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Message From The Chair

Louis Butler, Section Chair

Now that I am approaching the end of my term as chair of this section, I have had an opportunity to reflect on some of the issues this section has faced over the last year. Not a day goes by where I am not inundated with a ton of email messages about new legislation that is of relevance to people who care about the individual rights and responsibilities that each of us possess. Examples include legislation that restricts access to an absentee ballot, or that would take away someone's ability to drive a motor vehicle for violations of the law unrelated to driving, or that would allow police officers to stop a vehicle simply because someone in the car did not have on a seat belt, or that would allow a person who applied for a professional license who had been charged with an offense to be photographed and fingerprinted, or that required a person to lose a professional license for five years if convicted of operating while intoxicated 6th offense, or that would require "mandatory" sentencing "guidelines" for judges, or a bill against flag desecration, and so on and so on. And this is just within the last week. Regardless of your view of the merits of each bill and your view as to whether the influx of legislation will help or hurt this state and country, this section has been vigilant in reviewing legislation that would impact of the rights of each and every

citizen and making its position known to the bar and the legislature. Indeed, we were successful in getting one bill, the "peeping tom" bill modified so that included a trespass provision before one could be charged with that offense. Our Board has been on the lookout for issues that would safeguard or hinder our rights, and takes stands that it deems appropriate.

Individual safety and security concerns are important issues for each of us. We must always remember, however, that it is our basic freedom to dissent, to be left alone without unnecessary government interference, to stand up for what we believe is right, that makes this a great nation. It would be unwise, foolish and indeed un-American to surrender our basic rights in the name of security. I am proud to be associated with a Bar that recognizes the importance of individual liberties, and a section willing to work to protect those liberties. Thank you for allowing me to play a small role.

Newsletter Suggestions

Please contact Liza Kessler (lkessler@lharris.com) or Jill Packman (jpackm@ssclaw.com) with any suggestions you may have for the newsletter. Feel free to suggest items you want included in upcoming issues. The Individual Rights and Responsibilities Section Newsletter is designed to keep section members informed of section activities and matters of importance to the civil rights bar. We hope that all members will contribute and benefit from this publication.

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Recent Developments in Equal Employment Law from the Perspective of Plaintiffs' Attorneys

Patrick O. Patterson, Law Office of Patrick O. Patterson

The following excerpt was presented by Wisconsin attorney and IRR Board member Patrick O. Patterson for the National Employment Law Institute in Chicago during July 2002. This excerpt represents the second half of Attorney Patterson's presentation. (The first part covering "Supreme Court Decisions" was published in the last issue of Rights.) A full copy of the presentation was graciously provided by Attorneys Patrick O. Patterson of Fox Point, Wisconsin and Barry Goldstein of Oakland, California and will be available shortly on the IRR Section's website.

II. LOWER COURT DECISIONS

A. Compulsory Arbitration

1. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, No. 98-15992 (9th Cir., Feb. 4, 2002)

On remand from the Supreme Court, 532 U.S. 105 (2001), the Ninth Circuit holds that Circuit City's "Dispute Resolution Agreement" (DRA), as applied to claims under the California Fair Employment and Housing Act, is unconscionable and therefore unenforceable under California law. The DRA is procedurally unconscionable because it is a contract of adhesion imposed as a prerequisite to employment, and it is substantively unconscionable because (a) it forces employees to arbitrate their claims against Circuit City without requiring Circuit City to arbitrate its claims against employees; (b) it limits the remedies available to injunctive relief, a maximum of one year of back pay and two years of front pay, compensatory damages, and punitive damages up to the greater of the amount of back pay and front pay awarded or \$5,000; (c) it

requires employees to split arbitration fees with Circuit City; and (d) it imposes a strict one-year statute of limitations that deprives employees of the benefit of the continuing violation doctrine. See also *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001) (similar arbitration clause held unconscionable and unenforceable under Montana law).

In addition, the DRA is unenforceable under federal law. Courts have interpreted *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), "to require basic procedural and remedial protections so that claimants can effectively pursue their statutory rights." See, e.g., *Cole v. Burns Int'l Security Svcs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997). The agreement here fails to provide for all types of relief that would otherwise be available in court, and fails to ensure that employees will not have to pay either unreasonable costs or any arbitrators' fees or expenses.

2. *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, No. 98-55896 (9th Cir., March 22, 2002)

On remand from the Supreme Court for proceedings in accordance with *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Ninth Circuit holds that Circuit City's "Associates Issues Resolution Program" is valid and enforceable. A mandatory arbitration agreement is unconscionable under California law only if it is both procedurally and substantively unconscionable. The agreement here is not procedurally unconscionable because employees were "given a meaningful opportunity to opt out of the arbitration program" without losing their jobs.

3. *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280, No. 00-13489 (11th Cir., June 12, 2001)

A clause in the mandatory arbitration agreement stated that all fees and costs of arbitration "will be shared equally" between the employee and the company. The court holds that this provision "circumscribes the arbitrator's authority to grant effective relief by mandating equal sharing of fees and costs of arbitration despite the award of fees permitted a prevailing party by Title VII," and is therefore invalid.

The court further holds that, where an arbitration agreement limits remedies that Congress has determined to be appropriate, the proper course of action is not to sever the invalid clause, but rather to declare the entire agreement unenforceable. "By denying access to a remedy Congress made available to ensure violations of the statute are effectively remedied and deterred, the Agreement eroded the ability of arbitration to serve those purposes as effectively as litigation. ... Globe's attempt to defeat the remedial purpose of Title VII taints the entire agreement, making it unenforceable." (Note: The agreement did not contain a severability provision.)

4. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, No. 00-3243 (8th Cir., Aug. 17, 2001)

The district court held that the clause in Circuit City's Dispute Resolution Agreement limiting punitive damages to \$5,000 was invalid, and that the entire agreement was therefore invalid and unenforceable. The Eighth Circuit reverses, holding that "[s]evering the punitive-

damages clause is consistent with the terms of the contract, the intent of the parties, Missouri contract law, and the FAA's policy favoring the enforcement of arbitration agreements." The court disagrees with the Eleventh Circuit's decision in *Perez v. Globe Airport Sec. Serv., Inc.*, *supra*, and observes that severing invalid terms rather than declaring the entire agreement unenforceable is appropriate in "an evolving climate" in which the "boundaries of private arbitration agreements in the employment context are currently being set" (Note: The agreement contained a severability provision.)

5. *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, No. 00-2355 (7th Cir., Oct. 17, 2001)

Employment Dispute Services, Inc. (EDS), contracts with employers to provide an arbitration forum for any employment-related claims their employees may bring, and the employers in turn require their employees to enter into contracts with EDS in which the employees agree to use EDS's services to arbitrate any claims they may have against their employers. EDS had such contracts with the employer and the employee in this case. Under EDS's Rules, EDS provides the parties to a dispute with a list of three potential arbitrators in each of three categories: managers at companies with EDS contracts, non-management employees at companies with EDS contracts, and "neutrals." After each side exercises unlimited strikes "for cause" and one strike in each category, the remaining three arbitrators form a panel to hear the claim. The EDS Rules also restrict discovery (each side may take only one deposition in the absence of extraordinary circumstances), give the panel complete discretion to set the time and place of the hearing, give EDS's CEO the authority to interpret the Rules and to decide "any issue which may arise relating to them," and provide that EDS has the power unilaterally to amend or modify the

Rules at any time.

The district court held that the EDS system was inherently biased against employees and therefore refused to compel the plaintiff to arbitrate his ADA claim. The Seventh Circuit declined to reach the question "whether the EDS system is so deeply flawed that it should be rejected on its face (a difficult standard to meet, as *Green Tree [Financial Corp. v. Randolph]*, 531 U.S. 79 (2000)) makes clear)" It held instead that, under Indiana law, the plaintiff never entered into an enforceable contract to participate in that system. The plaintiff's agreement with EDS did not contain mutual obligations, and therefore lacked consideration. It contained "only an unascertainable, illusory promise on the part of EDS," a promise that EDS could fulfill "by providing [the employee and employer] a coin toss." Since the contract made EDS's performance "entirely optional with the promisor," it was not enforceable.

See also *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001) (EDS arbitration agreements are unenforceable under Tennessee and Kentucky law due to lack of consideration); *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943 (8th Cir. 2001) (EDS arbitration agreement is clear and unambiguous, not unconscionable, and enforceable under Missouri law).

