

aggrieved individual.⁷

In Kolstad v. American Dental Association, 119 S.Ct. 2118 (1999), the Supreme Court rejected the requirement imposed by the lower court that the plaintiff must prove "egregious" conduct on the part of the defendant in order to qualify for punitive damages. The Court addressed the issue of the "proper legal standards for vicarious liability to an employer in the punitive damages context." The Court started with common-law agency principles,⁸ as summarized in the Restatement (Second) of Agency § 217c and the Restatement (Second) of Torts § 909:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

- (a) the principal authorized the doing and manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

However, the Court modified these principles because, in its view, the Restatements go too far in imposing vicarious punitive damages liability on employers for all conduct by an agent "employed in a managerial capacity" who was "acting within the scope of employment." The Court therefore modified the common-law principles and held that, "in the [Title VII] punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"

After one year of litigation under Kolstad and decisions by half the Circuits, the decisions under the Kolstad opinion have generally been quite favorable to plaintiffs.

2. Post-Kolstad Appellate Court Decisions

⁷Punitive damages are subject to caps under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, based upon the size of the employer's workforce. Punitive damages are not capped under 42 U.S.C. §§ 1981 and 1983, or under many state statutes and city ordinances.

⁸In sexual harassment cases, the Court has also relied upon common-law agency principles. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 804 (1998).

a. Alexander v. Riga, 208 F.3d 419 (3d Cir., March 22, 2000). The Third Circuit reversed the denial of punitive damages to plaintiffs in a housing discrimination case. The court held that punitive damages were recoverable in the absence of a compensatory award and that no requirement of outrageous or egregious conduct was required beyond proof of an intentional violation and evidence that defendant knew of the federal law prohibiting discrimination in housing.

The court rejected the argument that the discriminatory conduct of Maria Riga could not be imputed to her husband, who had been out of the country when the unlawful conduct occurred. In a case of first impression in the Third Circuit under the Fair Housing Act, the Alexander court held that Joseph Riga was not insulated from punitive damages liability for his wife's unlawful conduct. Importing Kolstad's "good faith efforts" language into the Fair Housing Act, the Third Circuit held that the issue of Mr. Riga's liability should be submitted to the jury; and that if he can show to the jury's satisfaction that he "made 'good faith' efforts to prevent discrimination, ... efforts to 'deter and detect [civil rights] violations' and to 'enforce an anti-discrimination policy,'" he could avoid liability. The court assumed that the burden of proof on the "good faith efforts" issue was on the defendant.

b. Lowery v. Circuit City Stores, Inc., 206 F.3d 431 (4th Cir., March 14, 2000). Pursuant to a remand specifically because of Kolstad, 119 S.Ct. 2388 (1999), the Fourth Circuit reflects tellingly the positive effects of Kolstad for civil-rights plaintiffs. In this Title VII case involving claims of race discrimination, the Fourth Circuit had previously upheld compensatory verdicts for plaintiffs Lowery and Peterson in the amounts of \$12,500 and \$4,200, but had thrown out the punitive-damage awards of \$225,000 in favor of Lowery and \$47,000 for Peterson because it found there was "insufficient evidence" to conclude that Circuit City's conduct toward Lowery and Peterson was so egregious that it was appropriate to submit the issue of punitive damages to the jury. 158 F.3d at 746.

Following Kolstad, the Fourth Circuit reinstated the two punitive-damage verdicts after answering what it described as a "series of questions" posed by Kolstad's teachings." The court determined that the decisionmakers knew that denial of promotions based on race violated federal law because they had attended week-long training sessions that included education concerning federal anti-discrimination laws, that they supervised and hired employees in their sole discretion and thus were "managerial employees," and that the making of promotion decisions was within the scope of their managerial duties.

The Fourth Circuit then took up what it called the "good faith exception" to punitive awards. Circuit City pointed to its company-wide training policy, a three-avenue approach it had instituted for reviewing complaints of suspected discrimination, the distribution of EEO posters and handbooks, and its week-long training seminar for managers and supervisors.

