EMERGING EMPLOYMENT LAW ISSUES

by

ROBERT B. FITZPATRICK, ESQ.
ROBERT B. FITZPATRICK, PLLC
Suite 640
Universal Building South
1825 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728
(202) 588-5300 (telephone)
(202) 588-5023 (fax)
fitzpatrick.law@verizon.net (e-mail)
www.robertbfitzpatrick.com (website)

“At that time there were two monks who were discussing the topic of the wind and flag. One said, “The wind is moving.” The other said, “The flag is moving.” They argued incessantly. Hui Neng stepped forward and said, “The wind is not moving, nor is the flag. Your minds, Kind sirs, are moving.” Everyone was startled.

- The Sixth Patriarch's Dharma Jewel Platform Sutra
DISCLAIMER OF ALL LIABILITY AND RESPONSIBILITY

THE INFORMATION CONTAINED HEREIN IS BASED UPON SOURCES BELIEVED TO BE ACCURATE AND RELIABLE -- INCLUDING SECONDARY SOURCES. DILIGENT EFFORT WAS MADE TO INSURE THE ACCURACY OF THESE MATERIALS, BUT THE AUTHOR ASSUMES NO RESPONSIBILITY FOR ANY READER'S RELIANCE ON THEM AND ENCOURAGES READERS TO VERIFY ALL ITEMS BY REVIEWING PRIMARY SOURCES WHERE APPROPRIATE AND USING TRADITIONAL LEGAL RESEARCH TECHNIQUES TO MAKE SURE THAT THE INFORMATION HAS NOT BEEN AFFECTED OR CHANGED BY RECENT DEVELOPMENTS.

THIS PAPER IS PRESENTED AS AN INFORMATIONAL SOURCE ONLY. IT IS INTENDED TO ASSIST READERS AS A LEARNING AID BUT DOES NOT CONSTITUTE LEGAL, ACCOUNTING OR OTHER PROFESSIONAL ADVICE. IT IS NOT WRITTEN (NOR IS IT INTENDED TO BE USED) FOR PURPOSES OF ASSISTING CLIENTS, NOR TO PROMOTE, MARKET, OR RECOMMEND ANY TRANSACTION OR MATTER ADDRESSED AND, GIVEN THE PURPOSE OF THE PAPER, MAY OMIT DISCUSSION OF EXCEPTIONS, QUALIFICATIONS, OR OTHER RELEVANT INFORMATION THAT MAY AFFECT ITS UTILITY IN ANY LEGAL SITUATION. THIS PAPER DOES NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE AUTHOR AND ANY READER. DUE TO THE RAPIDLY CHANGING NATURE OF THE LAW, INFORMATION CONTAINED IN THIS PAPER MAY BECOME OUTDATED. IN NO EVENT WILL THE AUTHOR, BE LIABLE FOR ANY DIRECT, INDIRECT, CONSEQUENTIAL OR OTHER DAMAGES RESULTING FROM AND/OR RELATED TO THE USE OF THIS MATERIAL.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADA</td>
<td>1</td>
</tr>
<tr>
<td>ADA – CLASS ACTIONS</td>
<td>3</td>
</tr>
<tr>
<td>ADA – CLASS ACTIONS</td>
<td>3</td>
</tr>
<tr>
<td>ADMISSIBILITY OF E-MAILS</td>
<td></td>
</tr>
<tr>
<td>ADVERSE ACTION</td>
<td>4</td>
</tr>
<tr>
<td>AFFIRMATIVE ACTION</td>
<td>5</td>
</tr>
<tr>
<td>AGE DISCRIMINATION IN EMPLOYMENT ACT</td>
<td>9</td>
</tr>
<tr>
<td>ADEA - DISPARATE IMPACT</td>
<td>11</td>
</tr>
<tr>
<td>AGENCY FEES – FIRST AMENDMENT</td>
<td>11</td>
</tr>
<tr>
<td>APPLICANTS</td>
<td>11</td>
</tr>
<tr>
<td>ARBITRATION</td>
<td>12</td>
</tr>
<tr>
<td>ATTORNEY-CLIENT PRIVILEGE</td>
<td>16</td>
</tr>
<tr>
<td>ATTORNEY-CLIENT PRIVILEGE – INTERNAL INVESTIGATION</td>
<td>20</td>
</tr>
<tr>
<td>ATTORNEY-CLIENT PRIVILEGE – PUBLIC RELATIONS FIRMS</td>
<td>21</td>
</tr>
<tr>
<td>ATTORNEY-CLIENT PRIVILEGE – OMBUDSMEN PRIVILEGE</td>
<td>21</td>
</tr>
<tr>
<td>ATTORNEYS’ FEES</td>
<td>22</td>
</tr>
<tr>
<td>ATTORNEYS’ FEES – DISCOVERY OF DEFENSE FEES</td>
<td>25</td>
</tr>
<tr>
<td>BACKGROUND CHECKS</td>
<td>27</td>
</tr>
<tr>
<td>BANKRUPTCY</td>
<td>28</td>
</tr>
<tr>
<td>BLOGS AND INTERNET MESSAGE BOARDS</td>
<td>29</td>
</tr>
<tr>
<td>BLOGS – FREE SPEECH</td>
<td>31</td>
</tr>
<tr>
<td>BONUS PLAN</td>
<td>32</td>
</tr>
<tr>
<td>CAREGIVER DISCRIMINATION</td>
<td>33</td>
</tr>
<tr>
<td>CASH BALANCE PLANS</td>
<td>33</td>
</tr>
<tr>
<td>CIVIL RIGHTS ACT OF 1866 – 42 U.S.C. § 1981</td>
<td>34</td>
</tr>
<tr>
<td>CLASS AND COLLECTIVE ACTIONS</td>
<td>35</td>
</tr>
<tr>
<td>CLASS ACTIONS - CERTIFICATIONS</td>
<td>36</td>
</tr>
<tr>
<td>CLASS ACTIONS - SETTLEMENT</td>
<td>36</td>
</tr>
<tr>
<td>CLASS ACTION FAIRNESS ACT (CAFA)</td>
<td>36</td>
</tr>
<tr>
<td>COMMON LAW</td>
<td>37</td>
</tr>
<tr>
<td>COMMUNICATIONS DECENCY ACT</td>
<td>40</td>
</tr>
<tr>
<td>COMPUTERS</td>
<td>40</td>
</tr>
<tr>
<td>COMPUTERS - COMPUTER FRAUD AND ABUSE ACT</td>
<td>41</td>
</tr>
<tr>
<td>COMPUTERS – COMPUTER RELATED OFFENSES ACT (CROA)</td>
<td>42</td>
</tr>
<tr>
<td>Topic</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>COMPUTERS – EMPLOYER ACCESS TO EMPLOYEES’ COMPUTERS</td>
<td>42</td>
</tr>
<tr>
<td>COMPUTERS - MONITORING</td>
<td>43</td>
</tr>
<tr>
<td>COMPUTERS - PRIVACY</td>
<td>43</td>
</tr>
<tr>
<td>CONGRESSIONAL ACCOUNTABILITY ACT</td>
<td>44</td>
</tr>
<tr>
<td>CONSTRUCTIVE DISCHARGE</td>
<td>45</td>
</tr>
<tr>
<td>CONTRACT - COMMISSIONS</td>
<td>46</td>
</tr>
<tr>
<td>CONVERSION OF ELECTRONIC DATA</td>
<td>47</td>
</tr>
<tr>
<td>CORPORATE INVESTIGATIONS</td>
<td>47</td>
</tr>
<tr>
<td>COSTS</td>
<td>48</td>
</tr>
<tr>
<td>CREDIT UNIONS</td>
<td>48</td>
</tr>
<tr>
<td>DAMAGES</td>
<td>48</td>
</tr>
<tr>
<td>DAMAGES – FRONT PAY</td>
<td>49</td>
</tr>
<tr>
<td>DAMAGES – LOST HEALTH INSURANCE COVERAGE</td>
<td>50</td>
</tr>
<tr>
<td>DAMAGES – MITIGATION</td>
<td>51</td>
</tr>
<tr>
<td>DAMAGES – PUNITIVE DAMAGES</td>
<td>51</td>
</tr>
<tr>
<td>DAMAGES – PUNITIVE DAMAGES – DEFENDANT’S NETWORTH</td>
<td>53</td>
</tr>
<tr>
<td>DAMAGES – TAX BUMP RELIEF</td>
<td>54</td>
</tr>
<tr>
<td>DAMAGES – UNCONDITIONAL OFFER OF REINSTATEMENT</td>
<td>56</td>
</tr>
<tr>
<td>D.C. § 12-309 NOTICE REQUIREMENT</td>
<td>56</td>
</tr>
<tr>
<td>D.C. HUMAN RIGHTS ACT – INDIVIDUAL LIABILITY</td>
<td>56</td>
</tr>
<tr>
<td>DEFAMATION</td>
<td>57</td>
</tr>
<tr>
<td>DISABILITY DISCRIMINATION - FEDERAL</td>
<td>61</td>
</tr>
<tr>
<td>DISABILITY DISCRIMINATION – DEFINITION OF EMPLOYEE</td>
<td>63</td>
</tr>
<tr>
<td>DISABILITY DISCRIMINATION - STATE</td>
<td>64</td>
</tr>
<tr>
<td>DISCOVERY</td>
<td>65</td>
</tr>
<tr>
<td>DISCOVERY - DISPUTES</td>
<td>65</td>
</tr>
<tr>
<td>DISCRIMINATION – BURDEN OF PROOF</td>
<td>68</td>
</tr>
<tr>
<td>DISCRIMINATION – MIXED MOTIVE</td>
<td>69</td>
</tr>
<tr>
<td>DISCRIMINATION – PRETEXT</td>
<td>70</td>
</tr>
<tr>
<td>DISCRIMINATION – RACE</td>
<td>72</td>
</tr>
<tr>
<td>DISCRIMINATION – SEX</td>
<td>72</td>
</tr>
<tr>
<td>DISCRIMINATION – SOURCE OF INCOME</td>
<td>73</td>
</tr>
<tr>
<td>DISPARATE IMPACT - RACE</td>
<td>75</td>
</tr>
<tr>
<td>DOMESTIC ABUSE</td>
<td>75</td>
</tr>
<tr>
<td>DUTY TO WARN</td>
<td>76</td>
</tr>
<tr>
<td>E-DISCOVERY</td>
<td>77</td>
</tr>
<tr>
<td>EEOC ADMINISTRATIVE PRACTICE</td>
<td>82</td>
</tr>
</tbody>
</table>
ERISA ........................................................................................................................................... 85
EMPLOYEE CHOICE DOCTRINE................................................................................................ 91
EMPLOYEE HANDBOOK................................................................................................................ 92
EMPLOYER LIABILITY FOR EMPLOYEES ON CELL PHONES WHILE DRIVING ............ 93
EMPLOYMENT AGREEMENTS .................................................................................................... 93
EQUAL PAY ACT ....................................................................................................................... 93
EQUAL PROTECTION – CLASS OF ONE .................................................................................. 94
ETHICS .......................................................................................................................................... 94
ETHICS – LAWYER AS A WITNESS ...................................................................................... 104
ETHICS – MISREPRESENTATIONS DURING INVESTIGATIONS .............................................. 105
EVIDENCE ..................................................................................................................................... 106
EVIDENCE – AGENCY DETERMINATIONS .............................................................................. 107
EVIDENCE – ATTORNEY-CLIENT PRIVILEGE ........................................................................ 109
EVIDENCE – CHARACTER & REPUTATION .......................................................................... 109
EVIDENCE – DECISION MAKING AUTHORITY ....................................................................... 110
EVIDENCE – DISCRIMINATION ............................................................................................... 111
EVIDENCE - ELECTRONIC ......................................................................................................... 112
EVIDENCE – OUTSIDE STRESSORS ....................................................................................... 112
EVIDENCE – PRIOR ACTS .......................................................................................................... 112
EVIDENCE - SPOiliation ........................................................................................................... 113
EXECUTIVE COMPENSATION ................................................................................................. 114
EXECUTIVE COMPENSATION - § 409A .................................................................................. 114
EXPERT WITNESS TESTIMONY ............................................................................................... 115
EXPERT WITNESS TESTIMONY – MENTAL HEALTH .......................................................... 116
EXPERT WITNESS TESTIMONY – WORK PRODUCT DOCTRINE ....................................... 116
EXTRATERRITORIALITY ............................................................................................................ 117
FAIR CREDIT REPORTING ACT ............................................................................................... 118
FALSE CLAIMS ACT .................................................................................................................. 120
FAMILY RESPONSIBILITIES DISCRIMINATION .................................................................... 123
FEDERAL EMPLOYEE’S COMPENSATION ACT .................................................................... 124
FEDERAL JURISDICTION OVER STATE-LAW MALPRACTICE CLAIMS .............................. 124
FEDERAL SECTOR EEO ............................................................................................................. 124
FIRST AMENDMENT .................................................................................................................. 125
FLSA ............................................................................................................................................ 125
FMLA ........................................................................................................................................... 131
FOREIGN CORRUPT PRACTICES ACT .................................................................................... 136
FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA) ................................................................. 137
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender Identity Discrimination</td>
<td>137</td>
</tr>
<tr>
<td>Harassment</td>
<td>140</td>
</tr>
<tr>
<td>Hedonic Damages</td>
<td>142</td>
</tr>
<tr>
<td>HIPAA</td>
<td>142</td>
</tr>
<tr>
<td>IDEA-Submission Claims</td>
<td>143</td>
</tr>
<tr>
<td>Immigration</td>
<td>143</td>
</tr>
<tr>
<td>Imputation of Liability – Cat's Paw</td>
<td>148</td>
</tr>
<tr>
<td>Indemnification</td>
<td>150</td>
</tr>
<tr>
<td>Independent Contractor</td>
<td>150</td>
</tr>
<tr>
<td>Individual Liability</td>
<td>151</td>
</tr>
<tr>
<td>Injunctive Relief - Mootness</td>
<td>152</td>
</tr>
<tr>
<td>Insurance Coverage</td>
<td>152</td>
</tr>
<tr>
<td>International Employment Law</td>
<td>153</td>
</tr>
<tr>
<td>Internet</td>
<td>154</td>
</tr>
<tr>
<td>Internet Applicants</td>
<td>154</td>
</tr>
<tr>
<td>Internet Service Providers</td>
<td>155</td>
</tr>
<tr>
<td>Intersectional Discrimination</td>
<td>155</td>
</tr>
<tr>
<td>Investigation</td>
<td>156</td>
</tr>
<tr>
<td>Joint Defense Agreements</td>
<td>156</td>
</tr>
<tr>
<td>Legislation - Federal</td>
<td>159</td>
</tr>
<tr>
<td>Legislation - State</td>
<td>171</td>
</tr>
<tr>
<td>Life Insurance</td>
<td>176</td>
</tr>
<tr>
<td>Lifestyle Discrimination</td>
<td>176</td>
</tr>
<tr>
<td>Liquidated Damages</td>
<td>176</td>
</tr>
<tr>
<td>Metadata</td>
<td>176</td>
</tr>
<tr>
<td>Mediation</td>
<td>177</td>
</tr>
<tr>
<td>National Identification Card</td>
<td>179</td>
</tr>
<tr>
<td>National Origin</td>
<td>179</td>
</tr>
<tr>
<td>Negligence</td>
<td>180</td>
</tr>
<tr>
<td>ADA</td>
<td>180</td>
</tr>
<tr>
<td>ADA</td>
<td>180</td>
</tr>
<tr>
<td>NLRB</td>
<td>180</td>
</tr>
<tr>
<td>Non-Competition Agreements</td>
<td>184</td>
</tr>
<tr>
<td>OWBPA</td>
<td>187</td>
</tr>
<tr>
<td>OFCCP</td>
<td>188</td>
</tr>
<tr>
<td>OSHA</td>
<td>189</td>
</tr>
<tr>
<td>Personnel Files</td>
<td>189</td>
</tr>
</tbody>
</table>

CASES

Abatnie v. Alta Health & Life Insurance Co., 458 F.3d 955 (9th Cir. 2006) (en banc) .......................................................... 70
Abraham v. Singh, 480 F.3d 351 (5th Cir. 2007) .......................................................... 167
Adair v. County of Wayne, 452 F.3d 482 (6th Cir. 2006) .......................................................... 202
Adkins v. Elliott, No. 02-2-15703 KNT (2003) .......................................................... 197
AFL-CIO v. Chertoff .......................................................... 112
Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld and Branscomb, P.C. .......................................................... 96
Albrechtstien v. Board of Regents of Univ. of Wisconsin Sys., 309 F.3d 433, 436 (7th Cir. 2002) .......................................................... 191
Alexander v. City of Milwaukee, 474 F.3d 437 (7th Cir. 2007) .......................................................... 4
Alirio v. Nichols .......................................................... 73
Allen v. Tobacco Superstore, Inc., 475 F.3d 931 (8th Cir. 2007) .......................................................... 46
Alio v. Union Pac. R.R. Corp., 129 F.3d 999 (Colo. 2006) .......................................................... 186
Alvarado v. Texas Rangers .......................................................... 3
Alvarado v. KOB-TV L.L.C. .......................................................... 28
Andrej Madarassy v. Nomura .......................................................... 119
Andreoli v. Gates, 482 F.3d 641 (3rd Cir. 2007) .......................................................... 110
Anheuser-Busch Inc. .......................................................... 138
Applied Industrial Materials Corp. v. Ovalar Makine Tacaret ve Sanayi, A.S. .......................................................... 13
Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 484 F.3d 162 (2d Cir. 2007) .......................................................... 20
Archdiocese of Wash. v. Moersen, 2007 Md. LEXIS 348 (Md. June 14, 2007) .......................................................... 155
Arias v. Super. Ct. of San Joaquin County .......................................................... 208
Asia Global Crossing, Ltd. .......................................................... 37
Asmo v. Keane, Inc., 471 F.3d 588 (6th Cir. 2006) .......................................................... 149
AT&T Pension Benefit Plan v. Call .......................................................... 192
Atkinson v. Sellers .......................................................... 176
Augustine v. Dept. of Veterans' Affairs, 429 F.3d 1334 (Fed. Cir. 2005) .......................................................... 78
B.B.K. v. Maui Police Department, 276 F.3d 1091 (9th Cir. 2002) .......................................................... 83
B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006) .......................................................... 12
Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) .......................................................... 179
Balboa Island Village Inn, Inc. v. Lemen, 156 P.3d 339 (Calif. Ct. App. 2007) .......................................................... 51
Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287 (11th Cir. 2007) .......................................................... 110
Baldwin v. Key Equip. Fin., Inc. .......................................................... 99
Ballard v. Muskegon Reg'l Med. Ctr., 238 F.3d 1250 (10th Cir. 2001) .......................................................... 44
Baptist v. City of Kansas City, 481 F.3d 485 (7th Cir. 2007) .......................................................... 177
Barbour v. Merrill, 48 F.3d 1270 (D.C. Cir. 1995) .......................................................... 44
Barfield v. Orange Co., 911 F.2d 644 (11th Cir. 1990) .......................................................... 81
Barham v. UBS Financial Services, Inc. .......................................................... 4
Barrie School v. Patch .......................................................... 133
Bates v. UPS, 465 F.3d 1069 (9th Cir. 2006) .......................................................... 57
Baum v. Helget Gas Prods., Inc., 440 F.3d 1019 (8th Cir. 2006) .......................................................... 75


El v. SEPTA, 479 F.3d 232 (3d Cir. 2007) .......................................................................................64
Elock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) ...........................................................................90
El-Hadad v. United Arab Emirates .....................................................................................................107
Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004) ......................................................158
Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333, 1335 (7th Cir. 1988) .........................32
Engquist v. Oregon Department of Agriculture, 478 F.3d 985 (9th Cir. 2007) .................................76
Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 408 (6th Cir. 1998) .........................................85
Etsitty v. Utah Transit Auth. ..................................................................................................................108
Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999) ...........................................................................84
Faege Benson LLP v. Purdy, 367 F. Supp. 2d 1238 (D. Minn. 2005) ..................................................27
Fair Housing Council of San Fernando Valley v. Roommates.com, LLC .............................................34
Fariss v. Lynchburg Foundry .................................................................................................................8
Farris v. Lynchberg Foundry, 769 F.2d 958, 965-66 (4th Cir. 1985) ......................................................45
Fasano v. Federal Reserve Bank of New York, 457 F.3d 274 (3d Cir. 2006) ........................................146
Feldman v. Allstate Ins. Co., 322 F.3d 660 (9th Cir. 2003) .................................................................194
Felix Palacios de la Villa v. Cortefiel Servicios SA .............................................................................119
Fenjie v. Feld, 301 F. Supp. 2d 781 (N.D. Ill. 2003) ..........................................................................194
Ferko v. NASCAR, 218 F.R.D. 125 (E.D. Texas 2003) ......................................................................17
Foraker v. Chaffinch ..............................................................................................................................151
Francis v. Mineta ..................................................................................................................................160
Frontier Ins. Co. v. Blaty, 454 F.3d 590 (6th Cir. 2006) ......................................................................111
Galarneau v. Merrill Lynch ....................................................................................................................54
Galindo v. Stoddy Co., 793 F.2d 1502, 1517 (9th Cir. 1986) ...............................................................45
Gallagher v. Delaney, 139 F.3d 338 (2d Cir. 1998) ............................................................................84
Gallipo v. City of Rutland, 882 A.2d 1177, 2005 VT 83 (Vt. 2005) ....................................................211
Gambini v. Total Renal Care, Inc., 2007 U.S. App. LEXIS 9290 (9th Cir. 2007) .................................58
Garvey v. Grant Thornton LLP, 368 F.3d 356 (4th Cir. 2004) .........................................................31
Garland-Sash v. Lewis .........................................................................................................................36
Gary v. MacComb, 696 N.W.2d 646 (Mich. 2005) ............................................................................188
Gasser v. District of Columbia, 442 F.3d 758 (D.C. Cir. 2006) .........................................................56
Geddes v. United Staffing Alliance ......................................................................................................192
Gelof v. Papineau, 829 F.2d 452 (3d Cir. 1987) .................................................................................. 49
Gentry v. The Superior Court of Los Angeles County ........................................................................... 12
Geret v. Atlantic City Hilton Casino Resort, 877 A.2d 1233 (N.J. 2005) ........................................... 147
Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986) .................................................. 83
Gomez v. Perez, 476 F.3d 54 (1st Cir. 2007) ......................................................................................... 91
Gonzalez v. Barrett Bus. Servs., Inc. ...................................................................................................... 99
Gonzalo v. All Island Transp., 2007 U.S. Dist. LEXIS 13069 (E.D.N.Y. Feb 26, 2007) ...................... 136
Green v. Adm’s of the Tulane Educ. Fund., 284 F.3d 642 (5th Cir. 2002) ........................................... 87
Green v. State of California ................................................................................................................ 58
Gregory v. Dillard's Inc. ......................................................................................................................... 30
Gresham v. Lumberman’s Mutual Casualty Co. ............................................................................... 209
Griffin v. City of Opal-Locka, 261 F.3d 1295 (11th Cir. 2001) ............................................................. 87
Griffin v. Washington Convention Ctr., 142 F.3d 1308 (D.C. Cir. 1998) ........................................... 85
Gross v. Miramax Film Corp., 383 F.3d 965 (9th Cir. 2004) ............................................................... 112
Grunman Corp. v. LTV Corp. ............................................................................................................... 23
Gulino v. New York State Education Dept., 460 F.3d 361 (2d Cir., Aug. 17, 2006) ......................... 64
Haas v. Lockheed Martin Corp., 914 A.2d 735; 396 Md. 469 (Md. Ct. App. 2007) ......................... 188
Hall St. Assocs., LLC v. Mattel, Inc. .................................................................................................. 193
Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) ..................................................................................... 159
Hanover Insurance Co. v. Rapo & Jepsen ......................................................................................... 122
Harrell v. U.S. Postal Serv., 445 F.3d 913 (7th Cir. 2006) ................................................................. 103
Harris v. Euronet Worldwide, Inc. ....................................................................................................... 135
Harrison v. Sarah Coventry Inc., 184 S.E.2d 448; 228 Ga. 169 (Ga. 1971) ........................................ 140
Harso Corp. v. Renner, 475 F.3d 1179 (10th Cir. 2007) ..................................................................... 46
Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984) ........................................................................ 86
Hatley v. Hilton Hotels Corp., 308 F.3d 473 (5th Cir. 2002) ............................................................. 87
Haynes v. K-Va-T Food Stores, Inc. .................................................................................................... 73
Haynes v. Level 3 Communications, LLC, 456 F.3d 1215 (10th Cir. 2006) ...................................... 55
Healthcare Advocates Inc. v. Harding, Earley, Follmer & Fraley
Heiko v. Colombo Savings Bank, F.S.B.
Hein v. The PNC Fin. Servs. Group, Inc.
Henson v. Columbus Bank & Trust Co.
Hernandez v. Dep't of the Air Force
Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995).
Hite v. Vermeer Mfg. Co., 446 F.3d 858 (8th Cir. 2006).
Hi-Voltage Wire Works v. City of San Jose.
Hoffeld v. Shepherd Electric Co., Inc.
Hohider v. UPS
Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007).
Holly v. Clairson Industries, LLC.
Holowekc v. Fed. Express Corp.
Howard v. Winter, 446 F.3d 559 (4th Cir. 2006).
Huebner v. ESEC, Inc.
Huff v. Sheahan
Hurley v. Atlantic City Police Dept., 174 F.3d 95 (3rd Cir. 1999).
Hux v. City of Newport News, Virginia.
In re Cendant Corp. Securities Litigation, 343 F.3d 658 (3d Cir. 2003).
In re EchoStar Communications Corp. 448 F.3d 1294 (Fed. Cir. 2006).
In re Farmers Ins. Exchange
In re Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006).
In re Polymedica Corp. Sec. Litig., 432 F.3d 1 (1st Cir. 2005).
In re Qwest Comm. Int'l Inc., 450 F.3d 1179 (10th Cir. 2006).
Incalza v. Fendi N. Am., Inc., 479 F.3d 1005 (9th Cir. 2007).
Int'l Airport Ctrs., LLC v. Citrin, 440 F.3d 418 (7th Cir. 2006).
Iqbal v. Hasty.
Iudson v. City of Boston, 452 F.3d 94 (1st Cir. 2006).
Leon v. IDX Systems Corp., 464 F.3d 951 (9th Cir. 2006)..........................................................66
Leroy v. Haack, ............................................................................................................................117
Lettieri v. Equant, Inc., 478 F.3d 640 (4th Cir. 2007).......................................................................59
Leuthner v. Blue Cross and Blue Shield of northeastern Pennsylvania, 454 F.3d 120 (3d Cir. 2006) ..............................................................................................................................71
Liberty Mutual Ins. Co. v. Continental Casualty Co., ........................................................................22
Linn v. Fossum, 2006 Fla. LEXIS 2590 (Fla. Nov. 2, 2006).........................................................90
Linton v. KB Home Ind., 2007 U.S. Dist. LEXIS 48780 (S.D. Ind. 2007).........................................142
Lively v. Flexible Packaging Ass'n, ..................................................................................................21
Loew v. Dodge County Soil & Water Conservation District, 2006 Minn. App. Unpub. LEXIS 450 (Minn. Ct. App., May 9, 2006).................................................................163
Lomack v. City of Newark, 463 F.3d 303 (3d Cir. 2006)...............................................................4
Long v. Anderson Univ., 204 F.R.D. 129 (S.D. Ind. 2001)................................................................18
Long v. Marubeni America Corp., ................................................................................................37
Loveless v. John's Ford, Inc.........................................................................................................88
Loveless v. John's Ford, Inc., ...........................................................................................................8
Lowery v. Alabama Power Co., 483 F.3d 1184 (11th Cir. 2007)....................................................32
Lozano v. City of Hazleton ...........................................................................................................112
Lubke v. City of Arlington, 455 F.3d 489, 498 (5th Cir. 2006).....................................................45
Lubrizol Corp. v. Exxon Corp., .......................................................................................................22
Lugosch v. Congel, 219 F.R.D. 220 (N.D.N.Y. 2003).................................................................91
Lust v. Sealy, Inc., 383 F.3d 580, 584 (7th Cir. 2004)....................................................................116
Lutheran Church-Missouri Synod v. FCC .......................................................................................5
Lyle v. Warner Bros. Television Prods., 132 P.3d 211 (Cal. 2006).............................................111
MacDonald v. Grace Church Seattle, 457 F.3d 1079 (9th Cir. 2006)...........................................68
Marsh & McLennan Cos. v. Palmer & Cay, Inc., 404 F.3d 1297 (11th Cir. 2005).......................140
Martinez v. Potter, 347 F.3d 1208 (10th Cir. 2003)......................................................................164
Marx v. Jackson, 833 F.2d 1121, 1125 (3d Cir. 1987)..................................................................194
Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672 (7th Cir. 2003)...............................................47
Mayers v. Laborers' Health & Safety Fund, 478 F.3d 364 (D.C. Cir. 2007).................................67
Mazer v. Safeway, Inc., ..............................................................................................................54
McCoy v. City of Shreveport ............................................................................................................3
McFarlane v. New Leaders for New Schools ..................................................................................50
McGavock v. Water Valley Miss., 452 F.3d 423 (5th Cir. 2006)...............................................202
McGee v. A.C. and S., Inc., 933 So.2d 770 (La. 2006).................................................................111
Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507 (D.C. Cir. 1995) .................................................. 84
Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc., 259 F.3d 154 (3d Cir. 2001) ........................................... 31
Nicholas v. Attorney General .................................................. 106
Nichols v. City of Taft .......................................................... 21
Nilsson v. City of Mesa .......................................................... 154
Niswander v. The Cincinnati Ins. Co. ........................................... 166
Niswander v. The Cincinnati Insurance Co. ........................................... 42
Nitsche v. CEO of Osage Valley Elec. Coop., 446 F.3d 841 (8th Cir. 2006) ............................................... 181
Northwest Publications v. Star Tribune Co. ........................................... 140
O’Connor v. City of Newark, 440 F.3d 125 (3d Cir. 2006) ................................................................. 188
O’Dea v. Shea .............................................................. 151
Oaks v. 3M Co., 453 F.3d 781 (6th Cir. 2006) ................................................................. 75
Ofori-Tenkorang v. Am. Int'l Group, Inc., 460 F.3d 296 (2d Cir. 2006) .................................................. 91
Olibrices v. Florida, 929 So. 2d 1176 (Fla. 4th D.C.A. 2006) .................................................. 136
Ortega v. City of New York .................................................. 88
Ottenberg’s Bakers, Inc. v. District of Columbia Comm’n on Human Rights, 917 A.2d 1094 (D.C. 2007) ... 50, 188
Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988) .................................................. 83
Owner-Operator Independent Drivers Assoc., Inc. v. Federal Motor Carrier Safety Administration ........................................... 153
P.C. of Yonkers Inc. v. Celebrations! The Party and Seasonal Superstore ........................................... 36
Pacheco v. Mineta, 448 F.3d 783 (5th Cir. 2006) ................................................................. 68
Pachter v. Bernard Hodes Group, Inc. ........................................... 209
Padilla v. Metro-North Commuter R.R., 92 F.3d 117 (2d Cir. 1996) .................................................. 44
Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847 (D. Minn. 2007) .................................................. 141
Paolini v. Albertson’s Inc., 149 P.3d 822 (Idaho 2006) .................................................. 208
Paolitto v. John Browne E & C, Inc., 151 F.3d 60 (2d Cir. 1998) .................................................. 82
Park v. City of Chicago, 297 F.3d 606 (7th Cir. 2002) ................................................................. 186
Parsons v. Wynee ........................................................... 166
Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493 (9th Cir. 2000) ........................................... 44
Patten v. Signator Ins. Agency ........................................... 13
Payton v. New Jersey Turnpike Authority, 73 FEP Cases (BNA) 1149 (N.J. Sup. Ct. 1997) .... 15
Pearce v. Carrier Corp., 966 F.2d 958, 959 (5th Cir. 1992) .................................................. 45
People v. Jiang ................................................................. 106
Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am., 448 F.3d 252 (4th Cir. 2006) ........................................... 117
Petitie v. DSL net, Inc. .................................................. 33
Petruska v. Gannon Univ., No. 05-1222, 462 F.3d 294 (3d Cir. 2006) .................................................. 158
Peyton v. DiMario, 287 F.3d 1121 (D.C. Cir. 2002) .................................................. 43
Phason v. Meridian Rail Corp., 479 F.3d 527 (7th Cir. 2007) .................................................. 209
Phelan v. Cook Co., 463 F.3d 773 (7th Cir. 2006) ................................................................. 162
Salitros v. Chrysler Corp., 306 F.3d 562 (8th Cir. 2002) ............................................................. 47
Sarei v. Rio Tinto ................................................................................................................................. 119
Sarko v. Penn-Del Directory Co. ........................................................................................................ 169
Saulsberry v. St. Mary’s Univ., 318 F.3d 862 (8th Cir. 2003) ......................................................... 85
Schachter v. Saint Luke’s Hospital of Bethlehem, Pennsylvania .................................................... 65
Scheidemantle v. Slippery Rock University, 470 F.3d 535 (3d Cir. 2006) ...................................... 180
Sciolino v. City of Newport News ...................................................................................................... 150
Scott v. Beth Israel Medical Center .................................................................................................. 37
Scott v. Cingular Wireless .................................................................................................................. 13
Scotts Co., LLC v. Liberty Mut. Ins. Co. ............................................................................................. 66
Sears v. Acheson, Topeka & Kansas City Ry. Co., 749 F.2d 1451 (10th Cir. 1984) ................. 49
Sears v. Acheson, Topeka & Kansas City Ry. Co., 749 F.2d 1451, 1456 (10th Cir. 1984) .......... 50
Sears, Roebuck and Co., v. Midcap, 893 A.2d 542 (Del. 2006) ......................................................... 186
Seidemann v. Bowen ......................................................................................................................... 10
Serrano v. 180 Connect, Inc., 478 F.3d 1018 (9th Cir. 2007) .......................................................... 31
Sheely v. MRI Radiology Network ................................................................................................... 118, 154
Sherover v. New Cingular Wireless .................................................................................................. 12
Shrum v. City of Coweta, 2006 U.S. App. LEXIS 14170 (10th Cir., June 8, 2006) ..................... 156
Shumaker v. West ............................................................................................................................. 169
Sidley v. Austin LLP v. EEOC, 437 F.3d 695 (7th Cir. 2006) .......................................................... 68
Slagle v. County of Clarion, 435 F.3d 262 (3d Cir. 2006) ............................................................... 163
Slin CD Inc. v. Heartland Payment Systems Inc. .............................................................................. 41
Smith v. Cafe Asia .............................................................................................................................. 66
Smith v. Castaways Family Diner, 453 F.3d 971 (7th Cir. 2006) .................................................. 68
Smithfield Packing Co., Inc. v. Evely ................................................................................................. 33
Snowden v. Checkpoint Check Cashing ............................................................................................ 13
Sommer v. The Vanguard Group, 461 F.3d 397 (3d Cir. 2006) ......................................................... 104
Sorrell v. District of Columbia ........................................................................................................... 50
Spinelli v. Goss, 446 F.3d 159 (D.C. Cir. 2006) ............................................................................. 96
Spivey v. Beverly Enters., 196 F.3d 1309 (11th Cir. 2006) ............................................................... 148
Spriggs v. Diamond Auto Glass, 242 F.3d 179 (4th Cir. 2001) ....................................................... 166
Sprint/United Mgmt. Co. v. Mendelsohn .......................................................................................... 193
Sprint/United Mgmt. Co. v. Mendelsohn, 466 F.3d 1223 (10th Cir. 2006), cert. granted, 2007 U.S. LEXIS 7526 (June 11, 2007) ................................................................. 193
St. George’s Warehouse ................................................................................................................... 139
St. Joseph’s Hospital, 337 NLRB No. 12 (Dec. 20, 2001) ............................................................. 138
Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Employment Practices Litig.), 479 F.3d 936 (8th Cir. 2007) ................................................................. 147
Starcevski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995) ............................................. 49
Stark v. Molod Spitz & Stark .............................................................................................................. 13
Stasny v. S. Bell Tel. & T. Co. ........................................................................................................... 23
State v. Reid, 914 A.2d 310 (App. Div. 2007) ................................................................................. 121
Stein v. KPMG, LLP, 2007 U.S. App. LEXIS 12023 (2d Cir. May 23, 2007) ................................. 117

xix
Stepp v. NCR Corp. .................................................................................................................. 12
Stevenson v. Hyre Electric Co. ................................................................................................. 106
Stocking v. AT&T Corp., 436 F. Supp. 2d 1014 (W.D. Mo. 2006) ............................................ 148
Stockman v. Oakcrest Dental Ctr., P.C., 480 F.3d 791 (6th Cir. 2007) .................................... 176
Suffolk Construction Co. v. Div. of Capital Asset Management ............................................ 71
Summit Contractors, Inc., OSHRC Docket No. 03-1622 (2007) ............................................. 143
Syverson v. IBM Corp., 2007 U.S. App. LEXIS 16 (9th Cir. Jan. 3, 2007) ......................... 142
Syverson v. IBM Corp., 461 F.3d 1147 (9th Cir. 2006) ......................................................... 142
Szabo v. Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001) ............................................ 31
Szymanski v. County of Cook, 468 F.3d 1027 (7th Cir. 2006) ............................................. 164
Taboda v. Daly Seven, Inc., 626 S.E.2d 428 (Va. 2006) ........................................................ 149
Takacs v. A.G. Edwards and Sons, Inc. .................................................................................. 98
Tammy Smith v. Captain D’s, LLC, 2007 Miss. LEXIS 343, (Miss. June 14, 2007) (en banc) .... 11
Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213 (11th Cir. 2003) 90
Taxman v. Board of Educ. ....................................................................................................... 4
Taylor v. Federal Express Corp., 429 F.3d 461 (4th Cir. 2005) ................................................ 57
TBG Insurance Serv. Corp. v. The Superior Court of Los Angeles County ....................... 37
Tellis v. Alaska Airlines, 414 F.3d 1045 (9th Cir. 2005) ....................................................... 104
Tenge v. Phillips Modern Ag. Co., 446 F.3d 903 (8th Cir. 2006) ........................................... 180
Tenp. Prod. Credit Ass’n, 861 F.2d 884 (6th Cir. 1988) ....................................................... 44
Tepper v. Potter ...................................................................................................................... 161
Thaeter v. Palm Beach County Sheriff’s Office, 449 F.3d 1342 (11th Cir. 2006) .................. 97
Thola v. Henschell .................................................................................................................. 122
Thyroff v. Nationwide Mut. Ins. Co. .................................................................................... 41
Tillman v. Camelot, 408 F.3d 1300 (10th Cir. 2005) .......................................................... 133
Tisdale v. Fed. Express Corp., 415 F.3d 516 (6th Cir. 2005) ............................................... 164
Toeller v. Wisconsin Dept. of Corrections, 461 F.3d 871 (7th Cir. 2006) ......................... 104
Toering Electric ..................................................................................................................... 139
Tomassi v. Insignia Financial Group, Inc., 478 F.3d 111 (2d Cir. 2007) ............................. 81
Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006) ............................... 158
Tony v. Elkhart County, 851 N.E.2d 1032 (Ind.Ct.App. 2006) .................................. 40
Touchard v. La-Z-Boy Inc., 148 P.3d 945 (Utah 2006) .................................................... 167
Transp. Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994) ................................................... 48
Travelers Cas. & Sur. Co. v. United States Filter Corp. ....................................................... 119
Trosper v. Bag ‘N Save, 273 Neb. 875 (Neb. 2007) .......................................................... 162
UAW v. Johnson Controls ..................................................................................................... 63
UMG Recording, Inc. v. Bertelsmann AG (In re Napster Copyright Litig.), 479 F.3d 1078 (9th Cir. 2007) 14
Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005) ..................................................... 31
United States ex rel Zaretzky v. Johnson Controls Inc., 457 F.3d 1009 (9th Cir. 2006) .... 210
United States v. Bly-Magee v. Primo, 470 F.3d 914 (9th Cir. 2007) ......................................................94
United States v. Hendow v. University of Phoenix ..........................................................................................95
United States v. Barrows, 481 F.3d 1246 (10th Cir. 2007) ...........................................................................38
United States v. Camejo, 929 F.2d 610 (11th Cir. 1991) ..............................................................................88
United States v. Forrester, 2007 U.S. App. LEXIS 16147 (9th Cir. July 6, 2007) ................................................38
United States v. Novak, 476 F.3d 1041 (9th Cir. 2007) ...............................................................................71
United States v. Roxworthy, 457 F.3d 590 (6th Cir. 2006) .......................................................................80
United States v. Thomas, 134 F.3d 975 (9th Cir. 1998) .............................................................................88
Universal Commn. Sys. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007) ...............................................................25
Urbano v. Continental Airlines, 138 F.3d 204 (5th Cir. 1998) ..................................................................148
v. Southern Co., 390 F.3d 695 (11th Cir. 2004) .......................................................................................31
Valentine v. City of Chicago, 2006 WL 1736556 (7th Cir., June 26, 2006) .....................................................182
Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006) ...............................................................179
Vicaiuca Company v. Tieman ..................................................86
Volkemans v. Town of Wallingford ........................................189
Wachtel v. Health Net Inc., 482 F.3d 225 (3d Cir. 2007) ...........................................................................70
Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977) (en banc) ..................................................................83
Wampler v. Commonwealth of Pennsylvania ........................................105
Weaver v. ZeniMax Media, Inc. .............................................170
Webb v. City of Philadelphia .......................................................................................................................160
Weeks v. Harden Manufacturing Corp., 291 F.3d 1307 (11th Cir. 2002) ...................................................164
Weisbarth v. Geauga Park Dist. .................................................28
West v. AK Steel Corp. Ret. Accumulation Pension Plan, 484 F.3d 395 (6th Cir. 2007) ...............................28
Westar Energy, Inc. v. Lake .....................................................................................................................117
White v. Sun Life Assurance Co. of Canada ..................................................................................................73
Willard Packaging Co. v. Javier ..............................................................................................................178
Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004) ...............................................................85
Willis v. Coca-ColaEnterprises, 445 F.3d 413 (5th Cir. 2006) ..............................................................103
Willis v. Marshall, 426 F.3d 251 (4th Cir. 2005) .....................................................................................76
OTHER AUTHORITIES

ABA Formal Opinion 06-438 .................................................................................................................. .77
ABA Formal Opinion 06-442 .................................................................................................................. .134
ABA Formal Opinion 07-445 .................................................................................................................. .77
ABA Formal Opinion 92-368 .................................................................................................................. .78
AEI Conference, October 1, 2007, On Bias, Preferences, or Biology? Science and Sex Differences .......... .63
Alabama State Bar Opinion 2007-02 .................................................................................................... .134
Anthony Lin, “Sidley Austin Settles Age Bias Suit; No Determination of Merits,” in N.Y.L.J., Oct. 8, 2007 .... .9
Arizona Statute § 46-140.01 .................................................................................................................. .115
Bullying Bosses – Healthy Workplace Act ............................................................................................... .130
California Sexual Harassment Training Statute ..................................................................................... .130
Civil Rights Tax Fairness Act ................................................................................................................. .129
Civil Rights Tax Relief Act of 2007 ....................................................................................................... .123
Colorado Bar Association Opinion 115 ................................................................................................. .78
Commerce, Justice and Science Appropriations Bill .............................................................................. .124
D.C. Bar Ethics Opinion 341 .................................................................................................................. .134
D.C. Bar Opinion 335 ............................................................................................................................. .79
Department of Homeland Security, 8 C.F.R. Part 274(a), 71 F.R. 34296 (June 14, 2006) ................. .152
Disanisons Securities Litigation .............................................................................................................. .17
DOL FMLA Report ................................................................................................................................. .151
EEOC Guidance – Job Announcements ................................................................................................. .6, 152
Employee Free Choice Act .................................................................................................................... .122
Employment Non-Discrimination Act ................................................................................................... .108
Eradicating Racism and Colorism from Employment (E-RACE) ............................................................ .10, 151
February 16, 2001 DOL Opinion Letter, 2001 DOLWH LEXIS 5 ................................................................... .99
Fed. Rule Evid. 404(a) ............................................................................................................................. .83
Florida Bar Opinion 06-1 ....................................................................................................................... .134
Genetic Information Nondiscrimination Act of 2005 (GINA) ............................................................... .124
Georgia Statute S.B. 529 ........................................................................................................................ .114


EMERGING EMPLOYMENT LAW ISSUES

by

ROBERT B. FITZPATRICK, ESQ.
ROBERT B. FITZPATRICK, PLLC
Suite 640
Universal Building South
1825 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728
(202) 588-5300 (telephone)
(202) 588-5023 (fax)
Fitzpatrick.law@verizon.net (e-mail)
www.robertfitzpatrick.com (website)

“At that time there were two monks who were discussing the topic of the wind and flag. One said, "The wind is moving." The other said, "The flag is moving." They argued incessantly. Hui Neng stepped forward and said, "The wind is not moving, nor is the flag. Your minds, Kind sirs, are moving." Everyone was startled.”