6. *McCaskill v. SCI Management Corp.*, 285 F.3d 623, No. 00-2839 (7th Cir., April 4, 2002)

The arbitration agreement (1) requires each party to pay its own costs and attorneys' fees regardless of the outcome and (2) mandates that each party must pay one-half of all arbitration fees and costs. The court holds that the attorneys' fee provision renders the agreement unenforceable in a Title VII action, and therefore finds it unnecessary to decide whether the provision regarding arbitration

fees and costs would have the same effect.


"In *Gilmer* ..., the Supreme Court held that claims under federal statutes may be appropriate for arbitration as long as the litigant may effectively vindicate her statutory cause of action in the arbitral forum, and the statute will continue to serve its remedial and deterrent purposes." The right to attorneys' fees under Title VII "is integral to the purposes of the statute and often is central to the ability of persons to seek redress from violations of Title VII." Because the arbitration agreement here prevents the plaintiff from "effectively vindicating her rights in the arbitral forum by preemptively denying her remedies authorized by Title VII, the arbitration agreement is unenforceable."

7. *Blair v. Scott Specialty Gases*, 283 F.3d 595, No. 01-1096 (3d Cir., March 13, 2002)

The Third Circuit joins several other circuits in holding that, under *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), a district court order dismissing the plaintiff's claims and compelling arbitration is a final, appealable order, regardless of whether the dismissal is with or without prejudice and regardless of whether the order is entered in an "embedded" or an "independent" proceeding. See *Salim Oleochemicals v. M/V Shropshire*, ___ F.3d ___, No. 01-7624 (2d Cir., Jan.18, 2002); *Interactive Flight Technologies, Inc. v. Swissair Swiss Air Transport Co.*, 249 F.3d 1177 (9th Cir. 2001); *Employers Insurance of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316 (11th Cir. 2001). See also *McCaskill v. SCI Management Corp.*, 283 F.3d 595 (7th Cir. 2002); *Murray v. United Food Workers*, 289 F.3d 297 (4th Cir. 2002).

The court also holds that, under Pennsylvania law, mutuality of obligation is not required as long as an arbitration agreement is supported by consideration, and that the employer's

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Raving Lunacy: How Mainstream Misconceptions of Electronic Music Events Threaten Civil Liberties¹

Erik R. Guenther, Associate Attorney, Hostak, Henzl & Bichler, S.C.

Early in the morning hours of November 3, 2002, the Racine Police Department raided an electronic music concert and cited 442 attendees as being “inmates of a disorderly house.” The citations were issued with a fine of \$986. The police also arrested four individuals on criminal drug charges which are still pending. The raid of 442 persons netted Racine police approximately forty ecstasy pills and some small amounts of other drugs that individuals apparently discarded when uniformed officers stormed the event.

Immediately after the raid, reports from the local newspaper referred to the event as a “drug party.” In the articles, Racine Police Department Captain Purdy boasted that “raves will not be tolerated in Racine,” and that the “effective” police action was planned in advance.² Electronic music events have long been under fire from the federal and local governments but Racine’s event is unusual as it marks the first occasion where the attendees, and not the organizers, were the targets of the police action.³

The electronic music concert was hosted by the Uptown Theatre Group, Inc., as part of a series of “haunted theatre” attractions to raise awareness of the plight of the Majestic Theatre – a historic downtown Racine theater badly in need of renovation. The Haunted House Party, or “rave party” as the Racine Police called it, was to be the culmination of a series of haunted houses fundraising for the theater. Electronic music was the primary featured entertainment in an attempt to draw a large crowd largely because the performers were relatively inexpensive in comparison with other

musicians. During the earlier haunted theatre events, uniformed off-duty Racine Police officers were hired to provide security. Unlike a traditional “rave,” the event was well advertised in the public, so police were well aware that it would be occurring.

Two undercover officers arrived at the event after Racine police received a tip from U.S. Customs that the party was a “rave” and drugs were likely to be found there. According to prepared police statements, the two officers then went on a tour of the theater and entered the concert, which was held a few doors down, from the theater at the Tradewinds Village banquet hall.⁴ At the concert, two individuals approached the officers and reportedly offered them narcotics. Acting on this information and claims that “drug use would be obvious” to those in attendance, the police called armed officers who barricaded the doors to the banquet hall and shut down the event. All individuals in attendance in the basement, where the electronic music was being performed, received “inmate of a disorderly house” citations. Those patrons frequenting the bar on the upper floor were largely left alone by the police.

The citations were issued to those in attendance for their mere presence at the event, despite the fact that not one of the individuals received a narcotic charge stemming from the incident. The individuals were charged as being “inmates of a disorderly house” under secs. 66-346 and 66-347, Racine Municipal Code. Sec. 66-346 defines a “disorderly house” as “any building, place or room in which gambling, prostitution or liquor and fermented

malt beverage violations occur or which is used for the purpose of unlawfully selling, serving, storing, keeping or giving away controlled substances as defined in Wis. Stats. Ch. 961 (the Uniform Controlled Substances Act).” Sec. 66-347 penalizes persons for “knowingly ... be[ing] an inmate of... or be[ing] found within any disorderly house.”

Under the ordinance, to succeed, the City of Racine was faced with, what the Assistant City Attorney later called, an “impossible burden” to prove that the concert attendees were guilty under this citation. The City would have had to prove that the theater fundraiser featuring electronic music was a “disorderly house” – or a place used for “the purpose” of transferring controlled substances; despite the fact that undercover officers toured the theater and observed the electronic music being performed to a large audience, both stated purposes of the event. If the City met its burden, it would then be required to show that each cited individual attended the event knowing that it was a “disorderly house.”

Attorneys were also prepared to mount a challenge to the ordinance as applied based on its infringement of the artist’s freedoms of expression and assembly and the violation of the due process rights of all individuals cited because no one at the event could have expected that they would receive a quasi-criminal citation for attendance at a concert.

The shocking disregard for civil rights drew the ACLU and volunteer attorneys to advocate for those persons cited. Two months after the event, the

ACLU of Wisconsin, the National Drug Policy Litigation Project of the ACLU and volunteer local counsel were able to reach a settlement with the City of Racine. The ACLU agreed not to proceed with a class action lawsuit against the City of Racine, and the City agreed to dismiss and expunge all citations and promised to revise the ordinance providing enforcement guidelines and training to police to ensure that similar actions would not occur again. Also, as part of the settlement, the City Attorney's Office provided written assurance that the ordinance "will not be enforced against individuals attending large public gatherings who are not engaged in illegal activities" and that "the City Attorney's Office has met with the mayor and police command staff and our office, the mayor's office, and the Racine Police Department have jointly agreed that the incident of November 2-3, 2002, at which all attendees were cited with a violation of the disorderly house ordinance will not be repeated."

Despite the victory, a larger question remains: Why is electronic music targeted with such fervor by local and federal authorities when the drug use at these events is incidental and appears to be on par with that of other genres of music?

Popular misconceptions about electronic music are solely to blame. By educating mainstream media, as the ACLU and local cooperating counsel attempted to accomplish in the Racine "rave" case, it is hoped that public education and awareness will prevent future attacks on electronic music fans' constitutionally protected freedoms. The widespread myths include the following:

- **Electronic music came into popularity primarily from "underground" events in the United States, and the popular misconception is that these events are still "underground."** The first electronic music concerts, or "raves," were held in abandoned

warehouses, fields, and factories. The locations of the events were kept secret and were provided to attendees by word-of-mouth, use of toll-free numbers and later, the internet. The clandestine nature of the events, and the fact that attendees were often trespassing made them a natural target in the "War on Drugs." However, since then, the events have become more public, are now advertised, as the Racine event was, and are now routinely held in bars and clubs in larger cities.

- **There is an association of "rave culture" with "club drugs," such as ecstasy, and there is a misconception that these drugs are especially prevalent and the main attraction at electronic music concerts.** Some individuals at these concerts do use illegal drugs such as ecstasy and Special K (ketamine), as well as other controlled substances. However, no other genre of music is currently targeted like electronic music in the United States. This is the same type of targeting that occurred during the 1920s at jazz clubs and at rock concerts during the 1960s – eras during which particular genres of music were viewed as having a large-scale association with narcotics use. The misconceptions of the past had been used to justify the massive infringement of the rights of attendees and performers. However, now in the 21st century, an action against jazz or rock audiences such as what occurred to electronic music fans would be unheard of.⁵⁵ Targeting by authorities of rap music and heavy metal events still continues to occur in some parts of the country on a lesser scale.