The Fourth Circuit found that no reasonable juror could find that this evidence showed good-faith compliance because of the other evidence in the record. That evidence included two internal

reports which were highly critical of Circuit City's promotion policies and practices, which had been recalled and "buried." The court reasoned as follows:

... While an employer's institution of a written policy against race discrimination may go a long way toward dispelling any claim about the employer's reckless or malicious state of mind with respect to racial minorities, such a policy is not automatically a bar to the imposition of punitive damages. ... Here, the sincerity of Circuit City's commitment to a company-wide policy against racial discrimination in the workplace is called into question when one considers the racially discriminatory attitudes of two top Circuit City executives and the implementation of a promotional system by one of those executives having the capacity to mask race discrimination in promotional decisions. Furthermore, the positive nature of Circuit City's Open Door Policy, Associate Cool Line, and Coffee Conferences in reflecting Circuit City's attempt to offer employees an avenue to complain about racial discrimination without intimidation or fear of retaliation is countered by evidence of employees who testified they felt ignored or intimidated for complaining about promotion procedures and feared retaliation if they used one of these venting procedures to complain about racial animus among Circuit City management. Other evidence suggesting that Circuit City's purported efforts to comply with § 1981 were not taken in good-faith, but with the intent to cover-up a corporate policy of keeping African-Americans in low level positions, is Zierden's burying of the Booth and Cook reports.

...

Lowery shows that an employer which invokes the "good faith" defense ought not have any skeletons in its closet, for surely they will be discoverable and, once disclosed, may even be dispositive.

c. Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278 (5th Cir., Aug. 31, 1999). Upholding a punitive damage award entered prior to Kolstad, the Fifth Circuit considered questions relating to "managerial capacity" and "good-faith efforts."

The Fifth Circuit held that so long as the individual who terminated the plaintiff from employment was acting in the exercise of independent authority granted by the employer, the individual was acting in a "managerial capacity" for purposes of imputing liability. The individual who carried out the termination had the title of "district manager" and had authority to make personnel decisions regarding employees in the plaintiff's department and corresponding departments in five other stores. The court found substantial evidence to support a jury determination that the individual was a managerial agent acting within the scope of employment.

Regarding the good-faith defense, the court held that evidence of the existence of a grievance procedure did "not suffice to establish, as a matter of law, Wal-Mart's good faith in requiring its managers to obey Title VII."

The decision implicitly treated the matter of the employer's good-faith efforts to prevent discrimination as an affirmative defense as to which the employer bore the burden of proof.⁹

d. Gile v. United Airlines, Inc., No. 99-2509 (7th Cir., May 22, 2000). The Seventh Circuit upheld a \$200,000 compensatory damage award to an employee who was denied a shift change as an accommodation for psychological disorders, but vacated a \$100,000 punitive damage award on a 2-1 vote on the ground that the evidence did not establish sufficient "malice or reckless indifference." The majority (Kanne and Easterbrook, JJ.) stated that "[p]unitive damages depend not on the egregiousness of the defendant's misconduct, or its callousness in denying reasonable accommodation, but instead run from a culpable state of mind regarding whether that denial of accommodation violates federal law." Here, United did not exhibit the requisite culpable state of mind. Judge Diane Wood stated in dissent that, while evidence of the decisionmaker's "astonishing callousness in the face of Gile's disability" did not compel a finding of malice or reckless indifference under Kolstad, it was sufficient to support a finding that United engaged in reckless behavior.

e. Blackmon v. Pinkerton Security & Investigative Services, 182 F.3d 629 (8th Cir., June 30, 1999). The Eighth Circuit reversed a judgment as a matter of law for the employer and reinstated a \$100,000 punitive damage award in a sexual harassment case in which the employer, among other things, failed to investigate the employee's complaint and take remedial action. See also Kimbrough v. Loma Linda Development, 183 F.3d 782 (8th Cir., July 9, 1999) (affirming punitive damage award where general manager ratified sexually-harassing conduct by plaintiff's supervisor); Dhyne v. Meiners Thriftway, Inc., 184 F.3d 983 (8th Cir., July 21, 1999) (affirming JMOL for employer on punitive damage claim where assistant manager initially took partially corrective action and the company's general manager later took decisive corrective action when the matter was presented to him).

f. Passantino v. Johnson Consumer Products, Inc., 212 F.3d 493 (9th Cir., April

⁹A decision by the Tenth Circuit, also involving Wal-Mart as a defendant in a termination case, is to the same effect as Deffenbaugh-Williams on the questions of "managerial capacity" and "good-faith efforts." EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir., Aug. 23, 1999). A store manager and assistant store manager were held to be acting within their respective scopes of employment when they terminated the plaintiff in that they were employed in part to make such decisions and their actions stemmed from a desire to serve their employer. The court also held that the fact that Wal-Mart had a written anti-discrimination policy was not enough to establish "good-faith efforts." It declared itself "unconvinced" that Wal-Mart made a "good faith effort to educate its employees about the ADA's prohibitions." Again, the court implicitly treated the matter of "good -faith efforts" as an affirmative defense.

27, 2000). The Ninth Circuit remanded a \$300,000 punitive award to the district court to determine whether defendant could assert the new "affirmative defense to punitive damage liability" established by Kolstad. The court regarded this affirmative defense as an extension of the similar Burlington v. Ellerth defense for hostile work environment claims:

Kolstad extends the doctrine by allowing defendants to assert it in response to punitive damage claims, even in cases involving tangible employment action.