- The Sixth Patriarch's Dharma Jewel Platform Sutra

ADA
Holly v. Clairson Industries, LLC, 492 F.3d 1247 (11th Cir. 2007). The Eleventh Circuit held that a “no-fault” punctuality policy may not be an essential job function under the ADA.

Heiko v. Colombo Savings Bank, F.S.B., 434 F.3d 249 (4th Cir. 2006). The court of appeals found that plaintiff was disabled within the meaning of the ADA. The court found that the elimination of human waste is a major life activity and that, where plaintiff was required to spend at least four hours on three days per week undergoing dialysis in order to remove waste from his body, the limitations on a major life activity were substantial. Accordingly, plaintiff was deemed disabled within the meaning of the ADA.

Woodruff v. Peters, 482 F.3d 521 (D.C. Cir. 2007). The Court of Appeals held that where an employer had permitted an employee to telecommute as a temporary accommodation, it may be required to justify to the jury why that accommodation could not continue to be provided to the plaintiff. Plaintiff had been injured on the job, and had been permitted under a prior supervisor to work from home two days each week. When a new supervisor assumed responsibility, he
directed that the telecommuting cease. When challenged, the employer contended that it was not required to permit telecommuting when other accommodations were offered.

Bogden v. Harry's Tap Room of Arlington, Civil action No. 01178-LO-TRJ (E.D.Va). The Federal District Court in Alexandria, Virginia has a fascinating case. The case involves a lawsuit filed under the ADA by James Bogden against several restaurants in which he argues that because he has coronary artery disease and secondhand smoke can increase his risk of another heart attack, the restaurants, by permitting smoking, are discriminating against him on the basis of an alleged disability. See also: Lainie Rutkow, John S. Vernick, Stephen P. Teret, Banning Second-Hand Smoke in Indoor Public Places Under the Americans With Disabilities Act: A Legal and Public Health Imperative, 40 CTLR 409, (December 2007).

McBride v. City of Detroit, 2007 U.S. Dist. LEXIS 87391 (E.D. Mich., Nov. 28, 2007). In this case, Judge Zatkoff denied Defendant's motion to dismiss an ADA case where the Plaintiff claimed that she suffered from chemical sensitivity to perfume, body lotion, aftershave, cologne, deodorant and hairspray, among others. She claimed that exposure caused headaches, nausea, chest tightness, cough and rhinitis (to wit, a runny nose). She alleged that chemical sensitivity is a physiological disorder and is thus a physical impairment. She alleged that the chemical sensitivity substantially limited her major life activities of breathing, engaging in social activities and reproduction. She requested, as a reasonable accommodation, that the Defendant, City of Detroit, implement and enforce a "no scent policy", prohibiting the wearing of scents or perfumes in the workplace.

Ross v. Ragingwire Telecommunications, Inc., 2008 Cal. LEXIS 784 (3d Dist. Ct. App., #C043392, 9/7/05). A divided California Supreme Court in this case upheld the employer's termination of an employee who tested positive for marijuana and who argued that to do so was disability discrimination because, pursuant to California's Compassionate Use Act of 1996, a doctor had recommended marijuana for medical purposes.


Brown v. City of Los Angeles, 521 F.3d 1238 (9th Cir. April 10, 2008) (The 9th Circuit held that a disability pension plan’s provision requiring that any benefits for police officers injured in the line of duty be offset by worker’s compensation payments they received for the same injuries, did not violate the ADA).


JOHN PARRY, DISABILITY DISCRIMINATION LAW, EVIDENCE AND TESTIMONY (ABA Book Publishing 2008).

Brady v. Wal-Mart Stores, Inc., 2008 U.S. App. LEXIS 13850 (2nd Cir. July 2, 2008) (Employers have a duty under the ADA to reasonably accommodate an employee’s “obvious” disability – even absent a request for accommodation).

ADA – Amendments Act


- States that mitigating measures should not be considered when determining whether an impairment materially restricts an individual's major life activity, including medical devices, assistive technology, behavior adaptations, reasonable accommodation or auxiliary aids. This would reverse the ruling in the Sutton vs. United Airlines decision by the U.S. Supreme Court that "mitigating measures" should be taken into account when determining whether a plaintiff is disabled.

- Excludes minor impairments and impairments with an actual or expected duration of six months or less as disabilities.

- States that employers would not need to provide reasonable accommodations to employees they regard as disabled.

Includes a section with examples of major life activities such as caring for oneself, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

ADA – Cancer


ADA – Class Actions


ADA – Dyslexia and Dyscalculia


Wong v. Regents of University of California, 410 F.3d 1052 (9th Cir. 2005)

ADA – Hostile Work Environment

ADA – Mental Disability
Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007) (The 9th Circuit held that the employee’s “violent outbursts” were symptomatic of bipolar disorder, and accordingly the employer should have engaged in the interactive process mandated by the ADA to determine whether a reasonable accommodation was available).


Adverse Action
Alvarado v. Texas Rangers, 2007 U.S. App. LEXIS 16928 (5th Cir. July 16, 2007). The Court of Appeals held that a lateral transfer which did not result in a decrease in pay, title or grade, may nonetheless be a demotion if the new position proves objectively worse - such as being less prestigious or less interesting or providing less room for advancement. The Court further discusses, in the context of a prima facie case, an employer's reliance on subjective reasons for its personnel decision. The Court repeatedly states that while an employer may rely on subjective criteria, it will satisfy the employer's burden of production only if the employer articulates a clear and reasonably specific basis for its subjective assessment. See also EEOC v. Target Corp., 460 F.3d 946, 957-58 (7th Cir. 2006). NEED TO SUMMARIZE TARGET CASE

McCoy v. City of Shreveport, 492 F.3d 551 (5th Cir. 2007). NEED TO SUMMARIZE
Affirmative Action

“We are tired of people who think that affirmative action is the way out and is another way of putting puppets where they don’t belong.”
Lucky Dube (1964-2007)


Worth v. Jackson, 451 F.3d 854, 371 U.S. App. D.C. 339 (D.C. Cir. 2006). Affirmative action challenge rejected on grounds of standing, mootness, and ripeness. A white male employee challenged HUD’s affirmative employment plan (AEP) because he alleged its unwritten policies and practices favored minorities and women. The court ruled the employee had standing to challenge the AEP because of its impact on white male employees, but that he lacked standing to challenge HUD’s unwritten policies because of insufficient knowledge of HUD taking race and gender into account. The court ruled that although the employee had standing for the AEP claim, it was moot because the AEP no longer existed, having been replaced by the EEOC’s new management directive. See also King v. Jackson, 2007 U.S. App. LEXIS 12341 (D.C. Cir. May 29, 2007), infra.

Recently, seven African-American brokers filed suit, claiming that UBS Financial Services established and staffed a suburban Washington, D.C. office predominantly with African-American brokers in order to draw business from clients of the same race, but that it did not provide it with the same staff and technical support as other offices with white brokers. See Barham v. UBS Financial Services, Inc., No. 1:07-cv-00853 (D.D.C.).


Kohlbek v. City of Omaha, 447 F.3d 552 (8th Cir. 2006). The court reversed the lower court’s decision granting summary judgment to the defendant employer. The lower court held that the employer’s actions could withstand constitutional scrutiny because they were narrowly tailored to remedy past racial discrimination. The Court of Appeals found that the defendant used racial classifications in areas where there was no past discrimination, yielding a system that was not narrowly tailored.
Lomack v. City of Newark, 463 F.3d 303 (3d Cir. 2006). The Third Circuit reversed dismissal of involuntarily transferred firefighters claim and found that the purely race-based transfer policy implemented by Newark violated the Equal Protection Clause. The elimination of de facto discrimination was not a compelling government interest and the racial classification was therefore unjustified.

Alexander v. City of Milwaukee, 474 F.3d 437 (7th Cir. 2007). Where seventeen white, male police officers claimed discrimination in promotions because of their race and sex, and the record established that the department chief when promoting forty-one individuals to captain, had promoted females and minorities more quickly than comparable white males, the court, in upholding a jury verdict for the plaintiffs, stated: “There is simply no evidence in the record of the actual content of their policies – policies that we must examine under the most searching form of judicial scrutiny. A race-conscious promotion system with no identifiable standards to narrowly tailor it to the specific, identifiable, compelling needs of the municipal department in question cannot pass constitutional scrutiny”(emphasis in original). The Court of Appeals applied its “loss of a chance” doctrine, first recognized by it in an employment case in Doll v. Brown, 75 F. 3d 1200, 1206-07 (7th Cir. 1996), in this case, finding that the district court’s approach was inconsistent with the dictates of the lost-chance doctrine.

By Any Means Necessary (BAMN) v. Granholm, 2006 U.S. Dist. LEXIS 93257 (E.D. Mich. Dec. 27, 2006). On November 7th, 2006, Michigan became the fifth state to adopt an affirmative action ban in college admissions. The other jurisdictions that have done so are California, Florida, Texas and Washington. The Michigan initiative bans the use of race and gender affirmative action in university admissions. On November 8th, 2006, the BAMN action was filed, claiming that the Michigan initiative is preempted by the Civil Rights Act of 1964 and that it violates the Equal Protection Clause of the 14th Amendment. The District Court denied the proposed motions to intervene as either plaintiffs or defendants, finding that the interest of the interveners was already adequately represented by the parties present to the case. A similar proposed challenge to California’s Proposition 209, which also banned such affirmative action, failed before the Ninth Circuit. Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997). Subsequently, in Coalition to Defend Affirmative Action v. Granholm, 127 S. Ct. 1146 (U.S. 2007), the Supreme Court denied and application to vacate the stay entered by the Sixth Circuit.

NEED TO SUMMARIZE ALL THE CASES BELOW (and add quote from J. O'Connor or 25 Years to Sunset)

Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998).


Hi-Voltage Wire Works v. City of San Jose, 12 P.3d 1068 (Cal. 2000).


Messer v. Meno, 130 F.3d 130 (5th Cir. 1997).


Striking a Balance: EEO, Diversity, and Affirmative Action, Hearing before the Equal Employment Opportunity Commission (May 16, 2006) (Testimony of Roger Clegg, President and General Counsel, Center for Equal Opportunity

A group of Stanford law students has started a website grading law firms on diversity called Building a Better Legal Profession, available at www.betterlegalprofession.org.

Job Announcements-EEOC Guidance at

The EEOC, in response to correspondence from the Center for Equal Opportunity regarding language that would be appropriate for colleges to use in their job advertisements, specifically
endorsed the use of language that does not indicate a particular welcome to certain groups, e.g.,
females or minority applicants. The letter does not bar colleges from indicating that they
welcome female or minority applicants.

“We commented that job advertisements typically should not indicate a preference based on race,
sex, or ethnicity. We noted that there are circumstances under which focused recruiting is used in
order to eliminate barriers to employment opportunity and attract a more diverse applicant pool.
We also noted that the legality of a particular practice cannot be assessed outside the context of
particular facts that have been fully investigated,” the letter said.

“Of course, there are different ways to develop a diverse applicant pool and particular
circumstances will determine which methods are both lawful and efficacious. You suggested that
a way for employers to signal that they welcome applications from all individuals without regard
to race, color, religion, sex, or national origin, but without indicating a preference for any group,
would be to use language such as the following: ‘Men and women, and members of all racial and
ethnic groups, are encouraged to apply.’ We agree, and such a statement is lawful regardless of
the surrounding circumstances, even if an employer had no need to diversify its applicant pool,”
the letter added.

Eric Dreiband, What the Schools Cases Mean for the Workplace, SCOTUS BLOG (July 2, 2007)


Peter Kirsanow, “Affirmative Damage: Students Sacrificed in the Name of ‘Diversity,’” Nat’l
Review Online, June 27, 2006, available at http://article.nationalreview.com/?q=NGY3YmI0MjEwNzFiMTZiYmM5OGFjYzFmNDEyZjkzYzE=

The Bar Association of San Francisco 2005 Report, Goals and Timetables for Minority Hiring

Richard Sander, Affirmative Action Research and Articles. See http://www.law.ucla.edu/sander/
for a list of Professor Sander’s articles and links to each article.

Mark Ogden, Watch Out for the Many Legal Pitfalls of Affinity Groups, THE BUS. J. OF
2006).

AMERICAN BAR ASSOCIATION SECTION OF LABOR AND EMPLOYMENT LAW: EQUAL EMPLOYMENT
Age Discrimination in Employment Act

Loveless v. John's Ford, Inc., 2007 U.S. App. LEXIS 11001 (4th Cir. 2007). The Fourth Circuit found that an award of liquidated damages under the ADEA is mandatory upon a finding of willfulness. The Court further found that “contradictions between an employer’s explanation for an adverse employment action at trial and its statements to the employee at the time of discharge constitute strong evidence of pretext.” The Court found ample direct evidence that the plaintiff’s age was a motivating factor in the decision to terminate him. Plaintiff testified that he was told that he was being “retired”; that the company needed younger, more aggressive managers; that the terminating supervisor referred to another, older employee as “an f’n dinosaur”; and one of the derogatory remarks about plaintiff was made when he was terminated.

The defense had argued that the District Court was obliged to grant it judgment as a matter of law or a new trial because it claimed that plaintiff’s damages expert engaged in the spoliation of evidence. The Court of Appeals found no evidence that the destruction was so egregious as to warrant judgment as a matter of law.

Finally, the Court of Appeals, recognizing that a liquidated damage award can bestow a windfall on the plaintiff, held that the award did not create a windfall for the plaintiff in this case because the plaintiff had suffered a substantial pecuniary loss unlike the plaintiff in Fariss v. Lynchburg Foundery, 769 F.2d 958, 967 (4th Cir. 1985).

Gomez-Perez v. Potter, 476 F.3d 54 (1st Cir. 2007) The First Circuit held that the ADEA, which allows federal employees to sue their employer for “any discrimination based on age”, does not
include a cause of action for retaliation on account of the fact that the statute does not specifically mention “retaliation”.

**Price v. Bernanke**, 470 F.3d 384 (D.C. Cir. 2006). In an ADEA retaliation case against a federal agency, the plaintiff-employee who had filed more than 90 days after receiving the final agency decision, argued that the statute of limitations was not 90 days as the ADEA lacks a limitation period applicable to federal employees. The EEOC, by regulation, has established a 90-day time period for filing ADEA cases by federal employees. See 29 C.F.R. §1614.407(c). The employee argued alternatively for the six-year period under 29 U.S.C. §2401 applicable to non-tort civil claims against the United States, or the four-year period under the catch-all statute, 28 U.S.C. §1658, or the two-year limitations period contained in the FLSA, 29 U.S.C. §255. The Court of Appeals adopted the 90-day period contained in the EEOC regulations. The Ninth Circuit in **Lubniewski v. Lehman**, 891 F.2d 216, 221 (9th Cir. 1989) adopted the six-year period.

In a voice vote at the August 2007 ABA convention, the House of Delegates approved a recommendation that law firms discontinue mandatory age-based retirement policies and that law firms should “evaluate senior partners individually, consistent with the firm’s employment criteria.” [Link](http://www.abajournal.com/annual/aba_end_forced_retirement/)

Anthony Lin, “Sidley Austin Settles Age Bias Suit; No Determination of Merits,” in N.Y.L.J., Oct. 8, 2007, available at [http://www.law.com/jsp/article.jsp?id=1191575010850](http://www.law.com/jsp/article.jsp?id=1191575010850). In an age discrimination suit brought by the EEOC, Sidley Austin agreed to pay a $27.5 million settlement to 32 former partners, who were demoted, allegedly based on performance, although all of the partners were in their 50s and 60s.


**EEOC v. Jefferson County Sheriff’s Dep’t**, 467 F.3d 571, 579 (6th Cir. 2006) (en banc). Defendant’s disability benefits plan provided that employees may not receive disability benefits if they have already reached normal retirement-benefit age when they become disabled. Under the plan, employees in hazardous jobs are eligible for normal retirement benefits at age 55 or
after 20 years of service. Employees who have already reached normal retirement age are not eligible for disability-retirement benefits. The plan also calculates benefits so that older employees receive lower monthly benefit payments than similarly situated younger employees.

A panel of the Sixth Circuit held that the plan did not violate the ADEA, stating that the case indistinguishable from Lyon v. Ohio Education Association, 53 F.3d 135 (6th Cir. 1995). On rehearing en banc, the court agreed with EEOC’s position and reversed the panel’s holding. In doing so, the court stated: “[I]t is apparent that the...plan is facially discriminatory on the basis of age in at least two ways. First . . . the . . . plan categorically excludes still-working employees over age fifty-five from a particular employment benefit because of their age.” Further, the court stated: “[T]he . . . plan is facially discriminatory . . . in that . . . employees who become disabled when they are still ‘young enough’ to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age.”

**ADEA**

EEOC final Rule on Job Advertisement – Coverage Under the Age Discrimination Act, 72 Fed. Reg. 36,873 (July 9, 2007)

**ADEA – Disparate Impact**

Meachem v. Knolls Atomic Power Laboratory, 461 F.3d 134 (2d Cir. 2006). The Second Circuit in a case alleging disparate impact age discrimination held that the plaintiff bears the burden of persuading the fact-finder that the justification proffered by the employer is unreasonable. The court further held that the employer had satisfied its burden of production by showing that the criteria that it used in its RIF were routinely used in personnel decision-making systems in general and were appropriate to the circumstances that had prompted the RIF.


**Agency Fees – First Amendment**

Seidemann v. Bowen, 2007 U.S. App. LEXIS 18243 (2d Cir., Aug. 1, 2007). The Second Circuit ruled that a union may not require agency fee payers to file annual objections to expenditures unrelated to the collective bargaining process. The circuit found: “The union’s procedures for dealing with agency fee payers failed to minimize the risk that objectors’ First Amendment rights would be burdened.”

**Applicants**

Eradicating Racism and Colorism from Employment (E-RACE) “[S]ome facially neutral employment criteria are significantly disadvantaging applicants and employees on the basis of
race and color. Studies reveal that some employers make selection decisions based on names, arrest and conviction records, employment and personality tests, and credit scores, all of which may disparately impact people of color. Further, an employer’s reliance on new technology in job searches, such as video resumes, could lead to intentional race or color discrimination based on appearance or a disproportionate exclusion of applicants of color who may not have access to broadband-equipped computers or video cameras”, at http://www.eeoc.gov/initiatives/e-race/why_e-race.html. See also Lisa Takeuchi Cullen, It’s a Wrap, You’re Hired!, TIME, Mar. 5, 2007 at 51.


Arbitration

EEOC v. Woodmen of the World Life Ins. Soc’y, 479 F.3d 561 (8th Cir. 2007). The court ordered an employee to enter into binding arbitration, based on an existing agreement, where the employee had intervened in a Title VII sex discrimination suit by the EEOC against the employer. The employee did not lose her substantive rights, despite the Supreme Court’s statement that if the EEOC files suit, “the employee has no independent cause of action.” EEOC v. Waffle House Inc., 534 U.S. 279 (2002). The Supreme Court also noted in Waffle House that the employee’s conduct, such as the acceptance of a settlement agreement, could affect the relief obtained by the EEOC. Thus, the Eighth Circuit reasoned, the employee’s existing arbitration agreement must be valid because the Supreme Court would have no reason otherwise to mention the ramifications of any arbitral awards.

Smith v. Captain D’s, LLC, 2007 Miss. LEXIS 343, (Miss. June 14, 2007) (en banc). The Supreme Court of Mississippi found that an arbitration agreement in an employment application does not apply to a claim of negligent hiring brought by an employee who was raped by her boss, because the claim had no connection with the employee’s employment. Thus, the restaurant did not show the parties had agreed to arbitrate the dispute and the court remanded the case to the trial court for a full trial on the merits.

Faust v. Command Ctr. Inc., 2007 U.S. Dist. LEXIS 32793 (S.D. Iowa May 3, 2007). The District Court granted the employer’s motion to compel arbitration where the plaintiff argued that the arbitration agreement was not valid because it foreclosed statutory remedies otherwise available to her under Title VII. The Court recognized a circuit split on this issue, finding that the Eight Circuit has held that an arbitration agreement which forecloses statutory remedies does not affect the validity of the agreement. The Ninth and Eleventh Circuits have held that arbitration

Fromm v. ING Funds Distrib., 2007 U.S. Dist. LEXIS 38310 (S.D.N.Y. May 24, 2007). The District Court denied a petition to modify an arbitration award which simply stated: “After considering the pleadings, the testimony and the evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination [that ING is liable to Fromm for] compensatory in the amount of $42,000.00 [and that] any and all relief not specifically addressed herein including punitive damages, is denied.”

Davis v. O’Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007). The Court of Appeals invalidated the arbitration agreement that the defendant-law firm had required its employees to sign. The court found that the law firm’s “take it or leave it” approach to its employees, among other factors, rendered the agreement unconscionable under California state law. See Justin Scheck, 9th Circuit Panel Faults O’Melveny for ‘Take It or Leave It’ Hiring Clause, The Recorder, May 15, 2007, available at http://www.law.com/jsp/nlj/LawArticleFriendlyNLJ.jsp?id=1179146398173.

Douglass v. Pflueger Haw., Inc., 135 P.3d 129 (Haw. 2006). Despite the fact that the plaintiff was a minor at the time he was hired by defendant, the Hawaii Supreme Court held that he was contractually bound by an arbitration provision set forth in the employer’s employee handbook.

In re Dillard Dep’t Stores, Inc., 186 S.W.3d 514 (Tex. 2006). This is a case where the employer required arbitration and the employee signed an agreement to use arbitration should the need arise. Upon termination, the employee sued for defamation. The arbitration terms expressly applied to claims arising from employment that were violations of law or personal injuries arising from termination. Upon her termination the plaintiff challenged the validity and scope of the arbitration agreement. The plaintiff argued that the claims she filed relating to defamation were not covered because they were not personal injuries and not linked to termination but the Court disagreed and stated that courts have ruled that “personal injuries” deal with injuries to reputation and any damages for defamation in the case could be viewed as intertwined with her employment and termination.

B.L. Harbert Int’l, LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006). The court declared that the appellant’s position in a groundless appeal from an arbitration award “did not come within shouting distance” of any basis to vacate the award and threatened to sanction future appellants “who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards.”

LB&B Associate, Inc. v. IBEW, Local No. 113, 461 F.3d 1195 (10th Cir. 2006). The Court of Appeals held that an arbiter’s finding that a termination was not for “just cause” overrides a provision in a union contract allowing the “immediate discharge” of employees who engage in sexual harassment. The court, split 2-1, found the arbiter’s “just cause” finding applies to all discharges. In so ruling, the Court of Appeals followed the Third and Sixth Circuits on this issue, and rejected the Eleventh Circuit’s ruling.
Grafton Partners GP v. Superior Court of Alameda County, 116 P.3d 479, 36 Cal. 4th 944 (Cal. Sup. Ct. 2005). The California Supreme Court unanimously held that pre-dispute waivers of the constitutional right to a trial by jury are unenforceable in California.


Campbell v. General Dynamics, 407 F.3d 546 (1st Cir. 2005). The First Circuit found email notice to employees of a mandatory arbitration clause to be insufficient.


Gentry v. The Superior Court of Los Angeles County, 2007 Cal. LEXIS 9376 (Cal. Sup. Ct., Aug. 30, 2007). The California Supreme Court held that class arbitration waivers in employment arbitration agreements, “at least in some cases,” would undermine the vindication of the employees’ unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state’s overtime laws.


Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007). The Washington Supreme Court held that a class action waiver in arbitration for a cellular service contract was substantively unconscionable.

Snowden v. Checkpoint Check Cashing, 290 F.3d 631 (4th Cir. 2002). The Fourth Circuit rejected a claim that an arbitration clause precluding class actions was unconscionable. Accord: Jenkins v. First Am. Cash Advance of Georgia, 400 F.3d 868 (11th Cir. 2005).

Coady v. Cross Country Bank, 729 N.W. 2d 732 (Wis. Ct. App. 2007). A Wisconsin Court of Appeals has stated: “We are . . . persuaded by what appears to be a growing minority of courts that a waiver of class-wide relief is a significant factor in invalidating an arbitration provision as unconscionable.”

Patten v. Signator Ins. Agency, 441 F.3d 230 (4th Cir. 2006). The Court of Appeals held that an arbiter erred when he imposed a limitation period where the agreement between the parties
contained no limitation period for the filing of a claim. The court vacated the arbitrator’s decision on the ground that the limitation period had not been agreed to by the parties. An earlier agreement between the parties had contained a limitation period, and the arbiter had decided that that earlier limitation period was implicitly incorporated into the agreement, and then he dismissed the claim on the ground that it had not been timely filed.

**Applied Industrial Materials Corp. v. Ovalar Makine Tacaret ve Sanayi, A.S.,** 492 F.3d 132 (2d Cir., July 9, 2007). The Court of Appeals vacated an arbitration award because one of the three arbitrators, who cast a deciding vote in a 2-1 decision, was found to have acted with “evident partiality” for his failure to recuse himself. The FAA provides “when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality.” 9 U.S.C. §10(a). The Court of Appeals held that the mere failure to investigate is not, by itself, sufficient to vacate an arbitration award.

**Collins v. D.R. Horton, Inc.,** 2007 U.S. App. LEXIS 22613 (9th Cir., Sept 24, 2007). The Court of Appeals held that the arbiters did not manifestly disregard the law when deciding not to apply offensive non-mutual collateral estoppel. As no binding precedent existed as to whether arbiters possess the same broad discretion as district courts in determining whether to apply offensive non-mutual collateral estoppel, they were held not to have manifestly disregarded the law.

**Stark v. Molod Spitz DeSantis & Stark,** 2007 N.Y. LEXIS 2713 (N.Y. Ct. App. Oct. 16, 2007). The New York Court of Appeals held that the defendant law firm had not waived its right to compel arbitration of plaintiff’s gender discrimination claims despite its earlier participation in litigation over the terms of the partner’s departure from the firm.

**Murphy v. Check ‘N Go of California, Inc.,** 2007 Cal. App. LEXIS 1722 (Cal. App. 4th, Oct. 17, 2007). The California Court of Appeals held that the Court was empowered to decide whether the class action waiver in an arbitration agreement was unconscionable, and then, guided by Gentry v. Superior Court, affirmed the trial court’s finding that it was unconscionable in this wage and hour case and affirmed the trial court’s denial of the employer’s motion to compel arbitration.

The article comprehensively covers the status of issues being litigated in state and federal court regarding arbitration of employment cases. There is also an accompanying checklist of ten steps for effective arbitration and a sample arbitration agreement, both prepared by Alan S. Gutterman, General Counsel ASI Computer Technologies Inc. of Silicon Valley, California.


AAA has a subscription site where you can search and retrieve arbitration awards for $100 per year. It is available at http://www.adr.org/sp.asp?id=22157.


Attorney-Client Privilege

UMG Recording, Inc. v. Bertelsmann AG (In re Napster Copyright Litig.), 479 F.3d 1078 (9th Cir. 2007). When a party seeks an outright disclosure of privileged attorney-client communications under the crime-fraud exception in a civil case, the appropriate burden of proof is preponderance of the evidence. This slightly higher burden is justified because the party has the option of seeking an in camera review, under a less burdensome prima facie case standard. The party defending the privilege against an outright disclosure must be given the chance to present contravening evidence in a hearing prior to the court’s ruling.

In re Qwest Comm. Int'l Inc., 450 F.3d 1179 (10th Cir. 2006). The court rejected a rule of "selective waiver" or "limited waiver" of attorney-client privilege and work-product doctrine which would allow selective production of attorney-client privileged and work-product protected documents to the federal government in the course of a federal agency investigation without waiver of further protection for those documents.

Deel v. Bank of Am., N.A., 227 F.R.D. 456 (W.D. Va. 2005). Documents relating to an audit conducted in reaction to pending litigation were not protected by the self-critical analysis privilege because, as such an audit was not voluntary, the court felt that allowing discovery would not deter employers from conducting similar audits in the future.

Murray v. Bd. of Educ., 199 F.R.D. 154 (S.D.N.Y. 2001). The disclosure of attorney-client privileged communications during psychotherapy did not waive attorney-client protection when the communication during psychotherapy was protected by the psychotherapist-patient privilege, but the subsequent waiver of psychotherapist-patient privilege also waived attorney-client privilege as to the communication disclosed in psychotherapy.


Waugh v. Pathmark Stores, Inc., 191 F.R.D. 427 (D.N.J. 2000). The court found that neither in-house counsel’s involvement in the investigation nor his presence at a meeting to discuss the results of the internal investigation “necessitates a finding of participation as a business person in the decision making process such that his advice should be subject to disclosure.” Rather, his
limited role in providing a legal opinion did not remove the cloak of privilege where he did not conduct interviews, did not render disciplinary determinations, and was not retained as an attorney for the purpose of conducting the investigation.

**Martini v. Fannie Mae**, 977 F.Supp. 464 (D.D.C. 1997). Where the defendants had successfully opposed the plaintiff’s efforts to obtain its investigative report on the ground of attorney-client privilege, the court held that having used the privilege as a shield, it could not later use it as a sword. When the defense attempted to use the information at trial in its defense, the court stated:

> Defendants’ pretrial position, that the report was privileged and generated in preparation for litigation, is flatly inconsistent with a claim that the Report was kept in the general course of business. Finally, such a late introduction of the Report would obviously have been severely prejudicial to Plaintiff, who was not provided it prior to trial, who had no time to investigate the information underlying the Report, and who was not provided with over 2,000 pages of underlying supporting documents. Thus, the Court properly excluded the Report.

**Payton v. New Jersey Turnpike Authority**, 73 FEP Cases (BNA) 1149 (N.J. Sup. Ct. 1997). The New Jersey Supreme Court held that documents created during an employer’s investigation of a complaint of sexual harassment were not protected from disclosure by the attorney-client privilege merely because the EEO department of the employer conducted the investigation with the advice of the law department.

**Harding v. Dana Transport**, 914 F.Supp. 1084 (D.N.J. 1996). The court concluded that an attorney who acted at the request of the employer in conducting an investigation of former employees’ sexual harassment complaints and who engaged in conferences with managerial personnel during the investigation, was acting as an attorney, rather than as a fact-finder or investigator, for the purpose of determining whether the attorney-client privilege barred the former employees from deposing him about his investigation and compelling the production of documents he prepared during the investigation.

**Kennedy v. Klaus Fritsch**, 1991 U.S. Dist. LEXIS 19624 (N.D. Ill. 1991). The court held that by voluntarily producing the report of an investigation in discovery and intending to use the report as evidence it did not and should not have known of plaintiffs’ allegations, the defendant waived any privileges applicable to the notes taken during the investigation.

**Raugh v. Coyne**, 744 F.Supp 1181 (D.D.C. 1990). The court found that documents relating to an investigation of alleged sexual assault against an employee, conducted by outside counsel, which were prepared before the date plaintiff filed charges of sex discrimination were protected as privileged work product and attorney-client communications.

**EEOC v. Commonwealth Edison**, 119 F.R.D. 394 (N.D. Ill. 1988). The court ruled that documents prepared for the internal investigation of allegations of discrimination prior to the commencement of litigation were not subject to protection as work product because the
employer did not establish that the principle purpose of the documents was to aid in the employer’s defense of possible future litigation “in this particular case”.

EEOC v. Anchor Hocking Corp., 31 FEP Cases (BNA) 1049 (S.D. Ohio 1981). The court held that hand written notes prepared by attorneys retained by the employer to investigate discrimination charges were privileged from disclosure as work product because they were, “[i]n the Court’s view, … reasonably likely to reflect the mental impressions and conclusions of the attorneys in assessing the statement of [a witness],” especially where the plaintiff already had access to a verbatim transcript of the employees statement.

See also Detta, Lawyers as Investigators: How Ellreth and Faragher Reveal a Crisis of Ethics and Professionalism through Trial Counsel Disqualification and Waivers of Privilege in Workplace Harassment Cases, 24 J. Legal Prof. 261 (1999/2000).


Waiver of Privilege – Disclosures to Auditor. The Southern District of New York held that if any significant part of the attorney-client privileged communication is voluntarily disclosed, the privilege is deemed waived. See U.S. v. Stewart, 287 F. Supp.2d 461 (S.D.N.Y. 2003)) (Martha Stewart waived attorney-client privilege by forwarding an e-mail sent to her lawyer to her daughter); Stenovich v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367 (New York Co., N.Y. Sup. Ct. 2003) (holding that a law firm waived the attorney-client privilege with respect to documents that the firm shared with investment bankers and other third parties); but, see Ferko v. NASCAR, 218 F.R.D. 125 (E.D. Texas 2003) (holding that a disclosure to third-party accountant did not waive privilege when the accountant assisted the attorney in providing legal advice).