Furthermore, the Department of Justice's Community Oriented Policing Series reports that "[r]aves are enormously popular

among a significant minority of teenagers and young adults, most of whom are generally law-abiding and responsible."⁶

In addition, the use of ecstasy at electronic music events is larger overstated. While ecstasy use has not been studied in the United States, a study in Scotland showed that only 3.3% of ecstasy use occurs at licensed "rave" concerts, while 59% takes place in traditional nightclubs and the remaining 24.6% occurs in a home or house party.⁷

More importantly, the DJs that perform at these concerts are the main attraction for the huge majority of attendees at these events. While electronic music artists such as DJ Logic, Paul Oakenfold, and Fatboy Slim have achieved crossover success into popular music and can draw enough of an audience to support a national tour, fans of lesser-known artists will also travel large distances to hear lesser-known artists. The audience is at the event to hear these artists not for the potential opportunity to use or find narcotics. In fact, electronic music has become so popular that it is now used in commercials for multinational corporations such as Coca-Cola and Ford Motor Company. The misconception that the prevalence of drugs was the primary purpose for fans of the events was dismissed by the Department of Justice report, which noted that, "[a] well-known disc jockey is often the rave's main attraction."⁸

- **There is a misconception that electronic music events are associated with violence and sexual assault in the media.** Although instances of sexual assault and other violence have occurred at "rave" events before, it has not been shown to be more prevalent than at other public

events. Again, the Department of Justice report does not support this view, and states that “[u]nlike other youth events or other types of concerts, raves do not typically involve much assault.”⁹ The Department of Justice publication also decries hysteria that these events are associated with sexual assault, and states that, “in some respects, raves are safer places for young people, especially women, than conventional bars and clubs.”¹⁰

In the Racine case, the ACLU and volunteer attorneys worked to overcome each of these misconceptions urging the general public to finally recognize that it is simply wrong to detain people for hours and issue them citations when they had done nothing wrong. The community-at-large would have no hesitation in voicing their outrage if police targeted a play or a jazz concert and a similar amount of drugs were recovered. It came as some surprise, however, when the local press initially referred to the event as a “drug party” or “illegal rave” and despite the prevalence of advertising, described the event as “underground.” To the press, the audience was presumed to have attended the event due to the perceived accessibility of drugs, despite the reality of what the police recovered and that fact that the event featured a number of DJs with regional fame that routinely drew audiences from a wide geographic area. Citizen comments in the local press also suggested that the quick police action prevented violence and sexual assault despite the fact that no evidence substantiated those claims. Perhaps, the matter could have been more quickly resolved or prevented if the misconceptions were not so ingrained in popular opinion.

In Europe and elsewhere, electronic music events are commonplace, “above ground,” and attendees and promoters do not have a similar fear of police action because the police and popular media are better educated

about the nature of these events. Although, it is hoped that education about the events could move the United States to a more rationale position regarding “raves,” it unfortunately does not appear to be on the horizon. With the language of the RAVE Act, reintroduced as the Illicit Drug Anti-Proliferation Act (S. 226, 108th Cong. (2003)), providing for harsh penalties against electronic music event promoters for the crimes of their customers, it is unlikely the United States will see past this “raving lunacy” in law enforcement policy any time soon.¹¹ Therefore, it is important that civil libertarians recognize the significance of this issue and strive to move the United States to a less arcane position regarding electronic music culture to preserve individual freedom of expression.

¹ The author wishes to thank the American Civil Liberties Union of Wisconsin for the opportunity to serve as local counsel and Hostak, Henzl & Bichler, S.C. for allowing him to undertake this case.

² Allison L. Smith, *Police Arrest 3, Ticket 445 at Rave*, Racine Journal Times, November 4, 2002.

³ ACLU Drug Policy Litigation Project, *After*

ACLU Action, Police Dismiss Citations Against Hundreds of Electronic Music Concertgoers in Wisconsin, (January 16, 2003) <<http://www.aclu.org/DrugPolicy/DrugPolicylist.cfm?c=185>>.

⁴ The Haunted House Party was originally scheduled to occur at the Majestic Theatre, but Racine Police Captain Hurley informed the Uptown Theatre Group, Inc. on the eve of the concert that they did not have the proper permits. The event location was moved to the Tradewinds Village banquet hall and the change was announced on signs in and around the theater.

⁵ Targeting by authorities of rap music and heavy metal events still continues to occur in some parts of the country on a lesser scale.

⁶ Michael S. Scott, *Rave Parties*, U.S. Dep’t of Justice, Problem Oriented Guides for Police Series, p. 1-2.

⁷ Alisdair J.M. Forsyth, *Places and Patterns of Drug Use In the Scottish Dance Scene*, 91 *Addiction* 511, 515 (1996).

⁸ Michael S. Scott, *supra*, at page 4.

⁹ *Id.* at page 8.

¹⁰ *Id.* at page 9.

¹¹ **Editor’s Note:** On April 10, 2003, the Illicit Drug Anti-Proliferation Act passed both houses of Congress without a public hearing, vote or debate, as an attachment to the Amber Alert Bill – the child abduction prevention bill rushed through Congress after the recent recovery of abductee Elizabeth Smart. The legislation must be signed by President Bush before becoming law.



The IRR Section along with the Wisconsin Hispanic Lawyers Association, the Wisconsin Employment Lawyers Association and the ACLU of Wisconsin Foundation sponsored a CLE seminar entitled, *Opening Pandora’s Box: Civil Rights and Arbitration* on April 11, 2003.

Legislative Update

Deb Sybell, Government Relations Coordinator, State Bar of Wisconsin

The new legislative session is in full swing with a myriad of proposals that could encroach on civil liberties and constitutional rights. Thus, the IRR Section will be playing a lot of defense this session to protect the rights of individuals. The section's board has voted to *oppose* the following bills:

Assembly Bill 111 (Photo Identification Requirement for Voting)

Makes voting less accessible by requiring citizens to present a photo ID before exercising their right to vote. This proposal would have a disparate impact on the poor, disabled, homeless and elderly. The bill is on the fast-track in the legislature despite its \$856,000 price tag when the State is facing a \$3.2 billion deficit.

Assembly Bill 120 (Notice of Felon Ineligibility to Vote)

Requires the court to inform felons of their ineligibility to vote at the time

of sentencing. This bill makes it easier for prosecutors to convict felons for voting; however, at the same time, the bill does nothing to educate felons of their right to vote after paying their debt to society.

Assembly Bill 41 (Felon Employment Discrimination by Schools)

Permits an educational agency to refuse to employ or to terminate from employment a felon, regardless of whether the elements of the offense substantially relate to the circumstances of a particular job. The bill would automatically deny jobs to applicants based on felony records frustrating the State's efforts to reintegrate such individuals into society and its efforts to reduce recidivism.

Senate Bill 14 (Peeping Tom)

Makes "peeping" a Class A misdemeanor sex crime and gives courts

discretion to order a "peeper" to register as a sex offender. The broad language of the bill raises red flags and its expansion of the sex offender registry limits post-conviction employability of such individuals.

On a positive note, the Governor's budget proposal and Assembly Bill 95 would allow foreign nationals who meet certain conditions to pay in-state tuition. Under the bill, children who enter the United States with their parents and who live in and finish high school in Wisconsin will be treated no differently than any other child who has also lived and attended school in Wisconsin.

If you have any questions about these proposals or other legislative initiatives, please feel free to contact me at (608) 250-6128.

Guardians ad litem training deadline approaching, June seminars available in statewide locations

Effective July 1, 2003, to be eligible to accept a guardian ad litem (GAL) appointment in actions affecting the family, attorneys must have at least three hours of family court training or request the court make a finding that they are qualified to accept the GAL appointment.