Treating Kolstad as an extension of Ellerth, the court found that the status of the principal actors is "crucial" because Kolstad had not eliminated the rule of earlier cases that an individual "sufficiently senior in the corporation must be treated as the corporation's proxy for purposes of liability" (citing Faragher and Harris v. Forklift Systems, 510 U.S. 17, 19 (1993)). Thus, according to the Ninth Circuit, the "good faith defense" is not available to employers where the decisionmakers are of such a senior level as to be proxies for the corporation. The defense only comes into play when the decisionmakers are managers for whom liability is not direct -- *e.g.*, where the defendant is not a sole proprietorship or where the decisionmaker does not occupy a senior-level position. Under this reading of Kolstad, the American Dental Association cannot invoke the good faith defense for the actions of its Executive Director, but it can do so concerning the acting director of its Washington office, but only if he was not of a sufficiently senior status as to also be a proxy. The court, moreover, made clear that adoption of a policy of non-discrimination is not enough. An employer must show that the policy has been "implemented ... in good faith" and "fairly and adequately enforced."

g. Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262 (10th Cir., Feb. 1, 2000). The Tenth Circuit sustained a punitive damage award of \$295,000 (reduced from \$1 million by the district court) in a sexual harassment case; compensatory damages were awarded in the amount of \$5,000.

This decision provides useful guidance on what constitutes an adequate showing of "reckless indifference." The employer argued on appeal that the defendant's manager had, at worst, acted negligently and not with the requisite "reckless indifference" to support punitive damages. The Tenth Circuit responded: "Recklessness and malice are to be inferred when a manager responsible for setting or enforcing policy in the area of discrimination does not respond to complaints, despite knowledge of serious harassment. See Baty, 172 F.3d at 1244-45." As additional indicia of "reckless indifference, the Tenth Circuit cited evidence that the manager made statements tending to minimize the plaintiff's

¹⁰Another decision of the Tenth Circuit provides guidance on what constitutes "reckless indifference" in the context of sexual harassment cases. Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177 (10th Cir., Aug. 16, 1999). Reversing a directed verdict for the employer on punitive damages, the Tenth Circuit cited evidence that management was aware of the employee's complaints of sexually-harassing behavior by her

complaints and that he would not take action against "revenue producers."¹⁰

On a separate point, the Deters decision is the first after Kolstad to apply a theory of direct liability for punitive damages. The manager to whom Ms. Deters complained was the human relations officer vested with responsibility for dealing with sexual harassment complaints. The defendant argued on appeal that this individual was not acting in a "managerial capacity," as necessary to support vicarious liability. The Tenth Circuit found it unnecessary to resolve the question of vicarious liability because the evidence, in its view, supported a finding of direct liability:

When a company specifically designates a particular employee within the company as a final person responsible for enforcing that company's policy against discrimination, then by the company's own designation, information provided to such an employee is knowledge to the company.

Upholding punitive damages based on evidence supporting direct liability, the Tenth Circuit rejected the defendant's contention that the human relations officer's conduct went "against the company's good-faith policies against sexual harassment." The Tenth Circuit found Kolstad's "good-faith efforts" defense inapplicable:

Kolstad was a case involving vicarious liability, unlike this case which is premised on a theory of direct liability. Thus, the good-faith defense does not apply. It is negated by a showing of direct malice or reckless indifference to federally protected rights of Ms. Deters, by Mr. Taylor who was designated by the company as a final decision-making authority responsible for implementing the company anti-discrimination policy in the Lenexa office.

The "good-faith efforts" defense similarly appears inapplicable in the remand proceedings in Kolstad itself in that the selecting official was the defendant's Executive Director. In other words, Kolstad should also be recognized as a case of "direct" rather than "vicarious" liability.

Finally, the Tenth Circuit in Deters took up and rejected the defendant's argument that the punitive damage award of \$295,000, though reduced by the district court, remained excessive. Citing

supervisor and was unresponsive. On this basis, the court found a jury could determine that the employer "acted recklessly and with disregard for Knowlton's federally protected civil rights."

Based on Knowlton and Deters, it should suffice to support a punitive damages claim that a person acting in a managerial capacity was on notice of a complaint of sexual harassment and failed to take action reasonably necessary to safeguard the employee's protected rights.