But, if the work product is shared with an outside auditor, then courts are more willing to uphold the work-product privilege, especially if a company either has a “common interest” or has entered into a confidentiality agreement with the auditor. See Merrill Lynch & Co. Inc. v. Allegheny Energy Inc., 229 F.R.D. 441 (S.D. N.Y. 2004) (upholding the work-product immunity even though Merrill Lynch did not share a common litigation interest with its auditors with whom Merrill Lynch had provided internal investigative reports); but, see Diasonics Securities Litigation, 1986 WL 53402 (N.D. Calif. 1986) (where disclosure of documents to third-party accountants effectively waived the privilege). See Sharing Attorney Work-Product with an Auditor in the Course of Litigation Does Not Automatically Waive Work-Product Protection, Business Litigation Report (Quinn Emanuel Urquhart Oliver & Hedges, LLP), June 2007, at 10.
Waiver of Privilege – Reliance on Opinion of Counsel. In re EchoStar Communications Corp, 448 F.3d 1294 (Fed. Cir. 2006). The defendant had obtained a non-infringement opinion from its in-house counsel before the case was filed. The defendant obtained additional legal advice from outside counsel after the case was filed. The defendant elected to rely solely on the opinion of its in-house counsel to rebut the plaintiff’s claim of willful patent infringement. The lower court held that the defendant’s reliance on its in-house counsel’s opinion constituted a waiver of attorney-client privilege and work-product immunity, and that the waiver included the opinion of outside counsel. The lower court also held that the waiver extended to all work product, including the outside attorney’s work product, regardless of whether such work product was provided or communicated to the defendant. In granting outside counsel’s petition for a writ of mandamus, the Federal Circuit agreed with the lower court that the waiver applied to communications with outside counsel relating to the same subject matter of the in-house attorney’s opinion upon which the defendant had chosen to rely. The court went on to rule that work-product immunity was waived only as to documents that inform the court of the infringer’s state of mind, and accordingly documents reflecting the attorney’s mental impressions that were not provided or communicated to the client, are not within the scope of the waiver. See DeBari, “Scope of Waiver Still Uncertain After ‘EchoStar’”, NLJ (Jan. 22, 2007), available at http://www.kramerlevin.com/files/Publication/7a0e2c5f-b604-48dc-bfae-19b57b671167/Presentation/PublicationAttachment/4321442e-28bc-4296-b768-22e2af5d4b75/DeBariArticle.pdf (last visited Mar. 8, 2007) See Outside the Box Innovations, LLC v. Travel Caddy, Inc., 455 F. Supp. 2d 1374, 1376 (N.D. GA 2006). See also Samuel C. Miller III, “Ethical Considerations in Rendering Patent Opinions and the Impact of Knorr, EchoStar and Andrew,” 88 J. PAT. & TRADEMARK OFF. SOC’Y 1019, 1022 (2006); “A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summary: Survey of the Federal Circuit’s Patent Law Decisions in 2006: A New Chapter in the Ongoing Dialogue with the Supreme Court,” 56 AM. U.L. REV. 793, 836 (2007); and Joseph Casino and Michael Kasdan, “In re Seagate Technology: Willfulness and Waiver, a Summary and a Proposal,” 2007 PATENTLY-O PATENT L.J. 1, available at http://www.patentlyo.com/lawjournal/2007/05/in_re_seagate_t.html.

The Advisory Committee on Evidence Rules is considering a proposed amendment to Evidence Rule 502 which would clarify some of the issues regarding the waiver of attorney-client and work product privileges.

David M. Brodsky, Updates on the Corporate Attorney-Client Privilege, 8 Sedona Conf. J. 89 (2007).


Avianca, Inc. v. Corriea, 705 F.Supp. 666 (D.D.C. 1989)(Lamberth, J.), aff’d, Avianca, Inc. v. Harrison, 70 F.3d 367 (D.C.Cir. 1995) (The district court, in rejecting the defendants’ attorney-client privilege argument, found that the defendants had made no showing that any of the communications were for the express purpose of seeking advice, and also did not show that the law firm was acting in a purely professional, as opposed to business, capacity).
Attorney-Client Privilege – Internal Investigation

McGrath v. Nassau County Health Care Corp., 204 F.R.D. 240 (E.D.N.Y. 2001). By asserting the affirmative defense that they took effective remedial action, the defendants put the investigation at issue, and waived any applicable privileges.

Jones v. Scientific Colors, Inc., 2001 WL 845650 (N.D. Ill. 2001). The court found that because the question whether the employer acted reasonably to prevent and correct harassment was an issue in the case, the plaintiff was entitled to discovery regarding employer’s investigation even though it was the defense attorney who conducted the investigation.

Long v. Anderson Univ., 204 F.R.D. 129 (S.D. Ind. 2001). The court held that the work product doctrine did not apply to documents relating to University’s internal investigation of a former student’s sexual harassment complaints.

McIntyre v. Main Street and Main Inc., 2000 U.S. Dist. LEXIS 19617 (N.D. Cal. 2000). Where the defendant did not intend to rely on the investigation by outside counsel, it did not waive the attorney-client privilege applicable to such communication.

Roberts v. Hunt, 187 F.R.D. 71 (W.D.N.Y. 1999). The court rejected a self-evaluative privilege claim in the context of an investigation in response to an age discrimination claim, as: (1) the communications were not made in the belief they would not be disclosed, (2) the willingness of the deposed employees to maintain their relationship with the defendant did not hinge on the communications remaining confidential, and (3) the employee initiated the public disclosure, so if “the employment relationship is eventually impaired by disclosure, it is not for lack of complete confidentiality”.

Brownell v. Roadway Package Sys., Inc., 185 F.R.D. 19 (N.D.N.Y. 1999). Attorney-client privilege was waived when the adequacy of an internal investigation was used as a defense in a sexual harassment case.

Boling v. First Utility District of Knox County, 1998 U.S. Dist. LEXIS 21123 (E.D. Tenn. 1998). Where defendant claimed they were not relying upon the investigation performed in response to a sexual harassment claim, the attorney-client privilege was not waived.

Kaiser Found. Hosp. v. The Superior Court of San Mateo County, 66 Cal. App. 4th 1217 (Cal. Ct. App. 1998). By putting privileged communication directly at issue, the attorney-client privileged is not automatically waived; the disclosure of the privileged communications must also be essential for a thorough examination of the adequacy of the investigation.

Wellpoint Health Networks, Inc. v. The Superior Court of Los Angeles County, 59 Cal. App. 4th 110 (Cal. Ct. App. 1998). The court held that if a defendant uses the adequacy of investigation as a defense, it puts the adequacy of the investigation directly at issue, and waives the attorney-client and work product privileges.
Volpe v. US Airways, Inc., 184 F.R.D. 672 (M.D. Fla. 1998). The court held that defendants waived any applicable privilege by asserting that they were insulated from liability by the investigation into plaintiff’s sexual harassment claim.

Worthington v. Endee, 177 F.R.D. 113 (N.D.N.Y. 1998). The court held that by asserting an affirmative defense of effective remedial action, the defendants implicitly waived the attorney-client and work product privileges in relationship to an investigation of a sexual harassment claim.

Johnson v. Rauland-Borg Corp., 961 F.Supp. 208 (N.D. Ill. 1997). The court held that the legal advice of an outside attorney, hired for the purpose of investigating sexual harassment allegations, was discoverable as the attorney-client privilege was waived by placing the reasonableness of the investigation at issue.

Peterson v. Wallace Computer Serv., Inc., 1997 U.S. Dist. LEXIS 15831 (D.Vt. 1997). The court held that as company defended itself on the ground that the investigation of sexual harassment claims was adequate, the defendant had affirmatively placed the nature of its investigation in dispute and had to fully disclose the content of its investigation.

Pray v. The New York City Ballet Co., 1997 U.S. Dist. LEXIS 6995 (S.D.N.Y. 1997). “[W]here, as here, an employer relies on an internal investigation and subsequent corrective action for its defense, it has placed that conduct ‘in issue.’ Thus, an employer may not prevent discovery of such an investigation based on attorney-client or work-product privileges solely because the attorney has hired attorneys to conduct its investigation.”

Fultz v. Federal Sign, 1995 U.S. Dist. LEXIS 1982 (N.D. Ill. 1995). “[O]ne cannot assert the attorney/client privilege to keep an opponent from discovering facts about an investigation when the investigation is to be used at trial as a defense to defeat the opponent’s allegations.”

Attorney-Client Privilege – Public Relations Firms

In re Grand Jury Subpoenas, 265 F. Supp. 2d 321 (S.D.N.Y. 2003). Confidential communications between an attorney and public relations consultant are protected by the attorney-client privilege when they meet certain conditions.

In re Copper Market Antitrust Litigation, 200 F.R.D. 213 (S.D.N.Y. 2001). The privilege should attach to communications with a public relations firm.


Attorney-Client Privilege – Ombudsmen Privilege

Solorzano v. Shell Chem. Co., 83 FEP Cases (BNA) 1481, 2000 WL 1145766 (E.D. La. 2000). The court, in rejecting the ombudsmen privilege, stated:
“I am particularly reluctant to recognize such a privilege as a matter of federal common law when a narrowly drawn protective order... short of recognition of a broad-ranging privilege will suffice to accommodate any need for confidentiality of the records that might be responsive to plaintiff’s discovery request.”

Carmen v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997). The court refused to recognize the ombudsmen privilege, while recognizing the value of ombudsman programs.

Garstang v. California Institute of Technology, 39 Ca. App. 4th 526, 46 Ca. Rptr. 2nd 84 (1995). The court applied the Kientzy factors and recognized the ombudsmen privilege, noting that a finding of privilege is more likely when employees are advised that communications with the ombudsmen will be kept confidential.

Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570 (E.D. Mo. 1991). Where the ombudsman sought a protective order in a sexual harassment case, the court granted the protective order, finding communications between an employee and ombudsmen are protected from disclosure under Evidence Rule 501.

Attorneys’ Fees

Arbor Hill Concerned Citizens Neighborhood Ass’n v. County of Albany, 484 F.3d 162 (2d Cir. 2007). The Court of Appeals affirmed a lower court holding, awarding Gibson Dunn fees at a rate of $210 per hour, the maximum permitted in the Northern District of New York, even though Gibson’s New York office is located in the pricier Southern District. The Court of Appeals explained that a higher rate, that is, in excess of $210 an hour, was not justified under applicable factors, including the rate that a reasonable client would pay. The Court of Appeals held that a reasonable client would not pay top dollar for services in this type of case, knowing that it could obtain the service pro bono where lawyers might be willing to use the case to promote their “reputational or social goals.” The Court of Appeals reasoned that the lower rate would not necessarily penalize the Gibson attorneys, who are motivated to take pro bono case not only for fees, but also for “considerable non-monetary returns – in experience, reputation, or achievement of the attorneys’ own interests and agendas.” See Adam Liptak, “In Court’s Calculation, What Feeds Lawyers’ Souls Need not Fatten Their Wallets,” N.Y. TIMES, May 28, 2007, in the Sidebar; Carolyn Elefant, “Is $1M in Attorney Fees Fair When a Law Firm Works Pro Bono?,” LAW.COM BLOG NETWORK, May 16, 2007, http://legalblogwatch.typepad.com/legal_blog_watch/2007/05/index.html; Carolyn Elefant, “Assessing Attorney Fees When Biglaw Works Pro Bono: Part II,” LAW.COM BLOG NETWORK, May 31, 2007, http://legalblogwatch.typepad.com/legal_blog_watch/2007/05/index.html.

Sacco v. United States, 452 F.3d 1305 (Fed. Cir. 2006). The court held that the plaintiffs could not recover attorney’s fees under the Back Pay Act. The plaintiffs prevailed at trial, but while the case was on appeal, the employer rescinded the offending actions; thus, the plaintiffs were not prevailing parties, though they were successful in halting the offensive action.

Imgarten v. Bellyboy Corp., 383 F. Supp. 2d 825 (D. Md. 2005). The district court, in this attorneys’ fees decision, stated that where the employer defended the case “street by street and house by house. . . [h]aving forced its adversary to incur substantial legal fees, [the employer] cannot complain about the size of the bill.”

Roberson v. Giuliani, 346 F.3d 75 (2d Cir. 2003). The court held that “prevailing party” status, for the purpose the fee-shifting provision of civil rights statute, 42 U.S.C. § 1983, is established when the court retains enforcement jurisdiction over a private settlement agreement.

L & W Supply Corp. v. Acuity, 475 F.3d 737 (6th Cir. 2007). The Sixth Circuit, relying on Supreme Court precedent, held that expert witness fees (the hourly rate charged) are not recoverable under 28 U.S.C. § 1920, absent explicit statutory authority. The case was remanded to determine appropriate “attendance fees” under 28 U.S.C. § 1821, e.g., travel and subsistence.

Jones v. United Space Alliance, L.L.C., 494 F.3d 1306 (11th Cir. 2007). The Eleventh Circuit held that a prevailing defendant in an employment discrimination case under Title VII and the Florida Civil Rights Act was not entitled to an award of attorneys’ fees under the Florida offer-of-judgment statute.

Lively v. Flexible Packaging Ass’n, 2007 D.C. App. LEXIS 551 (D.C. 2007). The D.C. Court of Appeals, using the Laffey Matrix as one legitimate means of calculating attorneys’ fees, awarded fees based on historic experience levels. The court approved percentage reductions for limited success and for “unreliable billing records”.

The court awarded interest on compensatory damages, noting that other jurisdictions have stopped the accrual of interest on such damages where an unconditional offer to make partial payment has been made. Finally, the court permitted post-judgment interest on punitive damages.

Nichols v. City of Taft, 2007 Cal. App. LEXIS 1646 (Cal. Ct. App. Oct. 2, 2007). The plaintiff was represented in this employment case by members of a large out-of-town law firm with offices in Los Angeles and San Francisco. Plaintiff’s lawyers hourly rates were considerably higher than those charged in the local Kern County area. When the underlying case settled and the settlement agreement provided that plaintiff would file a fee petition, plaintiff’s attorneys did so and sought to be compensated at rates higher than the local rates. Plaintiff failed to demonstrate a need for non-local counsel. Nonetheless, the lower court, after computing the lodestar fee, enhanced it by a multiplier of 1.33, believing that it was mandatory to do so to account for the fact that plaintiff’s lawyers were from out-of-town and in a higher fee market. The appellate court reversed finding that lodestar enhancement is discretionary, not mandatory, and further finding that the failure to make the threshold showing that it was impracticable for
plaintiff to hire local counsel, precluded consideration of her lawyers out-of-town rates when, on remand, the trial court exercises its discretion to impose or not impose a multiplier to the lodestar fee. The court did reaffirm that a plaintiff can demonstrate the need to hire out-of-town counsel, “if a potential defendant is too intimidating to the local bar or so replete with resources as to potentially overwhelm local counsel, or if the local plaintiffs’ bar has not the resources to engage in complex litigation on a contingency-fee basis. . . .”

Caplin & Drysdale Chartered v. Babcock & Wilcox Co., 2008 U.S. App. LEXIS 9402 (5th Cir. 2008) (The 5th Circuit disallowed charges by Caplin & Drysdale for full hourly rate for travel time where the firm sought $271,370 for travel time of its attorneys for the asbestos claimants’ committee in the bankruptcy case involving the Babcock & Wilcox company).

Hubbard v. SoBreck, LLC, 2008 U.S. App. LEXIS 13563 (9th Cir. 2008) (“A violation of the federal ADA constitutes a violation of the CDPA [California Disabled Persons Act]. See, e.g., Cal. Civ. Code §§ 54(c), 54.1(d), 54.2(b). Therefore, to the extent that California’s Section 55 mandates the imposition of fees on a losing plaintiff who brought both a nonfrivolous ADA action and a parallel action under Section 55, an award of attorney’s fees under Section 55 would be inconsistent with the ADA, which would bar imposition of fees on the plaintiff. In such a case, the proof required to show a violation of the CDPA and of the ADA is identical. In that circumstance, it is impossible to distinguish the fees necessary to defend against the CDPA claim from those expended in defense against the ADA claim, so that a grant of fees on the California cause of action is necessarily a grant of fees as to the ADA claim. As federal law does not allow the grant of fees to defendants for non-frivolous ADA actions, we must conclude that preemption principles preclude the imposition of fees on a plaintiff for bringing nonfrivolous claims under state law that parallel claims also filed pursuant to the federal law. See Cal. Fed. Sav. [Ass’n v. Guerra, 479 U.W. 272, 280-81 (1987)].”).

Reeves v. Astrue, 2008 U.S. App. LEXIS 9633 (11th Cir. 2008) (The Eleventh Circuit held that an attorneys’ fee award under the Equal Access to Justice Act belongs to the prevailing party, and not the party’s attorney.).

Kenny A. v. Perdue, 2008 U.S. App. LEXIS 14204 (11th Cir. July 3, 2008) (Judge Carnes in dicta called into question the validity of attorneys’ fee enhancements for so-called “exceptional” litigation results. In doing so, he stated:

“A result that obtains more or better relief than plaintiffs are entitled to receive under the law is, to the extent it exceeds their entitlement on the merits, analogous to relief on a meritless claim. Just as Dague instructs us that fee awards should not underwrite efforts to obtain relief where none is due under the law, neither should they underwrite efforts to receive more or better relief than that due under the law. Just as the societal costs for fee awards for non-meritorious claims are too high, so also are they too high for results that exceed what the law allows. Just as encouraging non-meritorious claims cannot have been an objective of the fee-shifting provisions, neither can encouraging results that go beyond what the law allows have been an objective.
To put it in an either-or manner, superb results are either what a fair application of the law produces, which means that they are not truly "superb," or they are results that exceed what the law allows and for that reason are beyond the purpose of the fee-shifting statutes. Those statutes are designed to provide a reasonable fee for a reasonable result, not an extraordinary fee for a result that goes beyond what the law would provide if the claims were litigated to their correct conclusion on the merits.

Look at it this way. A merits-exceeding result for plaintiffs must be the product of one, or some combination, of the following factors: superior lawyering by plaintiffs' counsel, bad lawyering by defendants' counsel, poor decision making by the court, or dumb luck.

The Supreme Court held in *Delaware Valley I* that superior lawyering by the plaintiffs' counsel is not a proper basis for an enhancement. *Delaware Valley I*, 478 U.S. at 565-68, 106 S. Ct. at 3098-100. So, the first possible cause of results that go beyond the merits cannot be used to justify an enhancement.

Nor can it plausibly be argued that plaintiffs' attorneys ought to reap a windfall, and defendants ought to have to pay more in fees than they otherwise should, because of bad lawyering on the defense side. Surely a defendant suffers enough from the additional relief granted against it because of inferior representation without making the defendant pay a surcharge to the other side for the privilege of having been the victim of bad lawyering.

Nor can it be argued, with tongue out of cheek, that fees should be increased to reward plaintiffs' attorneys for being on the side that happens to benefit from bad judging or good luck. That exhausts the possible explanations for excessively favorable results, and none supports awarding an enhancement.

*Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062 (9th Cir. March 7, 2008) (The 9th Circuit affirmed the denial of an award of attorneys’ fees where the defense had incorrectly removed a class action to Federal Court on the ground, under the CAFA, that the basis for the removal was objectively reasonable. The Court, having found that the class action was “commenced” prior to CAFA’s effective date, found that the defendants argument regarding the meaning of “commencement” under CAFA raised a novel issue of first impression and thus being objectively reasonable, attorneys’ fees should be denied).

**Attorneys’ Fees – Discovery of Defense Fees**

*McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805, 809 (9th Cir. 1994) (comparing plaintiffs’ and defendant’s counsel’s fees and costs in determining that plaintiffs’ request should be reduced by 51.5 hours “because of duplication of plaintiff’s counsel’s efforts”).
Lubrizol Corp. v. Exxon Corp., 957 F.2d 1302, 1308 (5th Cir. 1992) (noting that the district court had “bestowed upon Lubrizol the opportunity to conduct discovery into Exxon’s litigation expenses,” but not discussing the basis of the district court’s decision).

Liberty Mutual Ins. Co. v. Continental Casualty Co., 771 F.2d 579, 588 (1st Cir. 1985) (comparing both sides’ attorneys’ fees to determine whether remittitur was appropriate, but providing no information as to how both sides’ fees were entered into the record).

Henson v. Columbus Bank & Trust Co., 770 F.2d 1566, 1575 (11th Cir.1985) (“In light of the concerns the district court expressed regarding the reasonableness of the hours claimed in Henson’s petition, it would seem most appropriate for the court to have allowed discovery of” defendant’s attorney’s fees) (emphasis added).

Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 768 & n.18 (7th Cir. 1982) (“The rates charged by defendant’s attorneys provide a useful guide to rates customarily charged in this type of case.”) (emphasis added).

Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1220 (8th Cir. 1981) (affirming an attorneys fee award, noting that the award appeared “appropriate and reasonable, as Kalmanovitz testified at trial that Falstaff had expended close to one million dollars in attorney fees in this case”) (emphasis added).

Mitroff v. XOMOX Corp., 631 F. Supp. 25, 28 (S.D.Ohio 1985) (“Pertinent to any consideration of a reasonable amount of time expended in the prosecution of a law suit is the amount of time expended by the defendant in defending that law suit) (emphasis added).

Ruiz v. Estelle, 553 F. Supp. 567, 589 (S.D. Tex. 1982) (“In an action for which no adequate parallel can be found, the best example of a fee paid for similar work is that paid by opposing counsel in the same action.”).

Murray v. Stucky’s Inc., 153 F.R.D. 151, 152-53 (N.D. Iowa 1993) (noting that “[w]hether discovery is appropriate depends, in part, on the objections raised by the opponent to the fee petition going to the reasonableness of the fee petition,” and that since “defendants have resisted plaintiffs’ fee claim both on the basis of the number of hours claimed and the hourly rate applied . . . [t]he hours expended by all attorneys . . . for the defendants, must be disclosed.”) (emphasis added) (citation omitted).

Coalition to Save our Children v. State Bd. of Educ. of the State of Delaware, 143 F.R.D. 61, 64-66 (D. Del. 1992) (noting that [w]hether discovery is appropriate depends, in part, on the objections raised by the opponent to the fee petition going to the reasonableness of the fee petition,” and ordering defendant to disclose its attorneys’ billing rates and time spent on the case in part because defendant “raised the issues of reasonableness and ‘overlap’ [of hours] by plaintiff”).

Cohen v. Brown Univ., No. CA 92-197 L, 1999 WL 695235, at *1, 6 (May 19, 1999 D.R.I.) (granting plaintiffs’ motion for limited discovery where defendants “challenge both the number
of hours for which Plaintiffs’ attorneys seek compensation and the hourly rates at which those hours should be compensated").

Grumman Corp. v. LTV Corp., 533 F.Supp. 1385, 1391 (E.D.N.Y. 1982) (granting plaintiff “leave to take comparative discovery from LTV’s counsel . . . as bearing on the issue of reasonableness of rates and time charged in prosecuting LTV’s opposition to Grumman’s preliminary injunction application”) (emphasis added).

Blowers v. Lawyers Coop. Publ’g Co., 526 F. Supp. 1324, 1327 (W.D.N.Y. 1981) (allowing discovery by plaintiff regarding the “amount of time spent by defendant’s attorneys in the case and the amount of costs and disbursements incurred by them,” after finding that this information “may have significant bearing” on the reasonableness of amount of time spent and amount of costs and disbursements incurred by plaintiff’s attorney).

Naismith v. Prof’l Golfers Ass’n, 85 F.R.D. 552, 562-63 (N.D. Ga. 1979) (allowing discovery of “the time of [defendants’] attorneys” as such information “is reasonably calculated to lead to the discovery of admissible evidence” related to the reasonableness of the hours plaintiffs’ attorneys expended).

Stastny v. S.Bell Tel. & T. Co., 77 F.R.D. 662, 663-64 (W.D.N.C. 1978) (“In a contest over what time was reasonably and necessarily spent in the preparation of a case, it is obvious that the time that the opposition found necessary to prepare its case would be probative . . . The defendant must provide information as to the number of hours that each attorney . . . spent on this case.”) (emphasis added).

**Background Checks**


A recent survey by EXECUNet found that 83% of executives and corporate recruiters research job candidates online, and 43% have eliminated a candidate because of the online search results. ExecuNet, http://www.execunet.com/m_releases_content.cfm?id=3651 (last visited on May 20, 2008).

In a recent article by Elizabeth Ody of Kiplinger’s Personal Finance entitled “Keeping Your Profile Clean” (Washington Post, F3, May 18, 2008) it was advised that job candidates search themselves on Google to pinpoint any negative hits you would like to remove, and then advises that if you are not able to destroy them, the name of the game is to bump them down the list. The article goes on to provide detailed advice on how to create online material that will be higher on the Google list, and thus push the negative material further down the list. Elizabeth Ody, “Keeping Your Profile Clean,” http://www.washingtonpost.com/wp-dyn/content/article/2008/05/16/AR2008051603089.html, (last visited May 19, 2008).


Bankruptcy

Cannon-Stokes v. Potter, 2006 U.S. App. LEXIS 16757 (7th Cir. July 5, 2006). The Seventh Circuit, aligning itself with six other circuits, held that a debtor in bankruptcy who fails to list a legal claim in the petition forfeits that claim after the bankruptcy ends, by operation of judicial estoppel.

Porter v. Sells, 2007 Bankr. LEXIS 3138 (B.A.P. 8th Cir., Sept. 21, 2007). The Court of Appeals held that a judgment for sex harassment and retaliation is non-dischargeable in bankruptcy. The employee/judgment creditor argued that her judgment was non-dischargeable under §523(a)(6) of the Bankruptcy Code which excepts from discharge any debt for a willful and malicious injury. The Court of Appeals ruled that the jury’s finding established both willfulness and malice, and that accordingly the judgment was not dischargeable.

Moses v. Howard University Hospital, No. 01-cv-2528 (D.D.C. July 1, 2008) (Judge Friedman of the U.S. District Court for the District of Columbia issued an opinion that addresses the question of what happens to a plaintiff’s employment discrimination claims when the plaintiff files for personal bankruptcy during the course of litigating the employment claims, but fails to include his/her employment claims in his filings with the bankruptcy court? Judge Friedman held that the doctrine of judicial estoppel barred the plaintiff from pursuing his employment claims where he failed to disclose them to the bankruptcy court. Two factors that cut against the plaintiff were that (1) he did disclose some other lawsuits against him in the bankruptcy filings, in order to make his financial situation look more dire, which shows that he knew he had to disclose other litigation; and (2) the bankruptcy proceeding was closed out with some 20k in
debts discharged, without his ever notifying the creditors or the bankruptcy court of his pending discrimination claims.)

**Blogs and Internet Message Boards**

*Diamond Offshore Servs. Co. v. Gulfmark Offshore, Inc.*, 2007 U.S. Dist. LEXIS 5483 (S.D. Tex. Jan. 5, 2007). In trying to decide if defendant and another company were considered separate entities or one company, the district court stated (in dicta) that retrieving corporate information on the internet is “inherently untrustworthy” and that “allegations on the Internet . . . are not enough to create a genuine issue of material fact . . .” However, the court did accept that an examination of the totality of the circumstances did warrant looking at the websites in question.

*United States v. Hassoun*, 2007 U.S. Dist. LEXIS 3404 (S.D. Fla. Jan. 17, 2007). The District Court held that, in light of the employer’s policy regarding internet and email usage, and monitoring thereof, the employee, the defendant in this case, did not have a legitimate expectation of privacy on his office computer or email.

*Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007). The First Circuit affirmed dismissal of a suit against an internet message board company and its operator. The Communications Decency Act (CDA) gave broad immunity to parties who facilitate speech of others on the internet, and none of the Plaintiff’s claims, i.e., cyberstalking and securities violations, fell within the exceptions to the CDA.


*Matrixx Initiatives, Inc. v. Doe*, 2006 Cal. App. LEXIS 544, 42 Cal. Rptr. 3d 79 (Cal. Ct. App. 2006). Plaintiffs sued multiple individuals for defamation and related claims pursuant to negative statements about the company that were posted on internet message boards. This is an appeal of the trial court’s grant of a motion to compel answers to deposition questions designed to reveal the identity of two posters that remained anonymous. The court held that, as third parties, the appellants did not have standing to oppose the discovery order. The appellants were not party to the action, did not demonstrate any relationship to those that they sought to protect, and did not suggest that their refusal to reveal the information protected their own interests. The grant of the motion to compel was affirmed.


Employment lawyers ought to consider the potential use of these techniques in resolution of employment disputes. Scott R. Peppet has a good article entitled: “The (New) Ethics of Collaborative Law” in Dispute Resolution Magazine, Volume 14 No. 2 (Winter 2008), the publication of the ABA's Section of Dispute Resolution.

Let me share with you a checklist, not necessarily exhaustive, of what ought to be included in an employer's electronic usage policies.

1. The policy should prohibit disclosure of trade secrets, trademark, copyright or other confidential, proprietary non-public information.

2. It should prohibit the use of the company's name, logo, or slogans.

3. Blogging on the clock/on company time should be prohibited.

4. Blogging, using company equipment and company electronic systems, should be prohibited.

5. Any electronic communication, using company equipment or company electronic systems, may not include disparaging, threatening, harassing, or other inappropriate content whether it be about the company, its employees or others.

6. Any non-business electronic communication should clearly indicate that the content of the communication contains the opinions and views of the writer, and not the company.

7. The policy should clearly indicate that violation thereof may subject the employee to immediate disciplinary action, including termination.
8. The policy should clearly indicate that the equipment and electronic systems are the property of the company, that there is no right of privacy whatsoever with respect to electronic communications on company equipment or using company systems, and that the company may at any time for any reason monitor electronic communications.

9. The policy should warn employees that they may be held legally responsible for the content of such communications, including a blog, if it violates the law, for example, trade secret laws, the copyright laws, and privacy concerns.

In working with an employer-client to develop such a policy, one should craft the policy with the employer's particular industry in mind. For example, financial institutions have customer information that needs to be carefully protected, including Social Security numbers and account numbers.

Blakey v. Continental Airlines, Inc., 751 A.2d 538 (June 1, 2000) The defendant airline provided pilots with a software package which allowed them to communicate with each other through posts, similar to blogs. When a number of male pilots posted inappropriate comments, a female pilot filed suit, claiming harassment and discrimination. The airline contended that, as it did not sponsor the site, it was not libel for the comments. The court declined to adopt the airline's sponsorship test, and instead held that if the airline benefited from the site, it could be vicariously liable for the comments.

Blogs – Free Speech

Bynog v. SL Green Realty Corp., 97 Fair Emp. Prac. Cas. (BNA) 709, 2005 U.S. Dist. LEXIS 34617 (S.D.N.Y. December 22, 2005). The plaintiff was employed as a concierge at a Park Avenue and allegedly was fired after her coworkers made discriminatory and threatening comments. Afterwards, she publicized her termination, using, among other methods, a website which included a blog and timeline chronicling the events of her termination. The employer sought a preliminary injunction to bring about a cessation of her conduct, but the court denied the request, finding that the injunction would constitute a prior restraint of protected speech.

Faegre Benson LLP v. Purdy, 367 F. Supp. 2d 1238 (D. Minn. 2005). Plaintiff law firm and two of its partners sued the creator of various websites that objected to the law firm’s apparent work on behalf of two pro-abortion rights groups. The complaint alleged violations of trademark laws and defamation. The websites contained altered versions of the law firm’s official webpage, featuring the same color scheme, layout, buttons, fonts and graphics, and then included graphic
photographs purporting to show aborted fetuses. The court held that because the “counterfeit” websites included a clear parody disclaimer, the sites did not offend the law.

**Bonus Plan**

*Prachasaisoradej v. Ralph’s*, 165 P.3d 133 (Cal. 2007). The California Supreme Court held that profit-based bonus plans are legal. It had been argued that, in deducting expenses from revenues in order to determine profits, the employer was shifting workers’ compensation expenses to employees. In a 4-3 ruling the majority found that there was a difference between an employer’s deducting certain expenses from an employee’s earned wages, which is illegal under a section of the Labor Code, and an employer deducting those expenses from gross revenues to determine profit for purposes of calculating a profit-based bonus.

**Bullying – New Exposure**


A bill in New Jersey would give an individual the right to seek as much as $25,000 in damages if an employer created “an abusive work environment.” Assemb. 3590, 2006 Leg., 212th Sess. (N.J. 2006), available at: http://www.njleg.state.nj.us/2006/bills/a4000/3590_11.htm.

Raess v. Doescher, 883 N.E.2d 790 (Indiana Sup. Ct. April 8, 2008) (The Indiana Supreme Court, over the dissent of one judge, declined to decide whether it was error to admit the testimony of a so-called “bullying expert.” A cardiac surgeon who was accused of being a workplace bully because he yelled at a co-worker, was sued by the co-worker for intentional infliction of emotional distress, and the trial court permitted a so-called “bullying expert” to testify. The Supreme Court did state as follows: “The phrase ‘workplace bullying,’ like other general terms used to characterize a person’s behavior, is an entirely appropriate consideration in determining the issues before the jury. As evidenced by the trial court’s questions to counsel during pre-trial proceedings, workplace bullying could ‘be considered a form of intentional infliction of emotional distress.’”
Caregiver Discrimination


Cash Balance Plans

West v. AK Steel Corp. Ret. Accumulation Pension Plan, 484 F.3d 395 (6th Cir. 2007). The 6th Circuit held that a cash balance pension plan sponsor caused an illegal forfeiture of participants’ benefits when it failed to use a whipsaw calculation to compute the lump sum payments of those who retired or terminated their employment prior to reaching age 65. *See also* Lyons v. Georgia-Pacific Corp Salaried Employees Retirement Plan, 221 F.3d 1235 (11th Cir. 2000); Semiesden v. Bank of Boston, 229 F.3d 154 (2d Cir. 2000); Berger v. Xerox Corp Retirement Income Guarantee Plan, 338 F.3d. 755 (7th Cir. 2003).


Drutis v. Rand McNally & Co., 2007 U.S. App. LEXIS 20275 (6th Cir. Aug. 27, 2007). The Sixth Circuit held that the employer’s “cash balance” pension plans did not violate the anti-age-discrimination provision of ERISA.


Amara v. Cigna Corp., 2008 U.S. Dist. LEXIS 11378 (D. Conn. Feb. 15, 2008) (The district court held that, in effectuating conversion to a cash balance plan, the employer did not give appropriate notice to employees as required by ERISA, and that the SPD and other materials were inadequate under ERISA).


Aleman v. Chugach Support Services, Inc., 485 F.3d 206 (4th Cir. 2007). The Fourth Circuit holds that the exemptions contained in Title VII do not foreclose a claim under Section 1981. Here, specifically, the court held that the exclusion in Title VII from the definition of employer of Indian Tribes and Alaska Native Corporations, is not to be read into Section 1981. In addition, the court, in applying Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005), held that retaliation claims were cognizable under Section 1981 as retaliation was “a form of differential treatment subsumed in the antidiscrimination language of Section 1981” (citations omitted). See also CBOCS West v. Humphries, 474 F.3d 387 (7th Cir. 2007), cert. granted, 2007 U.S. LEXIS 9079.

Gregory v. Dillard's Inc., 494 F.3d 694(8th Cir. 2007). The majority, with Judge Colloton dissenting, held in a § 1981 action that surveillance of African American shoppers in a department store may constitute interference with their rights to freedom of contract as codified in § 1981, as amended by the 1991 Civil Rights Act.

Metoyer v. Chassman, 2007 U.S. App. LEXIS 22750 (9th Cir., Sept. 26, 2007). The Court of Appeals held that the mixed-motive defense to liability is no longer available for discrimination claims brought under §1981, but does remain available to defendants for retaliation claims under §1981.

Arendale v. Memphis, Tennessee, 519 F.3d 587 (6th Cir. Mar. 20, 2008) (The 6th Circuit, joining the 4th, 10th and 11th Circuits, held that the 1991 Civil Rights Act did not amend §1981 to provide a private remedy against municipalities for racial discrimination. The court held that § 1981(c), which provides that the “rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law” did not overrule Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989), which held that Section 1981’s implied private cause of action does not extend to suits against state actors. The 9th Circuit disagrees).

Pittman v. State of Oregon, 509 F.3d 1065 (9th Cir. 2007) (The 9th Circuit held that section 1981 does not create a private right of action against a state defendant).

Class and Collective Actions

Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.), 471 F.3d 24 (2d Cir. 2006). (“In re IPO”) The Second Circuit in this case clarified the requirements for class certification under FRCP 23. The court held that (a) all the requirements of Rule 23 must be analyzed and met; (b) any factual disputes must be resolved, with all relevant evidence considered; and (c) the court must still make these findings even if it touches upon or is identical to the merits of the case. However, the district judge retained wide discretion to limit disputes over Rule 23 from becoming full-fledged trials on the merits. Further, any findings made at this stage do not bind the ultimate fact-finder.

Hnot v. Willis Group Holdings, Ltd., 241 F.R.D. 204 (S.D.N.Y. 2007). Plaintiffs moved for class certification on a sexual discrimination suit, which was granted by the court. However, the Second Circuit later handed down its’ In re Initial Pub. Offering Sec. Litig., 471 F.3d 24 (2d Cir. 2006) opinion (“In re IPO”), and the defendants moved for reconsideration or decertification. The district court stated the In re IPO test as such: (a) rigorously apply each part of Fed. Rule of Civ. Pro. 23, (b) resolve factual disputes over the certification, regardless of whether the disputes touch upon the merits of the case, and (c) use judicial discretion to prevent a full-blown discussion on the merits. Defendants argued that the court had not satisfied the second prong – it had not considered all countervailing evidence. The court held that it had considered all relevant evidence in making the decision, but only insofar as necessary to make appropriate findings under Rule 23, which is all In re IPO required.

Lindsey v. Gov’t. Emples. Ins. Co., 448 F.3d 416 (D.C. Cir. 2006). Plaintiffs filed an overtime Rule 23 “opt-out” class action under the New York Minimum Wage Act in addition to their “opt-in” FLSA action. The District Court denied class certification of the New York state law claim, finding that the FLSA class certification procedures that require all class members to affirmatively opt-in, precluded the court from exercising supplemental jurisdiction over the state law claim. The Court of Appeals reversed, holding that a supplemental opt-out class action could proceed even though the court had original jurisdiction over an opt-in FLSA class certification procedure.

Reich v. SNET, 121 F.3d 58, 66-68 (2d Cir. 1997). The court of appeals held that at trial in an opt-in FLSA collective action, where more than fifty individuals had opted-in, only a representative number needed to testify. The court permitted the representative testimony of 2.5% of the plaintiff class as a sufficient basis upon which damages could be inferred.

In re Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006). The Second Circuit, in a non-employment case, rejected plaintiff’s broad application of Eisen v. Carlisle & Jacquelin et. al., 417 U.S. 156, (1974), and joined the prevailing consensus that a court must examine whether the putative class representatives have satisfied all Rule 23 requirements, even if that process requires the court to resolve issues that overlap with merits issues. See also In re
Polymedica Corp. Sec. Litig., 432 F.3d 1 (1st Cir. 2005); Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005); Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005); Cooper v. Southern Co., 390 F.3d 695 (11th Cir. 2004); Gariety v. Grant Thornton LLP, 368 F.3d 356 (4th Cir. 2004); Szabo v. Bridgeport Machs. Inc., 249 F.3d 672 (7th Cir. 2001)); Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc., 259 F.3d 154 (3d Cir. 2001).

Davis v. Coca-Cola Bottling Co., 516 F.3d 955 (11th Cir. Feb. 6, 2008) (The Court of Appeals affirmed the District Court’s dismissal of a claim that the defendant company maintained a pattern or practice of discrimination on the ground that the plaintiffs failed to file their case as a class action).

Kaltwasser v. Cingular Wireless LLC, 543 F. Supp. 2d 1124, 1126-27 (N.D. Cal. 2008) (The District Court denied the defendant’s motion to compel individual arbitration of class action claims under a wireless service contract, holding that the arbitration agreement, which included a class action waiver, was unconscionable under California State Law).

Fiser v. Dell Computer Corp., 2008 N.M. LEXIS 93 (N.M. Sup. Ct. June 27, 2008) (The New Mexico Supreme Court held that a class action waiver was unenforceable, stating that “New Mexico’s fundamental public policy requires that consumers with small claims have a mechanism for dispute resolution via the class action”).

Class Actions - Certifications


Sherman v. Westinghouse Savannah River Co., 2008 U.S. App. LEXIS 2855 (4th Cir. 2008) (The district court denied class action certification on the ground that none of the plaintiffs had made meritorious disparate impact claims and thus could not be proper class representatives. The 4th Circuit found the issue to be moot).