Attend one or two days of the State Bar CLE Seminars' video replay of its **GAL Training 2003: Child Custody and Family Law** program to fulfill the new SCR 35.015 requirements, as amended in

2001. The **Basic Course**, June 3, prepares attorneys to take on a GAL appointment or helps existing GALs with limited experience better understand their role. The **Advanced Course**, June 4, addresses specific areas GALs encounter and helps to increase the skills of experienced GALs whose practices require a thorough understanding of the myriad issues that come up in cases involving a minor

Both programs are offered at statewide locations. The basic program, 8 a.m. - 4 p.m. is approved for up

to 7.0 CLE/GAL credits. The advanced program, 8 a.m. - 4:30 p.m. is approved for up to 7.5 CLE/GAL credits. Both programs are approved for 1.0 EPR credit and will be submitted for Minnesota CLE credits. Tuition is \$360 for both days and \$199 for day one or day two. To register, contact the State Bar at (800) 728-7788, (608) 257-3838, or visit www.wisbar.org/cle/seminars.

Recent Developments in Equal Employment Law from the Perspective of Plaintiffs' Attorneys (continued from page 3)

promise to be bound by arbitration is adequate consideration.

But the court remands the case for discovery and further proceedings on the effect of the provision in the agreement requiring the employee to pay one-half of the arbitration fees and costs. As the Supreme Court acknowledged in *Green Tree*, "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." 531 U.S. at 90. *Green Tree* placed the initial burden of proof on the party resisting arbitration to demonstrate that arbitration would be prohibitively expensive, but the Third Circuit reads *Green Tree* as indicating that the burden then shifts to the party seeking arbitration to "prove that arbitration will not be prohibitively expensive, or ... offer to pay all of the arbitrator's fees." The Third Circuit also finds that *Green Tree* "established the right of a claimant to invoke discovery procedures in the pre-arbitration proceeding in order to assist the claimant in meeting her burden of showing the likelihood of bearing prohibitive costs."

8. *Harris v. Parker College of Chiropractic*, 286 F.3d 790, No. 01-10219 (5th Cir., March 25, 2002)

In a twist on the usual scenario, the employer here appealed from the district court's judgment confirming and adopting an arbitrator's award in favor of the plaintiffs for violations of Title VII and the Texas Commission on Human Rights Act. With respect to the standard of appellate review, the arbitration agreement provided that an arbitrator's award "shall be binding on the parties hereto, although each party shall retain his right to appeal any questions of law" The Fifth Circuit holds that, under this standard as

interpreted in accordance with Texas law, pure questions of law are reviewed *de novo*, while questions of fact and mixed questions of law and fact are reviewed only for "manifest disregard of the law" or on the grounds listed in the FAA, 9 U.S.C. § 10(a). The Fifth Circuit affirmed the district court's judgment confirming the arbitration award.

9. *Murray v. United Food and Commercial Workers Int'l Union*, 289 F.3d 297, No. 01-1602 (4th Cir., May 10, 2002)

The employer in this case was a union. Its arbitration agreement included the following provisions: (1) a single arbitrator would be chosen by the alternate strike method from a list of arbitrators provided by the office of the union president; and (2) the arbitrator would not have the authority to alter, change, or diminish any power, right, or authority granted to the president by the union's bylaws (including the power to terminate an employee).

The Fourth Circuit holds that the arbitration agreement is unconscionable and therefore unenforceable. "[A]greements to arbitrate federal statutory claims, such as those pursued under Title VII, may be revoked if the prospective litigant demonstrates that it cannot 'effectively ... vindicate his or her statutory cause of action in the arbitral forum.'" *Green Tree*, 531 U.S. at 89. Cf. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). In the arbitration agreement here, the employer "provid[ed] itself with the exclusive right to select the list of potential arbitrators from which the ultimate decision maker will be selected," and it "prohibit[ed] a decision that would contravene the

President's right to terminate the employee in any event." The court "refuse[s] to enforce an agreement so 'utterly lacking in the rudiments of even-handedness.'" *Hooters*, 173 F.3d at 195.

B. Age Discrimination in Employment Act

1. *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, No. 01-1023 (1st Cir., Sept. 10, 2001)

The court recognizes hostile work environment claims under the ADEA, and holds that the occurrence of six age-related comments about the plaintiff by company officials over a two-year period were sufficient to constitute a continuing violation. The court also holds that the seven-year age difference between the plaintiff and his replacement was sufficient to support a *prima facie* case of age discrimination. See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) (plaintiff must be replaced by someone "substantially younger"). The First Circuit therefore reverses summary judgment for the employer.

2. *Bennington v. Caterpillar, Inc.*, 275 F.3d 654, No. 01-1361 (7th Cir., Dec. 28, 2001)

The court assumes without deciding that plaintiffs may bring hostile environment claims under the ADEA, but affirms summary judgment for the employer on this issue because the plaintiff failed to produce evidence that the alleged offensive conduct was discriminatory. The Seventh Circuit also affirms summary judgment for the employer on the plaintiff's discharge claim because he offered no evidence that other substantially younger and similarly situated employees were treated more favorably than he was. He offered proof that one other

similarly situated employee was given preferential treatment, but that employee was only five years younger than the plaintiff - a "presumptively insubstantial" difference under the Seventh Circuit's 10-year-difference rule. See *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 892-93 (7th Cir. 1997); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672 (7th Cir. 1997). The plaintiff offered no other evidence of age discrimination to overcome this presumption.

See also *Alexander v. CIT Technology Financing Svcs., Inc.*, 82 EPD ¶ 40,880, 2002 WL 69493, No. 01 CV 7217 (N.D. Ill., Jan. 17, 2002) (collecting cases and concluding that "the combined weight of authority from the Seventh Circuit as well as the other circuits that have faced this issue persuades this court that a hostile environment claim is valid under the ADEA").

3. EEOC v. Board of Regents of the University of Wisconsin System, 288 F.3d 296, No. 01-2998 (7th Cir., April 30, 2002)

A jury found that the defendant willfully violated the ADEA when it terminated four employees of the University of Wisconsin Press based on their age. The Seventh Circuit holds that, although the individual charging parties are barred by the Eleventh Amendment from suing the state, see *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), the EEOC is not barred from suing the state to recover relief for those individuals. The court concludes that the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), "compels us to find that sovereign immunity does not bar this suit, which is brought independently by an agency of the United States government."

The Seventh Circuit also holds that there was sufficient evidence to support the jury's decision that the charging parties were terminated because of their age. Not all of the

charging parties were replaced by persons at least 10 years younger. But the court's "10-year line is not indelible"; it is "not so bright as to exclude cases where the gap is smaller but evidence nevertheless reveals the employer's decision to be motivated by the plaintiff's age." *Hartley, supra*, 124 F.3d at 893. Such additional evidence exists here, including the facts that the four oldest employees were the only ones terminated; that they were held to a higher performance standard than the younger workers; and that the jury could reasonably believe that a number of "code words" reflected age bias.

Finally, the court also affirms the jury's finding that the violation was willful under *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The decisionmakers testified that they wanted to bring younger individuals into the Press as part of a "new vision" if they could jump "legal hurdles," including the ADEA. The court noted that the decisionmakers had not been given any training in employment law, and that no one who had such training looked at the terminations to see if age discrimination might have been involved. "[L]eaving managers with hiring [or firing] authority in ignorance of the basic features of the discrimination laws is an "extraordinary mistake" from which a jury can infer reckless indifference." *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 778 (7th Cir. 2001).

4. Rose v. New York City Board of Education, C.S.D. #13, 257 F.3d 156, No. 00-7599 (2d Cir., July 16, 2001)

The plaintiff, a public school principal, testified at trial that the district superintendent twice told her that he would replace her with someone "younger and cheaper." The jury found for the employer, and the plaintiff appealed.

The Second Circuit reversed, holding that the plaintiff was entitled to an instruction under *Price Waterhouse v. Hopkins*, 490 U.S. 228

(1989), directing the jury to shift to the defendant the burden of showing that the plaintiff would have been demoted even in the absence of a discriminatory motive. The court holds that the "younger and cheaper" remarks were "sufficiently direct evidence of discrimination to allow a jury to find that [the plaintiff's] demotion was motivated, at least in part, by a forbidden factor." "[W]here a plaintiff provides sufficiently direct evidence of discriminatory animus and also challenges all of defendants' proffered motives as pretextual, a jury must be instructed, if requested, to apply the *Price Waterhouse* burden-shifting analysis if it finds the employer was motivated by discriminatory animus but is not fully persuaded by the plaintiff's claims of pretext."

The court also holds that the testimony of two assistant principals regarding their experiences with age discrimination by the district superintendent will be admissible at trial on remand. An EEOC investigation of the plaintiff's age discrimination charge "could reasonably be expected to inquire into other instances of alleged discrimination by the same actor," and the testimony of these two persons "would presumably be relevant on the issue of [the superintendent's] discriminatory animus towards the elderly."