BMW of North America v. Gore, 517 U.S. 559(1996), and Continental Trend Resources Inc. v. OXY USA Inc., 101 F.3d 634, 636 (10th Cir.1996), the Tenth Circuit determined that the defendant had fair notice from the terms of the statute that it could be held liable for the full amount of damages authorized by Title VII's statutory cap. Additionally, it rejected the defendant's contention that the punitive award was unduly out of proportion to the \$5,000 award of compensatory damages. The court answered that, under BMW, ratios are primarily applicable to cases where the injury is primarily economic; that higher ratios may be warranted where the conduct is egregious; and that higher ratios may be warranted where the injury is primarily personal in character. Additionally, the Tenth Circuit found the amount of the award appropriate in light of the wealth and size of the defendant.

h. Alexander v. Fulton County, 209 F.3d 1122 (11th Cir. 2000). This case involved racial discrimination claims by 18 white present and former employees of a sheriff's department. Following Kolstad, the court determined that the sheriff's testimony that she knew it was illegal to treat employees differently on account of race, when coupled with the jury's finding of intentional discrimination, provided ample support for the jury's determination that she had acted "in the face of a perceived risk that [her] actions would violate federal law."

G. Settlement

1. Torres v. Metropolitan Life Ins. Co., 189 F.3d 331 (3d Cir., June 24, 1999).

In July 1998, plaintiff's attorneys negotiated a settlement of his Title VII suit for \$45,000, and asked the court to dismiss the suit. In August, after the settlement was executed, they asked the employer to pay an additional \$22,000 in fees and costs. The employer refused, and they later filed a motion requesting an award of over \$30,000 in fees and costs.

The settlement agreement included a general release stating that plaintiff released "all claims," but did not specifically refer to attorneys' fees or costs.¹¹ The Third Circuit held that the agreement did not settle the fee claims, and that plaintiff's counsel were therefore free to petition the court for fees and costs in addition to the amount of the settlement. "If the parties to a settlement agreement wish to extinguish the prevailing party's claim for attorney's fees, they must do so specifically and expressly in the terms of the agreement." The court rejected a "silence equals waiver" approach: "A settlement agreement that is silent as to attorney's fees will not be deemed to constitute a waiver, regardless of the course of negotiations."

¹¹The settlement agreement stated: "Without limitation, Plaintiff specifically releases all claims, charges, or demands asserted or assertable in the Pending Lawsuit, and all claims, charges, or demands arising from or relating to Plaintiff's relationship of any kind with the Released Parties, including without limitation any rights or claims Plaintiff may have under Title VII of the Civil Rights Act of 1964 ... and the Civil Rights Act of 1991."

2. Hayes v. National Service Industries, 196 F.3d 1252 (11th Cir., Nov. 24, 1999).

Plaintiff claimed that her attorney negotiated an agreement settling her Title VII suit without her authority, and that the agreement was therefore unenforceable. Her attorney had told defense counsel that he had authority to settle the suit. The Eleventh Circuit held that Georgia law controlled, and that under Georgia law a client is "bound by his attorney's agreement to settle a lawsuit, even though the attorney may not have had express authority to settle, if the opposing party was unaware of any limitation on the attorney's apparent authority."

3. Pohl v. United Airlines, Inc., 213 F.3d 336 (7th Cir., May 10, 2000).

Plaintiff filed suit alleging discrimination and retaliation under the Uniformed Services Employment and Reemployment Rights Act. After three months of negotiations, the parties' lawyers informed the court that they had reached a settlement. When the written agreement was presented to the plaintiff, however, he refused to sign it, claiming that he did not understand that the settlement under discussion included all of the counts in the complaint. On the employer's motion to enforce the settlement, the trial court found after an evidentiary hearing that, under Indiana law, the plaintiff's attorney had actual authority to settle the case and that the plaintiff was bound by the settlement.

The Seventh Circuit affirmed. Objective evidence (including billing records documenting telephone calls between plaintiff's counsel and defense counsel, and between plaintiff's counsel and plaintiff, as well as a letter confirming the settlement) supported the testimony of plaintiff's counsel that his client was informed of and approved each aspect of the settlement. The client's oral authorization was sufficient. "Pohl's misplaced belief that he could back out of the settlement at any time prior to signing it does not entitle him to legal relief from a settlement negotiated with actual authority by his attorney."

The court stated: "Some litigants in pursuing settlement of their claims hold the belief that they can change their mind at any time before they actually sign the settlement agreement. As this case illustrates, that perception is often unfounded in the law."

H. Attorneys' Fees

1. Torres v. Metropolitan Life Ins. Co., 189 F.3d 331 (3d Cir., June 24, 1999). See Settlement, supra.
2. Dalal v. Alliant Techsystems, Inc., 182 F.3d 757 (10th Cir., June 29, 1999).