Class Actions - Settlement


The Zoran and the CNET cases (In these two recent decisions by Judge Alsup, the court held that a payment of attorney’s fees, combined with some “therapeutics,” but without a cash payment to the company, in proposed settlements of stock option backdating cases, constitutes a “collusive” settlement).

Class Action Fairness Act (CAFA)
Serrano v. 180 Connect, Inc., 478 F.3d 1018 (9th Cir. 2007). Under the Class Action Fairness Act of 2005 (CAFA), the defendant employer removed the suit to federal court. The plaintiff sought remand under two exceptions to CAFA, the “home state exception” and the “local controversy” exception. The Ninth Circuit first noted the long-standing rule that proponents of removal bear the burden of showing jurisdiction. However, the exceptions in CAFA are not part of the prima facie case for original jurisdiction. The court, using Supreme Court precedent, held that the plaintiff, or party seeking remand, shoulders the burden of proving exceptions to federal jurisdiction under CAFA, once original jurisdiction has been established by the defense.

Lowery v. Alabama Power Co., 483 F.3d 1184 (11th Cir. 2007). The 11th Circuit held that the Class Action Fairness Act (CAFA) does not support removal to federal court of a multi-plaintiff suit under CAFA’s mass action provision. CAFA primarily applies to class actions, but also includes a provision for mass actions that allows federal jurisdiction in some cases for claims brought individually by a large group of plaintiffs. The court stated: “CAFA’s mass action provisions present an opaque, baroque, maze interlocking cross-references that defy easy interpretation, even though they are contained in a single paragraph of the amended diversity statute.” The court held that a mass action must satisfy, as a minimum, the following requirements: (1) An aggregate amount in controversy of at least $5 million; (2) minimal diversity, that is at least one plaintiff and one defendant from different states; (3) 100 or more plaintiffs; (4) plaintiff’s claims involve common questions of fact and law.

Common Law

Griffin v. Acacia Life Ins. Co., 2007 D.C. App. LEXIS 266 (D.C. May 24, 2007). The D.C. Court of Appeals held that the tort claim of negligent supervision could not be predicated on a violation of the D.C. Human Rights Act as a common law claim of negligent supervision may be predicated only on common law causes of action or duties otherwise imposed by the common law and not by duties imposed by statute. Thus, a negligent supervision claim could be predicated on a battery, for example, but not the Human Rights Act. The Court emphasized that it did not intend to suggest that the Human Rights Act preempts or otherwise abolishes common law causes of action based on the same set of operative facts. The Court also emphasized that its holding was limited to the tort of negligent supervision and its earlier decisions permitting common law claims for intentional infliction of emotional distress to be predicated on violations of the Human Rights Act were unaffected by this decision.

Doe v. Pharmacia, 122 Fed. Appx. 20 (4th Cir. 2005). Court of Appeals held that a wife had no claim against her husband’s employer who negligently tested him and then wrongly informed him that he was not HIV positive.

Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333, 1335 (7th Cir. 1988). Judge Posner described the implied covenant of good faith and fair dealing as a “chameleon,” stating that it was capable of manipulation to justify virtually any position.

Saks Fifth Avenue, Inc. v. James, Ltd., 630 S.E.2d 304 (Va. 2006). The trial court, in this breach of fiduciary duty and statutory conspiracy to injure another’s business case, awarded plaintiff $548,611 in compensatory damages which was trebled pursuant to Virginia Code §18.2-500 for a total damage award of $1,645,833 as well as an award of attorneys’ fees. The Virginia Supreme Court reversed, holding that the expert witness’s testimony on damages relied exclusively on the fact that Mr. Douglas Thompson, James’ highest-selling salesman, had terminated his employment with James and James’ lost profits were directly attributable to his resignation. The expert’s calculation of damages was not based on any causal connection to wrongful conduct on the part of the defendants, but rather his calculations were based entirely upon the resignation of Mr. Thompson who was an at-will employee. The court found that the expert’s calculation of damages was “merely a projection into future years of the total sales James would have achieved on the assumption Thompson had remained employed there and produced sales at his historic levels.” In short, the court found that James failed to carry its burden of proving that the wrongful conduct of Saks and Thompson proximately caused damages.

Smithfield Packing Co., Inc. v. Evely, 905 A.2d 845 (2006). In this malicious prosecution case, the Court of Special Appeals held that the employer had probable cause to initiate criminal proceedings against the plaintiff based upon the fact that the facility at which plaintiff worked had experienced serious problems with theft, and an undercover investigator observed employees stealing merchandise during the nightshift, and the investigator observed the plaintiff drive his tractor-trailer to the loading dock with its lights extinguished, and place merchandise in the cab of his truck.


Diamond v. T. Rowe Price Assocs., 852 F. Supp. 372 (D. Md. 1994). The court, in the wake of Adams v. Coates, 626 A.2d 36 (Md. 1993), assumed that the elements of a breach of fiduciary duty claim were those contained in the Restatement (Second) of Torts §874 which had been cited with approval by the Adams court. The court denied the defense’s replevin action, finding that the defense had not demonstrated that its business operations were hampered in any respect by the plaintiff’s possession of company files. All company files, having been returned, the court found that the defense can only recover monetary damages in a replevin action upon a demonstration that the deprivation of the property caused a loss, and that showing was not made. The court further rejected the defense’s conversion claim on the ground that mere temporary interference, absent damage to the rightful owner, was insufficient to establish conversion. The court found that the five month period between the defense’s demand for the disputed documents and the plaintiff’s return of same may have caused the company some inconvenience, but said inconvenience could not be redressed through an action for conversion. The court found the
defense’s trespass claim failed also because it failed to show the value of the chattel had diminished during the five month period and because, after analyzing six factors to determine the seriousness of the interference, the court concluded that the documents were not harmed, the company’s business operations were not hampered, the plaintiff had a plausible belief that many of the documents belonged to her, and plaintiff’s possession was not exclusive as the company had full access to the files. Finally, the court rejected the defense’s arguments that the plaintiff had misappropriated trade secrets in violation of the Maryland Uniform Trade Secrets Act, finding that the documents did not qualify as trade secrets and even if they were, there was no actionable misappropriation as the defense made no demonstration that the plaintiff disclosed the contents of the documents to others.


Foradori v. Harris, 2008 U.S. App. LEXIS 6937 (5th Cir. April 1, 2008) (The 5th Circuit upheld a $20 million verdict, affirming that a restaurant was liable for failing to properly train, supervise and control an off-duty cook who assaulted a teenage restaurant employee, an assault that resulted in the Plaintiff being paralyzed).


Ellett v. Giant Food, Inc., 66 Md. App. 695, 505 A. 2d 888 (Md. Ct. Spec. App. Mar. 11, 1986) (The Maryland Court of Special Appeals reversed summary judgment for the employer where the employee alleged the malicious and wrongful interference with the economic relationships of the employee, that is, willful and malicious misrepresentations of her employment status to the unemployment board).

Defontes v. Mayflower Inn, Inc., 2007 U.S. Dist. LEXIS 88375 (D.Conn. Dec. 3, 2007) (The district court denied summary judgment, allowing the jury to decide whether an employer’s use of the term “probationary at-will”, in combination with a promise of a performance review at the end of the probationary period and a statement of the employer’s right to terminate the employee for violation of various standards, creates and inference that post-probationary employment is subject to a just cause standard).
Communications Decency Act
Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir., May 5, 2007), *rehearing granted*, 2007 U.S. App. LEXIS 23922 (9th Cir., Oct. 12, 2007) (en banc). Earlier this year, a fractured panel of the Ninth Circuit considered the scope of immunity accorded to an online roommate matching service by the Communications Decency Act (“CDA”), 47 U.S.C. §230(c). Chief Judge Kozinski in his opinion, held that the roommate matching service was a provider of interactive computer services and that such providers are immune from liability for content created by third parties. However, a provider is not immune for publishing materials as to which it is an “information content provider”. A content provider is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet.” 47 U.S.C. §230(f)(3). Chief Judge Kozinski went on to find that in certain instances, the roommate matching service had created, for example, questionnaires and reasoned that the questionnaires with their answer choices resulted in the creation or development of the information at issue in the case. Chief Judge Kozinski emphasized that the only question being decided was the immunity issue, and not whether the online service had violated the California Fair Housing Act. On October 12, 2007 the Court of Appeals granted rehearing en banc.

Computers
Delfino v. Agilent Technologies Inc., 2006 Cal. App. LEXIS 1937 (Cal. Ct. App. 2006). The state appellate court, in a case of first instance, held that an employer was a provider of interactive computer services within the meaning of Section 230 of the federal Communications Decency Act, and as a result, it could not be held accountable for publishing information provided by its employees while they were using its equipment. The employee had used his office computer to send threatening emails to, and post anonymous messages about, several individuals with whom he had an ongoing dispute. The court specifically rejected a contrary holding from New Jersey in *Jane Doe v. XYC Corp.*, 887 A.2d 1156 (N.J. Super. Ct. App. Div. 2005). The California Appellate Court stated:

“It would be a dubious proposition indeed to suggest that a party, simply by virtue of engaging in business, owes a duty to the world for all acts taken by its employees, irrespective of whether those actions were connected with the enterprise . . . And it is not realistic that the type of risk involved here – unknown malicious acts of an employee bearing no relationship to his job achieved by accessing the Internet to make death threats – is a readily insurable one. Therefore, we conclude that plaintiffs did not establish here that [the company] owed a duty.”

Guard Publishing Co. d/b/a Register Guard and Eugene Newspaper Guild, CWA Local 37194, 36-CA-8743-1, 36-CA-8849-1, 36-CA-8789-1, and 36-CA-8842-1 The three member majority held that an employer may prohibit employees from using its e-mail to solicit on behalf of a union so long as the employer enforces its non-job-related solicitations policy in a non-discriminatory manner. With respect to the employer's alleged discriminatory enforcement of the e-mail policy, the majority modified the NLRB's approach in discriminatory enforcement cases.
and announced a new, more limited, conception of "discrimination" relying upon two decisions of the Seventh Circuit, that is, Fleming Co. v. NLRB, 349 F.3d 968 (7th Cir. 2003), denying enf. to 336 NLRB 192 (2001) and Guardian Industries Corp. v. NLRB, 49 F.3d 317 (7th Cir. 1995), denying enf. to 313 NLRB 1275 (1994). The Board majority held that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status."

Computers - Computer Fraud and Abuse Act

Int'l Airport Ctrs., LLC v. Citrin, 440 F.3d 418 (7th Cir. 2006). The court found that the defendant breached his duty of loyalty and violated the Computer Fraud and Abuse Act by transmitting a program to a laptop owned by his former company; the program destroyed all the files on the laptop. The court determined that there was no difference between transmitting a program intended to do harm and physically inserting a disk with the same intention. The court also held that even though the defendant-employee was authorized to destroy data, he was not authorized to destroy data he knew the company would want.

Egilman v. Kelle & Heckman LLP, 401 F. Supp.2d 105 (D.D.C. 2005). An expert witness alleged that the information found on his website regarding the case could only be found through improper means under the Computer Fraud and Abuse Act, however the Court dismissed his claims as they were untimely. The court was also called upon to construe the Digital Millennium Copyright Act’s “circumvention” provision regarding unauthorized access to a personal website. The court held that the “circumvention” provision required descrambling, decrypting, bypassing, or otherwise avoiding access control technology. As here, the individual gained access by using another's username and password, the Act had not been violated. In so holding, Judge Kennedy aligned himself with a similar holding in I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys. Inc., 307 F. Supp.2d 521 (S.D.N.Y. 2004).

Brett Senior & Assoc., P.C. v. Fitzgerald, 2007 U.S. Dist. LEXIS 50833 (E.D. Penn. July 13, 2007). A law firm associate who copied onto a CD and emailed documents to his new employer, including a list of various clients that he serviced, the fees paid, and the clients' telephone numbers, did not violate the federal Computer Fraud and Abuse Act by accessing the firm's computer system to transfer files and records to the new employer. The courts are split on their reading of 18 U.S.C. § 1030(a)(4). Compare Lockheed Martin Corp. v. Speed, 2006 U.S. Dist. LEXIS 53108 (M.D. Fla. 2006); Int'l Ass'n of Machinists & Aero. Workers v. Werner-Matsuda, 390 F. Supp. 2d 479 (D. Md. 2005); SecureInfo Corp. v. Telos Corp., 387 F. Supp. 2d 593 (E.D. Va. 2005) (finding that access was fully authorized and therefore no CFAA claim was stated) with EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir. 2001); Nilfisk-Advance, Inc. v. Mitchell, 2006 U.S. Dist. LEXIS 21993 (W.D. Ark. 2006); George S. May Int'l Co. v. Hostetler, 2004 U.S. Dist. LEXIS 9740 (N.D. Ill. 2004); HUB Group, Inc. v. Clancy, 2006 U.S. Dist. LEXIS 2635 (E.D. Pa. 2006); Int'l Sec. Mgmt. Group, Inc. v. Sawyer, 2006 U.S. Dist. LEXIS 37059 (M.D. Tenn. 2006) (finding that, under facts presented, the employee exceeded his authorized access); Int'l Airport Centers LLC v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006) (holding that an employee’s authorization to the company computers is governed by the law of
agency, which is terminated when the employee enters the company computers to take data to compete against his employer); Doe v. Dartmouth Hitchcock Medical Center, 2001 WL 873063 (D.N.H. July 13, 2001) (allowing employer to define authorization to its computer through company rules); United States v. Phillips, 477 F.3d 215, 221 (5th Cir. 2007) (summarizing the various ways “unauthorized access can be proven under the CFAA).


Garland-Sash v. Lewis, 2007 WL 935013 (S.D.N.Y. Mar. 26, 2007). The district court recognized that damages under the Computer Fraud and Abuse Act (“CFAA”) are limited to compensatory damages “by the plain language of the statute.” In contrast, in some states, punitive damages can be awarded for conversion. See, e.g., Cole v. Control Data Corp., 947 F.2d 313, 319-20 (8th Cir. 1991) (applying Missouri law).

Under the Computer Fraud and Abuse Act, four of its seven causes of action are based on “unauthorized access” to the computer.

Computers – Computer Related Offenses

P.C. of Yonkers Inc. v. Celebrations! The Party and Seasonal Superstore, 2007 U.S. Dist. LEXIS 15216 (D.N.J. Mar. 2, 2007). After denying plaintiff’s motion for preliminary injunction which the Third Circuit affirmed, 428 F.3d 504 (3rd Cir. 2005), the defendants, on remand, moved to dismiss plaintiff’s claims under the Computer Fraud and Abuse Act as well as plaintiff’s claims for misappropriation of trade secrets, confidential proprietary information, the breach of the duty of loyalty and a claim under the New Jersey Computer-Related Offenses Act (“CROA”).

An Act Concerning Identity Fraud, Maryland House Bill 1113, 2008 Regular Session, 2008 Bill Text MD H.B. 1113 (Lexis cite), available at http://mlis.state.md.us/2008rs/chapters_noln/Ch_355_hb1113T.pdf (last accessed June 16, 2008) (This new Maryland statute takes effect October 1. Among other things, the statute provides that “a person may not intentionally, willfully, and without authorization, access, attempt to access... a computer or copy, attempt to copy... the contents of... a computer database.”)

Computers – Employer Access to Employees’ Computers


**Computers - Monitoring**

*United States v. Ziegler*, 2007 U.S. App. LEXIS 14715 (9th Cir. June 21, 2007). The Ninth Circuit denied en banc review to a case involving a dispute over an employee’s expectation of privacy in his office computer files. The original appeals court panel (*United States v. Ziegler*, 456 F.3d 1138 (9th Cir. 2006)) held that there was a subjective and reasonable expectation of privacy because the employee had kept his office door locked and computer password-protected. However, because the computer was owned by the employer and was the type of equipment which the employer retained control over despite personal items place on it by the employee, the employer could give a valid consent to a search of the hard drive of the computer. At the en banc level, there was a dissent to denial, and the original panel which decided the case wrote a concurrence defending their decision. See also Geoff Boodell, *Revisiting The Need For Employers To Implement and Enforce Electronic Communications Policies*, Employment Law Notes (Feb. 2007), available at [http://www.sebrisbusto.com/publications/getEmploymentLawNotes.asp?employmentlawnote_id=0207](http://www.sebrisbusto.com/publications/getEmploymentLawNotes.asp?employmentlawnote_id=0207); Richard Cooper, *Is There a Reasonable Expectation of Privacy in the Office?*, The Nat’l L. J., Oct. 18, 2006, available at [http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1161075921850](http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1161075921850).

**Computers - Privacy**

*United States v. Forrester*, 2007 U.S. App. LEXIS 16147 (9th Cir. July 6, 2007). The Ninth Circuit held that the defendant had no Fourth Amendment protections against government surveillance of non-content “header” information like email addresses and IP addresses. The court stated that the government used “a pen register analogue on [the defendant]’s computer” to collect the IP address, to/from email addresses, and total volume transferred. Interestingly, the opinion does not indicate whether the ISP or the government installed the pen register analogue.

*United States v. Barrows*, 481 F.3d 1246 (10th Cir. 2007). An employee brought his personal computer to work and used it in an open area, taking no steps to prevent third party usage. The appeals court held he had no reasonable expectation of privacy under the Fourth Amendment in these circumstances.

*Warshak v. United States*, 2007 U.S. App. LEXIS 14297 (6th Cir. June 18, 2007), rehearing en banc granted, 2007 U.S. App. LEXIS 23741 (6th Cir., Oct. 9, 2007). The Sixth Circuit, in an opinion that has generated substantial controversy, held that email users have a reasonable expectation of privacy in emails that are stored with or sent through a commercial ISP, and accordingly the court held that the government does not have the right to access and review stored email message without a warrant.

*Doe v. Cahill*, 884 A.2d 451 (Del. 2005). The Delaware Supreme Court held in a politician’s defamation action that, before he could compel an ISP to disclose who posted anonymous,
allegedly defamatory comments about him, the suit must first survive a summary judgment analysis.

**Apple Computer Inc. v. Doe 1**, 2005 WL 578641 (Cal. Super. Ct. Mar. 11, 2005). The California Superior Court ordered an ISP to identify individuals whom Apple accused of misappropriating trade secrets and divulging information about Apple products on websites. The court left unresolved whether the three ISP employees were journalists who could claim protection under the journalist shield law which protects sources.

**Scott v. Beth Israel Medical Center**, 2007 WL 3053351, 2007 N.Y. App. Div. LEXIS 7561 (NY Sup. Oct. 17, 2007) The defendant hospital and a doctor who had been formerly employed there, locked horns over emails on the hospital's computer system between the doctor and his attorney. The hospital argued that the privilege status of those communications had been waived by the doctor by virtue of the fact that he had used the hospital's email system to communicate with his lawyer. The court, utilizing the test articulated by the Bankruptcy Court of the Southern District of New York in **In re: Asia Global Crossing, Ltd**, 322 B.R. 247, 2005 Bankr. LEXIS 415 (Bankr. S.D.N.Y. 2005), concluded that no privilege attached to the doctor's emails with his attorney as the court determined that the doctor had actual or constructive notice of the hospital's policy which stated that its communications systems were its property and were to be used "for business purposes only," and that employees "have no personal privacy right in any material created, received, saved or sent" using those systems. See also **Long v. Marubeni America Corp.**, 2006 WL 2998671, 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. Oct. 19, 2006) (court held that employees had waived privilege even though employees, in communicating with their counsel, used personal, password-accessed email accounts).

**In re: Boucher**, 2007 WL 4246473, 2007 U.S. Dist. LEXIS 87951 (D. Vt. Nov. 29, 2007), Magistrate Judge Niedermeier quashed a subpoena which would have required a Mr. Boucher to provide the password to encrypted files on his laptop, holding that to do so would violate his Fifth Amendment right against self-incrimination. This case is on appeal to the First Circuit.

**United States v. Arnold**, 454 F. Supp. 2d. 999 (C.D. California, 2006), Judge Pregerson refused to authorize a search of a laptop. Judge Pregerson's decision was argued on appeal before the Ninth Circuit last October, and some are predicting a reversal based on the oral argument. **United States v. Arnold**, No. 06-50581 (9th Cir. 2007). See also **United States v. Ickes**, 393 F.3d 501, 504 (4th Cir. 2005).


**Congressional Accountability Act**
Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1 (D.C. Cir. 2006) (en banc). The en banc Court of Appeals held that members of Congress do not have absolute Speech or Debate Clause immunity from suit under the Congressional Accountability Act of 1995. The court held that the proper scope of the Speech and Debate Clause immunity looks not to the duties of the employees, but to whether liability implicates protected legislative activity, such as speech or debate on the floor, proposing and voting on legislation, publishing legislative reports, investigative activities, and participating in hearings. In so holding, the court overruled its prior precedent in Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir. 1986). See also Bastian v. Office of Senator Ben Knighthorse Campbell, 390 F.3d 1301 (10th Cir. 2004). On remand, the district court granted summary judgment finding that plaintiff’s pay claim was untimely on the ground that she had not requested counseling within 180 days of the alleged adverse action, and that plaintiff’s rebuttal to the employer’s asserted reasons for the alleged disparate treatment and retaliation, were merely unsupported, conclusory statements. Fields v. Office of Eddie Bernice Johnson, No. 2004-CV-0717 (JR) (D.D.C. Oct. 10, 2007).

Constructive Discharge

Morris v. Schroder AL Management Int’l 481 F.3d 86 (2d Cir. 2007). The Second Circuit had certified to the New York Court of Appeals the question of whether the federal constructive discharge standard applies to determinations of involuntary termination under the “employee choice doctrine.” The New York Court of Appeals answered in the affirmative. Under New York’s “employee choice doctrine,” restrictive covenants in deferred compensation plans are not subject to strict scrutiny if the employee voluntarily leaves his/her employment. In such circumstances, the employee is afforded a choice between either staying and receiving his deferred compensation or foregoing the deferred compensation in order to leave and compete. Following the answer from the New York Court of Appeals to the certified question, the Second Circuit found that the courts will enforce forfeiture of deferred compensation awards if an employee resigns to compete, regardless of the reasonableness of the restriction, unless the employee can establish that “the working conditions at his former place of employment were so difficult or unpleasant that a reasonable person in his shoes would have felt compelled to resign.” Tony v. Elkhart County, 851 N.E.2d 1032 (Ind. Ct. App. 2006). The Indiana Court of Appeals held that an at-will employee who was forced to resign after he filed a workers’ compensation claim, can sue for constructive retaliatory discharge.

Mayers v. Laborers' Health & Safety Fund of North America, 478 F.3d 364 (D.C. Cir. 2007). At the end of its brief opinion, the Court of Appeals suggests that it is an open issue for decision at a later date as to whether a constructive discharge case, after National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), can be amenable to continuing violation analysis because, like a hostile work environment claim, a constructive discharge claim by its very nature involves repeated conduct. While the question is intellectually interesting, one wonders why the Court saw it to be of any possible significance. After all, as Morgan teaches us, there must be one act within the limitations period that is a part of a chain of events culminating, in the case of a constructive termination, in the plaintiff-former employee's resignation which he/she alleges to
be a constructive termination. Would not, in all events, the one act be the resignation, and therefore what possible difference could it make whether a court viewed the alleged constructive termination to be a Morgan-type continuing violation or merely a discreet act of discrimination.

**Contract - Commissions**

*Jensen v. IBM*, 454 F.3d 382 (4th Cir. 2006). Applying Virginia law, the court of appeals rejected a breach of contract claim by a software salesman for $2.1 million in commissions that he contended he had earned under IBM’s Sales Incentive Plan. The plan stated as follows: “while IBM’s intent is to pay employees covered by this program according to its provisions, this program does not constitute a promise by IBM to make any distributions under it. IBM reserves the right to adjust the program terms or to cancel or otherwise modify the program at any time during the program period, or up until actual payment has been made under the program. . . No one becomes entitled to any payment in advance of his or her receipt of the payment.” The court of appeals held that, with this language, IBM did not invite a bargain or manifest a willingness to enter into a bargain, and indeed manifested its clear intent to preclude the formation of a contract. The court found that IBM had expressly stated that the plaintiff could not rely upon payment of the commissions described in the plan until actual payment had been made, that IBM could modify or cancel the plan at any time before a commission was paid, and that plaintiff was not entitled to any payment in advance of his receipt of the payment. The court went on to state: “Thus, IBM made clear that there were no conditions that Jensen could satisfy to create a binding contract before IBM decided to pay him. IBM unambiguously characterized sales commissions as a form of incentive pay that it intended to make but which it reserved the right to calculate or even not make, even after sales were closed.” In conclusion, the court stated: “Based on the text of the various communications about the Sales Incentive Plan, however, we view this case as an effort by Jensen to create an enforceable contract out of a policy that expressed IBM’s contrary intentions. We see IBM’s Sales Incentive Plan as no more than an announcement of a policy expressing its intent to pay incentives in specified amounts but retaining full discretion to determine amounts until the time that they are actually paid. Seen in this light, descriptions of the plan did not amount to an offer to enter into a contract, but the announcement of a nonbinding intention, much like that in which an employee is told that he will be paid a bonus if the company does well, without being promised specific amounts.”

**Contracts – Love Contracts**

Conversion of Electronic Data

Slim CD Inc. v. Heartland Payment Systems Inc., 2007 U.S. Dist. LEXIS 62536 (D.N.J Aug. 4, 2007). The district court held that since computer data have been viewed as “intangible property,” the theft of such data has not been viewed as conversion, conversion traditionally being defined as “the unlawful taking or retention of tangible personal property.” In re Robert R. Fox, 370 B.R. 104, 121, B.A.P (6th Cir. 2007).

Thyroff v. Nationwide Mut. Ins. Co., 2007 N.Y. LEXIS 264 (N.Y. Mar. 22, 2007). The Court of Appeals abandoned the tangible/intangible property distinction and held that conversion applies to computer data. Mr. Thyroff, an insurance agent, at the time of his termination by Nationwide, was denied access to “his customer information and other personal information that was stored on the [company] computers.” He then sued Nationwide in federal court for, inter alia, “the conversion of his business and personal information.” The federal district court dismissed his claim on the ground that conversion does not apply to intangible computer data, and on appeal, the Second Circuit certified the question to the New York Court of Appeals. The New York Court of Appeals that electronic records maintained on a computer are “subject to a claim of conversion in New York.” In doing so, the court abandoned the so-called “merger doctrine” which had modified conversion’s strict requirement for tangible property and had held that “an intangible property right can be united with a tangible object for conversion purposes.” Other courts continue to strict apply the merger doctrine. See, e.g., Northeast Coating Technologies Inc. v. Vacuum Metallurgical Co. LTD., 684 A.2d 1322, 1324 (Me. 1996). In contract, the Ninth Circuit, applying California law, in Kremen v. Cohen, 337 F.3d 1024, 1031 (9th Cir. 2003), held that California does not follow the Restatement’s strict merger requirement. See also Perk v. Vector Resources Group LTD., 485 S.E. 2d 140 (Va. 1997) (holding that conversion of computer programs, data and software is actionable without any discussion of a merger requirement or the tangible/intangible property distinction.); Mundy v. Decker, 1999 WL 14479 (Neb. Ct. App. Jan. 5, 1999) (same).

Niswander v. The Cincinnati Insurance Co., 2007 U.S. Dist. LEXIS 28911 (N.D. Ohio Apr. 19, 2007). Where the plaintiff legally possessed company documents at her home as she worked for the company out of her home, and did not refuse to return the documents when the company demanded their return, the defendant’s claim of conversion failed as the defense had not established an act of dominion or control inconsistent with the other party’s ownership. In other words the defense failed to establish that the plaintiff exerted control over the documents in a manner inconsistent with the defendant’s ownership of the documents.


Corporate Investigations


**Corporate Social Responsibility**


**Costs**

*Edwards v. Brookhaven Sci. Assocs.*, 2006 U.S. Dist. LEXIS 88308 (E.D.N.Y. 2006). Following a jury decision for the Defendant employer on a retaliation claim, the Court Clerk taxed costs against the Plaintiff. The Plaintiff sought review, not on the amount of the costs, but on his ability to pay. The court considered the Plaintiff’s financial situation (unemployed with less than $5,000 income per year) and his good faith in bringing the original action, and vacated the order for costs. The court used only New York district court precedents.

*Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506 (D. Md. 2005). The district court in denying an award of costs against the losing party stated: “[I]f the losing party is of such modest means that it would be unjust or inequitable to enforce Rule 54(d)(1) against him, then the court acts within its discretion to deny costs to the prevailing party.”

**Credit Unions**

*McGee v. Tucoemas Federal Credit Union*, 2007 Cal. App. LEXIS 1281 (Cal. App., Aug. 2, 2007). The California Court of Appeals for the Fourth District held, in an employment discrimination case, that the defendant, a federally-chartered credit union, is not immune from an award of punitive damages as federal “instrumentalities” that are subject to a “sue and be sued” clause are presumed to have fully waived immunity.

**Damages**

*Peyton v. DiMario*, 287 F.3d 1121 (D.C. Cir. 2002). The D.C. Circuit held that the district court had not abused its discretion in awarding back pay, but reversed on the issue of front pay. Regarding back pay, the employer must show failure to mitigate, and the Defendant in this case failed to prove that the Plaintiff took inadequate measures in searching for employment. However, an award of front pay was inappropriate because it was “unduly speculative” to assume that the Plaintiff would continue working at a low-paying job for the rest of her career.

*Lopez v. Safeway Stores, Inc.*, 129 P.3d 487 (Ariz. Ct. App. 2006). The court rejected a grocery store’s argument that the damage amount awarded to the appellee in a personal injury case should be lowered based on the amount of medical expenses that appellee was charged but did...
not have to pay. The court held that the collateral source rule applies “when, due to a healthcare provider's gratuitous treatment, a plaintiff neither incurs nor is responsible for payment of the reasonable value of medical services, but nonetheless can claim and recover compensation for that value from the tortfeasor.”

Hardi v. Nezzanotte, 818 A.2d 974, 985 (D.C. 2003). The Court of Appeals, aligning itself with the majority of the state courts, held that plaintiffs are entitled to claim and recover the full amount of reasonable medical expenses charged, based on the reasonable value of medical services rendered, including amounts written off from the bills pursuant to contractual rate reductions. See also Acuar v. Letourneau, 531 S.E.2d 316, 322 (Va. 2000) (same); Lopez v. Safeway Stores, Inc., 129 P.3d 487 (Ariz. Ct. App. 2006) (collects cases).


**Damages – Collateral Source**

Norfolk Southern Railway Corp. v. Tiller, 179 Md. App. 318 LEXIS 41 (Md. Ct. Spec. App. Mar. 31, 2008) (The Maryland Court Special Appeals, in a FELA case, applied the collateral source rule to exclude evidence of the employee’s eligibility for retirement benefits at a particular age even though such evidence, if known to the jury, would have had a bearing on computation of damages).

**Damages – Front Pay**

Ventresco v. Liberty Mut. Ins. Co., 770 N.E.2d 23 (Mass. App. Ct. 2002). Upholding 14 year front pay award where the evidence to the jury was sufficient that the plaintiff likely would have remained in his position for the 14 years.

Ballard v. Muskogee Reg’l Med. Ctr., 238 F.3d 1250 (10th Cir. 2001). The court held that front pay was an issue for the court to decide.

Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493 (9th Cir. 2000). Trading future increases against reduction of value is appropriate.


Barbour v. Merrill, 48 F.3d 1270 (D.C. Cir. 1995). Provides a list of factors to consider in determining an award of front pay, including age and the length of time persons in similar positions generally hold those positions.

Jackson v. City of Cookeville, 31 F.3d 1354 (6th Cir. 1994). The jury was tasked with reducing the amount to present value. Even when it was clear that the jury did not follow the instructions on reduction to present value, the court held the jury had still approximated present value in failing to credit the plaintiff with any increases.

Tenn. Prod. Credit Ass’n, 861 F.2d 884 (6th Cir. 1988). The court held that the court should make the initial determination as to whether plaintiff is entitled to front pay and the jury should determine the amount.

Hagman v. Washington Mutual Bank, Inc., 2006 DOL SOX LEXIS 130 (Dec. 19, 2006). The ALJ had to decide what amount of front pay to award in a SOX § 806 case. The complainant's expert had testified that the complainant would never recover her career track and earnings potential in her lifetime. The expert alternatively calculated complainant's front pay as though she would recover her career track and earnings potential within ten years. The ALJ found the assumption that Ms. Hagman would never recover her career track and earnings potential as not credible, and instead found that the ten year assumption was reasonable and persuasive, resulting in a front pay award of $642,941. The ALJ relied heavily on the line of cases regarding front pay referenced in the District of Columbia Circuit's opinion in Peyton v. DiMario, The Public Printer of the U.S., 287 F.3d 1121 (D.C. Cir. 2002).


**Damages – Lost Health Insurance Coverage**

EEOC v. Dial Corporation, 469 F.3d 735 (8th Cir. 2006). In calculating damages, the district court awarded damages for lost medical premiums. On appeal, the employer argued that the claimants should have been required to prove that they actually incurred medical expenses. Recognizing that the circuits are divided on this issue, the court upheld the award, reasoning that the limited award was reasonable as health care benefits are an important element of an employee’s overall employment package, and the court did not award reimbursement for health care costs actually incurred. See Farris v. Lynchberg Foundry, 769 F.2d 958, 965-66 (4th Cir. 1985) (awarding medical benefits to widow of age discrimination victim without requiring proof of out-of-pocket medical insurance costs); see also Blackwell v. Sun Elec. Co., 696 F.2d 1176, 1185-86 (6th Cir. 1983) (granting the amount of health care premiums to claimant as part of
recovery); but, see Galindo v. Stoody Co., 793 F.2d 1502, 1517 (9th Cir. 1986) (reimbursing only out-of-pocket expenses incurred to obtain health care).

Lubke v. City of Arlington, 455 F.3d 489, 498 (5th Cir. 2006). The lower court, in this FMLA case, held that the proper measure for plaintiff’s lost insurance benefits was the “value” of the lost insurance and excluded evidence that the plaintiff sustained no out-of-pocket loss to replace insurance as he obtained substitute coverage under his wife’s municipal-furnished medical plan. On appeal, the municipality argued that the proper measure of damages is either the actual replacement cost for his insurance or expenses actually incurred that would have been covered under the plaintiff-employee’s former plan. The Fifth Circuit, relying on its interpretation of the ADEA, held that the correct measure of damages in FMLA cases is either “actual replacement cost for the insurance, or expenses actually incurred that would have been covered under a former insurance plan.” Pearce v. Carrier Corp., 966 F.2d 958, 959 (5th Cir. 1992) (ADEA). See also Brunnemann v. Terra Int’l, Inc., 872 F.2d 175, 179 (5th Cir. 1992).

Damages – Mitigation

EEOC v. Gurnee Inn Corp., 914 F.2d 815 (7th Cir. 1990). Holding that the district court was within its discretion in concluding that the young plaintiffs acted reasonably in waiting some period after being subject to sexual harassment before seeking other employment, and, thus, awarding full back pay.

Maturo v. Nat’l Graphics, Inc., 722 F. Supp. 916 (D. Conn. 1989). Plaintiff’s rejection of reinstatement was not a failure to mitigate due to the long history of harassment and the fact that the plaintiff would have been working within close proximity to her harasser.

Damages – Punitive Damages


Hardman v. Autozone Inc., D.C. No. 02-CV-2291-KHV (10th Cir. Jan. 25, 2007) (Unpub.), available at http://www.kscourts.org/ca10/cases/2007/01/05-3347.htm (last visited July 6, 2007). The district court granted a new trial after the employee obtained a jury verdict of $1 in nominal damages and $87,000 in punitive damages, on account of an erroneous jury instruction on punitive damages. A subsequent re-trial resulted in a judgment for the employer. The Tenth Circuit never reached the punitive damages issue as it found that the plaintiff-employee had waived his challenge to the Kolstad defense in the re-trial by presenting an inadequate appendix on appeal.

Allen v. Tobacco Superstore, Inc., 475 F.3d 931 (8th Cir. 2007). The panel majority vacates an award of $75,000 in punitive damages, finding that the plaintiff-employee had failed to prove under Kolstad malice or reckless disregard of federal law. Judge Smith dissented. The record reflected the following facts:
In awarding punitive damages, the district court found (1) TSI had no employment policies; (2) TSI did not hire a black manager until after two other black employees, Dianne Darrough (Darrough) and Theresa Sharkey (Sharkey) filed discrimination claims; (3) TSI had eighty-two stores in 2003 and no black managers; (4) TSI did not promote Darrough and Allen; (5) TSI was on notice of claims of discrimination because three charges of discrimination had been filed; (6) despite the charges, TSI continued its practice of not posting vacancies; and (7) the EEOC found TSI discriminated against Sharkey.

_Harsco Corp. v. Renner_, 475 F.3d 1179 (10th Cir. 2007). In an harassment case, the plaintiff received a $20,000 award of punitive damages. On appeal, the Tenth Circuit reversed, finding that the plaintiff failed to rebut evidence that the corporation took affirmative steps to comply with Title VII in good faith under _Kolstad_. In so holding, the court stated:

Harsco Corporation submitted substantial evidence showing that the company established comprehensive policies and training procedures in an effort to comply with Title VII. In response, Ms. Renner alleges that her supervisors were not properly trained, but the only evidence she provides of that faulty training is the fact that her supervisors did not comply with the company’s policies and procedures in various respects. If failure of supervisors to comply with company policy were sufficient evidence to prove the lack of a good-faith effort to train, the _Kolstad_ defense would be effectively eliminated.


We do not feel that a 4-to-1 ration falls within constitutional limits in this case because (1) the original punitive damage award was based on the jury’s determination that [the employer] was guilty of harassment, a qualitatively different tort, and one for which we have failed to find evidentiary support in the record; (2) more than half of the compensatory damage award - $80,000 – represents compensation for emotional distress, humiliation and mental suffering, outrage; components that are, to a large extent, duplicated by the punitive damage verdict . . . and finally (3) the magnitude of the punitive damage award dwarfs the maximum civil [state employment law] penalties for the same wrongful conduct

. . . Considering the shifting, complex mosaic of elements at play in this case, we conclude that a punitive damage award of $2 million reaches the constitutional frontier. Such a sum yields a ratio of compensatory to punitive damages of approximately 1.42 to 1 or about one-third of the original ratio. Our figure comports with Supreme Court jurisprudence on the subject yet is large enough to have a deterrent effect on future conduct.

Salitros v. Chrysler Corp., 306 F.3d 562 (8th Cir. 2002). Front pay damages are sufficiently compensatory in nature to satisfy the traditional common law rule prohibiting punitive damages in the absence of compensatory damages.

Corti v. Storage Tech. Corp., 304 F.3d 336 (4th Cir. 2002). Back pay damages serve a similar purpose to compensatory damages, thus, punitive damages could be awarded.


Kolstad v. Am. Dental Ass’n., 527 U.S. 526 (1999). “[A]n employer must at least discriminate in the face of a perceived risk that the employer's actions violate federal law to be liable in punitive damages.”


Abner v. City Southern Railroad, 513 F.3d 154 (5th Cir. Jan 2, 2008) (The 5th Circuit held that the court may award punitive damages in a Title VII and Section 1981 case despite the fact that the plaintiff’s did not receive an award of compensatory damages. In so holding, the court rejected the employer’s due process argument, and stated, “Injury that results from discrimination under Title VII is often difficult to quantify in physical terms; preventing juries from awarding punitive damages when an employer engaged in reprehensible discrimination without inflicting easily quantifiable physical and monetary harm would quell th3 deterrence that Congress intended in the most egregious discrimination cases under Title VII).