5. Cicero v. Borg-Warner Automotive, Inc., 280 F.3d 579, No. 00-1022 (6th Cir., Jan. 2, 2002)

The Sixth Circuit reverses summary judgment for the employer, holding that the district court misapplied the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The *McDonnell Douglas prima facie* case requirement "is not onerous" and "poses a burden easily met." The district court here erred when it "conflated" the plaintiff's *prima facie* case burden to establish his qualifications with the employer's rebuttal burden to come forward with legiti-

mate, nondiscriminatory reasons for the discharge. "A court must evaluate whether a plaintiff established his qualifications independent of the employer's proffered nondiscriminatory reasons ..."; the court "should only consider the employer's proffered reason in the later stages of the *McDonnell Douglas* analysis." The district court here erred when it analyzed the employer's proffered evidence of the plaintiff's poor work performance as an element of the *prima facie* case. The plaintiff's evidence that he was qualified for the position and was performing satisfactorily included his prior work experience; his receipt of merit increases, bonuses, and written positive evaluations; and his identification by the employer as a "key member" of the management staff. When viewed independently of the employer's asserted nondiscriminatory reason for his discharge, this evidence was "more than enough" to withstand summary judgment on the qualifications issue.

The Sixth Circuit also holds that the district court erred in finding that the plaintiff's 43-year old replacement was not "substantially younger" than the plaintiff, who was 51 at the time of his discharge. "A question of fact remains for a fact finder to resolve whether, under the circumstances of the present case, the seven and one-half year age difference satisfies the fourth prong of [the plaintiff's] *prima facie* case."

The court further holds that the employer's evidence of the plaintiff's poor work performance was sufficient to satisfy its burden of offering a legitimate, nondiscriminatory reason for firing him, but that the plaintiff offered enough evidence to defeat summary judgment by creating a genuine issue of material fact that the employer's asserted reason for firing him was a pretext for discrimination. To raise a genuine issue of fact as to pretext, the plaintiff "must show one of the following: '(1) that the proffered reason[] had no basis in fact, (2) that

the proffered reason[] did not actually motivate the action, or (3) that the proffered reason[] was] insufficient to motivate the action.'" *Nelson v. Gen. Elec. Co.*, 2 Fed. Appx. 425, 430 (6th Cir. 2001) (unpublished). Under the first and third methods, "the fact finder may infer discrimination from the circumstances," and at the pretext stage may rely on evidence used to establish his *prima facie* case. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Under the second method, the plaintiff "may not rely exclusively on his *prima facie* evidence, but instead must introduce some further evidence of discrimination."

The plaintiff here offered sufficient evidence to defeat summary judgment on the pretext issue under any of the three methods discussed above. As to methods (1) and (3), the *prima facie* case "evidence of [the plaintiff's] qualifications, coupled with a lack of contemporaneous criticism of his performance and [the employer's] continued grant of bonuses, could allow a fact finder to find that [the employer's] proffered reason either had no basis in fact or that it was insufficient to motivate the discharge decision." As to method (2), "[b]y showing that the defendants' justification for firing him changed over time, [the plaintiff] shows a genuine issue of fact that the defendants' proffered reason was not only false, but that the falsity was a pretext for discrimination." When the justification for an adverse employment action changes during litigation, that inconsistency "raises an issue whether the proffered reason truly motivated the defendants' decision."

Additionally, the plaintiff offered "statistical evidence" that all six of the employees discharged by the employer were age 51 or older, and that four of them were replaced with younger employees. The court holds that "even [such] a small statistical sample, though not as probative as it might

otherwise be, can nevertheless serve as circumstantial evidence making discrimination more likely than not." This evidence, "coupled with the other circumstantial evidence that [the plaintiff] offers[,] raises a triable issue of fact that the defendants' proffered reason for dismissing [the plaintiff] was a pretext for discrimination."

C. Taxation of Attorneys' Fees

1. *Kenseth v. Commissioner of Internal Revenue*, 259 F.3d 881, No. 00-3705 (7th Cir., Aug. 7, 2001)

The Circuits are split on whether a contingent fee is part of the client's taxable income. The Fifth, Sixth, and Eleventh Circuits have held that, depending on the state law governing contingent fee agreements, such fees may be excluded from the client's taxable income. The Fourth, Ninth, and Federal Circuits (and now the Tenth Circuit, see *Hukkanen-Campbell, infra*), on the other hand, have held that contingent fees must be included in the client's taxable income.

The Seventh Circuit now joins the latter group, holding that the entire proceeds of a \$150,000 ADEA settlement - including the 40 percent that went to the lawyer - are part of the client's gross income. Such attorneys' fees qualify as a miscellaneous itemized deduction for purposes of the regular federal income tax. But attorneys' fees are not deductible in computing the client's alternative minimum tax (AMT) under 26 U.S.C. § 56(b)(1)(A)(i). The court therefore affirms the Tax Court's ruling that the client owes approximately \$17,000 in AMT that he would not have owed if the contingent fee had been excludable from his income.

Judge Posner's opinion for the court acknowledges that this result may seem inequitable. See L. Sager & S. Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 So. Cal. L. Rev. 1075 (2000). But, he states, "it is not a feasible judicial undertaking to achieve global equity in taxation

And, if it were a feasible judicial undertaking, it still would not be a proper one, equity in taxation being a political rather than a jural concept.”

2. *Hukkanen-Campbell v. Commissioner of Internal Revenue*, 274 F.3d 1312, No. 00-9030 (10th Cir., Dec. 19, 2001), cert. denied, 122 S. Ct. 1915 (May 13, 2002)

The Tenth Circuit agrees with the position of the Fourth, Seventh, Ninth, and Federal Circuits, holding that the client must include in her gross income the entire amount of a \$150,000 payment issued jointly to the client and her attorneys pursuant to a judgment in a Title VII case. Even though her attorneys retained \$73,000 as their fee, “[t]he \$150,000 [the client] recovered in her Title VII suit clearly constitutes income from ‘whatever source derived.’” 26 U.S.C. § 61(a).

The Title VII judgment “is a recovery of lost income; the attorney fees she paid represent expenses incurred in generating that income.” But for the AMT, the client would be allowed to deduct the attorneys’ fees as an expense. The AMT, however, precludes various miscellaneous itemized deductions, including fees paid to attorneys by taxpayers. The Tenth Circuit therefore affirms the Tax Court’s decision upholding an AMT deficiency notice in the amount of \$17,402.

Like Judge Posner’s opinion in *Kenseth*, the opinion here rejects the Title VII plaintiff’s invitation “to judicially overturn what she terms an ‘anomalous and unjust result’ created by the application of the AMT to the present case.” “The perceived inequities of the AMT are simply not at issue here. Congress, not this court, must correct any shortcomings in the AMT’s application.”

3. *Sinyard v. Commissioner of Internal Revenue*, 268 F.3d 756, No. 99-71369 (9th Cir., Sept. 25, 2001)

The taxpayer in this case joined two

ADEA class action suits against his former employer and entered into a fee agreement with class counsel which provided that the attorneys would be paid one-third of any amount he recovered in the lawsuit. The EEOC subsequently intervened. The suits ultimately were settled, with the employer agreeing to undertake various corrective measures and to pay the sum of \$35 million to 32 individual plaintiffs (apparently including the taxpayer here) and their attorneys. The plaintiffs agreed to allocate one-third of the net settlement amount (after costs and disbursements) for payment of attorneys’ fees pursuant to the ADEA, 29 U.S.C. §§ 626(b) and 216(b). The employer agreed to pay the attorneys’ fees, costs, and disbursements directly to the plaintiffs’ attorneys. The district court later entered an order approving the settlement. The order allocated one-third of the net settlement amount to attorneys’ fees recoverable pursuant to the ADEA, to be paid directly to the law firm without withholding for taxes.

Under the settlement, in 1992 the taxpayer received a total of \$547,146 (\$273,573 in taxable back pay, \$164,144 in taxable tort damages, and \$109,429 in nontaxable personal injury damages). The IRS maintained that \$252,608 in attorneys’ fees should also be treated as income to the taxpayer. Most of this amount (minus 2 percent of adjusted gross income) would have been allowable as a miscellaneous deduction but for the AMT, which does not allow deductions for attorneys’ fees.