Before trial, plaintiff rejected the employer's \$150,000 offer of judgment under Rule 68, Fed.R.Civ.P., in his ADEA case. After trial, appeal, and remand, plaintiff ultimately obtained a

judgment for \$36,000 in back pay and \$102,000 in fees, plus post-judgment interest. The Tenth Circuit held that Rule 68 does not bar a fee award in these circumstances. However, the offer must be taken into account in calculating reasonable fees. The district court properly did so when it awarded all of the fees generated before the Rule 68 offer but only half of the fees generated thereafter. Reducing the lodestar amount from \$134,000 to \$102,000 adequately reflected both the plaintiff's lack of success on his Title VII claim (which had been dismissed before trial) and his rejection of the employer's Rule 68 offer.

3. Garcia v. City of Houston, 201 F.3d 672 (5th Cir., Feb. 9, 2000).

Plaintiff, a Hispanic police officer, claimed that the City violated Title VII by denying his request to transfer to the police department's SWAT unit because of his race and national origin. The jury found that race was a motivating factor, but also found that the City would have made the same decision even if it had not considered plaintiff's race. Under the "mixed-motive" provisions of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g)(2)(B), plaintiff was not entitled to monetary relief, and the trial court found no basis for granting an injunction because the plaintiff did not ask to be reconsidered for the SWAT unit. However, the trial court awarded \$18,502 in attorneys' fees and costs.

Fee awards in mixed-motive cases are within the discretion of the district court. The Fourth, Seventh, Ninth, and Eleventh Circuits have held that such awards should be proportional to the plaintiff's success, and that the district court should consider several factors in deciding whether to award fees: the reasons why injunctive relief was or was not granted, the public purposes served, whether the employer demonstrated a "widespread or intolerable" animus, and whether its actions were justified by the plaintiff's behavior. E.g., Sheppard v. Riverview Nursing Center, 88 F.3d 1332 (4th Cir. 1996). The Tenth Circuit, on the other hand, has held that "Congress intended fee awards to be permitted in most Title VII cases where an impermissible factor was used in an employment decision because Title VII serves the interest of American society by ridding the workplace of the pollutant of employment discrimination." Gudenkauf v. Stauffer Communications, 158 F.3d 1074 (10th Cir. 1998). In the Tenth Circuit's view, fees should therefore be awarded to plaintiffs in mixed-motive cases "in all but special circumstances." Id. The award here was proper under either approach.

I. Tax Treatment of Monetary Relief and Attorneys' Fees

1. Pipitone v. United States, 180 F.3d 859 (7th Cir., June 14, 1999).

A \$95,000 payment received by plaintiff in exchange for a general release of all claims against his employer, including claims under the ADEA and the Illinois Human Rights Act, was fully taxable as severance pay. In order to be excludable from income under 26 U.S.C. § 104(a)(2) of the Internal Revenue Code, settlement payments must be (a) based on tort or tort-type rights, and (b) intended to compensate for sickness or personal injury. See Commissioner v. Schleier, 515 U.S. 323 (1995). Plaintiff's state Human Rights Act claims and potential tort claims satisfied the first requirement, but the

court found no evidence of an intent to compensate him for any personal injury or sickness. The agreement's sweeping references to the release of all claims of any kind provided no such evidence; there was, instead, evidence that the employer intended the payment to be severance pay; and plaintiff offered no evidence showing what portion of the settlement payment, if any, was allocable to plaintiff's claims for damages that would potentially qualify for exclusion under § 104(a)(2).

2. Peaco v. Commissioner, No. 8273-99, T.C. Memo 2000-122 (U.S. Tax Ct., April 6, 2000).

The express terms of the settlement agreement in an age discrimination case provided that the proceeds were paid "for pain and suffering claimed in this matter arising from personal injury," although the plaintiff had not alleged facts relating to any personal injury in her complaint. The court found that the terms of the agreement did "not reflect the realities of the settlement," and that a "significant portion" of the payment was in fact back pay and front pay. Since plaintiff failed to establish that all or any part of the settlement proceeds were based on personal injury or sickness, none of the proceeds were excludible from income.

3. Kenseth v. Commissioner, 82 FEP Cases 1512, 114 T.C. 26 (U.S. Tax Ct., May 24, 2000).

Plaintiff recovered a total of \$229,501 in a settlement of his age discrimination claims, of which \$91,800 was retained by his attorneys under a contingent fee agreement. The court ruled that the full amount of the settlement, including the attorneys' fees, was includible in income and taxable to the plaintiff. "A taxpayer who enters into an agreement for the rendering of services that assists in the recovery from a third party must include the amount recovered (compensation) in gross income, irrespective of whether it is received by the taxpayer." "An anticipatory assignment of the proceeds of a cause of action does not allow a taxpayer to avoid the inclusion of income for the amount assigned."