**Damages – Punitive Damages – Defendant’s Net worth**

Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672 (7th Cir. 2003). “A defendant's wealth is not a sufficient basis for awarding punitive damages … Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly.”

Transp. Ins. Co. v. Moriel, 879 S.W.2d. 10 (Tex. 1994). The court held that because the jury can be easily prejudiced by evidence of the defendant’s net worth, the determination of punitive damages should be bifurcated from the other issues.

Campen v. Stone, 635 P.2d 1121 (Wyo. 1981). The court held that evidence of wealth could not be presented to the jury until the jury made the determination that the plaintiff is entitled to punitive damages.
See also Leila C. Orr, Making a Case for Wealth-Calibrated Punitive Damages, 37 Loy. L.A. L. Rev. 1739 (Summer 2004).

Special Comm. on Punitive Damages of the American Bar Assoc. Section on Litigation, Punitive Damages: A Constructive Examination, 64-66 (1986). “Evidence of net worth and other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined."

EEOC v. Fed. Express Corp., 513 F.3d 360 (4th Cir. Jan. 23, 2008) (The Court of Appeals held that the company’s failure to accommodate a deaf package-handler and eventual termination of the employee were sufficiently reprehensible to establish reckless indifference, and found that a $100,000 punitive damage award was “substantially below” the statutory damage cap, given the employer’s size and further found that the punitive damage award was proportionate to the compensatory damages award of $8,000).

**Damages – Tax Bump Relief**

Chuong Van Pham v. Seattle City Light, 151 P.3d 976, 159 Wn.2d 527 (Wash. 2007). The Washington Supreme Court, distinguishing Blaney v. International Ass’n of Machinists & Aerospace Workers, 55 P.3d 1208 (2002), declined to award a tax offset for non-economic damages. In Blaney, the court awarded tax offset damages where the plaintiff had incurred additional taxes on back pay and front pay that plaintiff received in a lump sum. The court found compelling reasons not to provide tax offset relief where the plaintiff was awarded non-economic damages, finding that the congress had explicitly decided that non-economic damages were to be taxable when they were attributable to non-physical injuries, and Congress had placed this tax burden on the plaintiff. Thus, the court found that under the reasoning of the plaintiffs, “a plaintiff would retain no tax liability for non-economic damages. Shifting the tax burden on these awards *entirely* to the defendant simply goes too far.” (emphasis in original) See also Greg D. Polsky & Stephen F. Befort, Employment Discrimination Remedies and Tax Gross Ups, 90 Iowa L. Rev. 67, 69 (2004).

Fogg v. Gonzales, 2007 U.S. App. LEXIS 15484 (D.C. Cir. June 27, 2007). The appeals court affirmed the award of back pay and denial of front pay, but reversed as to the extent of the “gross up.” The court held that the “same action” defense to damage liability applies only to “mixed motive” claims, and the district court had not abused its discretion in decided that the case had been tried on a single-motive theory and could thus award equitable remedies. On the issue of “gross up” relief, which increases the damages award to account for lump sum recovery and adverse tax consequences, the court found that D.C. Circuit precedent held that absent an agreement between the parties, “gross up” relief was not appropriate relief. See Dashnaw v. Pena, 12 F.3d 1112 (D.C. Cir., Jan. 7, 1994)(holding that “absent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support ‘gross-ups’ of back pay to cover tax liability. We know of no authority for such relief.”).
Blaney v. Int’l Ass’n & Aero. Workers, 87 P.3d 757 (Wash. 2004). State discrimination law allows offsets for additional federal income tax consequences. See also Blaney v. Int’l Ass’n of Machinists & Aerospace Workers, 55 P.3d 1208 (Wash. Ct. App. 2002). The court in an action under the state anti-discrimination law found that the tax consequences to the plaintiff flowing from the lump sum payment of damages and attorney’s fees was within the scope of the statutory term “actual damages”. A certified public accountant had provided expert testimony, establishing that plaintiff would incur nearly a quarter of a million dollars in tax obligations that she would not have incurred but for the awards. See also Gelof v. Papineau, 829 F.2d 452 (3d Cir. 1987) (allowing damages to compensate plaintiff for increased tax burden caused because of a single lump sum award); Sears v. Acheson, Topeka & Kansas City Ry. Co., 749 F.2d 1451, 1456 (10th Cir. 1984) (allowing an increase in award for back pay in order to compensate for the resultant tax burden from receiving a lump sum of more than 17 years in back pay); Cooper v. Paychex, Inc., 960 F.Supp. 966, 975 (E.D. Va. 1997) (citing Gelof and Sears with approval); EEOC v. Joe’s Stone Crab, Inc., 15 F. Supp. 2d 1364 (S.D. Fla. 1998) (citing Sears with approval but holding that such a tax bump required a sufficient evidentiary foundation); May v. Automated Data Mgmt., Inc., 1989 U.S. Dist. LEXIS 10760 (D.D.C. 1989) (holding that Sears applied to protracted litigation and that sufficient evidence was required to establish the tax penalty); Jordan v. CCH, Inc., 230 F. Supp. 603 (E.D. Pa. 2002); O’Neill v. Sears Roebuck & Co., 108 F. Supp. 2d 443 (E.D. Pa. 2000); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995); Laura Sager & Stephen Cohen, How The Income Tax Undermines Civil Rights Law, 73 So. Cal. L. Rev. 1075 (2000); Gregg D. Polsky & Stephen F. Befort, Employment Discrimination Remedies and Tax Gross Ups, 90 Iowa L. Rev. 67 (2004).

Bryant v. Aiken Reg’l Med. Ctrs., Inc., 333 F.3d 536 (4th Cir. 2003). The court held, in footnote 5, that the district court did not abuse its discretion in refusing to enhance the plaintiff’s back pay award to compensate for the higher income tax burden incurred as a result of receiving the payment in a lump sum.


Gelof v. Papineau, 829 F.2d 452 (3d Cir. 1987). Allowing damages to compensate plaintiff for increased tax burden caused because of a single lump sum award.
Sears v. Acheson, Topeka & Kansas City Ry. Co., 749 F.2d 1451, 1456 (10th Cir. 1984). Allowing an increase in award for back pay in order to compensate for the resultant tax burden from receiving a lump sum of more than 17 years in back pay.

See also Gregg D. Polsky & Stephen F. Befort, Employment Discrimination Remedies and Tax Gross Ups, 90 Iowa L. Rev. 67 (October 2004).

**Damages – Unconditional Offer of Reinstatement**

Ottenberg’s Bakers, Inc. v. District of Columbia Comm’n on Human Rights, 917 A.2d 1094 (D.C. 2007). The employer successfully argued that its unconditional offer of reinstatement eliminated its liability for front-pay and back-pay from the date of the plaintiff’s refusal which the court held to be unreasonable. While recognizing that there are special circumstances that might justify rejection of an offer of reinstatement, e.g., extreme hostility between the employer and the plaintiff, none of those exceptions were present in this case. The court noted that pervasive and intense hostility might be sufficient to constitute a “special circumstance” justifying rejection of an unconditional offer of reinstatement, the court noted that “mere recitation of hostility . . . is insufficient, because ‘antagonism between the parties occurs as the natural by-product [sic] of any litigation.’”

**D.C. Code § 12-309 Notice Requirement 12-309 Notice Requirement**


**D.C. Human Rights Act – Individual Liability**

Purcell v. Thomas, 2007 D.C. App. LEXIS 465 (D.C. July 26, 2007). The Court of Appeals clarified its holding in Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873 (D.C. 1998) which had extended liability under the D.C. Human Rights Act to individual law partners. In Purcell, the court indicates that, as “Mr. Purcell was a high level official [of the corporation/employer] who exercised extensive supervisory, management and administrative authority over the corporation, he was individually liable to Ms. Thomas under the DCHRA.”

D.C. Office of Employee Appeals


Defamation

Rosenberg v. Metlife, Inc., 866 N.E.2d 439 (N.Y. 2007). The Court of Appeals of New York, responding to a certified question from the U.S. Court of Appeals for the Second Circuit, held that absolute immunity from civil defamation suits applies when an employer files a U-5 form with the NASD giving the reasons for the termination of a broker.

Balboa Island Village Inn, Inc. v. Lemen, 156 P.3d 339 (Calif. S.Ct. 2007) The California Supreme Court, in a 5-2 ruling, approved the issuance of an injunction against defendant Anne Lemen to stop her from repeating false and scurrilous statements that were found by a trial court to be defamatory. The majority found that a narrow order prohibiting the utterance of further defamation was constitutional. Writing for the majority, Justice Moreno stated: “An injunction issued following a trial ... that does no more then prohibit the defendant from repeating the defamation is not a prior restraint and does not offend the 1st Amendment.” Justice Kennard, in dissent, said: “to forever gag the speaker – the remedy approved by the majority – goes beyond chilling speech. It freezes speech.”

Montgomery Investigative Servs. v. Horne, 173 Md. App. 193 (Md. Ct. Spec. App. 2007). When the Plaintiff, Robert T. Horne, applied for a position with Southern Services, a termite and pest control company serving residential home owners, as a technician who would have frequent access to private homes, he revealed that he had been arrested for impersonating a police officer and for transporting a handgun. During the interview, he stated that the impersonation charge resulted in a not guilty verdict and that he pleaded guilty to the transportation of the handgun charge, and that he received probation before judgment with one year of supervised probation. Southern Services conducted background checks, and outsourced the checks to Montgomery Investigate Services (“MIS”). MIS performed a criminal records check on Mr. Horne. MIS failed to use in one of the checks Mr. Horne’s middle initial, and obtained a report that indicated that a Robert Horne had been convicted of theft and had been sentenced to six months incarceration. Southern Services had provided MIS with Mr. Horne’s date of birth, and had MIS checked the date that the Robert Horne in the report had been convicted of theft, it would have found that Robert T. Horne was 12 years-old at the time. It did not do so and instead forwarded a summary report that it had prepared, stating that Mr. Horne had been convicted of theft. Mr. Horne was then fired by Southern Services on account of the report.

When Mr. Horne’s boss was advised of the MIS report, he approached Mr. Horne to fire him. Even though there was immediately available a private, walled-in office where the termination message could have been communicated, his boss chose, instead, to communicate the message in open office space in a public work area and in the presence and full hearing of three of Mr. Horne’s fellow workers. In the full hearing of the other three employees, Mr. Horne’s boss
excoriated Mr. Horne for the better part of an hour. Repeatedly, his boss said to him: “You’re a thief, man.”

Horne sued Southern Services, MIS, and an employee of MIS who prepared the report forwarded to Southern Services. The trial court entered judgment as a matter of law for the employer, and after a jury verdict against MIS and its employee, entered judgment against them. The Court of Special Appeals affirmed the judgments against MIS and its employee, and reversed the judgment in favor of Southern Services. With respect to MIS, it found that the qualified privilege had been breached on account of actual malice, actual malice being defined as the making of a false statement when one either knows that the statement was false, or that it was almost certainly false, or had obvious reasons to distrust the accuracy of the statement. It was the latter prong of the “actual malice” test upon which the Court relied, finding that MIS and its employee acted with reckless disregard of the truth. The Court found that there was inadequate training of the MIS employee, that she exhibited “unskilled processing of raw data” and that she “betrayed a blithe indifference to the sensitive nature of the material she was processing.”

In reversing the judgment for the employer, the Court reaffirmed its holding in General Motors v. Piskor, 352 A.2d 810 (1976) that defamation “may be published by conduct as surely as by express words.” The Court then went on to find that the employer had excessively published the false statement that Mr. Horne was a thief. The Court found that the circumstances in which the defamation was published by Mr. Horne’s boss were sufficiently abusive and excessive as to overcome the employer’s qualified privilege.

Hatfill v. New York Times Co., 416 F.3d 320 (4th Cir. 2005). Hatfill, an Army scientist, sued for defamation after a New York Times columnist implicated him in the fall 2001 federal investigation of mailing letters with anthrax. The Fourth Circuit reversed and remanded finding that the complaint adequately alleged a basis for defamation: the column’s allegation that the FBI should have investigated Hatfill more thoroughly and that all of the evidence pointed to him. The court found that the newspaper’s conduct qualified as extreme and outrageous because if its severity and also noted the lack of opportunity for the plaintiff to respond. The court also held that Hatfill’s allegations were sufficient to move forward with his claim for intentional infliction of emotional distress.

Clawson v. St. Louis Post-Dispatch, 906 A.2d 308 (D.C. 2006). The court of appeals ruled that a St. Louis Post-Dispatch article referring to the plaintiff as an “informer,” instead of a “whistleblower” neither destroyed his reputation nor constituted defamation. The court relied on precedent from other jurisdictions and dictionary definitions. It stated, “nothing in these definitions remotely suggests that an informer or a citizen informant is perceived as ‘odious, infamous, and ridiculous.’”

Kevorkian v. Glass, 913 A.2d 1043 (R.I. 2007). The Rhode Island Supreme Court, in affirming summary judgment, held that a former supervisor’s statement in a job reference that the plaintiff had “unacceptable” work habits is a privileged communication and accordingly may not be the basis for a defamation claim. Two years after the plaintiff, a licensed practicing nurse (LPN), resigned her position at a nursing home following a disagreement with her supervisor, who had
suspended her for three days for alleged insubordination, a placement agency contacted the former supervisor for a reference. In response, the supervisor faxed a reference, stating that she would be unwilling to rehire the plaintiff because of “unacceptable work practice habits”. In rejecting plaintiff’s argument that she had been defamed by her former supervisor, the court stated:

The defendant is a former supervisor of plaintiff who, at the request of both plaintiff and a replacement agency . . . provided information about plaintiff’s work performance while she was employed at [the nursing home]. Clearly, when she received an inquiry about [the plaintiff] from a prospective employer, [the defendant] has a qualified privilege . . . to reveal her dissatisfaction with plaintiff’s work during the time she worked at [the nursing home].

DeNardo v. Bax, 147 P.3d 672, 679 (Alaska 2006). The Alaska Supreme Court, in affirming summary judgment, held that a female employee’s statements to co-workers that she was worried that the male plaintiff was stalking her, were conditionally privileged. The plaintiff and the defendant had worked at a newspaper, and the plaintiff was terminated. In the course of a wrongful discharge suit by the plaintiff, the plaintiff discovered that his female co-worker, the defendant in the defamation action, had stated that plaintiff had followed her on several occasions and acknowledged that she had told co-workers that she was worried that the plaintiff was stalking her. The court recognized that a conditional privilege exists with respect to statements among co-workers about personal safety in the workplace. The court stated:

Where, as here, a worker reveals to coworkers that she is concerned that another coworker might be stalking her, a sufficiently important interest to the statement’s publisher, her personal safety, is at stake. Furthermore, by alerting coworkers to her fears, [the defendant] protected her interest in personal safety by attuning coworkers to the possibility that she was the victim of dangerous behavior. Recognition of a privilege under these circumstances is necessary in order to facilitate an environment in which employees feel safe while performing their duties.

Ledvina v. Cerasani, 146 P.3d 70, 74 (Ariz. Ct. App. 2006). The Arizona Court of Appeals held that statements contained in a police report were absolutely privileged. The court stated:

[R]equiring alleged crime victims to rely on the defense of qualified immunity in defamation actions would have detrimental consequences, including potentially permitting criminal defendants to harass and intimidate victims and witnesses who would testify in court. The mere possibility of retaliatory defamation claims would also tend to discourage free and unfettered reporting to law enforcement authorities to assist the detection and prosecution of criminal activity . . .

Raytheon Tech. Servs. Co. v. Hyland, 641 S.E.2d 84, 273 Va. 292 (Va. 2007). Plaintiff, who had been an employee of Raytheon for some twenty-one years, received a performance evaluation that contained five negative comments and thereafter Plaintiff was terminated. She sued the employer for defamation, and the jury returned a verdict in the Plaintiff’s favor,
On appeal, the Virginia Supreme Court found that defamatory statements contained in a performance evaluation can be actionable. The Court stated that it would agree “that performance reviews normally will contain the evaluator’s opinions”, but went on to state that it rejected the Raytheon contention that performance reviews should therefore be immune from claims of defamation, holding that false statements of fact made maliciously in a performance review remain subject to claims of defamation. Reaffirming that pure expressions of opinion are not actionable, the Court stated that expressions of opinion may often imply an assertion of objective fact, and thus if false and maliciously published, defamatory. The Court then proceeded to analyze five statements made in the performance review to determine whether they were actionable statements of fact or statements of pure opinion. The Court found that three of five were opinion and therefore not actionable defamation, returning the case to the trial court for a new trial.

Mazer v. Safeway, Inc., 398 F.Supp.2d 412, 431-32 (D.Md. 2005). The district court held that showing a letter that accused an employee of illegally misappropriating trade secrets to a “few individuals” did not constitute “publicity”.

Miron v. University of New Haven Police Dept., 631 A.2d 847 (Conn. Sept. 25, 2007) Available at: http://www.jud.state.ct.us/EXTERNAL/supapp/Cases/AROcr/CR284/284CR142.pdf The Connecticut Supreme Court’s decision in a defamation case involving job references, created a qualified privilege for such references. The court left open whether a plaintiff could prove actual malice to defeat the qualified privilege on some lesser showing of recklessness. The court also indicated that it was not deciding “whether a plaintiff alleging defamation could overcome the qualified privilege without proving actual malice, by proving a lack of good faith on the part of the employer.” Also, the court did not decide “whether a plaintiff could overcome the qualified privilege without proving actual malice, by proving that the defamatory statement had been published to others.”

Galarneau v. Merrill Lynch, 2007 U.S. App. LEXIS 23919 (1st Cir., Oct. 12, 2007). The Court of Appeals allowed a defamation claim to proceed based upon the U-5 form that Merrill Lynch was required to complete when it terminated the plaintiff. The U-5 contained the following statement: “Ms. Galarneau was terminated after the firm concluded that she had (I) engaged in inappropriate bond trading in one client’s account and (II) utilized time and price discretion in the accounts of three clients.” An expert witness presented by the plaintiff testified that the bond trading was appropriate, and the court then left it for the jury to determine the truth of the statement. The court declined to rule whether a heightened standard of defamation based on the First Amendment applied because the issue involved a matter of public concern. As the issue had not been raised below, the court declined to reach it.

Disability Discrimination – Federal

Wishkin v. Potter, 476 F.3d 180 (3d Cir. 2007). Under the Rehabilitation Act, the appeals court reversed a summary judgment decision which had been based solely on a doctor’s letter describing the Plaintiff as “unfit.” The court held that issues of fact existed as to the “circumstances surrounding the procurement of the letter” and whether the legitimate, non-discriminatory reasons asserted by the employer were pretextual. A doctor’s letter, standing alone, is insufficient to justify summary judgment.

Kramer v. Banc of America Securities, LLC, 355 F.3d. 961 (7th Cir. 2004). The 7th Circuit held that compensatory and punitive damages are not recoverable on retaliation claims brought under the ADA, relying on the fact that the 1991 amendments to the civil rights act failed to specifically mention section 503(b). Contra: Edwards v. Brookhaven Sci. Assocs., 390 F. Supp.2d 225 (E.D.N.Y. 2005).

Littleton v. Wal-Mart, 2007 U.S. App. LEXIS 11150 (11th Cir. May 11, 2007). The Court of Appeals held the plaintiff, who was mentally retarded, did not meet the disability definition of the ADA.

Huber v. Wal-Mart Stores, 2007 U.S. App. LEXIS 12426 (8th Cir. May 30, 2007). The Court of Appeals, recognizing a circuit split, agreed with the Seventh Circuit (EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027-28 (7th Cir. 2000)), and concluded that the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate non-discriminatory policy of the employer to hire the most qualified candidate.

Haynes v. Level 3 Communications, LLC, 456 F.3d 1215 (10th Cir. 2006). The Court of Appeals held that the plaintiff’s charge of discrimination, which was filed within 300 days of termination, provided no basis for finding her termination to be discriminatory, since all employees who had been placed on a performance improvement plan, like the plaintiff, were selected for the reduction in force.

Edwards v. Brookhaven Sci. Assocs., 390 F. Supp. 3d 225 (E.D.N.Y. 2005). Plaintiff sued under Americans with Disabilities Act (ADA), claiming hostile work environment and retaliation. Due to accidental discharges, the employer rescinded the Plaintiff’s firearm activity card (FAC), and fired him because there were no jobs available which did not require an FAC. The district court did not directly decide whether a hostile work environment claim may be sustained under the ADA. It held that the Plaintiff had not shown a prima facie case of discrimination under the ADA because he produced no evidence showing that the employer perceived him as unable to work in a “broad class of jobs” or performing major life activities. “Being unable to work in a specific job-related task is insufficient” to prove disability under the ADA. The court granted summary judgment on the hostile work environment claim, but allowed the retaliation claim to proceed to a jury decision.

fellow employees, and sexually harassed another. The man sued Goodyear, claiming discrimination under the Americans with Disability Act (ADA), as he was on medication for depression. The district court found that sufficient evidence existed to establish a prima facie case of discrimination on the basis of disability. It denied a motion to dismiss from the employer.

**EEOC v. Schneider Nat’l Inc.,** 489 F.3d 507 (7th Cir. 2007). A truck driver with neurocardiogenic syncope was fired under the trucking agency’s no tolerance policy of that disorder. The condition is treatable, and federal law does not prohibit individuals with the disorder from the truck-driving profession. The EEOC sued on the theory that the company had violated the Americans with Disabilities Act (ADA) by mistakenly believing that the physical disorder is a disability within the meaning of the statute. The district court granted summary judgment for the company, and the Seventh Circuit affirmed. The appeals court held that companies are allowed to decide upon the amount of risk they wish to handle, and can implement stricter safety standards than required by federal law. Further, the plaintiff showed no evidence indicating that the company believed he was impaired in any “major” life activities, as required by the ADA, or that the company believed he was incapable of performing a broad range of jobs, the standard in a “regarded as” case.

**Gasser v. District of Columbia,** 442 F.3d 758 (D.C. Cir. 2006). Among other rulings, the court indicated that the Supreme Court had recognized two ways an individual may be “regarded as” disabled: an employer’s mistaken belief either that the employee has a disability or the employer’s mistaken belief that the employee’s actual disability substantially limits major life activity. The court further indicated that EEOC has suggested a third way: a substantial limitation arising from others’ attitudes about impairment. See 29 C.F.R. § 1630.2(l)(2). The court declined to decide whether “working” is a “major life activity”, indicating that the court had so assumed in *Duncan*, 240 F.3d at 1114 n. 1.

**Wojewski v. Rapid City Reg’l Hosp., Inc.,** 450 F.3d 338 (8th Cir. 2006). Plaintiff doctor sued hospital claiming violations of the ADA under Title I and Title III and under the Rehabilitation Act when the doctor, who was bipolar, had a manic episode during a surgery. The Court affirmed the lower court’s decision to grant summary judgment on the Title I and Rehabilitation Act claims but remanded the Title III claim because the only relief under that statute is injunctive and nothing could be done because the defendant died during the pending appeal. The Court ruled that the doctor was not an “employee” but was an independent contractor. The doctor was an independent contractor in that he preformed highly skilled surgical work, leased his own office space, scheduled his operating room time, employed and paid his own staff, billed his patients directly and did not receive social security, or other benefits from the hospital or fill out a W-2 with the hospital. The Court also found the Rehabilitation act to apply only to employer-employee.

**Breitkreutz v. Cambrex Charles City, Inc.,** 450 F.3d 780 (8th Cir. 2006). The employer terminated the employee because with the lifting restriction for his back injury he could not perform the functions of his position. According to the Court the plaintiff must show that the defendant mistakenly regarded him as having an impairment substantially limiting one or more life activities or mistakenly believed he had an actual, non-limiting impairment which substantially limited one or more major life activities. The Court notes that a restriction on lifting
alone is not a major life limitation. The Court affirmed the district courts finding of summary judgment.

**Taylor v. Rice**, 371 U.S. App. D.C. 383 (D.C. Cir. 2006). Since the employer's arguments that it would be an undue hardship to accommodate the applicant's need for medical treatment at oversees posts were based on disputed issues of fact, summary judgment was inappropriate. The decision discusses both the direct threat and the undue hardship defenses.

**Dark v. Curry County**, 451 F.3d 1078 (9th Cir. 2006). The court held that summary judgment was not appropriate in a case involving dismissal of an employee from a road crew after an epilepsy seizure caused plaintiff-employee to lose control of the pick-up truck he was driving. The employer based the termination on a doctor’s note stating that plaintiff could predict, with 50% accuracy, when a seizure may happen and on the morning of said incident, the plaintiff had such indication and so acted recklessly. The court said there were material issues of fact as to whether or not this was the case and a full trial was needed.

**Mammone v. President & Fellows of Harvard Coll.**, 847 N.E.2d 276 (Mass. 2006). The court, in granting summary judgment to the defendant employer as to the plaintiff’s claim of termination on the basis of his mental disability, held that the plaintiff’s egregious conduct in the workplace was sufficient enough to have resulted in the termination of a non-handicapped employee, thereby removing the plaintiff from protection under state equal rights and employment discrimination statutes.

**Iverson v. City of Boston**, 452 F.3d 94 (1st Cir. 2006). The court, following the Supreme Court’s 2001 decision in **Alexander v. Sandoval**, 532 U.S. 275, held that regulations promulgated under the provisions of the ADA are not enforceable through a private right of action. The regulations promulgated by the Attorney General under Title II of the ADA are the so-called self-evaluation and transition plan regulations. Plaintiff argued that those regulations posed an affirmative obligation on the City both to evaluate its conformance with the ADA and to make structural changes to bring its existing facilities into compliance. Like Sandoval, the court held that a private plaintiff may not, merely by referencing the organic statute, enforce regulations that interdict a broader swath of conduct than the statute itself prohibits.

**Taylor v. Federal Express Corp.**, 429 F.3d 461 (4th Cir. 2005). The Court of Appeals affirmed grant of summary judgment for employer. The plaintiff employee was not substantially disabled in major life activity of working where there was testimony that he was eligible for hundreds of thousands of job in the Baltimore Washington Metro Area where he lived.

**Bates v. UPS**, 465 F.3d 1069 (9th Cir. 2006). The Court of Appeals affirmed a district court holding that UPS had violated the anti-discrimination laws by automatically barring the deaf and hearing-impaired from driving parcel delivery trucks.

**Disability Discrimination - Definition of Employee**

**De Jesus v. LTT Card Services**, 474 F.3d 16 (1st Cir. 2007). The First Circuit, reversing summary judgment, holds that shareholders-directors of a close corporation may be considered
“employees” for the purposes of determining whether the defendant-employer meets the fifteen-employee threshold for coverage under the ADA, holding that the six factor test in Clackamas Gastroenterology Associates v. Wells, 538 U.S. 440 (2003) should have been applied by the lower court.

Disability Discrimination - State

Whitney v. Wal-Mart Stores, Inc., 895 A.2d 309 (Me. 2006). In this certification of a question posed by the federal district court, the Maine Supreme Court held that unlike the Americans with Disabilities Act, the Maine Human Rights Act does not require a showing that a disability “substantially limits one or more major life activities.” The court further held that this decision to avoid defining a disability’s impact was a deliberate choice of the state legislature and is still valid under Maine Law.

Green v. State of California, 165 P.3d 118 (Cal. Aug. 23, 2007). The California Supreme Court held that the California Fair Employment and Housing Act requires employees to prove that they are “qualified individuals” under the statute just as the federal ADA requires. The California FEHA, unlike the federal ADA, does not expressly include the term “qualified individual”, and thus the issue was whether a plaintiff proceeding under the California statute had to establish that they have the ability to perform a job’s essential duties, that is, establish that they are a “qualified individual”. As stated, the California Supreme Court adopted the federal standard. Judge Werdegar dissented.


Discovery

In re Royal Ahold, 230 F.R.D. 433 (D. Md. 2006). The courts’ opinion contains an in-depth discussion of the definition of “prepared in anticipation of litigation.” The court ruled that subject matter waiver does apply to documents protected by the attorney-client privilege and to non-opinion work product and limited waiver is applied to opinion work product. In this case, the public disclosure on a SEC form coupled with the production of internal reports to the Plaintiff, the defendant waived his attorney-client privilege and non-opinion work product protection regarding the subject matter in the SEC form and reports.

Discovery – Disputes


From U.S. District Judge Sam Sparks:

"Stallions can drink water from a creek without a ripple; The lawyers in this case must have a bottle with a nipple.

Babies learn to walk by scooting and falling; These lawyers practice law by simply mauling

Each other and the judge, but this must end soon (Maybe facing off with six shooters at noon?)

Surely lawyers who practice in federal court can take A deposition without a judge's order, for goodness sake.

First, the arguments about taking the deposition at all, And now this -- establishing their experience to be small.

So, let me tell you both and be abundantly clear: If you can't work this without me, I will be near.

There will be a hearing with pablum to eat And a very cool cell where you can meet."
Discrimination
Ginger v. District of Columbia, 2008 U.S. App. LEXIS 12335 (D.C. Cir. June 10, 2008) (In affirming the grant of summary judgment to the defense, the D.C. Circuit held that a reorganization could be considered an adverse employment action. In the instant case, the plaintiff police officers demonstrated that they lost income as a result of the reorganization because they worked fewer hours at night and thus earned less of the pay differential for night work. Moreover, the court noted that the officers were “considerably inconvenienced by the reorganization” as they were switched to a rotating shift from a permanent shift which severely affected their sleep schedules and made it more difficult for them to work overtime and part-time day jobs.

The court also found that the District Court erred in its holding that, because every officer in the K-9 unit was subjected to the reorganization, no officer could claim employment discrimination. The court held that that holding conflicted with the Circuit’s prior jurisprudence (Czekalski v. Peters, 475 F.3d 360, 365-66 (D.C. Cir. 2007); Mastro v. Potomac Electric Power Co., 447 F.3d 843, 851 (D.C. Cir. 2006); George v. Leavitt, 407 F.3d 405, 412-13 (D.C. Cir. 2005); Stella v. Mineta, 284 F.3d 135, 146 (D.C. Cir. 2002)) wherein the court has held that a plaintiff need not demonstrate that a similarly situated person outside his protected group was treated differently.

The Court also found that the District Court erred in its holding that consideration of race relations at a macro level when developing policies on how to reorganize did not render the reorganization discriminatory. The court held that concern about race relations, however important and legitimate a matter of policy it may be does not make it permissible for an employer to subject an employee to an adverse employment action because of his race, relying upon Taxman v. Board of Education of Twp. Piscataway, 91 F.3d 1547, 1563 (3rd Cir. 1996) (en banc).

Despite finding these errors in the District Court’s analysis, the Circuit affirmed because the plaintiffs had proceeded on a single-motive theory of discrimination, rather than a mixed motive approach. The court indicated that race had played a role in the reorganization, and that had the officers argued that race was one of multiple motivating factors, they “might have had a compelling case . . .”).

Vincent v. Brewer Co., 514 F.3d 489 (6th Cir. 2007) (In a layoff case, where the plaintiff female laborer was not recalled allegedly because of her sex, the 6th circuit held that the district court erred when it required the plaintiff to demonstrate as a part of her prima facie case that she was as qualified for the job as the man who allegedly was hired to replace her. The 6th Circuit held that for purposes of showing a prima facie case, the plaintiff simply had to show that she was replaced by someone outside her protected class and did not have to show that she and her replacement had similar qualifications).
Discrimination – Associational Discrimination

**Dewitt v. Proctor Hospital,** 517 F.3d 944 (7th Cir. Feb 27, 2008) (Plaintiff Dewitt worked at the defendant Hospital, and her husband was covered under the Hospital’s medical plan. The Hospital was partially self-insured in that it paid the first $250,000 of annual covered medical costs, and anything in excess thereof rolled into the insurance policy. The Hospital kept quarterly reports of all employees with claims over $25,000. Plaintiff Dewitt’s husband suffered from prostate cancer, and thus incurred significant medical expenses. The Hospital had a series of conversations with plaintiff Dewitt expressing concern about the medical expenses, once specifically asking why her husband’s doctor had not put him in a hospice. When the Hospital management advised that because of financial troubles it required a “creative” effort to cut costs, and three months later plaintiff Dewitt was fired and designated as ineligible for rehire. Plaintiff Dewitt’s husband died a year later. She sued under the ADA, claiming “associational discrimination”, arguing that the hospital fired her to avoid having to pay for the substantial self-insured medical expenses of her husband. The 7th Circuit described three categories of associational discrimination claims. The first being the “expense” category; the second being the “disabled by association” category; and the third being the “distraction” category. The Court found that the plaintiff’s claim fell into the “expense” category, that is, an employee fired because a family member has a “disability”, costly to the company. The court found that the plaintiff presented a jury question and that she had presented “direct evidence” of discrimination. In doing so, the court stated: “[T]he timing of Dewitt’s termination suggest that the financial albatross of Anthony’s continued cancer treatment was an important factor in Proctor’s decision. . . . One could reasonably infer that Dewitt was terminated after Proctor conducted its latest periodic analysis of medical claim “outliers” and, this time around, decided that its “wait and see” strategy with the Dewitts was costing the hospital tens of thousands of dollars every year. A reasonable juror could conclude that Proctor, which faced a financial struggle of indeterminate length, was concerned that Anthony – a multi-year cancer veteran – might linger on indefinitely. . . . Because Dewitt has established that direct evidence of “association discrimination” may have motivated Proctor in its decision to fire her, a jury should be allowed to consider her claim.”).

**Thompson v. North American Stainless,** 2008 U.S. App. LEXIS 6776 (6th Cir. Mar. 31, 2008) (The plaintiff, who was fired after his fiancé filed a discrimination charge against his employer, was allowed to proceed with a retaliation claim under section 704(a) of Title VII).

**Holcomb v. Iona College,** 2008 U.S. App. LEXIS 6897 (2nd Cir. Apr. 1, 2008) (The Court of Appeals held that a white employee can sue under Title VII based upon the claim that he was fired because he was married to an African-American woman. The Court, in reversing Summary Judgment stated: “[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s own race.”).

**Trujillo v. PacifiCorp,** 524 F.3d 1149 (10th Cir. 2008) (In yet another association discrimination case, the Tenth Circuit held that parents who where terminated allegedly because of the expense of their son’s cancer treatment could pursue a claim under the ADA.).
**Discrimination – Burden of Proof**

*Lettieri v. Equant, Inc.*, 478 F.3d 640 (4th Cir. 2007). The Fourth Circuit held that summary judgment for the employer on Title VII discrimination and retaliation claims was inappropriate despite the fact that the employee’s replacement had been hired by another manager. The court relied on Fourth Circuit precedent, *Miles v. Dell*, 429 F.3d 480 (4th Cir. 2005), and relieved the Plaintiff’s burden regarding that prong of the prima facie case of discrimination, as it would not be probative to the inquiry of whether she was fired discriminatorily. The court noted, however, the evidence against the employer for gender and family responsibility discrimination was quite strong and served to establish the causal link between the alleged discrimination and the termination.

*Miles v. Dell, Inc.*, 429 F.3d 480 (4th Cir. 2005). One manager for the Defendant employer fired the Plaintiff and a different manager hired her replacement. The Fourth Circuit held, for the first time, that the Plaintiff could still make out a prima facie case of discrimination, despite not being able to show that the employer replaced her with someone outside her protected class. As dictated by Supreme Court and circuit court precedent, the prima facie case standard is not meant to be rigid or un-adaptable. While not dispensing of the replacement prong altogether, the Fourth Circuit stated that exceptions were valid in certain circumstances. Where the Plaintiff’s replacement is hired by someone other than the person who fired her, there is no probative value in showing that the Plaintiff was replaced by someone within her protected class, as the Plaintiff still may have been discrimination against in respect to the firing decision.

**Discrimination – Color**


*Vigil v. City and County of Denver*, 162 Fed. Appx. 809 (10th Cir. 2006)

**Discrimination – Comparators**

Discrimination – Mixed Motive

Fogg v. Gonzales, 2007 U.S. App. LEXIS 15484 (D.C. Cir. June 27, 2007). In post trial motions, the Government argued, relying presumably on Costa, that there is now just one way to prove discrimination—the motivating factor test contained in section 2000e-2(m), and that this approach always permits the same decision defense. The Court of Appeals characterized the Government's position as arguing for an "implicit repeal" of what it calls the "single-motive theory of sec. 2000e-2(a)," and held definitively that there remain two distinct ways to prove discrimination: the McDonnell Douglas method, and the 2000e-2(m) method.

In a concurrence, Judge Karen LeCraft Henderson suggested that the same action defense be determined after a finding of liability, at the remedy stage, seemingly to be suggesting that a jury be instructed that it may find either that discrimination was "a motivating factor," or that "discrimination alone motivated the decision." If it finds the former, then, at the remedy stage, the defendant may raise the same decision defense.

Porter v. Natsios, 414 F.3d 13, 367 U.S. App. D.C. 122 (D.C. Cir. 2005). The D.C. Circuit affirmed the denial of back pay and promoted placement relief to the Plaintiff, when the Plaintiff had opted for a mixed motive jury instruction, which allowed the Defendant to use the “same action” defense. Despite case law stating that “same action” defenses are a jury decision, the Plaintiff in this case waived his right to a jury decision when he objected to the “same action” instruction and agreed instead to a “motivating factor” instruction. Thus, the district court had properly decided upon appropriate relief and had not abused its discretion.


Gross v. FBL Financial Services, 2008 U.S. App. LEXIS 10355 (8th Cir. May 14, 2008) (The 8th Circuit held that the mixed-motive standard of Desert Palace does not apply to ADEA cases, but rather the Price Waterhouse standard still applies).


Gross v. FBL Fin. Servs., 526 F.3d 356 (8th Cir. May 14, 2008) (The 8th Circuit, joining the 3rd, 4th and 7th Circuits, held that Section 107 of the 1991 Civil Rights Act, which states that “[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice,” does not apply to claims under the Age Discrimination in Employment Act. The 5th Circuit has applied Section 107 to ADEA claims).
Discrimination – Pretext

Holland v. Wash. Homes, Inc., 2007 U.S. App. LEXIS 12222 (4th Cir. May 25, 2007). The Court of Appeals affirmed the District Court’s grant of summary judgment, rejecting plaintiff’s argument that the employer’s articulation of different reasons for termination to the Maryland unemployment compensation authorities than the reasons given to plaintiff when he was terminated created a genuine dispute of material fact bearing on the issue of pretext. The majority, over the dissent of Judge King, agreed with the district court that the employer’s representations to the Maryland unemployment authorities to the effect that plaintiff had been terminated due to lack of work were “charitable” in order that the plaintiff could qualify for unemployment benefits and the full value of his 401(k) plan. When the employer terminated the plaintiff, it told him that he was being fired for making threats against his supervisor.

Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc., 482 F.3d 408 (5th Cir. 2007). The Court of Appeals held that the plaintiff had established a triable issue of pretext because the court viewed the evidence as including shifting explanations for the hiring of the selectee. The court stated: “while Dr. Pepper offers an explanation for the difference between the reason for promoting Koester over Burrell it offered to the EEOC (‘purchasing experience’) and the one offered to this court (‘purchasing experience in the bottling industry’), its brief does not attempt to explain how either explanation is consistent with its arguments to the district court which were framed in terms of Burrell’s insufficient ‘bottling’ experience.” Thus summary judgment was denied because of the lack of precision or supposed subtle change of emphasis between the three phrases: purchasing experience, purchasing experience in the bottling industry, and insufficient bottling experience.