The Ninth Circuit majority affirms the Tax Court’s judgment upholding the deficiency. The payment of fees to ADEA plaintiffs’ lawyers by the plaintiffs’ employer constitutes income to the plaintiffs themselves. “That they never laid hands on the money paid to the lawyers does not obliterate their constructive receipt.” Moreover, under the fee-shifting

provision of the ADEA, “attorneys’ fees are available to prevailing plaintiffs, not to plaintiff’s counsel.” See *Vanegas v. Mitchell*, 495 U.S. 82, 87 (1990) (“it is the party, rather than the lawyer” who is eligible for fees under 42 U.S.C. § 1988).

The majority observes that “[t]he tax impact of the attorneys’ fees arises from the Alternative Minimum Tax. Without its limitation, the attorneys’ fees would be income to the [taxpayers], and the income would be wiped out by deduction of the total received. It would be a wash. The anomalous result, no doubt unintended, arises when part of the deduction is blocked by the AMT. We do not think we can change the basic rules of income tax in order to correct this result.” The remedy “lies with Congress specifically exempting ADEA damages as it has exempted personal injury damages; or the whole issue could be avoided by Congress redesigning the computation of the AMT to permit the full deduction of attorneys’ fees.”

Judge McKeown dissents on the ground that this “unfortunate result” is “at odds with the express statutory language [of the ADEA], which provides that the attorney’s fee award is ‘in addition’ to the plaintiff’s recovery, and with the intent of the statute, which is to make the plaintiff whole.”

Judge McKeown also notes that the taxation to a plaintiff of fees paid to the attorney, combined with the operation of the AMT, “sometimes leaves a victorious civil rights plaintiff with a net after-tax loss.” She gives the following example (quoted from L. Sager & S. Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 So. Cal. L. Rev. 1075, 1078 (2000)):

If the ratio of attorney’s fees to the entire recovery is high enough, a before-tax gain may metamorphose into an after-tax loss. In *Alexander v. Commissioner*, [72 F.3d 938 (1st Cir. 1995),] for example, the plaintiff

settled a state law employment claim for \$250,000 but incurred \$245,000 in attorney's fees, for a pre-tax profit of \$5,000. Under the AMT, the entire \$250,000 recovery was taxable but none of the \$245,000 in attorney's fees was deductible. If we assume that the taxpayer files jointly and has no other income, his AMT liability would be \$53,900. Under these assumptions, the nondeductibility of the employee's attorney's fees under the AMT would convert a \$5,000 before-tax gain into a \$48,900 after-tax loss.

In Judge McKeown's view, this "Draconian result under the Tax Code can only undermine our civil rights laws. After all, the purpose of fee-shifting provisions, like the one in the ADEA, is not only to permit plaintiffs without resources to pursue claims but to encourage meritorious civil rights litigation by defraying its cost." But few plaintiffs will step forward to litigate cases as private attorneys general once they realize that they may actually lose thousands of dollars even if they are "victorious" in their lawsuits. Like the majority, Judge McKeown believes that "this anomaly must ultimately be resolved by Congress."

D. Continuing Violations and Equitable Doctrines Concerning Timely Filing

1. *Frazier v. Delco Electronics Corp.*, 263 F.3d 663 (7th Cir. 2001) (Posner, J.)

In a hostile environment claim resulting from harassment by a coworker, the Seventh Circuit reversed summary judgment for the employer because "a claim of harassment by a coworker doesn't occur until the employer has failed to take reasonable steps to bring the harassment to an end."

The company could not be expected to resolve the problem immediately after it was notified of the harassment. "The company cannot plead for time to rectify a situation ... but deny the time to the victim of harassment to

learn that the company has failed to rectify it after all."

The court notes that this is a principle more "fundamental" than the doctrine of continuing violation. "When, as may have happened here ..., the victim of harassment is reasonably induced by the defendant or others to believe that the situation has been or is in reasonable course of being resolved, the statute of limitations is tolled."

While this case was decided before *National Railroad Passenger Corporation v. Morgan*, *supra*, Judge Posner's opinion anticipates the emphasis in *Morgan* placed upon "equitable doctrines."

2. *Cuddy v. Stop & Shop Supermarket Co.*, 750 N.E. 2d 928 (Mass. 2001)

In a hostile environment sex harassment claim, the Massachusetts Supreme Judicial Court adopted a continuing violation rule that permitted the litigation of a claim and obtaining relief that would have been barred by at least one version of the continuing violation doctrine applied by the federal courts. The Court rejected the pre-*Morgan* federal "revelatory standard" that a "continuing violation will fail if the plaintiff was, or should have been aware that she was being unlawfully discriminated against while the earlier acts, now untimely, were taking place." The Court concluded that this result is "fair neither to the employee, who may be forced prematurely to choose litigation as a remedy, nor to the employer, who has a legitimate interest in attempting to resolve allegations of harassment short of time-consuming and expensive litigation." The Court provided the following guidance: "[A] plaintiff who demonstrates a pattern of sexual harassment that creates a hostile work environment and that includes conduct within the six-month statute of limitations, may claim the benefit of the continuing violation

doctrine and seek damages for conduct that occurred outside the limitations period, unless the plaintiff knew or reasonably should have known that her work environment was pervasively hostile and unlikely to improve, and thus, a reasonable person in her position would have filed a complaint with MCAD before the statute ran on that conduct."

In this decision, the Massachusetts Supreme Judicial Court rejected a narrow federal appellate court standard for the application of the continuing violation doctrine. In light of the limitation on the application of the continuing violation rule by the Supreme Court of the United States, *National Railroad Passenger Corporation v. Morgan*, *supra*, for claims other than hostile environment claims, plaintiffs may achieve success by relying upon interpretations of state law.

E. Evidentiary Issues

1. *Byrnie v. County of Cromwell Board of Education*, 243 F.3d 93 (2d Cir. 2001)

The Second Circuit reversed summary judgment against plaintiff because the employer had failed to keep relevant employment records. The plaintiff had brought gender and age discrimination claims. The defendant did not have (a) the investigative notes that the school principal made in order to write the memorandum that was used to prepare the answers to the plaintiff's complaint; and (b) the documents used or made by the search committee that made the selection decision.

Importantly, there was no claim or evidence that the defendant had purposely destroyed the documents in order to conceal the contents from the plaintiff. The plaintiff was required to establish only that the defendant's destruction of the documents was not accidental; the plaintiff need not prove that the defendant intended to destroy evidence.

The Second Circuit ruled that the unavailable evidence created an “adverse evidentiary inference” that required a jury to hear and decide the facts of the case. The court relied upon 29 C.F.R. Part 1602, which requires an employer to preserve “personnel or employment records” for a period of time. Where “a party has violated an EEOC record retention regulation, a violation of that regulation can amount to a breach of duty necessary to justify a spoliation inference in an employment discrimination action.” A jury “could reasonably find that the documents destroyed ... would have filled out the picture in an unflattering manner showing [an] unlawfully discriminatory reason [for] the decision not to hire plaintiff.”

Plaintiffs may effectively use the failure of a company to comply with record-keeping requirements. If the company does not have the records that the law requires it to maintain, the jury may be influenced by arguments that (a) records would have contained evidence contrary to the interests of the company and (b) if a company disregards requirements of the law with respect to record-keeping, then it likely fails to adhere to other requirements regarding equal employment opportunity.

2. *Siler-Khodr v. University of Texas*, 261 F.3d 542 (5th Cir. 2001)

The Fifth Circuit affirmed a judgment awarding a female professor \$91,000 in back pay and \$20,000 in compensatory damages on Title VII and Equal Pay Act claims. (The court added \$91,000 in liquidated damages under the EPA and attorneys’ fees.) (1) The appellate court reemphasized the proposition that a fact finder may infer pretext in an individual case from a statistical showing of disparity. (2) The court concluded that the lower court properly denied the defendant’s motion for judgment as a matter of law, which was based upon the failure of the plaintiff’s regression analysis to consider certain variables. The

regression analysis did not consider either faculty salaries by medical subspecialty or discrimination by the plaintiff’s department chair. The omission of variables from a regression analysis usually affects only the probative value, not the admissibility, of the study. The Fifth Circuit emphasized that a plaintiff need not prove discrimination with scientific certainty.

3. *Hemmings v. Tidyman’s, Inc.*, 285 F.3d 1174 (9th Cir. 2002)

See Section II. H. 2., *infra* (expert evidence).