The Tax Court majority acknowledged that there is a split in the Circuits regarding the tax treatment of contingent attorneys' fees. The Fifth and Sixth Circuits have held that, under certain state attorney's lien statutes, contingent attorneys' fees are earned by the attorney and are not taxable to the client. Cotnam v. Commissioner, 263 F.2d 119 (5th Cir. 1959); Estate of Clarks v. United States, 202 F.3d 854 (6th Cir. 2000). Other Circuits have ruled to the contrary. Baylin v. United States, 43 F.3d 1451 (Fed. Cir. 1995); Alexander v. Internal Revenue Service, 72 F.3d 938 (1st Cir. 1995). See also Coady v. Commissioner, *infra* (9th Cir. 2000).

The Tax Court majority concluded that, even "if the AMT [alternative minimum tax] computation effectively renders de minimus a taxpayer's recovery due to the non-deductibility of the attorney's fees," it is for Congress, not the courts, to change the law. The dissenting judges argued that the courts could change the judge-made "assignment of income" doctrine on which the majority relied, and did not "believe Congress expected or intended that the interplay of the newly enacted itemized

deduction and AMT provisions could result in effective rates of tax substantially exceeding 50 percent up to more than 100 percent of a net recovery."

3. Coady v. Commissioner, 26 IER Cases 681, No. 98-71358 (9th Cir., June 14, 2000).

Plaintiff was awarded \$373,307 in her wrongful termination case. The employer issued a check to her for \$259,610, the full amount of the award with federal taxes withheld. Under a contingent fee agreement, she paid her lawyers \$124,435 in attorneys' fees and \$96,902 in litigation costs, leaving her with a net amount (after taxes, fees, and costs) of \$38,273.

On their 1994 joint return, the plaintiff and her husband reported \$89,225 (the part of the award paid for back wages) as income from wages, and \$284,082 (the part of the award paid for lost benefits and lost future earnings) as self-employment income on Schedule C. They claimed a deduction from the Schedule C amount of \$168,217 for the fees and litigation costs proportionate to the self-employment income. This resulted in net income from self-employment of \$115,865. Finally, they claimed a Schedule A miscellaneous itemized deduction of \$53,121 for the fees and costs proportionate to the income from wages.

The IRS notified them that the entire \$373,307 was gross income, and that the fees and costs were deductible only as Schedule A miscellaneous deductions.¹² As a result, the IRS stated, they owed a deficiency of \$49,531, plus interest. They challenged the notice, and the Tax Court found for the IRS.

The Ninth Circuit rejected the taxpayers' argument that they were entitled to exclude the attorneys' fees and costs because they "assigned" that part of the award to the lawyers. Under Alaska law, attorneys do not have a "superior lien," or ownership interest, in the plaintiff's cause of action, but only a "subordinate lien." The clients were entitled to receive all of the funds, and they "simply used a portion of the award to discharge their personal liability to their attorneys." Taxpayers "cannot avoid taxation by diversion to creditors, including counsel for a contingency fee."

J. Age Discrimination

1. Bennett v. Coors Brewing Co., 189 F.3d 1221 (10th Cir., Aug. 27, 1999).

Plaintiffs alleged that the employer engaged in fraud when it represented to them that it intended to eliminate their positions, thereby inducing them to sign waivers of their ADEA claims in exchange for voluntary separation benefits. Since the waivers complied with the express requirements of the Older

¹²Miscellaneous itemized deductions may be deducted from income "to the extent that the aggregate of such deductions exceeds 2 percent of adjusted gross income." 26 U.S.C. § 67(a).

Workers Benefits Protection Act, the district court granted summary judgment to the employer. The Tenth Circuit reversed. The OWBPA only sets forth "minimum" requirements; the court must "look beyond the specified statutory minimum requirements to the 'totality of the circumstances.'" The Tenth Circuit held "that non-statutory circumstances such as fraud, duress, or mutual mistake may render an ADEA waiver not 'knowing and voluntary' under the OWBPA." See also Griffin v. Kraft General Foods, Inc., 62 F.3d 368 (11th Cir. 1995).

2. Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231 (3d Cir., Aug. 31, 1999).

The district court granted summary judgment to the employer because the 61-year-old plaintiff who was laid off in a RIF showed only that other protected-group employees (52 and 45 years old) were retained, not that employees under the age of 40 were retained. The Third Circuit reversed, holding that the age difference between plaintiff and the over-40 retained employees was sufficient to establish a *prima facie* case under O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996).