Merillat v. Metal Spinners, Inc.,470 F.3d 685 (7th Cir. 2006). The Seventh Circuit, analyzing the pretext prong, held that while an employer’s decision to keep a 38-year-old male employee while discharging a 49-year-old female employee during a reduction in force was in hindsight a foolish mistake, that did not mean that the employer did not honestly believe that its decision was appropriate at the time it was made.

Barnette v. Chertoff, 453 F.3d 513, 372 U.S. App. D.C. 41 (D.C. Cir. 2006). The court held that the employer’s stated preference for hiring internally as opposed to those seeking a lateral transfer, even in the absence of a written policy, was not a pretext for discriminatory actions.

Brooks v. County Comm’n., 446 F.3d 1160 (11th Cir. 2006). Ms. Brooks, who is white, filed a Title VII claim against respondent, her employer. At trial, respondent won a motion for summary judgment and petitioner appeals. The court traces through the burden-shifting framework erected to establish prima facie cases of discrimination, which may be rebutted by a legitimate non-discriminatory reason, which the petitioner may then rebut by exposing it as a pretext. When this analysis was applied to the case, the court assumed that a prima facie case of discrimination had been made, that the employer gave a valid reason for hiring a different worker – she had better qualifications than the petitioner – but the court was unwilling to conclude that the respondent’s answer was a pretext for unallowable discrimination. The court did not conclude as such because the petitioner did not “show that the disparities between the successful
application’s and her own qualifications were ‘of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.’” (citing Cooper v. S. Co., 390 F.3d 695, 732 (11th Cir. 2004). The court claims that this language is blessed by the Supreme Court in Ash v. Tyson, although the Supreme Court specifically passed on a chance to decide the qualifications standard.

**Mastro v. Potomac Elec. Power Co.,** 447 F.3d 843 (D.C. Cir. 2006). The court found that the plaintiff established a genuine issue of material fact regarding pretext, relying extensively on the alleged unfairness and bias in the investigation of plaintiff’s recommendation to terminate another employee, the plaintiff being Caucasian and the employee whom he recommended for termination being African-American. In doing so, the court stated:

First, Duarte interviewed several individuals, but, curiously, not Mastro himself. Admittedly, Mastro was given an opportunity to offer his version of events, but only at a later date when management had already received the results of Duarte’s investigation, putting Mastro on the defensive and depriving him of the same opportunity that was given to Harsley, whom Duarte did interview. For Duarte to have spoken to everyone in the normal course of his investigation except the individual at the center of the controversy—and the only Caucasian—might well strike a jury as odd. Second, the investigation Duarte did conduct prior to delivering his findings to management lacked the careful, systematic assessments of credibility one would expect in an inquiry on which an employee’s reputation and livelihood depended. For example, while Duarte and Pepco management appeared to rely heavily on [PEPCO lead man] James Bryant’s statements in concluding that Maestro had been untruthful, a reasonable jury could find Bryant’s credibility questionable. The record reveals that Bryant and Mastro had a strained working relationship and that Bryant, as a second-in-command to Mastro, stood to gain from disciplinary action against his boss....Another puzzling shortcoming of Duarte’s investigation is his admitted failure to ask any of the individuals he interviewed whether they were friends with Harsley or if they had talked to each other about the incident prior to speaking with him, even though Duarte himself acknowledged that the members of Mastro’s team were ‘a pretty close-knit group. . .

**Tomasso v. Boeing Co.,** 445 F.3d 702 (3d Cir. 2006). Court held that where the defendant-employer articulated a host of alleged legitimate reasons for its challenged employment action, and where the plaintiff casts substantial doubt on the truthfulness of a fair number of the reasons, the plaintiff may not need to discredit the remainder.

**Hux v. City of Newport News, Virginia,** 451 F.3d 311 (4th Cir. 2006). The Court of Appeals rejected plaintiff’s pretext argument which focused on but one of several factors used in making selections in a promotional process. The court held that plaintiff should have focused on the totality of the criteria, and not cherry-picked and focused on but one.
**Discrimination – Proof**

*Peirick v. Indiana University – Purdue University Indianapolis Athletics Dept.*, 510 F.3d 681 (7th Cir. 2007) (The 7th Circuit reversed the District Court’s grant of summary judgment to the defendant University where two male coaches were accused of similar indiscretions as the female tennis coach, but received progressive discipline, rather than termination as was the case with the female tennis coach. In addition, the Court found that the exaggerated explanations for the female coach’s termination, sufficed to allow the case to go to the jury).

**Discrimination – Race**


**Tademy v. Union Pacific Corp.,** 2008 U.S. App. LEXIS 6916 (10th Cir. Apr. 1, 2008) (Multiple racial epithets and a noose supported a Title VII hostile work environment claim).

**Goldsmith v. Bagby Elevator Co, Inc.,** 513 F.3d 1261 (11th Cir. 2008) ("Forty-five years ago, 'the civil rights movement swirled into Birmingham, a city whose bitter resistance to change made it a battleground.' Jack Bass, Unlikely Heroes 201 (1981). Dr. Martin Luther King Jr. remarked, 'If we can crack Birmingham, I am convinced we can crack the South. Birmingham is a symbol of segregation for the entire South.' Id. By blood, toil, and tears, segregation was, of course, cracked in Birmingham, and today the city is led by its fourth black mayor and a majority-black city council. Against this historical backdrop, this appeal from the Northern District of Alabama offers, amid a host of technical issues, an important reminder: despite considerable racial progress, racism persists as an evil to be remedied in our Nation.”) (Pryor, J.).

**Discrimination – Sex**

**McGinnis v. Union Pacific Railroad,** 2007 U.S. App. LEXIS 18449 (8th Cir. Aug. 3, 2007). The Eighth Circuit held that a single allegation of sexual conduct against a manager who had no responsibility for the termination decision did not constitute evidence of sexual favoritism. The plaintiff had alleged sex discrimination, arguing that the defendant-employer treated young women, particularly the more attractive ones, better than men. He relied upon a manager’s affair with a female employee although that particular manager lacked authority to terminate him.

Michael Starr and Christine M. Wilson, “Fetal Injury at Work,” Nat’l L. J. (Oct. 29, 2007), available at [www.law.com/jsp/nlj/PublicArticleNLJ.jsp?id=1193130215852](http://www.law.com/jsp/nlj/PublicArticleNLJ.jsp?id=1193130215852). In **UAW v. Johnson Controls**, 299 U.S. 187 (1991), the Supreme Court held that employers violate the sex discrimination provisions of Title VII when they exclude pregnant or fertile women from working in particular jobs even though the employer does so out of a concern that the work would...
environment will subject the pregnant or fertile employee to fetal injury. In doing so, the Court said: “Decisions about the welfare of future children must be left to parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.” At the time, the defense argued that the Court’s decision would subject employers to liability under state tort law if, in complying with anti-discrimination laws, they allowed pregnant women to work, and then the offspring of those employees are born with birth defects due to exposure at the workplace. The theme of this article is that management’s prediction that this would be the case has indeed been validated. The article calls attention to various recent court decisions imposing liability on the employer.

AEI Conference, October 1, 2007, On Bias, Preferences, or Biology? Science and Sex Differences. Video and transcript available at www.aei.org/event1536/event. Several of the speakers spoke regarding stereotypical and unconscious discrimination. For example, Joshua Aronson of NYU offered extensive evidence for the existence of the use of gender-based stereotypes. Professor Amy Wax of The University of Pennsylvania countered that Professor Aronson’s finding were “vastly exaggerated” in that “there is no basis . . . for identifying stereotype threat as an important, significant, or substantial factor behind gender performance differences.”

Kirleis v. Dickie, McCarney & Chilcote, 2007 WL 2142397, 2007 U.S. Dist. LEXIS 75996 (W.D.Pa. July 24, 2007) The district court held that "defendant has 63 shareholders but . . . control is in fact concentrated on the small number of members of the Executive Committee." Based on that finding and the Supreme Court decision in Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (U.S. 2003), the court found that the plaintiff, a female lawyer and shareholder in the law firm, was an employee covered by Title VII of the Civil Rights Act of 1964 as well as the Pennsylvania Human Relations Act.

Discrimination – Source of Income

Blodgett v. The University Club, 2007 D.C. App. LEXIS 481 (D.C. Aug. 9, 2007). The District of Columbia Court of Appeals discussed at length the prohibition in the D.C. Human Rights Act of discrimination based upon “source-of-income”. The court declined to “attempt to define the boundaries of ‘source-of-income’ discrimination.” Instead, the court held that the statute did not prohibit the Club from expelling the plaintiff in the circumstances presented here. See also Feemster v. BSA Ltd. Partnership, 471 F.Supp.2d 87 (D.D.C. 2007) (plaintiffs had not established a prima facie case of source-of-income discrimination under the D.C. Human Rights Act); Borger Mgmt., Inc. v. Sindram, 886 A.2d 52, 64 (D.C. 2005) (remanding for further proceedings on claim of source-of-income discrimination).

The Maryland Court of Appeals has heard oral argument in Montgomery County v. Glenmont Hills Associates, No. 20 (Sept. term, 2007) which is a housing case in which the circuit court overturned an administrative panel decision that a Section 8 voucher is a protected source-of-income within the meaning of the county’s fair housing law. See also Rosario v. Diagonal Realty. LLC, 9 Misc.3d 681, 803 N.Y.S.2d 343 (Sup. Ct. N.Y. Cty 2005). The Opinion of the Appellate Division is reported at Rosario v. Diagonal Realty, LLC, 32 A.D.3d 739, 821 N.Y.S.2d 71 (1st Dep’t 2006). The Opinion of the Court of Appeals is dated July 2, 2007, and is reported at Rosario v. Diagonal Realty, LLC, 8 N.Y.3d 755, 840 N.Y.S.2d 748, 872 N.E.2d 860

**Discrimination – Summary Judgment**

Brady v. Office of the Sergeant of Arms, U.S. House, 520 F.3d 490 (D.C. Cir. March 28, 2008) (The D.C. Circuit held that the question whether the plaintiff has made out a prima facie is almost always irrelevant when the court considers an employer’s motion for summary judgment).

**Dismissal – Plausibility Standard**


EEOC v. Concentra Health Servs., Inc., 496 F.3d 773 (7th Cir. 2007). The Court of Appeals, in applying Twombly, 127 S. Ct. 1955, stated: “The Supreme Court has interpreted [Rule 12(b)(6)] to impose two easy-to-clear hurdles. First, the complaint must describe the claim in sufficient detail to give the defendant ‘fair notice of what the . . . claim is and the grounds upon which it rests.’ . . . Second its allegations must plausible suggest that the defendant has a right to relief, raising that possibility above a ‘speculative level’; if they do not, the plaintiff pleads itself out of court. . . .”

Alvardo v. KOB-TV L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007). The Tenth Circuit applied Twombly in a fashion which strongly suggests it will be the standard for all Rule 12(b)(6) motions, and that the rationale of Twombly will not be restricted to anti-trust cases, describing the Twombly standard as “. . . courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief.” 493 F.3d at 1215  See also Iqbal v. Hasty, 490 F.3d 143 (2nd Cir. 2007) (the Second Circuit held that Twombly is not limited to anti-trust cases.)

Iqbal v. Hasty, 490 F.3d 143 (2nd Cir. 2007). The Court of Appeals applied the Twombly plausibility standard in the context of a motion to dismiss plaintiff’s § 1983 claims based on qualified immunity. The Court of Appeals stated that Twombly “is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.” 490 F.3d at 157-58. In Weisbarth v. Geauga Park Dist., 499 F.3d 538 (6th Cir. 2007), the Court of Appeals stated: “Iqbal those held that Twombly’s plausibility standard did not significantly alter notice pleading or impose heightened pleading requirements for all federal claims. Instead, Iqbal interpreted Twombly to require more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief.” See also Collins v. Marva Collins Preparatory School, 2007 U.S. Dist. LEXIS 49410 (S.D. Ohio July 9, 2007) (noting that eight
federal district courts in the Sixth Circuit have thus far applied Twombly in the manner described in Iqbal, and one district court has restricted Twombly to the antitrust-conspiracy context).


Robbins v. State of Oklahoma, 519 F3d 1242, 1245 (10th Cir. 2008) (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.”).

**Disparate Impact – Race**

El v. SEPTA, 479 F.3d 232 (3d Cir. 2007) The defendant public transit agency had a policy of barring persons with prior criminal records from serving as paratransit drivers for the disabled. The plaintiff had a second-degree murder conviction from a gang-related juvenile shooting dating back to 1960, which disqualified him because the conviction was a “record of any felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person(s).” Plaintiff argued that the agency’s policy had a disparate impact, arguing that African-Americans and Hispanics are more likely to have a criminal record and to thus be barred from employment under this policy. The Third Circuit upheld the agency’s policy, finding that employers are allowed latitude to engage in risk management covering even remote contingencies, such as the personal risk to passengers of a violent assault by a driver. The court defined the business necessity defense as a “require[ment] that employers show that a discriminatory hiring policy accurately – but not perfectly - ascertains an applicants ability to perform successfully the job in question. In addition, Title VII allows the employer to hire the applicant most likely to perform the job successfully over others less likely to do so.” The agency presented unrebutted expert testimony of the risks of recidivism among violent offenders and the unique vulnerability of disabled passengers.

Gulino v. New York State Education Dept., 460 F.3d 361 (2d Cir. 2006). The Court of Appeals held that a standardized test, the Liberal Arts and Sciences Test, required for public school teaching certification may be racially discriminatory in violation of Title VII. The court, using disparate impact analysis, remanded the matter to the trial court for further review of the test’s validity.

**Domestic Abuse**


According to a CDC study, domestic violence leads to nearly $900 million in lost productivity each year. The study is available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/index.htm.
Domestic Violence

Domestic Workers
Domestic Workers – New York is considering the passage of the so called Domestic Workers Bill of Rights which would guarantee health benefits, paid time off, overtime, and cost-of-living raises among other things. There are estimated to be 200,000 domestic workers in New York State. See Bill Summary – A00628, New York State Assembly, http://assembly.state.ny.us/leg/?bn=A00628 (last visited June 10, 2008).

Driving Vehicle – Employer Liability
John Dwight Ingram, Vicarious Liability for Negligence of a Vehicle’s Driver, 43 Tort Trial & Ins. Prac. L.J. 71 (Fall 2007) http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=il&url=/abapubs/TortTrial/mo/premium-il/Fall07/ingram.pdf (last visited June 10, 2008) (ABA membership required to view) (Discusses employer’s responsibility for employee’s negligence while operating a motor vehicle).

Drugs – Marijuana

Drug Testing
Lanier v. City of Woodburn, 518 F.3d 1147 (9th Cir. Mar. 13, 2008) (The Court of Appeals held that the municipality’s demand that an applicant for a part-time public library job submit, without a showing of some particularized need, to a mandatory drug and alcohol test was unconstitutional).

Poulos v. Pfizer, 244 Conn. 598, 711 A.2d 688 (Conn. Sup. Ct. 1998) (The Connecticut Supreme Court, in a drug testing case, reversed the lower courts exclusion of evidence regarding employee’s consent).

Duty to Warn
E-Discovery


Krumwiede v. Brighton Assocs., 2006 U.S. Dist. LEXIS 31669 (N.D. Ill., May 8, 2006). In an employment case, the court enters default judgment against the plaintiff for destroying relevant computer data.

Broccoli v. Echostar Commc’ns Corp., 229 F.R.D. 506 (D. Md. 2005). On account of the defendant’s destruction in a Title VII case of email and other employment documents, sanctions, including an adverse inference jury instruction and an award of attorneys’ fees, were entered by Judge Davis. The employer’s computer system automatically, on a periodic basis, moved copies of all sent email to “deleted” folders and automatically purged all “deleted” email. The court described such a policy as “risky but defensible in the absence of threatened litigation” and held that the employer had a duty to halt the purging as soon as it knew of the potential litigation.

J.C. Associates v. Fidelity & Guaranty Inc. Co., 2006 U.S. Dist. LEXIS 32919 (D.D.C. May 25, 2006) The court ordered a sample of previously identified documents to be converted into a form that could be electronically searched for key terms. The court would subsequently determine the necessity of additional searches using a “marginal utility” test of need.

Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 280 Conn. 225 (Conn. 2006). The Connecticut Supreme Court held that one could sue for intentional spoliation of evidence independent of the underlying claim.

Leon v. IDX Systems Corp., 464 F.3d 951 (9th Cir. 2006). The Court of Appeals held that an employee’s discrimination and whistleblower claims could be dismissed as a sanction for the employee’s deletion of computer files from the defendant company’s laptop.

Smith v. Cafe Asia, 2007 U.S. Dist. LEXIS 73071 (D.D.C., Oct. 2, 2007). Magistrate Judge Facciola, in this discrimination and harassment case, ordered the preservation and inspection of cell phone images. The discovery dispute concerned explicit images stored on the Plaintiff’s cell phone. The defense sought to inspect and make copies of the images, asserting the images would assist the defense in establishing that the Plaintiff “welcomed, encouraged, and instigated” the alleged incidents. The Court, finding that a determination of whether the probative value of the images outweighed their prejudice, was a judgment best made by the trial judge, ordered that the images be preserved. Additionally, the Court ordered that one attorney for the defense would be allowed to inspect the images, “only so far as necessary to fully inform its discovery and trial preparation.”

Columbia Pictures v. Bunnell, 2007 U.S. Dist. LEXIS 63620 (C.D. Cal. Aug. 24, 2007). Random Access Memory (RAM) is subject to preservation and productions under Rule 34; See also Correy E. Stephenson, Is RAM Data Discoverable: California Ruling Raises Concerns About New Electronic Discovery Rules, LAWYERS USA, Aug. 13, 2007 at 17; Kelly Talcott,


For more E-Discovery information, see Jerry Bui’s E-Discovery in the Trenches Blog, available at http://www.jerrybui.com/edd/.


Electronic Discovery for Dummies, RenewData. Available at: http://www.renewdata.com


Treppel v. Biovail Corp., 2008 U.S. Dist. LEXIS 25867 (S.D.N.Y. Apr. 2, 2008) (The District Court found that the Defendant’s inadequate preservation efforts necessitated restoration and production of email from backup tapes, and a forensic search of the CEO’s laptop).


Texas v. City of Frisco, 2008 WL 828055 (E.D. Texas March 27, 2008) (The District Court declined to issue an advisory opinion as to what actions the State of Texas needed to take in order to fulfill its obligation to preserve documents for potential litigation).

If you have been working with a computer forensic examiner engaged to thoroughly wipe a hard drive, you have probably been told that a regimen of 35 varied overwriting passes, the so-called Gutmann Method erasure, is required to thoroughly erase the data. Craig Ball points out the fallacy of that advice, and indicates that only one overwriting pass is necessary unless your work requires compliance with DOD 5220.22-M. Craig Bell, “The Multipass Erasure Myth,” [http://commonsold.typepad.com/eddupdate/2008/04/the-multipass-e.html#more](http://commonsold.typepad.com/eddupdate/2008/04/the-multipass-e.html#more) (last visited May 20, 2008).


K&L Gates has a searchable database of in excess of 1,000 e-discovery cases from state and federal courts. The database is searchable by keyword, or by any combination of 28 different case attributes, several of which track the 2006 e-discovery amendments to the Federal Rules of

79
Civil Procedure. Each search will produce a list of relevant cases, including a brief description of the nature and disposition of each case, the electronic evidence involved, and a link to a more detailed case summary if it is available. The database is available at https://extranet1.klgates.com/ediscovery/.

Jon Hyman, 46.6 Million Reasons to Think About Settlement, Ohio Employer’s Law Blog, http://ohioemploymentlaw.blogspot.com/2008/07/466-million-reasons-to-think-about.html (last visited July 8, 2008) (A Cuyahoga County Jury recently awarded the largest verdict in Ohio history, a whopping $46.7 million, in an employment case. A devastating piece of evidence was testimony by a computer expert for the plaintiff who had found that the plaintiff’s boss had post-dated a memo, adding two paragraphs critical of plaintiff’s job performance, two weeks after the plaintiff filed the lawsuit).

Quon v. Arch Wireless Operating Co., 2008 U.S. App. LEXIS 12766 (9th Cir. June 18, 2008) (The 9th Circuit held that text messages stored by third parties should not have been provided to the user’s employer, and that the disclosure violated the Stored Communications Act). See also, Alan J. Ross, Ninth Circuit Rules Text Messages Stored by Third Parties Are Out of Bounds; Invokes the Stored Communications Act to Find Third Party Electronic Communications Service Provider Liable for Providing Text Messages to User’s Employer, eDiscotech Blog, http://www.bricker.com/legalservices/practice/litigation/ediscotech/eblog/ (last visited July 9, 2008).

In re Goetz, 2008 U.S. App. LEXIS 13459 (6th Cir. June 26, 2008) (The 6th Circuit granted defendant’s petition for mandamus, setting aside the District Court’s requirement that computers be forensically imaged and, in doing so, questioned whether the District Court had authority to compel forensic imaging in order to preserve relevant ESI). See also, Alan J. Ross, Sixth Circuit Slams the Door on Hard Drive Imaging, eDiscotech Blog, http://www.bricker.com/legalservices/practice/litigation/ediscotech/eblog/ (last visited July 9, 2008).


Charles Ragan et al., The Sedona Guidelines for Managing Information and Records in the Electronic Age (Sedona Conference 2005) available at http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf


Mary Mack & Matt Deniston, The Practical Guide to Electronic Discovery (Fios 2004)


ESI Admissibility


Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. MD 2007) (Rules 901 and 902 of the Federal Rules of Evidence govern the authentication and identification of evidence, and, of them, Rule 901(b)(4) “is one the most frequently used to authenticate e-mail and other electronic records. . . . [C]ourts have recognized this rule as a means to authenticate ESI, including e-mail, text messages and the content of websites.”); People v. Pierre, 838 N.Y.S.2d 546 (App. Div. 1st Dept. 2007) (The New York Appellate Division held that the Trial Court properly admitted an
internet text message that had been authenticated strictly on the basis of circumstantial evidence.; In the Interest of F.P. 878 A.2d 91 (Pa. Super. 2005) (The Pennsylvania Appellate Court observed that there is nothing inherently remarkable or suspect about instant messages (IMs) insofar as evidentiary standards are concerned. “We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.”); People v. Von Guten, 2002 Cal. App. Unpub. LEXIS 2361 (Cal. App. 3d Dept. Apr. 4 2002); United States v. Gagliardi, 506 F.3d 140 (2nd Cir. 2007); Andrew M. Grossman, Case Note & Comment, No. Don’t IM Me – Instant Messaging, Authentication, and the Best Evidence Rule, 13 Geo. Mason L. Rev. 1309 (2006), available at www.law.gmu.edu/gmulawreview/issues/13-6/documents/Grossman-09.pdf.


Lorraine v. Markel Am. Ins. Co., 2007 U.S. Dist. LEXIS 33020 (D. Md. May 4, 2007). The district court denied cross-motions for summary judgment when the parties had attached copies of emails as exhibits but failed to properly support them with appropriate evidence. The judge wrote an extensive decision concerning the admissibility of electronically stored information (ESI).

United States v. Safavian, 429 F. Supp. 2d 156 (D.D.C. 2006). The court held that e-mails with the name of the person connected to the address and the name of the sender or recipient in the body of the e-mail were sufficiently authenticated and admissible. Additionally, e-mails that did not satisfy this standard could be authenticated through a comparison with those that could be independently authenticated. The court stated that the possibility that the emails embedded within other emails were doctored could be raised with the jury and prohibited witnesses that were not involved in the email correspondence, by sending or receiving, from testifying beyond the words contained in the email. E-mails containing requests for information and/or assistance were determined to be non-hearsay “work.”

**EEOC Administrative Practice**

Mayers v. Laborers’ Health & Safety Fund, 478 F.3d 364 (D.C. Cir. 2007). The DC Circuit affirmed summary judgment for the ADA Defendant in a dispute over the 180-day charge-filing period. The court found that the EEOC regulation 29 C.F.R. § 1601.1(a)(4)(ii), which extends the filing deadline to 300 days when a work-sharing agreement between the employee and a state or local agency exists, did not apply in this case. This was because the Plaintiff failed to allege the existence of a work-sharing agreement and did not dispute the 180-day filing period. The court made no reference to Title VII § 706(c).

Griffin v. Acacia Life Ins. Co., 2007 D.C. App. LEXIS 266 (D.C. May 24, 2007). The D.C. Court of Appeals held that an employee who had filed a discrimination charge with the EEOC
had not made an election of remedies that would bar her from later filing suit under the D.C. Human Rights Act.

**Buck v. Hampton Twp. Sch. Dist.**, 425 F.3d 256 (3d Cir. 2006). The court held that “where, as here, an employer has actual notice of a discrimination charge and chooses to respond to the merits of the claim before the EEOC without asserting lack of verification as a defense, it waives its right to secure dismissal of the federal court proceedings on that basis.” (emphasis removed).

**Pacheco v. Mineta**, 448 F.3d 783 (5th Cir. 2006). Although noting the review of the scope of the charge was fact intensive and thus bright lines were hard to draw, the court, in holding that plaintiff could not proceed with a disparate impact claim, focused on the absence of the mention in the charge of a neutral business policy which is "the cornerstone of any EEO disparate-impact investigation, since the EEO must evaluate both the policy’s effects on protected classes and any business justifications for the policy."

**Holowecki v. Fed. Express Corp.**, 440 F.3d 558 (2d Cir. 2006), *cert. granted*, 2007 U.S. LEXIS 6823 (June 4, 2007). The court adopted a "manifest intent" rule, requiring that for a submission to EEOC, here an EEOC questionnaire, to constitute a "charge", it must manifest an individual's intent to have the agency initiate its investigatory and conciliatory process.

**Smith v. Castaways Family Diner**, 453 F.3d 971 (7th Cir. 2006). For the purpose of counting employees to determine whether the 15-employee threshold for Title VII, managers who do not have an ownership interest in the diner for which they worked may be counted.

**EEOC v. Technocrest Systems Inc.**, 448 F.3d 1035 (8th Cir. 2006). The Court of Appeals upheld an EEOC subpoena seeking records pertaining to the immigration status and work histories of employees of the respondent technology company charged with national origin discrimination. The court held that, because the six charging parties had alleged not only discrimination against themselves but also discrimination against all Filipino employees of the company, DOL and INS documents for all employees, and the personnel files of all employees, were relevant.

**EEOC v. Sidley Austin LLP**, 437 F.3d 695 (7th Cir. 2006). The Court of Appeals held that the EEOC may obtain monetary relief on behalf on individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits.

**MacDonald v. Grace Church Seattle**, 457 F.3d 1079 (9th Cir. 2006). The Court of Appeals held that plaintiff’s charge of discrimination was untimely filed where it was filed against a non-profit religious organization, an organization not covered by the Washington state anti-discrimination law, and thus the charge filed more than 180 days from the alleged discriminatory act, but less than 300 days was untimely.

**Carter v. WMATA**, 2007 App. LEXIS 23369 (D.C. Cir., Oct. 5, 2007). The D.C. Circuit, Judge Brown writing for the panel, addressed the vexing issue currently pending before the Supreme Court as to whether the EEOC’s questionnaire satisfies the statute’s charge filing requirement so long as a sworn charge is eventually filed even though filed well beyond the charge–filing
limitations. The Court stated: “her completion of an EEOC questionnaire on October 25, 2004 fell well within the 180-day filing period that commenced on July 6, 2004. Accordingly, the district court should not have had granted WMATA’s motion to dismiss.” The Supreme Court is currently considering this issue in Holowecki v. Federal Express Corp., 440 F.3d 558 (2d Cir. 2006), cert. granted, 2007 U.S. LEXIS 6823 (June 4, 2007). (The plaintiff in Holowecky went to the EEOC and completed a questionnaire which was not served on the employer as required by statute. The charging party filed an ADEA collective action (along with thirteen other plaintiffs) and after suit was filed, then filed formal EEOC charges. The Second Circuit held that an EEOC intake questionnaire may suffice for the charge of discrimination that must be submitted pursuant to the ADEA even in the absence of evidence that the EEOC treated the questionnaire as a charge or that the employee submitting the questionnaire reasonably believed that it constituted a charge.) The court did not necessarily draw a bright line, holding that in all circumstances an EEOC intake questionnaire will suffice. The very brief opinion places emphasis on the fact that, prior to plaintiff going to EEOC, the plaintiff had pursued an EEO complaint internally within WMATA and thus “WMATA had notice of Carter’s allegation from the outset.” The court also noted that the questionnaire stated that “the Commission will . . . consider it to be a sufficient charge of discrimination under the relevant statute(s),” and that plaintiff, when he first visited EEOC within the limitations period, asked to file a charge of discrimination.

In the district court, the plaintiff had filed for reconsideration, asserting in said motion for the first time the equitable tolling doctrine. The Court of Appeals held unequivocally that the district court was correct in refusing to entertain, on reconsideration, the newly minted equitable tolling argument.

The Court of Appeals, in discussing Ledbetter, reaffirmed the vitality of Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) when it stated that the charge-filing requirement “essentially functions as a statute of limitations for Title VII actions.”

Finally, the court stated that its holding “does not rest on the relation-back doctrine delineated in 29 C.F.R. § 1601.12, which applies in relatively narrow circumstances.”

King v. McMillan, 2007 U.S. App. LEXIS 10635 (4th Cir., May 4, 2007). Plaintiff King filed a charge of discrimination with the EEOC and the EEOC charge gave no notice of the collective nature of her claims. After receiving a right-to-sue, she filed suit and filed a motion to certify as a class action. The district court denied the motion as untimely because King had not moved to certify within 90 days. Shortly thereafter, six women, putative members of the class that the plaintiff had unsuccessfully sought to represent, moved to intervene in her case as plaintiffs-interveners. None of them had filed charges with the EEOC, and five of them were time-barred from filing with EEOC as of the date on which plaintiff King filed her charge with EEOC. Thus, only one of the six could have timely filed with EEOC as of the date when plaintiff did.

The six sought to rely on the “single-filing rule” which, in class actions, is a judge-made exception to the requirement of administrative exhaustion and allows non-exhausting plaintiffs to join in a lawsuit with other plaintiffs who have exhausted administrative remedies, provided that the claims are “substantially similar” and that the EEOC charge gave notice of the collective nature of the charge. The Fourth Circuit previously had approved the single-filing rule in class
actions, but had never decided whether to apply the rule to non-class actions, that is, to interveners. The court declined to rule on that issue in this case as there was only one potential intervenor and the court agreed with the holding of the Seventh Circuit in Horton v. Jackson County Bd. of County Commissioners, 343 F.3d 897, 900 (7th Cir. 2003) that in most cases where there are only two interveners, the rationale underlying the single-filing rule “is attenuated to the point of non-existence.” Finding that, in a two-complainant case, “it is much more difficult to justify excusing a single-intervener from the normal administrative exhaustion requirements”, the court affirmed the district court’s denial of the motion to intervene.

Depaoli v. Vacation Sales Assocs., LLC, 489 F.3d 615 (4th Cir. 2007). The phrase “in the current or preceding calendar year”, which is contained in 42 U.S.C. § 1981a(b)(3), is the definition of the year in which one counts the employer’s employees for the purposes of determining the statutory cap on compensatory and punitive damages. The District Court had read that phrase as referring to the year in which the employer allegedly committed the Title VII violation. The Fourth Circuit affirmed.


In researching Title VII cases, particularly federal sector cases, practitioners will want to access the decisions of EEOC’s Office of Federal Operations (“OFO”). These decisions can be found on EEOC’s website, www.eeoc.gov, under EEOC Federal Sector Appellate Decisions. OFO decisions are also available on Westlaw.

Surrell v. California Water Serv. Co., 518 F.3d 1097 (9th Cir. 2008) (The Ninth Circuit held that the plaintiff had not failed to exhaust her administrative remedies under Title VII even thought she never obtained a right-to-sue letter from the EEOC. Plaintiff had filed a discrimination charge with the California state anti-discrimination agency which had a work-sharing agreement with the EEOC. The California agency provided her with a state right-to-sue letter, and advised her that she also could obtain a federal right-to-sue letter from EEOC, but she did not obtain one. Plaintiff sued under Title VII, the defendant employer argued that the failure to obtain a right-to-sue letter from EEOC constituted a failure to exhaust administrative remedies, and thus barred the Title VII claim. The Ninth Circuit, relying upon Burke v. Cornerstone, 2007 WL 3046193 (D.Conn. Oct. 12, 2007), held “that where, as here, a plaintiff is entitled to receive a right-to-sue letter from the EEOC, a plaintiff may proceed absent such a letter provided she had received a right-to-sue letter from the appropriate state agency”).

Emotional Distress

JAMES Mc Donald, JR. AND FRANCINE B. KULICK, MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION SECOND EDITION (BNA Books 2001).

ERISA
Wachtel v. Health Net Inc., 482 F.3d 225 (3d Cir. 2007). The plaintiff beneficiaries sued their insurer for benefits and violations of fiduciary duty under the Employee Retirement Income Security Act (ERISA). They sought documents under the fiduciary exception to the attorney-client privilege, and the defendants refused. The appeals court held that the fiduciary exception did not apply because the plaintiffs were not the “real” clients of the attorney representation; rather, the insurance company was the sole client. The court based its decision on four factors: (a) unity of ownership and management, (b) conflicting interests regarding profits, (c) conflicting fiduciary obligations, and (d) payment of counsel with the fiduciary’s own funds.

Kolkowski v. Goodrich Corp., 448 F.3d 843 (6th Cir. 2006). The court, in holding that an employment protection plan (EPP) could be considered an ERISA plan, found that an employee did not breach his employment contract when he refused to take employment with his company’s new parent organization because it failed to offer an EPP with comparable benefits.

Abatie v. Alta Health & Life Insurance Co., 458 F.3d 955 (9th Cir. 2006)(en banc). The Ninth Circuit held that, when determining whether the administrator of an ERISA plan properly exercised its discretion in making a benefit determination, a trial court must apply an abuse of discretion standard. The court overruled its decision in Atwood v. Newmont Gold Co., F.3d 1317 (9th Cir. 1995), where it implemented a burden shifting scheme under which plan participants had to demonstrate that the administrator operated under a conflict of interest. The new standard looks at the nature, extent, and effect on the decision making process of any conflict of interest that appears in the record. The court may consider evidence outside of the record when an administrator fails to follow an ERISA procedural requirement.

Cooper v. IBM, 457 F.3d 636 (7th Cir. 2006)). The circuit court found IBM’s cash balance pension plan to be age-neutral and, therefore, not in violation of the Employee Retirement Income Security Act. Judge Easterbrook stated that the fact that younger workers had more time to accrue interest under the plan did not constitute discrimination against older workers and the plaintiffs failed to account for the “time value of money.”

Billings v. UNUM Life Insurance Co. of America, 459 F.3d 1088 (11th Cir. 2006). The circuit court affirmed a grant of summary judgment in favor of a plaintiff physician who claimed wrongful denial of disability benefits based on his obsessive compulsive disorder. The insurer classified plaintiff’s OCD as a mental illness and, per his policy, limited his disability to 24 monthly payments. The policy defined “mental illness” as “mental, nervous, or emotional diseases or disorders of any type.” The court agreed with the plaintiff’s argument that the definition was ambiguous with respect to whether the “mental” classification of the illness is based on the illness’s origin or its symptoms. The court construed this ambiguity against the insurer (as the drafter of the policy) and found a wrongful denial of benefits. This holding stands in contrast to the Fifth and Eighth Circuits which have held that the plain meaning of “mental illness” is unambiguously focused on the symptoms. Lynd v. Reliance Standard Life Insurance Co., 94 F.3d 979 (5th Cir. 1996); Brewer v. Lincoln Nat’l Life Ins., 921 F.2d 150 (8th Cir. 1990).

Leuthner v. Blue Cross and Blue Shield of Northeastern Pennsylvania, 454 F.3d 120 (3d Cir. 2006). The court held that standing to sue an ERISA plan administrator for breach of fiduciary
duty maybe predicated on “but for” causation. The court held that a plaintiff may plead that she would have remained an ERISA plan beneficiary but for the malfeasance of the administrator. However, the court did not find any evidence that the woman had relied on any misrepresentations concerning plan changes made years later.


Retail Indus. Leaders Ass’n v. Fielder, 475 F.3d 180 (4th Cir. 2007). The court held that ERISA preempted Maryland’s “Fair Share Health Care Fund Act” (Fair Share Act). The Fair Share Act required large private employers in the state to use a minimum percentage of wages for health insurance for its employees, or remit to the state the difference between that minimum percentage and what the employer actually spends on employee health care. ERISA preempts the Fair Share Act because in essence, the Maryland statute established a mandatory minimum amount employers must spend on health care, in violation of ERISA rules and policies.

Suffolk Construction Co. v. Div. of Capital Asset Management, 870 N.E.2d 33, 449 Mass. 444 (2007). The District Court held that the Suffolk County so-called “big box” health coverage law was preempted by ERISA. The local law required certain so-called “big box” retailers to provide health coverage for their employees. Previously, the Fourth Circuit had so ruled in a case arising out of a similar statute in Maryland in Retail Indus. Leaders v. Fielder, 475 F.3d 180 (4th Cir. 2007). Some fourteen other state governments and several counties and municipalities have enacted or are enacting similar health care mandates. The San Francisco law is being challenged in the Northern District of California in Golden Gate Restaurant Ass’n v. City & County of San Francisco, 2007 U.S. Dist. LEXIS 28974 (N.D. Cal. Apr. 5, 2007).

Bridges v. American Electric Power Co., Inc., 2007 U.S. App. LEXIS 19337 (6th Cir. Aug 15, 2007). The Sixth Circuit joined the Third and Seventh Circuits in holding that the term “participant” in ERISA includes former employees who have cashed out of their defined contribution plan benefits. See also Graden v. Conexant Systems, Inc., 2007 U.S. App. LEXIS 18179 (3d Cir., July 31, 2007) (the Third Circuit held that a cashed-out former employee had the right under ERISA to sue the plan administrator of his former employer’s 401(k) plan for allegedly mismanaging plan assets and thus reducing his share of benefits); Harzewski v. Guidant Corp., 489 F.3d 799, 804 (7th Cir. 2007) (same).

Carolina Care Plan Inc. v. McKenzie, 467 F.3d 383 (4th Cir. 2006). In this ERISA case, the court of appeals affirmed the district court’s conclusion that the plan administrator had abused its discretion by denying coverage for a cochlear implant, and the court of appeals reversed the award of attorneys’ fees. The court reiterated its prior jurisprudence that, when a plan administrator with discretion faces a conflict of interest, the court modifies the abuse of discretion standard to the degree necessary to neutralize any untoward influence resulting from the conflict. The court noted that evidence of cost is not irrelevant, and “a frequent and expensive claim might well demand comparatively more scrutiny on the ‘sliding scale’ than an inexpensive and infrequent claim.” Concluding that the conflict “demands diminished deference”, the court
stated that, under a modified abuse of discretion standard, a plan administrator’s decision will be upheld if it is reasonable. In reviewing the plan administrator’s decision in this case, applying the rule that an ambiguous contractual provision should be construed against the drafting party, the so-called *contra proferentem* rule, the court agreed with the district court that the plan administrator had abused its discretion in denying the plaintiff’s claim for a cochlear implant.