F. Standard of Proof and State Statutory Standards

1. *State Department of Health Services v. Superior Court*, 94 Cal. App. 4th 14, 113 Cal. Rptr. 2d 878, 2001 Cal. App. Lexis 2675 (3d Dist. 2001), *pet. for review granted*, 41 P. 3d 1, 2002 Cal. Lexis 594 (Feb. 13, 2002)

A California appellate court rejected the *Faragher/Ellerth* defense. “Under FEHA and California case law employers are strictly liable for harassing conduct of supervisors, even though the employer did not know, and did not have reason to know, of the conduct.”

The court emphasized a “critical distinction” between California and federal law. Unlike Title VII, the California Fair Employment and Housing Act explicitly describes illegal harassment. Cal. Gov. Code Section 12940(j)(1) provides that harassment by a non-supervisory coworker is unlawful only if the employer knew, or should have known, of the harassment and failed to correct it. There is no such statutory limitation on illegal harassment by a supervisor. The court listed Michigan, Missouri, and Illinois as other states whose courts have rejected the *Faragher/Ellerth* defense in actions under state anti-discrimination statutes. [Similarly, New Jersey law would probably limit the defenses that

a company might assert. See, *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 120-21 n. 19 (3d Cir. 1999) (the New Jersey fair employment law is in “some respects broader and more flexible than Title VII”).]

While *Faragher* and *Ellerth* are generally considered positive decisions for plaintiffs, some state courts have established even better standards for plaintiffs.

2. *Esberg v. Union Oil Co. of California*, 2002 Cal. Lexis 3801 (Cal. S. Ct. June 24, 2002)

The plaintiff, a 53 year-old employee, sought company financial support for postgraduate education. His supervisor rejected the request, stating that “you’re too old to invest in.” The plaintiff alleged that this denial violated section 12941 of the California Fair Employment and Housing Act because he was denied an employment benefit because of his age. The plaintiff also alleged that the denial of educational assistance to an employee over 40 years of age because of the employee’s age violates a fundamental public policy and thus constitutes a common law tort for which damages are recoverable under *Tamery v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980), and *Rojo v. Kliger*, 52 Cal. 3d 65 (1990).

The California Supreme Court rejected the plaintiff’s claims based upon a plain-meaning reading of the statutory language. The statute makes it an unlawful employment practice for an employer to “refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote any individual over the age of 40 on the ground of age ...” Section 12941 of FEHA. This prohibition contrasts with statutory language barring discrimination based on race, religious creed, color, sex, national origin, and other categories in, among other things, the “terms, conditions, or privileges of employment.”

Accordingly, under “no reasonable construction ... does the statutory

language of the FEHA extend the age discrimination prohibition ... to the terms and conditions of employment, such as the furnishing of educational assistance.” Plaintiff’s common law tort claim was dismissed because the public policy upon which it is based is not supported by a constitutional or statutory provision since the FEHA does not bar discrimination in the award of employment benefits, such as assistance for education.

G. Class Actions

1. *Robinson v. Metro-North*, 267 F.3d 147 (2d Cir. 2001), cert. denied, 122 S. Ct. 1349 (2002)

The district court denied motions for class certification and bifurcation and entered judgment for defendant. *Robinson v. Metro-North Commuter R.R.*, 197 F.R.D. 85 (S.D.N.Y. 2000).

The Second Circuit vacated the judgment dismissing the action, and ordered the district court to certify the disparate impact claims under Rule 23(b)(2) for class treatment, and to consider whether the pattern-or-practice disparate treatment claims were appropriate for (b)(2) certification. The Second Circuit further remanded the issue of whether the pattern-or-practice disparate treatment claims may be certified under Rule 23(b)(2). The Second Circuit further held that, in the event that the district court determines that the disparate treatment damages claims are not suitable for Rule 23(b)(2) treatment, the district court should certify “the liability of the pattern-or-practice disparate treatment claim for (b)(2) class treatment.”

The Second Circuit focused upon the question raised in *Allison v. Citgo Petroleum Corp.*, 157 F.3d 402 (5th Cir. 1998) and adopted by the lower court: “whether [the *Allison*] bright-line bar to (b)(2) class treatment of all claims for compensatory damages and other non-incidental damages (e.g., punitive damages) is appropriate.”

The Second Circuit declined to

adopt the incidental damages approach established in *Allison*. “Rather, we hold that when presented with a motion for (b)(2) class certification of a claim seeking both injunctive relief and non-incidental monetary damages, a district court must consider the evidence presented at a class certification hearing and arguments of counsel; and then assess whether (b)(2) certification is appropriate in light of ‘the relative importance of the remedies sought, given all of the facts and circumstances of the case.’”

“The district court may allow (b)(2) certification if it finds ... that (1) ‘the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed,’ *Allison*, 151 F.3d at 430 (Dennis, J., dissenting), and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.”

The court emphasizes the second standard: achieving judicial economy. The “ad hoc” approach is better than a “one size fits all” approach. “Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action ..., there is a presumption of cohesion and unity between absent class members and class representatives.”

In any event, the court rules that the liability phase of a class disparate treatment claim may be tried under (b)(2), but it does not analyze the reason that it reaches this result for this particular case.

The appellate court stated that it did not reach the plaintiffs’ second claim - i.e., that the liability phase may also be separately certified under Rule 23(b)(3). In *Allison*, the Fifth Circuit stated that the case as a “whole” must meet the predominance requirement and that Rule 23(c)(4) does not permit partial certification of a case. While the Second Circuit does not reach this issue, it does cite a Ninth Circuit decision, *Valentino v. Carter Wallace,*

Inc., 97 F.3d 1227, 1234 (9th Cir. 1996), as ruling to the contrary of *Allison*.

The circuit courts have adopted conflicting positions regarding important questions about the application of Rule 23. We can anticipate that the Supreme Court will review these questions. While this diverse approach continues, the plaintiffs, where they have a choice, will seek to file class actions in the Second, Ninth and, perhaps, Seventh Circuits rather than, for example, the Fourth and Fifth Circuits.

2. *Drayton v. Western Auto Supply Co.*, No. 01-10415 (11th Cir. March 11, 2002) (Not for Publication)

Although this opinion is “not for publication,” it illustrates a strategy that class plaintiffs may follow within circuits that follow a more restrictive approach to the application of Fed. R. Civ. P. 23 to employment discrimination cases.

It is noteworthy that the class allegations were premised upon an alleged policy of segregation. The plaintiffs claimed that the company sought to match the “racial composition of a store to the racial composition of the neighborhood in which the store was located.”

As a preliminary matter, the Eleventh Circuit applies its equitable tolling rule that the statute of limitations did not begin to run until the plaintiffs knew or suspected that the company had a policy of segregation. They learned about this policy when a company officer testified about it in another litigation. This equitable tolling principle is set forth in a published Eleventh Circuit opinion, *Carter v. West Publishing Co.*, 225 F.3d 1258, 1265 (11th Cir. 2000) (“under equitable tolling, Title VII’s statute of limitations does not start to run until a plaintiff knew or reasonably should have known that she was discriminated against”).

Both parties accepted the ruling in

Allison v. Citgo Petroleum Corp., 151 F.3d 402, 407-09 (5th Cir. 1998), that in almost all circumstances, plaintiffs could not maintain a class action if they sought compensatory and punitive damages.

The defendant argued that the plaintiffs could not serve as adequate class representatives if they were willing to forgo class claims for compensatory and punitive damages. The plaintiffs argued that “they are in a ‘catch 22’ situation if they cannot seek such damages on behalf of the class and, yet, failing to do so renders them inadequate.”

The court approved the plaintiffs’ approach *provided that* the class representatives did not seek compensatory or punitive damages for themselves. The court approved the certification of the class pursuant to Rule 23(b)(3).

Both plaintiffs and defendants should consider the interesting strategic advantages and disadvantages of this approach. Given that class members may opt out of a Rule 23 (b)(3) class action, a class member may take advantage of the class proceeding or, if she perceives that she has a significant claim for compensatory and/or punitive damages, may proceed in an individual case. The defendant should consider whether it has gained any advantage by limiting the class or whether it has placed itself in a worse situation by having to confront both a class action proceeding and individual damages trials. The strategic questions are further complicated by the possible application by plaintiffs of offensive collateral estoppel in individual trials.