3. Lewis v. YMCA, 208 F.3d 1303 (11th Cir., April 13, 2000).

Plaintiff's ADEA suit claiming that the YMCA discharged her because of her age was dismissed. After her subsequent application for employment at another YMCA branch was rejected, plaintiff filed a second lawsuit alleging retaliation for the first lawsuit. The YMCA offered evidence that, even if part of the reason for refusing to hire plaintiff had been retaliatory, it would not have hired her anyway because of the misconduct that led to the termination of her earlier YMCA employment. The district court granted summary judgment to the YMCA.

The Eleventh Circuit affirmed, holding that an ADEA "mixed-motive" case is governed not by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g)(2)(B), but by Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Therefore, the YMCA escaped all liability, and was not even subject to the limited relief potentially available in mixed-motive cases under the 1991 Act -- declaratory and injunctive relief and attorneys' fees and costs.

4. Frank v. United Airlines, 83 FEP Cases 1 (9th Cir., June 21, 2000).

The Ninth Circuit reaffirmed its position that disparate impact claims are cognizable under the ADEA. See also EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir., Sept. 14, 1999) (disparate impact claims may be litigated under the ADEA, but not on behalf of subgroups of the protected age group); Allen v. Entergy Corp., 193 F.3d 1010 (8th Cir., Oct. 8, 1999) (Jury Instructions and Verdicts, *supra*). The Second Circuit also allows disparate impact claims to be litigated under the ADEA, but the First, Sixth, Seventh, and Tenth Circuits do not.

K. Wage and Hour Law¹³

1. Introduction

The expansion of private enforcement of both federal law (the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219) ("FLSA") and state law wage and hour claims, particularly in large-scale federal collective actions and state class actions, is a major development in employment law. The past year has witnessed wage/hour settlements with defendants such as Albertson's (\$37.5 million), Shoney's Restaurants (\$18 million), and Meryvn's Department Stores (\$11 million). In addition to such large-scale litigation, many individual cases present wage/hour issues subject to the following developments.

2. Class/Collective Actions

Large-scale litigation under the FLSA is subject to the "opt-in" or collective action procedures in 29 U.S.C. § 216(b). A federal court in Tampa, Florida, certified a nationwide collective action as to allegations that "management assistants" were misclassified as exempt executive employees. Harrison v. Enterprise Rent-A-Car, 4 Wage & Hour Cas. 2d (BNA) 1339, 1998 WL 422169 (M.D. Fla. 1998). See also, McNeil v. District of Columbia, 1999 WL 571004 (D.D.C. 1999) (notice authorized to landscape crews who worked through lunch periods). Where parallel pendent state wage/hour claims are available, it is generally preferable to file class actions using Rule 23, Fed.R.Civ.P. Kelley v. SBC, Inc., 5 Wage & Hour Cas. 2d (BNA) 16, 1998 WL 928302 (N. D. Cal. 1998) (certifying state law misclassification of overtime claims under Rule 23).

The California Supreme Court ruled that under California's Unfair Competition Law ("UCL") (Bus. & Professions Code § 17200 *et seq.*), a representative action may be brought for workers to recover their unpaid overtime wages from their employers as restitutionary relief. The Court also held that the four-year statute of limitations in the UCL applies regardless of the statute of limitations in the underlying statute. Cortez v. Purolator, 23 Cal. 4th 163, 999 P. 2d 706, 96 Cal. Rptr. 2d 518 (June 5, 2000). Finally, the Court ruled that equitable considerations may guide the court in fashioning the appropriate remedy under the UCL. *Id.* In a companion case, Kraus v. Trinity Management Services, Inc., 23 Cal. 4th 116, 999 P. 2d 718, 96 Cal. Rptr. 2d 485 (June 5, 2000), the Court held that the UCL does not authorize fluid recovery in a representative action. Thus, restoration of unpaid wages must be made directly to the worker who earned the wages, and not made to a fluid recovery fund.

¹³David Borgen and Laura Ho, who litigate wage and hour cases at Saperstein, Goldstein, Demchak & Baller, prepared this section.

3. Executive Exemption

In what may herald a departure from the analysis in Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982), which grants the executive exemption, a recent district court more narrowly interpreted the exemption. Cowan v. Treetop Enterprises, Inc., 1999 US Dist. LEXIS 16902 (M. D. Tenn. 1999) (granting plaintiffs' summary judgment motion as to Waffle House "unit managers" who spent 80% of their time cooking). See also, Fife v. Harmon, 171 F.3d 1173 (8th Cir. 1999) (no summary judgment as to status of "acting airport managers").

4. Attorneys' Fees

Writ granted to plaintiffs' attorneys challenging notice to absent class members in state law overtime class action. The trial court had insisted that the class notice state that absent class members could be liable for defense attorneys' fees and costs in the event the employer prevailed. The appeals court ruled that plaintiffs were not liable for such fees, but even if they were, such defense fees could only be assessed against the named class representatives. Earley v. Washington Mutual Bank, 79 Cal. App. 4th 1420, 95 Cal. Rptr. 2d 57 (2000). The panel also opined, in dicta, that plaintiffs' attorneys' fees can be assessed against class members on a common-fund or percentage-of-recovery basis. Id.