The district court had awarded fees to the plaintiff, and the court of appeals reversed, finding that the first factor considered, i.e., culpability and bad faith require more than mere negligence or error. Reviewing the record, the court of appeals found no evidence of bad faith or culpability. The court of appeals rejected the third and fifth factors, finding that if they were determinative, “virtually every time a claimant prevailed in overturning an administrator’s decision denying ERISA benefits, the claimant would be entitled to attorneys’ fees.” The fourth factor was found to weigh against an award of fees as the plaintiff sought primarily to benefit herself only. Thus, the only factor supporting an award of fees was that the defendant, “as a large corporation, can easily pay the fees.” As ERISA, unlike, for example, Title VII, does not provide for a virtually automatic fee award to a substantially prevailing plaintiff, that one factor, by itself, did not suffice to support an award of attorneys’ fees.

LaRue v. DeWolff, Boberg & Associates, Inc., 415 F.3d 570 (4th Cir. 2006), cert. granted, 127 S.Ct. 2971 (June 18, 2007). The Supreme Court agreed to review the availability of individual relief for breach of fiduciary duty under ERISA sections 502(a)(2) and (a)(3) when it granted certiorari in a Fourth Circuit decision holding that ERISA does not provide a remedy for losses for participant’s section 401(k) plan account as a result of the plan fiduciary’s failure to implement the participant’s investment directions.

White v. Sun Life Assurance Co. of Canada, 488 F.3d 240 (4th Cir. 2007). The court, with Chief Judge Wilkins dissenting, affirmed the lower court’s holding that a three-year limitations period contained in a long-term disability plan document was not enforceable, and accordingly the claim for plan benefits was not time-barred. The majority rejected the defense argument that an ERISA plan may specify a different accrual date in its governing documents.

Alfa Laval, Inc. v. Nichols, 2007 U.S. Dist. LEXIS 23159 (E.D. Va, Mar. 29, 2007). The district court rejected the participant’s argument that the plan was funded, finding that a standby letter of credit was a contingent obligation between the bank and Alfa Laval and thus the plan was considered to be unfunded. As the only participant was the President and CEO and because the plan had been deemed to be unfunded, the court found that the plan met the requirements of a “top hat” plan and was exempt from ERISA.

Haynes v. K-Va-T Food Stores, Inc., 38 EBC (BNA) 1483 (W.D. Va, July 13, 2006). The district court held that the plan administrator failed to distributed a summary plan description (“SPD”) within ninety days after the plaintiff/employee had become a participant in a life insurance plan and as ERISA required such a distribution, the court ordered the plan administrator to reinstate the deceased employee in the plan and to pay the decedent’s beneficiary $34,000 in life insurance benefits. The district court did not require the plaintiff to demonstrate likely prejudice resulting from the failure to distribute the SPD in a timely manner.
Contra Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 113 (2nd Cir. 2003); Weinreb v. Hospital for Joint Diseases Orthopedic Institute, 404 F.3d 167 (2nd Cir. 2005).


The Department of Labor’s Employee Benefits Security Administration has established the ERISA Fiduciary Advisor on its website which is designed to assist employers who provide services to private sector retirement plans. The Advisor includes a listing of the common mistakes made by employers and provides links to additional information of use to employers. The site is available at http://www.dol.gov/elaws/ERISAFiduciary.htm.


Kirsch v. Jefferson Pilot Financial Ins. Co., 2008 U.S. Dist. LEXIS 43876 (D. Wis. Jun. 3, 2008) (“Although [the plaintiff] does not cite, and the court is unaware of, any binding authority explicitly requiring that the full administrative record be submitted prior to judicial review of a denial of benefits under ERISA, other district courts to address the issue have held that such a submission is necessary. See e.g. Tinkler v. Level 3 Communications, LLC, 2008 U.S. Dist. LEXIS 4953, 2008 WL 199901, at *11 (N.D. Oka. 2008) ("Regardless of the level of deference given to the Plan's decision, the Court must consider the entire administrative record . . . ."); Gentile v. John Hancock Mut. Life Ins. Co., 951 F. Supp. 284, 287 (D. Mass 1997) ("[T]hose cases which discuss judicial review of a denied benefit under ERISA uniformly assume that the full administrative record forms the basis of such a review, regardless of the standard of review applied. . . . In the absence of the full record which is a prerequisite for this Court's review of the determination, summary judgment for [the defendant] will be denied."). I find these cases persuasive and conclude that the entire administrative record should be submitted to the court to facilitate the review of the defendants' denial of benefits.").

Sgro v. Danone Waters of N. Am., Inc., 2008 U.S. App. LEXIS 13973 (9th Cir. July 2, 2008) (The 9th Circuit held that an ERISA plan administrator must provide a participant with notes of its investigation of the claim, if the plan participant so requests. In doing so, the court stated:

“[Plan participant] Sgro also claims that he asked defendants for a ‘complete copy of [his] claim file’ and that defendants didn’t fully comply with the request. In particular, Sgro argues that MetLife’s ‘claims personnel.’ Sgro argues that MetLife’s failure to provide these documents violated ERISA regulations, which require that a claimant shall be provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant’s claim for benefits. 29 C.F.R. § 2560.503-1(h)(2)(iii).

The documents that MetLife is alleged to have held back are ‘relevant,’ and thus covered by this regulation, because they were ‘generated in the course of making the benefit determination.’ Id. § 2560.503-1(m)(8)(ii). ERISA’s remedies provision gives Sgro a
cause of action to sue a plan ‘administrator’ who doesn’t comply with a ‘request for . . . information.’ 29 U.S.C. § 1132(c)(1).”

Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2007) (Most courts of appeals, have concluded that the Supreme Court’s cases dictate the conclusion that Section 502(a)(3) does not authorize suits against an ERISA fiduciary for monetary redress of losses caused by a breach of fiduciary duty. See Goeres v. Charles Schwab & Co., 220 Fed. Appx. 663 (9th Cir. 2007), petition for cert. pending, No. 06-1521 (filed May 15, 2007); Todisco v. Verizon Communications, Inc., 497 F.3d 95, 99-100 (1st Cir. 2007); Coan v. Kaufman, 457 F.3d 250, 262-264 (2d Cir. 2006) (reversing prior holding in Strom v. Goldman, Sachs & Co., 202 F.3d 138 (2d Cir. 1999)); Calhoon v. TWA, 400 F.3d 593, 596-598 (8th Cir. 2005); Callery v. United States Life Ins. Co., 392 F.3d 401, 404- 409 (10th Cir. 2004); Helfrich v. PNC Bank., Ky., Inc., 267 F.3d 477, 481-482 (6th Cir. 2001), cert. denied, 535 U.S. 928 (2002); see also Fox v. Herzog Heine Geduld, Inc., 232 Fed. Appx. 104, 106 (3d Cir. 2007) (holding that, under Great-West, “[i]n order to award equitable relief under § 502(a)(3), ‘money or property identified as belonging in good conscience to the plaintiff [must] clearly be traced to particular funds or property in the defendant’s possession’ ”) (citation omitted; brackets in original). The Seventh Circuit, on the other hand, has held that Section 502(a)(3) does authorize such suits because monetary relief, “when sought as a remedy for breach of fiduciary duty[,"] * * * is properly regarded as an equitable remedy.” Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (2000) (citation omitted).

The Seventh Circuit has not chosen to revisit Bowerman after Great-West. On the contrary, in a decision that post-dates Great-West, the court of appeals remanded to allow the plaintiff to amend his complaint to add ERISA claims because, in the court’s view, “ERISA ‘as currently written and interpreted, may allo[w] at least some forms of “make-whole” relief against a breaching fiduciary in light of the general availability of such relief in equity at the time of the divided bench.’ ”McDonald v. Household Int’l, Inc., 425 F.3d 424, 430 (7th Cir. 2005) (citation omitted).

Until recently, all the courts of appeals that have considered an action for monetary relief against a breaching fiduciary under Section 502(a)(2) or (a)(3) of ERISA have concluded that there is no right to a jury trial because the claims are equitable. See, e.g., Phelps v. C.T. Enters., Inc., 394 F.3d 213, 222 (4th Cir. 2005); Borst v. Chevron Corp., 36F.3d 1308, 1323-1324 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995); accord Broadnax Mills, Inc. v. Blue Cross & Blue Shield, 876 F. Supp. 809, 816-817 (E.D. Va. 1995). Likewise, courts have generally held that there is no right to a jury trial in non-ERISA cases where the plaintiffs seek monetary recovery for fiduciary breaches. See, e.g., In re Evangelist, 760 F.2d 27, 29 (1st Cir. 1985); Uselman v. Uselman, 464 N.W.2d 130, 137-138 (Minn. 1990); First Ala. Bank v. Spragins, 475 So. 2d 512, 514 (Ala. 1987) (per curiam); accord Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co., 90 F.R.D. 313, 321 (E.D.N.Y. 1981) (no jury trial in shareholder derivative action for accounting from breaching fiduciary).

The Second Circuit, however, recently held that the defendants were entitled to a jury trial in a non-ERISA case in which shareholders sought to recover monetary losses from corporate fiduciaries accused of breaching their fiduciary duties. Pereira v. Farace, 413 F.3d
Based on the Supreme Court’s analysis in Great-West of the scope of equitable relief available under ERISA, the Second Circuit concluded that such a remedy is necessarily “legal” rather than “equitable,” and therefore fiduciary defendants are entitled to a jury trial. Id. at 340-341. The court of appeals determined that Great-West dictated that result even though, as the concurring judge pointed out, it is “at odds with centuries of equitable proceedings involving claims against trustees, estate executors, and other fiduciaries.” Id. at 344.

Relying on reasoning similar to the Second Circuit’s analysis in Pereira, district courts have begun to hold that jury trial trials are available in breach of fiduciary duty cases under ERISA, despite the prior uniform precedent to the contrary. See, e.g., Chao v. Meixner, No. 18 1:07-cv-0595-WSD, 2007 WL 4225069, at *5 (N.D. Ga. Nov. 27, 2007); Ellis v. Rycenga Homes, Inc., No. 1:04-cv-694, 2007 WL 1032367, at *4 (W.D. Mich. Apr. 2, 2007); Bona v. Barash, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *35 (S.D.N.Y. Mar. 20, 2003). This Court should grant the petition for a writ of certiorari to eliminate the confusion among the lower courts on whether monetary redress against a breaching fiduciary is “equitable relief.”


Rogers v. Baxter Int’l, Inc., 521 F.3d 702 (7th Cir. 2008) (The 7th Circuit, applying the Supreme Court’s decision in LaRue, held that an action by plan participants alleging breach of fiduciary duty by plan administrators in the management of a defined contribution plan could proceed, rejecting also an argument that the claims were barred by the Private Securities Litigation Reform Act of 1995).

**Employee Choice Doctrine**

Morris v. Schroder AL Management Int’l 481 F.3d 86 (2d Cir. 2007). The Second Circuit had certified to the New York Court of Appeals the question of whether the federal constructive discharge standard applies to determinations of involuntary termination under the “employee choice doctrine.” The New York Court of Appeals answered in the affirmative. Under New York’s “employee choice doctrine,” restrictive covenants in deferred compensation plans are not subject to strict scrutiny if the employee voluntarily leaves his/her employment. In such circumstances, the employee is afforded a choice between either staying and receiving his deferred compensation or foregoing the deferred compensation in order to leave and compete. Following the answer from the New York Court of Appeals to the certified question, the Second Circuit found that the courts will enforce forfeiture of deferred compensation awards if an...
employee resigns to compete, regardless of the reasonableness of the restriction, unless the employee can establish that “the working conditions at his former place of employment were so difficult or unpleasant that a reasonable person in his shoes would have felt compelled to resign.” See also Christine N. Kearns and Julia E. Judish, Second Circuit and New York Court of Appeals Clarify Restrictions that Employers May Place on Eligibility for Deferred Compensation Awards, 0900 Pillsbury, Winthrop, Shaw, Pittman Client Alert 1 (Feb. 5, 2007).

Kirschbaum v. Reliant Energy, Inc., 2008 U.S. App. LEXIS 9124 (5th Cir. 2008) (The 5th Circuit held that ERISA exempts an Eligible Individual Account Plan (EIAP) from the duty to diversify with regard to the purchase or holding of company stock).

**Employee Handbook**


The D.C. Court of Appeals over the past decade has issued a series of decisions, finding that the particular language of the employee handbook and the language of the employer's disclaimer of contractual intent read together, raised a question for the jury as to whether or not the disclaimer effectively trumped any contract argument or not. See, e.g., Dantley v. Howard Univ., 801 A.2d 962 (D.C. 2002); Strass v. Kaiser Found. Health Plan of Mid-Atlantic, 744 A.2d 1000 (D.C. 2000); U.S. ex rel. Yesudian v. Howard Univ., 153 F.3d 731 (D.C. Cir. 1998); and Sisco v. GSA Nat'l Capital Fed. Credit Union, 689 A.2d 53 (D.C. 1997). A 2006 opinion by Judge Lamberth draws a brighter line as to when this is a jury issue and when the employer gets summary judgment on this issue. See Youngblood v. Vistronix, Inc., 2006 U.S. Dist. LEXIS 51460 (D.D.C., July 27, 2006). In Youngblood, the manual used permissive language, that is, repeatedly the word "may". For example, the manual in the disciplinary portion stated that the "employee may be notified" "Vistronix may take disciplinary steps" and "Vistronix may terminate the employee". Judge Lamberth held that such permissive language in conjunction with a disclaimer which stated as follows: "These guidelines do not constitute a contract or promise. Any individual employee can be terminated, at any time, with or without cause and without notice." Additionally, the employer had the employee Youngblood sign a receipt that affirmed his status as an at-will employee and that disclaimed any implied contract. Judge Lamberth contrasted this with Strass, where the handbook used mandatory language, that is, the word "shall". Then, Judge Lamberth drew the bright line, saying that in Youngblood, there was "no logical incongruity between Vistronix's disclaimer and the language contained elsewhere in the handbook, or in the parties' bargain." In contrast, the disclaimer in Strass is "rationally at odds with some aspect of the parties' bargain, [and] the ambiguity as to the parties' intention raises a question of fact for a jury."
Employer Liability For Employees On Cell Phones While Driving

Employment Agreements

Oaks v. 3M Co., 453 F.3d 781 (6th Cir. 2006). The court, applying Kentucky state law, held that a trial court possess “original subject matter jurisdiction over a wage and hour dispute between an employer and employee” and that an employment policy, found in an employee hand book, confers contractual rights to employees.

Nat’l Treasury Employees Union v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006). The court ruled that the Department of Homeland Security’s policy, allowing Department managers to unilaterally abrogate lawfully negotiated and executed labor agreements. Specifically, the DHS is no longer allowed to unilaterally create its own standards for performance-based pay as this is not true collective bargaining.

Baum v. Helget Gas Prods., Inc., 440 F.3d 1019 (8th Cir. 2006). The court held that when the terms of an employment contract are “textually ambiguous, a question of material fact exists as to the parties' intent, which is for a jury to resolve at trial,” and summary judgment is not appropriate.

Dore v. Arnold Worldwide, Inc., 2006 Cal. LEXIS 9288, 39 Cal. 4th 384 (Calif. Supp. Ct. 2006). Where an employment contract stated that the employee could be terminated “at any time,” the California Supreme Court held that the employee did not have the right to be fired only for cause. The Supreme Court held that the “language of the party’s written agreement is unambiguous, and plainly states that the employee would be an at-will employee, like everyone else.”


For a list of sample hiring contracts from companies such as ARAMARK, Fluor, Home Depot, Marsh & McLennan, and Outback Steakhouse, see http://contracts.onecle.com/type/2.shtml.

Equal Pay Act
Beck-Wilson v. Principi, 441 F.3d 353 (6th Cir. 2006). This is an Equal Pay Act case where the court discussed both the prima facie case and the affirmative defense of “reasonable factor other than sex.”

**Equal Protection - Class of One**

Engquist v. Oregon Department of Agriculture, 478 F.3d 985 (9th Cir. 2007). The 9th Circuit held that the class-of-one equal protection theory of Willowbrook, Illinois v. Olech, 528 U.S. 562 (2000), does not extend to public employees, disagreeing with seven other circuits that have addressed this issue.

Willis v. Marshall, 426 F.3d 251 (4th Cir. 2005). The plaintiff, who was barred from a municipal community center for “dirty dancing” lost on First Amendment grounds, but was allowed to proceed on a “class of one” Equal Protection claim under Willowbrook, Illinois v. Olech, 528 U.S. 562 (2000), which recognized such claims “where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”

Huebner v. ESEC, Inc., 2003 WL 21039345 (D. Ariz. Mar. 26, 2003). The district court, explicitly recognizing that the courts are split, in a case involving sales representatives, focused on total compensation, that is, base salary plus earned commissions, as the appropriate standard by which to measure an Equal Pay Act claim rather than the pay in each component of the compensation structure.


**Ethics**

Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 22 ABA/BNA Lawyers’ Manual on Professional Conduct 272 (N.J. 2006). The New Jersey Supreme Court found that its disciplinary rule, RPC 1.8(g), was substantially the same as DR 5-106 which provides that an attorney who represents two or more clients shall not make or participate in the making of any aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement and of the participation of each person in the settlement. Thus, the court rejected an agreement whereby the plaintiffs had agreed to accept that settlement would be governed by a majority vote of the plaintiffs. The court held that there was an inherent conflict of interest in such an arrangement, and that the rules impose two requirements on lawyers representing multiple clients, the first of which is that the terms of the settlement must be disclosed to each client and the second of which is that only after the terms of the settlement are known, can the client agree to the settlement and each client must agree. The court decided to apply its ruling prospectively only and indeed did not apply it in the instant case. Moreover, the...
court stating that it recognized that the ethical rules might need to be changed to accommodate mass lawsuits, referred this issue to the state Commission on Ethics Reform.

New York County Lawyer’s Association Committee on Professional Ethics, Opinion 737 (May 23, 2007) http://www.nycla.org/siteFiles/Publications/Publications519_0.pdf. The committee found that while it is generally improper for a non-governmental lawyer to use or oversee an investigator who will engage in false pretenses, there is a small number none the less of exceptional circumstances where it is ethically acceptable for lawyers to supervise an investigator who uses a pretense that is limited to identity and purpose, involving otherwise lawful activity undertake solely for the purpose of gathering evidence. Even in these circumstances the committee opined that lawyer’s role would be unethical unless four conditions are met, one of which could be that the purpose of the investigation is to probe a violation of civil rights and the lawyer believes in good faith that the violation is talking place or is imminent. The opinion gathers other ethics opinions as well as court decisions on this issue.

ABA Formal Ethics Opinion 06-438, available at: http://www.abanet.org/cpr/pubs/ethicopinions.html. The opinion restates the requirements of ABA Model Rule 1.8(g) regarding the representation of two or more clients in a matter where they are called upon to participate in an “aggregate settlement”. The American Law Institute has prepared a preliminary draft on the ethics of aggregate settlements which has been prepared by its Principles of Law of Aggregate Litigation project. See also Tax Authority Inc. v. Jackson Hewitt Inc., 898 A.2d 512 (N.J. 2006) (where the New Jersey Supreme Court held that a lawyer may not include in a retainer agreement an advance waiver of the client’s right to approve or disapprove a proposed settlement).

ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-445 (April 11 2007) available at http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=member&role=abanet mo&url=/cpr/mo/07-445.pdf. The ABA ethics committee advised that defense counsel, before a class action is certified, may contact putative class members without seeking permission from counsel for the named plaintiffs.

Restrictive Covenants for In-House Counsel, Op. Advisory Comm. on Prof’l Ethics. (185 N.J.L.J. 68, July 3, 2006) available at www.lawlibrary.rutgers.edu/ethics/acpe/acp708_1.html (last visited July 6, 2007). In Opinion 708, the New Jersey Supreme Court’s Advisory Committee on Professional Ethics declared a proposed employment agreement limiting the right of in-house lawyers at one employer to move to competitors unethical. The holding was that non-compete covenants are unethical under Rule of Professional Conduct 5.6 because they denied clients’ right to counsel of their choice.

The American Bar Association’s Standing Committee on Ethics and Professional Responsibility recently withdrew its 1992 ethics opinion, ABA Formal Opinion 92-368, which required a lawyer who inadvertently received privileged material from an opponent to refrain from reading the material, notify the sender of the error, and abide by the sender’s instructions. The Committee withdrew the opinion because it failed to correspond with any provision of the Model Rules of Professional Responsibility. A change to the Model Rules subsequent to the opinion
requires the recipient of the misdirected document to notify the sender, but does not explicitly prohibit review of the document. See ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 05-437 (October 1, 2005) available at http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=member&role=abanetmo&url=/cpr/05_437.pdf; Model Rules of Prof'l Conduct R. 4.4(b) (See also http://www.abanet.org/cpr/mrpc/rule_4_4.html).

Tennessee Supreme Court Board of Professional Responsibility, Formal Opinion 2007-F-153, http://www.tbpr.org/Attorneys/EthicsOpinions/Pdfs/2007-F-153.pdf (March 23rd, 2007). The Tennessee Supreme Court’s ethics board advised that lawyers who assist pro se litigants to draft significant court papers are not required to disclose their involvement to the opponent or the court so long as there is no continuing aid that will mislead others about the litigant’s status.

Augustine v. Dept. of Veterans’ Affairs, 429 F.3d 1334 (Fed. Cir. 2005). The court held that federal law, not state law, controlled whether a lawyer not licensed in a state may represent a claimant and recover statutory attorneys’ fees in a federal administrative proceeding before the Merit Systems Protection Board.

Willy v. Administrative Review Board, 423 F.3d 483 (5th Cir. 2005). The court of appeals held that a terminated in-house attorney may use his former employer’s privileged documents to prove a whistleblower retaliation claim in an administrative proceeding. The court held that its ruling might not apply in jury trials and public proceedings.

Colo. Bar Ass’n, Ethics Opinion 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts, (2007) available at http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth. In a controversial decision, the Colorado Bar Association’s Ethics Committee concluded as follows:

“The practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful. The Committee further concludes that pursuant to Colo.RPC 1.7(c) the client’s consent to waive this conflict cannot be validly obtained. Because Cooperative Law lacks the disqualification agreement found in Collaborative Law, the practice of Cooperative Law is not per se unethical. However, those participating in the Cooperative Law face unique ethical issues and must be mindful of myriad potential ethical pitfalls.”

Settlement Prohibiting Lawyers from Disclosing Public Information. In Formal Opinion 335, the Legal Ethics Committee of the District of Columbia Bar ruled that a settlement agreement that prohibits an attorney from disclosing public information is unethical. Its reasoning is based on Rule 5.6(b) which preserves the client’s right to make a reasoned choice of counsel based on information concerning the knowledge and skill of the lawyer in particular matters. Opinion 335 is available at www.dcbar.org, click “For Lawyers,” click “Ethics/Discipline”. See also Los Angeles County Bar Association Ethics Committee Formal Opinion No. 512, available at www.lacba.org, click “Resources”; New York State Bar Association Formal Opinion 730,
available at www.nysba.org, click “Publications”. In Sealed Party v. Sealed Party, 2006 U.S. Dist. LEXIS 28392 (S.D. Tex., May 4, 2006), the district court took a different view. In that case, the parties reached a confidential settlement and thereafter plaintiff’s attorney issued a press release, summarizing the allegations of the case, announcing that the case had been settled, and disclosing that the client had not wanted to sue his former employer. The court held that plaintiff’s attorney had violated his duty of confidentiality to his client despite the fact that most of the information in the press release was available from public sources.

In researching ethics issues, one should access the blog of Kentucky lawyer Ben Cowgill, www.legalethics.info. His site has a unique feature, the Legal Ethics Search Engine which enables one to search more than 10,000 pages of information and commentary about legal ethics all from a single search page. The site searches the ABA Center for Professional Responsibility, the American Legal Ethics Library at Cornell University, LegalEthics.com, Freivogle on Conflicts, and the Legal Ethics site, Hricik.com (http://www.hricik.com/).


Philip Furgang, Ethics And The Internet (2007) (On file with Author, philip@furgang.com).

Some twenty legal ethics professors signed a letter to the American Bar Association’s committee on ethics and professional responsibility, requesting an opinion regarding the ethics of class action lawyers directly and separately negotiating their attorney’s fees with the settling defendant. See Lester Brickman, Contingency-Fee Con-Men, WALL ST. J., Sept. 25, 2007 at A18. The text of the actual letter can be found at www.cardozo.yu.edu/faculty/brickman.
Florida Bar Advertising Committee Decision (The Florida Bar’s Standing Committee on Advertising held in an unpublished decision that Florida lawyers may advertise issued by the Avvo attorney rating service (https://www.avvo.com) which ranks lawyers on a scale from 1 to 10. According to an Avvo press release dated April 30, 2008, it then rated some nearly 65% of licensed attorneys in the country. The April 8, 2008 decision by the Advertising Committee was a reversal of the position that it had taken unanimously on January 18, 2008.)

Committee on Attorney Advertising, New Jersey Supreme Court, Opinion 39 “Advertisements Touting Designation as ‘Super Lawyer’ or ‘Best Lawyer in America’” (July 2006), available at http://www.judiciary.state.nj.us/notices/ethics/CAA_Opinion%2039.pdf (Stayed by the New Jersey Supreme Court on August 18, 2006 in an unpublished order) (The New Jersey Supreme Court’s Committee on Attorney Advertising in July 2006 issued an opinion finding advertising one’s selection as a “super lawyer” or “best lawyer” was misleading and accordingly unethical. When a petition challenging the committee’s opinion was filed with the New Jersey Supreme Court, the Court in August 2006 granted a stay of the opinion. Thereafter, the Court appointed a special master to develop a factual record. Super Lawyers, Best Lawyers, and Martindale-Hubbell have participated in the proceedings challenging the opinion.).

California State Bar Formal Opinion No. 2008-175, available at http://calbar.ca.gov/calbar/pdfs/ethics/2008-175.pdf (The California State Bar Standing Committee on Professional Responsibility and Conduct issued an opinion finding that an attorney representing a client on a contingency fee basis must not obey the client’s directive to keep a settlement of the case secret from a lawyer who previously represented the client in the matter.).

San Diego County Bar Association Legal Ethics Committee, Opinion 08-01, available at http://www.sdcba.org/ethics/ethicsopinion08-1.html (The San Diego County Bar Association’s Legal Ethics Committee issued an opinion stating that a terminated in-house attorney who desires to sue her former employer may speak confidentially with her own attorney to evaluate possible claims, but in litigation, she may not reveal information unless the disclosure is authorized by a protective order or by a specific exception to the duty of confidentiality or the attorney-client privilege.).

Ethics – Attorney-Client Privilege – The Funneling Issue
"Simply including an attorney in a communication will not render an otherwise discoverable document protected by the privilege." Muro v. Target Corp., 2006 U.S. Dist. LEXIS 86030 (N.D. Ill. Nov. 28, 2006)

"[T]he courts will not permit the corporation to merely funnel papers through the attorney in order to assert the privilege." Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 4 (N.D. Ill. 1980).

Radiant Burners, Inc. v. American Gas Assn., 320 F.2d 314, 324 (7th Cir. 1963) ("Certainly, the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure.")
Barton v. Zimmer Inc., 2008 U.S. Dist. LEXIS 1296 (N.D. Ind. Jan. 7, 2008) (citing Muro and Sneider with approval. The opinion also discusses e-mail strings, stating the following: "E-mails, with sometimes different and multiple recipients and authors, add complexity to the analysis of the attorney-client privilege. See Thompson v. Chertoff, No. 3:06-CV-004 RLM, 2007 U.S. Dist. LEXIS 85221, 2007 WL 4125770, at *2 (N.D. Ind. Nov. 15, 2007). "Email strands can span over several days, and they may have many different recipients and authors." Id. Moreover, some e-mails in which counsel are involved may contain factual information, which is not protected by the privilege, while others within the same strand may contain exclusively legal advice. Id. (citing Muro v. Target Corp., 243 F.R.D. 301, 305 n.4 (N.D. Ill. 2007)); see generally Upjohn, 449 U.S. at 395-96 ("The client cannot be compelled to answer the question 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."); Pippenger, 883 F. Supp. at 1208 ("It is beyond question that the attorney-client privilege does not preclude the discovery [*17] of factual information. Only the communications and advice given are privileged; the underlying facts communicated are discoverable if they are otherwise the proper subject of discovery.").

Baran v. Walsh Construction Co., 2007 U.S. Dist. LEXIS 953 (N.D.Ill. Jan. 4, 2007) (Includes an analysis of facts to determine whether emails sent to the company's lawyer were requests for legal advice and thus privileged.)

Thompson v. Chertoff, 2007 U.S. Dist. LEXIS 85221 (N.D. Ind. Nov. 15, 2007) ("Email part A was originally authored by a non-attorney and the primary recipients included both Darin, an attorney, and several non-attorneys. According to Defendant's log, the email discusses an appropriate response to Thompson's actions. The email includes a suggestion to Darin that Thompson's conduct might be deserving of criminal investigation. This communication is not protected by the attorney-client privilege. The email is not seeking legal advice. The non-attorney author is not seeking legal advice but merely discussing or restating facts to a variety of people in which one of the recipients, Darin, was an attorney. Darin, in effect, simply "sat in" on the communication. See Kodish v. Oakbrook Terrace Fire Protection Dist., 235 F.R.D. 447, 453 (N.D. Ill. 2006) (indicating that an attorney's mere presence does not shield a communication). Finally, a suggestion that a person's activities may be criminal is not seeking legal advice. Simply because legal issues may be implicated does not mean that legal advice is being sought.")

In re: Universal Service Fund Telephone Billing Practices Litigation, 2005 U.S. Dist. LEXIS 39804 (D.Kan. 2005) ("There is also a distinction between a conference with counsel and a conference at which counsel is present; the mere presence of counsel at a meeting does not make all communications during that meeting privileged.").

Ethics – Common Interest Rule

Minebea Co., Ltd. v. Papst, 228 F.R.D. 13 (D.D.C. Apr. 29, 2005) (Judge Friedman, in discussing the "joint defense" privilege, often referred to as the "common interest rule", held that, while a "written agreement is the most effective method of establishing the existence of a joint defense agreement, although an oral agreement whose existence, terms and scope are proved by the party asserting it, may be enforceable as well. See United States v. Hsia, 81 F. Supp. 2d at 17. As Professor Saltzburg has suggested: "The parties need not agree in writing to pursue a common
interest; the doctrine permits an exchange of confidential information when the parties have clearly and specifically agreed in some manner to pool information for a common goal. Nonetheless, it is certainly prudent practice to execute a written agreement before significant communications are exchanged. This would eliminate any doubt about whether the parties to the discussion were pursuing a common goal with respect to the matters communicated. Without a written agreement, the party's burden of proving that a statement was made in the common interest will undoubtedly be more difficult."

Miller v. Holzmann, 240 F.R.D. 20 (D.D.C. Feb. 2, 2007) (Magistrate Judge Facciola in a False Claims Act case recognizes that the government and the relator have a common interest in the prosecution of a common defendant. Here, when relator's counsel tendered documents to the government, counsel made it clear in the first page of an accompanying letter that he was continuing to assert that the documents being tendered would continue to be privileged because of what he called "the common interest doctrine" and that providing them to the government would not alter their privileged status. The court rejected the defense's argument that the government and the relator had to be completely aligned, and that they could not not be because of the possibility of criminal prosecution of the relator. Judge Facciola recognized that a relator might very well have been complicit in the submission of the false claims and that the common interest privilege is not forfeited because there is a theoretical possibility that the government may be interested in the relator as a defendant in any criminal or civil action it might bring.).

See also Katherine Taylor Schaffzin, An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It, 15 B.U. PUB. INT. L.J. 49, 61-65 (2005) (noting that some courts require identical interests, some do not, and some find common interest when parties otherwise have conflicting interests); George S. Mahaffey Jr., Taking Aim at the Hydra: Why the "Allied-Party Doctrine" Should Not Apply in Qui Tam Cases When the Government Declines to Intervene, 23 REV. LITIG. 629, 670 (2004) ("What are we left with? It seems that courts are confused about the scope and applicability of the allied-party doctrine. This confusion, unfortunately, only worsens when the issues have come to light in the qui tam context.").

Intex Recreation Corp. v. Team Worldwide Corp., 471 F. Supp. 2d 11 (D.D.C. Jan. 5, 2007) (Magistrate Judge Robinson recognizes the joint defense privilege, and relying on Minebea, 228 F.R.D. 13 (D.D.C. Apr. 29, 2005), holds that an oral agreement may provide the basis for the privilege although a written agreement is the most effective method of establishing the existence of a common interest agreement.).

U.S. ex rel. Purcell v. MWI Corp., 209 F.R.D. 21 (D.D.C. Aug. 26, 2002) (Judge Urbina recognizes both a joint-defense privilege and a common-interest privilege, recognizing that the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine. Judge Urbina goes on to recognize that the joint-prosecutorial privilege is a parallel privilege to the joint defense privilege he notes that the Fourth Circuit has explicitly included both defendants and plaintiffs when applying the joint privilege (In re: Grand Jury Subpoenas 902 F.2d 244, 249 (4th Cir. 1990)). Finally, Judge Urbina finds that the joint-prosecutorial privilege exists in False Claims Act cases, stating: "In fact, the unique relationship of the government and the relator in the qui tam cases requires the
sharing of the work product generated between the relator and his attorney with the government in order for the case to proceed... In FCA cases, the government's intervention still maintains a common interest between the government and the relator and the parties' attorneys may logically choose to share communications and written materials as though they are functioning as joint parties.”)

**Ethics – Company Computer – Waiver of Attorney-Client Privilege**

**In re: Asia Global Crossing, Ltd.,** 2005 Bank R. LEXIS 415, 322 B.R. 247 (BANKR.S.D.N.Y. Mar. 21, 2005) (A Bankruptcy Court Judge held that the use of a company’s e-mail system by an employee to send personal emails to the employee’s personal attorney does not, without more, waive any attorney-client privilege in such communications. Whether a waiver had occurred must instead be resolved by examining the employee’s subjective and objective expectations that the communications would be confidential).

**TransOceanCapital, Inc. v. Fortin,** 2006 WL 3246401 (Mass. Super. Oct. 20, 2006) (Where the evidence was clear that an employer did not notify employees of a policy prohibiting personal email use, the Massachusetts Superior Court concluded that an employee’s emails sent from the office computer to his lawyer remained privileged).

**Curto v. Medical World Communications, Inc.,** 2006 WL 1418387 (E.D.N.Y. May 15, 2006) (The court held that the existence of a computer usage policy prohibiting personal computer use did “not end the issue” because the company’s lack of enforcement created a “false sense of security” that “lulled employees into believing that the policy would not be enforced”).

101
Scott v. Beth Israel Medical Center, 2007 WL 3053351 (N.Y. Sup. Ct. October 17, 2007) (Relying upon the four-factor test of Asia Global Crossing, 322 B.R. 247 (2005), the Court held that the second factor was satisfied because the employer’s policy “allows for monitoring” even though the employer acknowledged that it had not monitored the employee’s emails).

National Economic Research Associates v. Evans, 2006 WL 24400088 (Mass. Super. August 3, 2006) (When an employee sent emails from and received emails on his office computer through an internet-based account or on a company-issued computer used at home, the Massachusetts Superior Court upheld attorney-client privilege for emails sent and received by an employee through a Yahoo account, using his company-issued laptop).

Long v. Marubeni America Corp., 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) (Where the employees communicated with their attorneys through password-protected internet-based email accounts, not the company’s email system, the court, relying on the company’s policy that it had warned employees that they had “no right of personal privacy in any matter stored in, created, received, or sent over the e-mail... and/or internet systems” held that the employees could not claim privilege over the contents of emails that were found in the temporary internet files of their office computers).


Haynes v. Office of Atty. Gen. Phill Kline, 298 F.Supp.2d 1154 (D.Kan. 2003) (former assistant attorney general was entitled to preliminary injunctive enjoining a state Attorney General's Office from accessing personal files and e-mail communications stored on his work computer following his termination; plaintiff had a subjective expectation of privacy in the personal files stored on his work computer, and this expectation was objectively reasonable
under the Fourth Amendment; although a computer use policy was displayed daily on his computer stating that there was no expectation of privacy in the computer system, he was told he could put personal information in a private file so no one could access it).

**Ethics – Ghostwriting**


United States District Court for the District of Maryland Local Rule (1)(a)(ii), available at http://www.mdd.uscourts.gov/LocalRules/localrules2008b.pdf ("Attorneys who have prepared any papers which are submitted for filing by a pro se litigant must be members of the bar of this Court and must sign the paper, state their name, address, telephone number and their bar number assigned by this Court.")


Utah Eth. Adv. Op. 08-01, (Utah St. Bar 2008), available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/pdf/08_01.pdf (The Utah State Bar Ethics Advisory Opinion Committee stated that a Utah attorney may provide legal assistance to a pro se litigant and assist a pro se litigant in preparing court filings without notifying the court of the lawyer’s participation or assuring that the pro se litigant did so. The Committee’s opinion indicated that Utah lawyers who appear before the Tenth Circuit must comply with Duran v. Carris 238 F.3d 1268 (10th Cir. 2001). In Duran, the Tenth Circuit criticized a New Mexico lawyer for ghostwriting an appellate brief. One member of the committee wrote a lengthy dissenting opinion which was joined by two other members.).


State Bar of Arizona Ethics Committee, Limited Scope Representation; Candor to Tribunal; Fees, Op. 05-06 (July 2005), available at http://www.myazbar.org/Ethics/opinionview.cfm?id=525


New Jersey Supreme Court Advisory Committee on Professional Ethics, Duties of Attorneys Providing Limited Legal Assistance or “Unbundled” Legal Services to Pro Se Litigants, Op. 713 (January 28, 2008), available at http://lawlibrary.rutgers.edu/ethics/acpe/acp713_1.html

**Ethics – Lawyer as a Witness**

“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.” Model Rules of Prof’l Conduct R. 3.7(a).

Lebovic v. Nigro, 1997 WL 83735 (E.D. Pa. 1997). “[Rule 3.7] does not preclude an attorney from representing a client when the attorney will likely be a necessary witness, but only prevents an attorney from acting as an ‘advocate at trial’ in such a case.”

**Ethics – Metadata**

New York County Lawyers’ Association Committee on Professional Ethics, Op. 738 (March 24, 2008) (The committee concluded that a lawyer generally may not explore or use metadata in electronic document received from opposing counsel unless the lawyers had some sort of understanding to the contrary). http://www.nycla.org/siteFiles/


NATIONAL SECURITY AGENCY, REDACTING WITH CONFIDENCE: HOW TO PUBLISH SANITIZED REPORTS CONVERTED FROM WORD TO PDF (December 13, 2005), http://www.fas.org/sgp/othergov/dod/nsa-redact.pdf.


Ethics – Misrepresentations During Investigations

European Union – Data Protection Directive


The Article 29 Working Party, the group of national data-privacy regulators from each European Union nation, has held that the E.U. rules on how a person’s internet address or search history is stored applied to internet search engines based outside Europe. Those rules provide that a person must consent to data being collected and be given the right to object and to verify the information. According to the Working Party, the rules apply to companies headquartered outside the European Union that have “an establishment” in one of the E.U. member states, or that use automated equipment based in a member state for processing personal data. Article 29


Evidence
United States v. Roxworthy, 457 F.3d 590 (6th Cir. 2006). A company had prepared tax information with an accounting firm. The IRS investigated, and sought an order in court to produce those documents when the company refused on the basis of Federal Rule of Civil Procedure 26(b)(3), which protects information prepared in the “anticipation of litigation.” Although the district court found for the IRS, the appellate court reversed, holding that the company had faced an objective, reasonable possibility of litigation.