H. Monetary Damages

1. *Peyton v. Dimario*, 287 F.3d 1121 (D.C. Cir. 2002)

Plaintiff prevailed on sexual harassment, hostile work environment, and retaliation claims against the government printing office (GPO). The jury awarded the plaintiff

\$482,000 in compensatory damages, which the district court reduced to the “cap” limit of \$300,000, and the court added \$78,476.90 as back pay and \$377,615.72 as compensation for lost future earnings. The GPO appealed only the damages and relief awarded.

The GPO argued that 42 U.S.C. § 1981a(b), which establishes the \$300,000 cap for compensatory and punitive damages, requires a “sliding scale” where only the most egregious discrimination would justify a \$300,000 award. But the appellate court held that the section “does nothing other than provide a cap.” The standard is “whether the judgment awarded, regardless of whether it is the statutory maximum, is supported by evidence, and does not shock the conscience, or is not inordinately large so as to be obviously unreasonable.” The court rejects GPO’s attempt to reduce the award by showing lower jury verdicts where there arguably was more egregious discrimination. Rather, the court concludes that it is “rarely appropriate for an appellate court to reduce the trial court’s determination as to the proper amount of damages.”

The appellate court ruled that the award of front pay was unduly speculative because it covered 26 years, until a projected retirement at 60, and assumed that plaintiff would work at a low-paying job compared to a skilled position at the GPO. The appellate court indicated that, while “some speculation is necessary,” the plaintiff failed to establish a sufficient record justifying the award. Notably, the court suggested that expert testimony regarding a projected work career would be relevant.

2. *Hemmings v. Tidyman’s, Inc.*, 285 F.3d 1174 (9th Cir. 2002)

The jury returned a verdict for two women who claimed discrimination in compensation, promotion, and retaliation in violation of Title VII and Washington civil rights law.

The jury awarded plaintiff Hemmings \$120,000 in lost wages, \$1,580,000 in future earnings, and \$230,000 in non-economic damages, for a total award of \$1,930,000; the jury awarded plaintiff Lamphear \$596,500 in lost wages, \$1,024,000 in future earnings, and \$650,000 in non-economic damages, for a total award of \$2,270,500; and the jury awarded each plaintiff \$1,000,000 in punitive damages. However, the district court ruled that the evidence did not support an award of punitive damages.

The jury found that the defendant had committed disparate impact discrimination in promotions and compensation based primarily upon the testimony of an expert. The defendant challenged the analysis of the plaintiffs’ expert, who included the entire lower management pool (i.e., management employees in both corporate and store positions) as potential applicants for upper management jobs. The Ninth Circuit held that the expert was correct, because employees for both types of positions are selected for upper management.

The appellate court also rejected the defendant’s argument that the analysis was not admissible because it did not eliminate all of the possible nondiscriminatory factors. As a general matter, “failure to include variables will affect the analysis’ probativeness, not its admissibility,” quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). On occasion, an analysis may be so incomplete as to be inadmissible or irrelevant. In this case, the defendant relied upon “subjective” and “undefined” promotion and compensation standards. The defendant cannot rely upon “unsubstantiated” assertions of error. For example, if Tidyman’s believed that information about education was central, then it “should have provided information about educational level to the plaintiffs, or at a minimum, introduced testimony that education was a central factor to promotions.” In this case, the

plaintiffs' expert used the best available data. The expert tracked the employees' seniority and experience at the company. The expert's testimony had probative value, and any inadequacies in such testimony were presented to the jury by cross-examination.

The Ninth Circuit rejected the argument that the damage awards were "grossly excessive." The plaintiffs introduced evidence of a certified public accountant covering past lost wages and future lost wages.

The district court allocated to state law the \$650,000 non-economic damages awarded to plaintiff Lamphear and therefore did not apply the federal cap. The Ninth Circuit affirmed.

The district court did not apply the standard for the award of punitive damages established by *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). The Ninth Circuit concluded that after *Kolstad*, "in general, intentional discrimination is enough to establish punitive damages liability." The "mental state element" for an award of punitive damages is satisfied if a jury could have concluded that that defendant acted with reckless disregard for the plaintiffs' rights. "The record contains substantial evidence" that Tidyman's was aware of anti-discrimination laws and "acted in the face of this awareness." Accordingly, the Ninth Circuit reversed the district court's ruling that the evidence was insufficient to support the jury's awards of punitive damages.

I. Wage and Hour Law

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. In the year 2001, the number of new FLSA collective action filings surpassed the number of new EEO class actions filed in federal court.

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). For example, 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). Other recent collective action cases include: *Vazquez v. Tri-State Management Co., Inc.*, 2002 U.S. Dist. LEXIS 385 (N.D. Ill. 1/14/02) (overtime collective action involving construction workers); *Ansoumana v. Gristed's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001) (state and federal wage claims of immigrant grocery delivery workers); *Ascencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660 (E.D. Pa. 2001) (collective action for "donning and doffing" time in poultry processing plant).

The California Supreme Court has 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 (2000).

While California trial courts have often certified state law wage/hour claims as class actions, the appellate court reversed a class certification order involving alleged misclassification as to the executive exemption. *Sav-On Drug Stores, Inc.*

v. Superior Court, 97 Cal.App.4th 1070 (2002). In this case, the appeals court ruled that individualized fact issues precluded class certification.

3. Executive Exemption

The U.S. Department of Labor is undertaking a review of the exemptions for white collar employees, including the executive exemption. *BNA Wage Hour & Leave Report* (June 21, 2002). Courts continue to hold that "managers" may be exempt as "executives" despite spending little time on exempt duties. *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104 (9th Cir. 2001) (RV park managers are executives despite spending 90% of their work time on non-exempt duties).

4. Administrative Exemption

Some courts continued to apply the "administrative-production dichotomy." In *Bell v. Farmers Insurance Exchange*, 87 Cal.App.4th 805 (2001), a California Court of Appeal affirmed summary judgment for a class of insurance claims adjusters, finding that they served a production role. A subsequent jury trial resulted in a class verdict of \$90 million in back overtime pay. See also: *Casas v. Conseco Finance Corp.*, 2002 U.S. Dist. LEXIS 5775 (D. Minn. 3/31/02) (loan sales agents not administrative employees, applying production dichotomy). *But see, Webster v. Public Schools Employees of Washington*, 247 F.3d 910 (9th Cir. 2001) (union staff representative is exempt administrative employee; questioning utility of production dichotomy).

5. Attorneys' Fees

Reasonable attorneys fees are available to employees' counsel who prevail in FLSA cases. In *Batt v. Micro Warehouse, Inc.*, 241 F.3d 891 (7th Cir. 2001), the Seventh Circuit affirmed an award of fees based on an hourly rate of \$350/hour.

6. Retaliation

Injunctive relief (in addition to potential tort damages) is now clearly available to litigants claiming retaliation.

tion for asserting their rights under the FLSA. *Bailey v. Gulf Coast Transportation, Inc.*, 280 F.3d 1333 (11th Cir. 2002).

7. 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. Whether travel time from home to the first customer's job site and return travel time to home from the last customer site were compensable, was ruled to be triable. *Steeleman v. Telco Telephone Co., Inc.*, 2001 WL 21361 (D. Ore. 2001). 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). On-call time may also be compensable. *Pabst v. Oklahoma Gas & Electric Co.*, 228 F.3d 1128 (10th Cir. 2000).

8. Outside Sales Exemptions

Employers are routinely misclassifying inside sales employees as exempt under the administrative exemption. Sales personnel are usually more appropriately classified as non-exempt production employees. *Casas v. Conseco Finance Corp.*, 2000 U.S. Dist. LEXIS 5775 (D. Minn. 3/31/02). 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 may be non-exempt employees as they spent the majority of their time hauling 40 pound bottles of water.

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, *Block v. City of Los Angeles*, 253 F.3d 410 (9th Cir. 2001) (partial week suspensions); *Whetsel v. Network Property Services, Inc.*, 246 F.3d 897 (7th Cir. 2001) (partial day deductions); *Yourman v. Giuliani*, 229 F.3d 124 (2nd Cir. 2000) (disciplinary deductions); *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). The window of corrections doctrine is not available where the violations arose due to an employer's unlawful policies. *Tobacs v. Hahn Automotive Corp.*, 246 F.3d 776 (6th Cir. 2001). In California, recent administrative controversies have left practitioners with no clear guidance as to whether state law requires a weekly as opposed to a monthly salary basis test.

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.

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