See also, the following recent FLSA fees cases: Uphoff v. Elegant Bath, Ltd., 176 F.3d 399 (7th Cir. 1999) (disallowing expert fees); Spegon v. Catholic Bishop of Chicago, 175 F.3d 544 (7th Cir. 1999) (applying 12-factor test re reasonable fee); Heidman v. County of El Paso, 171 F.3d 1038 (5th Cir. 1999) (reversing 50% enhancement of lodestar).

5. Retaliation

Retaliation claims will often be more valuable than the underlying wage/hour claim, especially where tort damages are available. In Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999), the Ninth Circuit affirmed that FLSA coverage for retaliation claims extended to internal and informal complaints, and not only to formal complaints filed with governmental agencies (accords with rule in 1st, 6th, 8th, 10th, and 11th Circuits). Lambert also affirmed an award of emotional distress damages and did not disturb an award of \$4 million in punitive damages. But see, Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000), holding that punitive damages are not available for FLSA retaliation claims (expressly disapproving 7th Circuit rule).

6. Compulsory Travel Time

Despite the dictates of the Portal-to-Portal Act, compensable time issues arise where employers require employees to travel on employer-provided transportation. In United Transportation Union Local 1745 v. Albuquerque, 178 F.3d 1109 (10th Cir. 1999), time bus drivers spent on a shuttle bus traveling to and from relief points at either end of split shifts was compensable. Similarly, interpreting

independent California labor law, the California Supreme Court ruled that where farmworkers were required to report to central assembly points to be bused to the fields, the compulsory travel time riding to and from the field in the employer's buses was compensable. The California Supreme Court rejected the employer's argument that the federal Portal-to-Portal amendment to FLSA, exempting certain travel to and from work, should be treated as permissive. Morillion v. Royal Packing Co., 22 Cal. 4th 575, 94 Cal. Rptr. 2d 3 (2000).

7. Outside Sales Exemptions

Employers are routinely misclassifying sales employees as exempt under the administrative exemption. Sales personnel are usually more appropriately classified as non-exempt production employees. Often, however, it is appropriate to inquire whether the sales personnel fall within the exemption for outside sales. In Ackerman v. Coca-Cola Enterprises, Inc., 179 F.3d 1260 (10th Cir. 1999), the Tenth Circuit permitted the employer to include setting up advertising materials and other "merchandising" tasks as part of "sales" activity time. But see, Ramirez v. Yosemite Water Co., 20 Cal. 4th 785 (1999), in which the California Supreme Court, interpreting parallel state law, held that bottled water delivery personnel were non-exempt employees as they spent the majority of their time hauling 40 pound bottles of water.

8. Compensatory Time

The U.S. Supreme Court has held that, under the FLSA, a public employer can require employees to use their comp time after stockpiling hours up to the contractual limit. Christensen v. Harris County, No. 98-1167 (May 1, 2000).

9. Salary Basis Test

Employees who may qualify for exempt status by virtue of their executive or professional duties may still be entitled to overtime pay where the employer does not pay them on a salary basis (*i.e.*, a predetermined uniform amount without improper deductions). See, Klem v. County of Santa Clara, 208 F.3d 1085 (9th Cir. 2000) (nurses entitled to overtime as non-exempt due to salary basis test where employer imposed suspensions without pay); In re Wal-Mart Stores, Inc., 58 F. Supp. 2d 1219 (D. Colo. 1999) (pharmacists not exempt under salary basis test where base hours and base pay subject to fluctuations in business); Belcher v. Shoney's, Inc., 30 F. Supp. 2d 1010 (M.D. Tenn. 1998) (restaurant managers not exempt under salary basis test due to deductions to cover cash shortages); East v. Bullock's, Inc., 34 F. Supp. 2d 1176 (D. Ariz. 1998) (retail store manager not exempt under salary basis test due to deductions for partial day absences such as illness and jury duty). The window of correction for such violations is available for isolated and sporadic incidents and not where the violation arose due to an employer's systematic practice. Klem, supra.

10. Conclusion

We can expect continuing major developments in the area of wage and hour law as we see increased private enforcement of employees' rights to compensation in accordance with federal (FLSA) and state statutes. Government agencies report widespread non-compliance by employers, and employees are often uninformed about their right to overtime pay. Large-scale cases brought as federal opt-in collective actions or as state law class actions are increasing, and courts are responding by developing appropriate methods for providing notice, trial, and settlement of these large actions.