Reg’l Airport Auth. v. LFG, LLC, 460 F.3d 697 (6th Cir. 2006). The Sixth Circuit held that Federal Rule of Civil Procedure 26(a)(2)(B) required that information communicated to testifying experts must also be given to the opposing counsel. This ruling encompassed attorney work product. The federal courts are split on this latter question of attorney work product, but the majority has ruled in the same manner as the Sixth Circuit. See In Re Pioneer Hi-Bred International, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001).

Tomassi v. Insignia Financial Group, Inc., 478 F.3d 111 (2d Cir. 2007) The Second Circuit holds that the supervisor’s numerous comments about the plaintiff’s age were not “stray” remarks. In so ruling, the court stated: “The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class. Inoffensive remarks may strongly suggest that discrimination motivated a particular employment action. . . . [W]e do not understand why [the trial court] characterized [the supervisor’s] remarks as stray. The remarks were made by the person who decided to terminate [the plaintiff]. They could reasonably be construed, furthermore, as explaining why that decision was taken.”

Nichols v. Am. Nat’l Ins. Co., 154 F.3d 875 (8th Cir. 1998). The Eighth Circuit held that expert witnesses are not allowed to testify regarding “psychiatric credibility” in a sexual harassment case, as it is a direct commentary on the credibility of the witness, disguised as a medical opinion. Further, evidence regarding the Plaintiff’s abortion was erroneously and prejudicially admitted. Last, the appeals court held that the trial court should have admitted evidence of sexual harassment where it was within the scope of her administrative complaint.

Structural Preservation Systems, Inc. v. Petty, 2007 D.C. App. LEXIS 390 (D.C. Cir. June 21, 2007). The Court of Appeals reversed the trial court on the issue of allowing the Plaintiff’s treating physician to testify as to the correctness of a diagnosis or reasonableness of the fees of another physician. The appeals court identified this type of testimony as expert testimony because it “tends to be of the type associated with preparation for litigation, rather than simply treating the patient.” Thus, the physician’s testimony was subject to discovery prior to trial under Fed. Rule of Evid. 26(b)(4).
Haley v. City of Plainfield, 169 Fed. Appx. 670 (3d Cir. 2006). The court rejects statistical evidence because it fails to account for "the qualified applicant pool for the position at issue or the flow of qualified candidates over the relevant time period", stating that "a mere summary of the demographic composition of the applicant pool is insufficient."


Barfield v. Orange Co., 911 F.2d 644 (11th Cir. 1990). The Court of Appeals approved the admission of an EEOC determination because the EEOC materials suffered from no defects in trustworthiness.

Plummer v. Western Int’l Hotels Co., Inc., 656 F.2d 502 (9th Cir. 1981). “A civil rights plaintiff has a difficult burden of proof, and should not be deprived of what may be persuasive evidence.”


Hernandez v. City of Vancouver, 2008 U.S. App. LEXIS 8336 (9th Cir. April 14, 2008) (The 9th Circuit, in reversing summary judgment for the employer, admitted into evidence the affidavit of the plaintiff’s attorney which recounted two out-of-court statements, the first being a conversation that the attorney had with the individual defendant in which that defendant admitted that the plaintiff was subjected to racial discrimination, and the other statement admitted was by a co-worker about racial insinuations that he overheard. The first statement was admitted as a party admission under Federal Rule of Evidence 801(d)(2)(A) and the latter was admitted as evidence of the employer’s racially discriminatory motive).

Evidence – Agency Determinations

EEOC v. Columbia Alaska Reg’l Hosp., 126 Fed. Appx. 382 (9th Cir. 2005). The court held that an investigator’s confidential report to his supervisor was not a “finding of fact or a determination on behalf of or by the agency,” and, as such, did not fall under the hearsay exception of Rule 803(8)(C).

Kasper v. City of Middletown. 352 F.Supp.2d 216 (D.Conn. 2005). The court held that agency correspondence is not inadmissible hearsay, but falls under the exception of Rule 803(8)(C).

Roebuck v. Washington. 408 F.3d 790 (D.D.C. 2005). Evidence that the plaintiff had filed as many as ten previous sexual harassment complaints was sufficient to discount plaintiff’s explanation for the delay in filing her complaint with her employer.


Beachy v. Boise Cascade Corp., 191 F.3d 1010 (9th Cir. 1999). “[A]n agency's determination that insufficient facts exist to continue an investigation is not per se admissible in the same manner as an agency's determination of probable cause … There is a much greater risk of unfair prejudice involved in introducing a final agency ruling as opposed to a probable cause determination, because a jury might find it difficult to evaluate independently evidence of discrimination after being informed of the investigating agency's final results.”

Paolitto v. John Browne E & C, Inc., 151 F.3d 60 (2d Cir. 1998). District courts generally have discretion regarding admissibility of employment agency investigation findings because of concerns revolving around unfairly prejudicing a jury.

Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995). “It is reversible error for the district court to exclude an Equal Employment Opportunity Commission (EEOC) probable cause determination from a Title VII trial. The probative nature of the EEOC probable cause determination far outweighs the prejudicial effect it may have on a jury.”


Goldbert v. B. Green and Company, Inc., 836 F.2d 845 (4th Cir. 1988). District courts have discretion regarding employment agency findings even during summary judgment hearings, where unfair prejudice to a jury is not in play.

Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988). “A plaintiff's litigiousness may have some slight probative value, but that value is outweighed by the substantial danger of jury bias against the chronic litigant.”

Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986). A letter of violation issued by the EEOC is not per se admissible.


Evidence – Attorney-Client Privilege
Vincent S. Walkowiak, Attorney-Client Privilege in Civil Litigation, American Bar Association (3d. ed. 2005)

Evidence – Character & Reputation

“[E]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.” Fed. Rule Evid. 404(a).

Zubulake v. UBS Warburg LLC, 382 F. Supp. 2d 536 (S.D.N.Y. 2005). “Because this is an employment discrimination case, plaintiff’s character is not in issue … no matter how defendants try to frame their intended use … they are seeking to introduce inadmissible propensity evidence.

B.K.B. v. Maui Police Department, 276 F.3d 1091 (9th Cir. 2002). “[I]n a sexual harassment lawsuit, as in any civil case, evidence offered to prove a victim’s sexual behavior or sexual predisposition is admissible only if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.” The court upheld attorney’s fee sanctions against the defense for knowing and reckless violation of Rule 412, and upheld emotional distress damages for the plaintiff for her humiliation caused by the evidence being admitted.

Beard v. Flying J., Inc., 266 F.3d 792 (8th Cir. 2001). Because the plaintiff knew the defendant planned to introduce evidence of her sexual conduct, the failure to adhere to the procedural requirements of Rule 412(c) was harmless, and the evidence was properly admitted.

Wolak v. Spucci, 217 F.3d 157 (2d Cir. 2000). Evidence of plaintiff’s sexual activities (viewing pornography and watching sexual acts) outside of the workplace fell under Rule 412 and were not admissible to show the welcomeness of the defendant’s advances.

Socks-Brunot v. Hirschvogel, Inc., 184 F.R.D. 113 (S.D. Ohio 1999). The court refused to allow evidence as to the plaintiff’s explicit conversations and flirtatious behavior at the workplace where the conversations and behavior were not witnesses or overheard by the defendant, but did allow evidence that the plaintiff used the word “cunt” and the defendant claimed to have witnessed it.

Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999). The district court was within its discretion in refusing to admit evidence of a sexual relationship between the plaintiff and her harasser (her ex-husband) outside of the workplace.

Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998). The district court was within its discretion in refusing to admit “evidence concerning plaintiff’s moral character and the
marital status of her boyfriend,” while allowing evidence that plaintiff’s relationship distracted her from work and that she exhibited flirtatious behavior towards her alleged harasser.

Gallagher v. Delaney, 139 F.3d 338 (2d Cir. 1998). Evidence that plaintiff was having an affair with a coworker did not permit an inference that the harasser’s advances were not unwelcome.

Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997). The trial court did not err in admitting evidence of plaintiff’s sexual history in a case seeking damages for transmission of genital herpes because the evidence was “highly relevant” to liability.

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507 (D.C. Cir. 1995). Evidence of plaintiff’s poor performance record was inadmissible character evidence when the defendant was not aware of her record when plaintiff was fired.

McLean v. United States, 377 A.2d 74 (D.C. 1977). “Reputation testimony should not be admitted except in the most unusual cases where the probative value is precisely demonstrated and outweighs the prejudicial effect of the testimony.”


Evidence – Decision Making Authority
DiCarlo v. Potter, 358 F.3d 408 (6th Cir. 2004). “[A]lthough direct evidence generally cannot be based on isolated and ambiguous remarks, when made by an individual with decision-making authority, such remarks become relevant in determining whether there is enough evidence to establish discrimination.”

Fears v. Heritage Ctrs., 2004 WL 1824126 (W.D.N.Y. 2004). The court held that a racial slur, made eight months before the plaintiff’s discharge, was not related to the decision-making process, and, as such, was not admissible.

Saulsberry v. St. Mary’s Univ., 318 F.3d 862 (8th Cir. 2003). Evidence of comments made by a receptionist and administrative assistant were inadmissible, as they were not made by decision-makers.

Robin v. Espo Eng’g Corp., 200 F.3d 1081 (7th Cir. 2000). Random comments that are not related to the decision-making process are not admissible.

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 408 (6th Cir. 1998). “[R]emarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, [are] relevant.”

Griffin v. Washington Convention Ctr., 142 F.3d 1308 (D.C. Cir. 1998). “Evidence of a subordinate’s bias is relevant where the ultimate decision maker is not insulated from the subordinate’s influence.”
Ryder v. Westinghouse Elec. Corp., 128 F.3d 128 (3d Cir. 1997). “To determine whether an ageist statement made by a corporate executive is relevant as evidence of "corporate culture," which would circumstantially prove a discriminatory animus, the court must, evaluate factors pertaining to the declarant's involvement in recognizing a formal or informal managerial attitude, including the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action.”

Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994). The court held that to determine whether statements made by the employer are probative, four factors should be considered: “whether the comments were made by a decision maker or by an agent within the scope of his employment; whether they were related to the decision-making process; whether they were more than merely vague, ambiguous, or isolated remarks; and whether they were proximate in time to the act of termination.”

Evidence – Discrimination
Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004). “Evidence of widespread toleration of racial harassment and disparate treatment condoned by management was relevant to its motive in firing [the plaintiff].”

Whittaker v. Fayette County, 65 Fed. Appx. 387 (3d Cir. 2003). Proximity in time and similarity of two employees’ terminations is relevant as to intent.

Cruz v. Coach Stores, Inc., 202 F.3d 560 (2d Cir. 2000). In a hostile environment case, “[b]ecause the crucial inquiry focuses on the nature of the workplace environment as a whole, a plaintiff who herself experiences discriminatory harassment need not be the target of other instances of hostility in order for those incidents to support her claim.”

Hurley v. Atlantic City Police Dept., 174 F.3d 95 (3rd Cir. 1999). The evidence of the harassment of other women can be relevant to show when the defendant knew of or show have known about the occurrence of harassment.

Bickerstaff v. Vassar Coll., 196 F.3d 435 (2d Cir. 1999). The court held that “statistical reports may be admissible to support an inference of discrimination.

Danzer v. Norden Sys., 151 F.3d 50 (2d Cir. 1998). The court held that comments made two and a half years before the plaintiff was fired were admissible because they were part of a continuous sequence of events leading to the discharge.

Rendine v. Pantzner, 141 N.J. 292 (1995). Witness testimony of similar discriminatory actions were admissible to show motive.

Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995). Testimony of harassment of other employees is relevant to prove discriminatory motive.
Glass v. Philadelphia Elec. Co., 34 F.3d 188 (3d Cir. 1994). Background evidence may be necessary to show unlawful motive.

Leblanc v. Great Am. Ins. Co., 6 F.3d 836 (1st Cir. 1993). The central focus in a disparate treatment case "is less whether a pattern of discrimination existed [at the company] and more how a particular individual was treated, and why."

Schrand v. Federal Pacific Elec. Co., 851 F.2d 152 (6th Cir. 1988). Because the plaintiff was not attempting to establish a pattern and practice case, “me too” evidence was not relevant.

Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984). The court held that evidence that the employer fired ten people in the suspect class over an eleven year period was not sufficient to support an inference of discrimination.

See also John P. Barry, Strategies for Excluding “Me, Too” Evidence, Employment Law Strategist (2000).

Evidence - Electronic
Victaulic Company v. Tieman, 2007 U.S. App. LEXIS 20077 (3d Cir. July 11, 2007). The Third Circuit, holding that it had jurisdiction over the interlocutory dismissal of claims related to a covenant not to compete because the dismissal effectively denied a request for a preliminary injunction, vacated the lower court’s determination of the reasonableness of the covenant which it based on the pleadings.

The opinion contains an interesting evidentiary discussion regarding internet discovery. The lower court had relied upon the website of the Plaintiff company to establish certain facts about its business. The court noted that it took judicial notice only from sources not subject to dispute, and here, referencing a Seventh Circuit and California federal district court opinions, found that printouts from a website do not bear the indicia of reliability demanded for other self-authenticated documents under Rule 902 of the Federal Rules of Evidence.

Evidence – Outside Stressors
Gage v. Metropolitan Water Reclamation Dis. Of Greater Chicago, 365 F.Supp. 2d 919 (N.D. Ill. 2005). In a Title VII case, the court held that the defendant could not offer evidence regarding outside stressors in response to liability, but could enter evidence regarding the plaintiff’s stress arising out of being a single parent with respect to damages for emotional distress.

Evidence – Prior Acts
Nat’l R.R. Passenger Co. v. Morgan, 536 U.S. 101 (2002). The Supreme Court held that time barred discriminatory acts may still be used as background evidence “in support of a timely claim.”
Connecticut v. Teal, 457 US 440 (1982). The Supreme Court held that evidence of “no sex discrimination” against other women was inadmissible.

Zubulake v. UBS Warburg LLC, 382 F. Supp. 2d 536 (S.D.N.Y. 2005). The court left open the question of whether testimony of alleged discriminatory conduct at past employers could be admitted, but stated that admittance was “highly unlikely”.

Johnson v. Elk Lake School District, 283 F.3d 138 (3d Cir. 2002). To be admitted, the past act must be “sufficiently similar to the type of sexual assault allegedly committed by the defendant.”

Green v. Adm’s of the Tulane Educ. Fund., 284 F.3d 642 (5th Cir. 2002). Testimony of prior complaints against the alleged harasser was properly admitted to prove the university was on notice that the alleged harasser might have been sexually harassing women.

Hatley v. Hilton Hotels Corp., 308 F.3d 473 (5th Cir. 2002). Testimony of other employees who had previously made sexual harassment complaints about the same alleged harassers and whose complaints were not properly addressed was admissible to show that the defendant did not take effective remedial measures to correct or prevent harassment.

Griffin v. City of Opa-Locka, 261 F.3d 1295 (11th Cir. 2001). Evidence of prior sexual harassment at previous jobs by the alleged harasser was admissible to show the defendant was indifferent in hiring the alleged harasser.

United States v. Thomas, 134 F.3d 975 (9th Cir. 1998). “[E]vidence of prior good acts is admissible under Rule 404(b) to prove the defendant’s intent or state of mind [in an entrapment defense] as long as it ‘bears meaningfully on the defendant’s lack of a criminal disposition at the time of the government’s inducement.’”

Frank v. County of Hudson, 924 F. Supp. 620 (D.N.J. 1996). Evidence of past instances of sexual abuse involving a child were inadmissible due to the potential for unfair prejudice.

United States v. Camejo, 929 F.2d 610 (11th Cir. 1991). “Evidence of good conduct is not admissible to negate criminal intent”.

Evidence - Spoliation
Loveless v. John’s Ford, Inc., 2007 U.S. App. LEXIS 11001 (4th Cir. 2007). The defense had argued that the District Court was obliged to grant it judgment as a matter of law or a new trial because it claimed that plaintiff’s damages expert engaged in the spoliation of evidence. The Court of Appeals found no evidence that the destruction was so egregious as to warrant judgment as a matter of law.

Ortega v. City of New York, 2007 N.Y. LEXIS 2715 (N.Y. 2007). The New York Court of Appeals, in a scholarly exposition of the law of negligent spoliation of evidence, rejected the plaintiff’s claim which sought to create a independent claim for spoliation of evidence by a third
party, here the City of New York which negligently destroyed an automobile involved in an accident before experts for the plaintiff could examine the car to determine causation of a fire.

**Executive Compensation**


Maybe Angelo R. Mozilo, CEO of Countrywide Financial Corp., heard the thundering hooves of judges like Judge James Rosenbaum when he decided to forego approximately $37.5 million in severance pay, fees and perks that he was scheduled to receive upon his retirement. Mr. Mozilo announced that in addition to cash severance payments, he has decided to forego $400,000 per year that he would have been paid under an agreement to consult the company in his retirement and also agreed to forego perks such as the use of a private airplane. Now, before anyone gets teary eyed about Mr. Mozilo's "losses", it is estimated that his payout, after foregoing the above, will exceed $110 million.

*In re UnitedHealth Group Incorporated Shareholder Derivative Litigation*, 2007 U.S. Dist. LEXIS 94616 (D. Minn. 2007). Judge Rosenbaum stated the following with respect to some $600 million after tax payments being made to the company's former CEO, Bill McGuire: Words such as "huge," "fantastic," "astounding," "staggering," or "astronomical," do not describe $1 billion. Such a sum can only be thought of as 'transcendent,' or in terms of the gross national product of smaller members of the United Nations. Judge Rosenbaum froze McGuire's stock options valued at some $600 million after taxes, even though McGuire had earlier agreed to surrender $420 million in options and other benefits.

**Executive Compensation - § 409A**


Joan Disler et al., “Executive Agreements After the § 409A Final Regulations” (May 2, 2007) (unpublished presentation on file with Epstein Becket & Green, P.C.).


On October 22, 2007, the IRS issued Notice 2007-86, which provides that executive compensation plans need not be amended until December 31, 2008, as long as they are in good faith compliance with 409A. It is available at www.treasury.gov/press/releases/reports/notice200786%20_checked__checked_.pdf.

**Ex Parte Interviews Treating Physician**

*Arons v. Jutkowitz*, 9 N.Y.3d 393 (N.Y. Ct. App. 2007) (The New York Court of Appeals held that opposing counsel may conduct informal interviews with treating physicians of a party that has injected his/her medical condition into the dispute. In any such interviews, the procedural requirements of the Privacy Rule issued under the 1996 HIPAA must be followed). See also *Seibert v. Intuit*, 8 N.Y. 3d 506 (N.Y. 2007) (defense attorneys allowed to have ex parte communications with a former executive of a securities firm who had taken part in the events involved in the litigation so long as measures are taken to steer clear of privileged or confidential information).

**Expert Witness Testimony**

Drs. Groover, Christie, and Merritt, P.C. v. Burke, 917 A.2d 1110 (D.C. 2007). The D.C. Court of Appeals held that it was not reversible error for the plaintiff to fail to formally designate a physician in his pre-trial Rule 26(b)(4) disclosure statement by name as an expert witness, where there were sufficient other indications that he would be testifying as an expert at trial.
Linn v. Fossum, 2006 Fla. LEXIS 2590 (Fla. Nov. 2, 2006). The Florida Supreme Court found that, where an expert witness solicits the opinions of other experts who lack firsthand knowledge of the case at hand, this information does not constitute facts or data, but rather unverifiable hearsay opinions, and accordingly the admission of such expert testimony by the lower court, not being harmless error, resulted in a reversal.


Structural Preservation Systems, Inc. v. Petty, 927 A.2d 1069 (D.C. 2007) (The D.C. Court of Appeals held it was reversible error to allow a treating health care provider to offer expert testimony as the testimony had not been disclosed under Rule 26(b)(4) as expert testimony).

Expert Witness – Mental Health
Collins v. Prudential Inv. and Retirement Serv., 119 Fed. Appx. 379 (3d Cir. 2005). The court held that the treating physician could not answer questions going beyond diagnosis and treatment when the treating physician was not listed as an expert witness.

Lamere v. New York State Office for the Aging, 223 F.R.D. 85 (N.D.N.Y. 2004). The court held that the treating physician was an expert under Rule 702, and that, although the defendants did not retain her as an expert, she was entitled to reasonable fees.

Brown v. Ryan’s Family Steak House, Inc., 113 Fed. Appx. 512 (4th Cir. 2004). Plaintiff’s treating physician was entitled to testify on the deceased plaintiff’s mental well-being without meeting Daubert standards because the opinion “was based on his perception of [the plaintiff] and her ailments, not on ‘scientific, technical, or specialized knowledge,’” and he was the most qualified person available to testify to the plaintiffs mental state.

Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213 (11th Cir. 2003). Testimony by employees of the ship repair company about rudder repairs were lay testimony subject to Rule 701, rather than expert testimony.


Expert Witness – Work Product Doctrine
Banks v. Office of Senate Sergeant-at-Arms, 222 F.R.D. 7 (D.D.C. 2004). The court held that not only can failure to produce a privilege log constitute a waiver of asserted privileges but that it may also be sanctionable.

Lugosch v. Congel, 219 F.R.D. 220 (N.D.N.Y. 2003). The court held that “[d]isclosure of all data and information considered by expert is required by federal civil rule governing expert disclosure, notwithstanding presence of work product considerations codified in federal civil rule, and if attorney's impressions and theories of case are considered by expert, they too should be revealed,” and that failing to provide a privilege log constitutes a waiver of asserted privileges.

Musselman v. Phillips, 176 F.R.D. 194 (D.Md. 1997). “When an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion testimony at trial—whether factual in nature or containing the attorney's opinions or impressions—that information is discoverable if it is considered by the expert.”

**Extraterritoriality**

Shekoyan v. Sibley International Inc., 409 F.3d 414 (D.C. Cir. 2005). The Court of Appeals held that Title VII does not apply to a lawful permanent resident alien employed outside the United States.


O’Mahoney v. Accenture, 537 F. Supp. 2d 506 (S.D.N.Y. Feb. 5, 2008) (The district court declined to decide whether Congress intended section 1514A of SOX to confer extraterritorial jurisdiction). See also* Carnero v. Boston Scientific Corp.*, 433F.3d 1 (1st Cir. 2006). (A citizen of Argentina and resident of Brazil sued the United States parent corporation of plaintiff’s former Latin American employers, under section 1514A, alleging he was terminated in retaliation for informing the company about fraud accruing at two Latin American subsidiaries. The court held that a foreign employ complaining of misconduct abroad by overseas subsidiaries could not bring a claim under section 1514A against the United States parent company).

**Extraterritoriality – Jurisdiction**


**Fair Credit Reporting Act**

Kelchner v. Sycamore Manor Health Center, 135 Fed. Appx. 499 (3d Cir. 2005). Here, the plaintiff employee appealed a district court grant of summary judgment to employer. The employee brought suit when she was terminated for refusing to sign a form that permitted the employer to conduct investigative consumer reports for employment related purposes. The Court of Appeals held that employee was not wrongfully terminated and that the FCRA did not prohibit the employer from taking adverse action against the employee for failing to sign the authorization.

There have been a spate of claims filed around the country under the Fair Credit Reporting Act ("FCRA") class action, asserting that prescreened credit offers that, once
responded to, permit access to a consumer's credit information, do not constitute a "firm offer of credit" for purposes of the FCRA and therefore the accessing of the individual's credit information violated the FCRA. See e.g., Cole v. U.S. Capital Inc., 389 F.3d 719 (7th Cir. 2004). See also April B. Chang, Valuables in Your Mailbox? How the Concept of Value in Cole v. U.S. Capital Inc. Enhances the FCRA's Guidelines Concerning Creditor Marketing, 10 N.C. Banking Inst. 209 (March 2006).

Zurich Am. Ins. Co. v. Fieldstone Mortg. Co., 2007 U.S. Dist. LEXIS 81570 (D. Md. 2007). Fieldstone Mortgage Company was sued in federal district court in Illinois on an FCRA claim. Fieldstone submitted the claim to its commercial general liability carrier, Zurich American Insurance Co., contending that Zurich had a duty to defend. Zurich agreed to defend under a complete reservation of rights, including the right to seek declaratory relief, the right to withdraw from the defense, and the right to seek reimbursement of defense costs. Thereafter, Zurich filed a declaratory judgment action in federal district court in Maryland, seeking a declaration that it had no duty to defend or to indemnify. Fieldstone counterclaimed and sought summary judgment on Zurich's duty to defend under the coverage for "personal and advertising injury." Zurich cross-motioned for summary judgment. Judge Blake held that there was coverage, and ordered Zurich to defend. Zurich argued that the policy's "advertising injury" language did not cover the FCRA claims and asserted, alternatively, that a policy exclusion precluded coverage. The court reviewed the right to privacy argument, with Zurich contending that FCRA does not establish a "right of privacy" recognized by the insurance policy, relying on Resource Bancshares Corp. v. St. Paul Mercury Insurance Co., 407 F.3d 631 (4th Cir. 2005). Judge Blake pointed out that Resource Bancshares made a distinction between two types of potentially affected privacy rights, one involving the manner of the advertisement and the other involving the content of the advertisement. In Resource Bancshares, the court found that the underlying statute, the Telephone Consumer Protection Act, was intended to protect consumers only from the intrusive nature of junk faxes - not the content of the faxes themselves.

Here, Judge Blake noted that the opposite situation was present - the Illinois FCRA lawsuit against Fieldstone involved not only the manner of Fieldstone's solicitation but also the message's content - the unauthorized accessing of the plaintiff's credit records.

The court then analyzed whether the term "publication" had been met by the facts and circumstances of this case - the word "publication" not being defined in the policy. Zurich argued that for it to constitute a "publication", the information that violated the right of privacy must be divulged to a third party. Judge Blake found that the majority of the circuits that have examined that question in the context of an "advertising injury" provision have found that publication to a third party is not an essential element of the claim.

Based on this analysis, Judge Blake concluded that Zurich had been obligated to pay Fieldstone's legal fees to defend as it had done during the pendency of the litigation. Fieldstone argued that Zurich was obligated to pay its legal fees associated with its defense against the declaratory judgment action and Judge Blake agreed, stating that "the benefit Fieldstone bargained for would be substantially dissipated if Fieldstone were forced to pay the costs of the suit brought by Zurich seeking to avoid its obligations."

False Claims Act

New York False Claims Act - New York has enacted a new False Claims Act (FCA), in response to a New York Times series on abuses of the Medicaid system in the state. New York is the sixteenth state, plus D.C. and the federal government, to enact an FCA.


United States ex rel. El-Amin v. The George Washington Univ., 2007 U.S. Dist. LEXIS 32166 (D.D.C. May 2, 2007). False Claims Act case where plaintiff (relator) signed a global release in another setting, and subsequently is relator in False Claims Act litigation. Defendant argues that global release bars the plaintiff in False Claims Act case, but this argument is rejected by the court, relying on public policy reasons, as has been the trend in most courts.

United States ex rel. Longhi v. Lithium Power Techs., Inc., 481 F. Supp. 2d 815 (S.D. Tex. 2007). The district court held that a relator who, subsequent to filing a False Claims Act action under seal, executed a general release in conjunction with a stock sale agreement as well as a covenant agreeing not to sue the defendant, was nonetheless not precluded from proceeding with the False Claims Act case. The district court stated as follows: “First, the release is invalid because of public policy demands and the pro-plaintiff posture of the FCA. Second, the release is also invalid under the plain language of the FCA. Statutory construction suggests that a release entered into during the proscribed 60-day investigatory period unduly interferes with the United States' exclusive and unilateral right during that time to evaluate whether to join the qui tam action. Defendants argue that the release should be analyzed under contract law. Even in the event that the court performed such a review, the defendants have not met their burden for summary judgment. However, such an analysis here would be contrary to the federal common law principles expressed in Town of Newton v. Rumery, 480 U.S. 386, 107 S. Ct. 1187 (1987). Therefore, the court declines the invitation. In addition, defendants' counterclaim for breach of contract and indemnification must collapse under the same analysis as the release, because one cannot exist without the other. And finally, case law squarely on point suggests that any indemnification of a qui tam defendant by the relator fails as a matter of law.”

Shekoyan v. Sibley International Inc., 409 F.3d 414 (D.C. Cir. 2005). The Court of Appeals held that the plaintiff-employee did not engage in protected activity under the False Claims Act’s whistleblower protection provisions by merely informing his supervisor of suspected misuse of government funds.
United States ex rel. Atkinson Pa. Shipbuilding Co., 473 F.3d 506 (3d Cir. 2007). The Third Circuit held that reliance on public records other than the types listed in the False Claims Act does not disqualify a qui tam relator from being an “original source” for purposes of the statute’s jurisdictional bar. The Tenth Circuit agrees with the Third; where as the Ninth disagrees.

United States ex rel. Saunders v. Allison Engine Co., 471 F.3d 610 (6th Cir. 2007). The Sixth Circuit held that presentment of a false or fraudulent claim to the government is required under one subsection of the False Claims Act (31 U.S.C. SEC 3729(a)(1)), but it is not a prerequisite for liability under subsections (a)(2) and (a)(3) thereof. The D.C. Circuit has disagreed, reading the presentment requirement into the entire section. See United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004)(Roberts, J; now Roberts, C.J.).

United States ex rel. Howard v. Lockheed Martin Corp., 2007 U.S. Dist. LEXIS 47029 (S.D. Ohio June 28, 2007). In this case, following United States ex rel. Sanders v. Allison Engine Co., Inc., 471 F.3d 610 (2006), the court held that in the Sixth Circuit pleading requirements do not require the relator to show presentment when alleging violations of 3729(a)(2) and 3729(a)(3) of the FCA. “Sixth Circuit precedent can no longer be read to require FCA relators to plead with particularity the actual presentment of false claims to the United States for purposes of 31 U.S.C. 3729(a)(2) and (3)”.

United States ex rel. Bly-Magee v. Primo, 470 F.3d 914 (9th Cir. 2007). The Ninth Circuit held that non-federal reports, audits, and investigations qualify as a “public disclosure” for purposes of a qui tam suit, under the False Claims Act. In Primo, the court found that a state audit was a “public disclosure”. The Eighth Circuit agrees with the Ninth; whereas the Third Circuit is of the view that only reports originating with the federal government constitute “public disclosures”.

United States ex rel. Hunt v. Merck-Medco Managed Care, LLC, 2004 WL 868271 (E.D. Pa. Nov. 14, 2004). In this False Claims Act case, the defense sought production of the relator’s disclosure statements. The district court held that the Disclosure statements were prepared “in anticipation of litigation” and thus fell within the general protection of the work product doctrine.

See also United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617 (E.D. Va. 2005).

United States ex rel. Hendow v. University of Phoenix, 461 F.3d 1166 (9th Cir. 2006). Plaintiffs in this False Claims Act case against the University of Phoenix alleged that it fraudulently obtained billions of dollars in student-aid money by paying recruiters incentives for boosting enrollment. See also United States ex rel. Main v. Oakland City University, 426 F.3d 914 (7th Cir. 2005) (case settled for $5.3 million; False Claims Act case alleged that the school paid incentives to recruiters); United States v. Chapman University, 2006 U.S. Dist. LEXIS 53686 (C.D. Cal. May 23, 2006) (False Claims Act case in which the University is alleged to have falsified classroom hours to get more federal funds).
United States ex rel. UNITE HERE v. Cintas Corp., 2007 WL 4557788 (N.D. Cal., Dec. 21, 2007), the district court (Hon. Phyllis J. Hamilton) stated in dicta that an internet posting on a government website was equivalent to "news media".

On January 22, 2008, the U.S. Supreme Court denied cert in U.S. ex rel. Bly-Magee v. Premo, Case No. 05-55556 (9th Cir. Dec. 13, 2006). The Ninth Circuit's opinion is at 470 F.3d 914. In Bly-Magee, the Ninth Circuit ruled that non-federal reports, audits, and investigations qualify as a source of public disclosure under 31 U.S.C. section 3730(e)(4)(A). This represents yet one more split in the circuits, for the Third Circuit limits this provision to federal reports, audits, investigations. See U. S. ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 745 (3d Cir. 1997). The Eighth Circuit, on the other hand, agrees with this Ninth Circuit decision. See Hays v. Hoffman, 325 F.3d 982, 988 (8th Cir. 2003).


Wilson v. Graham County Soil & Water Conservation District, 2008 U.S. App. LEXIS 12264 (4th Cir. 2008) (The 4th Circuit, Judge Traxler writing for the unanimous panel, held in this False Claims Act case that administrative audits, reports, hearings, and investigations prepared or conducted by state or local government are not public disclosures under the Act. The 9th and 11th Circuits have held to the contrary. See United States ex rel. Bly-Magee v. Premo 470 F.3d 914 (9th Cir. 2006) (cert. denied 128 S. Ct. 1119 (Jan. 22, 2008)); Battle v. Board of Regents 468 F.3d 755 (11th Cir. 2006). The 3rd Circuit is in accord with the 4th. See United State ex rel. Dunleavy v. County of Delaware 123 F.3d 734 (3rd Cir. 1997). Finally, the 8th Circuit has found such reports and audits to be public disclosures where they are involved in a cooperative state – federal program. See Hayes v. Hoffman 325 F.3d 982 (8th Cir. 2003).

U.S. ex rel K&R Limited Partnership v. Massachusetts Housing Financing Agency, No. 07-7014 Slip Op. (D.C. Cir. July 8, 2008) (the D.C. Circuit affirmed the D.C. District Court's grant of summary judgment in favor of the defendant-HUD mortgage lender. In this qui tam action, the relator alleged that the lender violated the FCA by engaging in certain transactions and then knowingly miscalculating subsidy payments it was receiving from HUD. After finding that both parties had offered up plausible interpretations of the applicable agreements and regulations, the D.C. Circuit determined that the relator could not show that the defendant had the requisite intent to "knowingly" submit false claims to HUD. The court noted that the defendant's interpretation was not unreasonable, that it had voluntarily disclosed the questionable transactions to HUD, and that HUD did not express any concerns about the transactions but continued to pay the
defendant, even after the relator filed its lawsuit. The court concluded that the lender "merely urges a different reading of the [claims], which here falls far short of showing a genuine issue as to whether [it] knew its claims were false."

**Family Responsibilities Discrimination**


The District of Columbia City Council is considering the passage of the so-called Child’s Right to Nurse Human Rights Amendment Act of 2007 which would protect a woman’s right to breastfeed her baby without being denied employment rights or public accommodations. The proposed legislation would amend the District of Columbia’s Human Rights Act to require that employer’s make reasonable efforts to provide unpaid break time, and a sanitary and private space for employee’s to breastfeed or express breast milk during the workday. The legislation would provide that a breastfeeding woman can remain anyplace she and her baby are legally permitted to be, and further provides that such conduct would not constitute indecent exposure.


Federal Employee’s Compensation Act

Spinelli v. Goss, 446 F.3d 159 (D.C. Cir. 2006). The court held that federal courts do not have jurisdiction over federal employees’ claims under the Federal Tort Claims Act until all administrative remedies are exhausted under the Federal Employee’s Compensation Act (FECA). This case involved a former CIA employee’s appeal of a decision by the Secretary of Labor to include employee’s new claim of post traumatic stress syndrome to a previously reported and decided FECA claim involving the same facts.

Federal Jurisdiction Over State-Law Malpractice Claims

Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld and Branscomb, P.C., 2007 U.S. App. LEXIS 24098 (Fed. Cir. Oct. 15, 2007). In a professional malpractice case, the Federal Circuit held that the federal courts have jurisdiction over a state-law malpractice claim where patent law is a necessary element of the malpractice claim. The court held: “Because proof of patent infringement is necessary to show AMT would have prevailed in the prior litigation, patent infringement is a ‘necessary element’ of AMT’s malpractice claim and therefore apparently presents a substantial question of patent law,” thus conferring federal jurisdiction. See also Immunocept v. Fulbright & Jaworski U.S. App. LEXIS 24095 (Fed. Cir. Oct. 15, 2007) (the court found federal jurisdiction also in this malpractice case based on alleged errors in the prosecution of a patent case, but held the claim was barred by the statute of limitations.) This concept of federal question jurisdiction, now recognized by the Federal Circuit, would seem to apply to malpractice cases against law firms handling claims under those federal antidiscrimination and/or labor standard statutes that confer exclusive jurisdiction upon the federal courts. In different contexts, the Fourth Circuit has repeatedly recognized the notion of federal question jurisdiction where proof of a federal claim is an essential element of a parties’ case.

Federal Sector EEO


Firearms in Employee Vehicles

ConocoPhillips Co. v. Henry, 520 F.Supp.2d 1282 (N.D. Okla. 2007) (The District Court enjoined enforcement of an Oklahoma statute that prohibits property owners from imposing any ban on the storage of firearms locked in or on vehicles. The plaintiffs in the instant case were employers who restrict employees from bringing weapons into the workplace, including the employer’s private parking lot. The district court held that the statute impermissibly conflicted with the employers’ obligations under the Occupational Health and Safety Act which requires employers to provide employees with a safe workplace, and thus enjoined enforcement of the statute. See also National Rifle Association Institute for Legislative Action, “Parking Lot Gun Laws and the Right to Transport Firearms” (February 2006), available at http://www.nraila.org/issues/ FactSheets/Read.aspx?ID=193; Forced Entry Laws Force Employers and Courts to Confront the Ability to Control for the Presence of Weapons in the Workplace, 211 Employment Law Counselor 1 (March 2008) (subscription only)).
Florida’s Governor has signed the Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008, Florida HB 503 into law. The law takes effect July 1, 2008 and prohibits public and private employers from having policies banning firearms on their property. The law is being challenged by employers, including the Florida Chamber of Commerce. In a civil action filed in the Northern District of Florida, contending that the law unconstitutionally violates private property rights and conflicts with OSHA.

**First Amendment**

*Thaeter v. Palm Beach County Sheriff’s Office*, 449 F.3d 1342 (11th Cir. 2006). Deputies were not engaging in protected free speech when they were paid to appear in exotic photographs and internet videos because they violated the rules and regulations of the defendant employer which required that they obtain prior written approval before engaging in off-duty employment.

*Piggee v. Karl Sandberg College*, 464 F.3d 667 (7th. Cir. 2006). The Court of Appeals held that a cosmetology teacher who was terminated after she gave a homosexual student anti-gay religious pamphlets is not protected under the First Amendment and therefore cannot sue under § 1983. Pending before the Seventh Circuit is *Mayer v. Monroe County Cnty. Sch. Corp.*, 2007 U.S. App. LEXIS 7157 (7th Cir. Mar. 12, 2007), in which case a teacher’s contract was not renewed allegedly because when asked by a student whether the teacher would be participating in a peace march, the teacher voiced her support for such activities.

**FLSA**

*Chao v. Self Pride Inc.*, 2007 U.S. App. LEXIS 11583 (4th Cir., May 17, 2007). In an FLSA action, where time records did not exist, the court permitted the plaintiff to use statistics to demonstrate the hours at issue. The court, for employees who had more than thirty percent of their timesheets available, used those timesheets to determine a so-called “individual average”, that is, how many hours, on average, were improperly deducted from the time that that employee worked. Then, that per-timesheet average was imputed to all the timesheets missing for that particular employee. For employees without sufficient timesheets to create an “individual average”, the Secretary of Labor used a “universal average”, that is, the average amount of time improperly deducted from all of the timesheets. The missing timesheets for those employees were then assumed to be in line with the universal average. The court approved of this methodology even though “there probably were imperfections in the calculation of damages”.

The court of appeals affirmed the district court’s finding that the violations of the FLSA were not willful and that accordingly the two-year, not the three-year, statute of limitations applied. The court of appeals found that mere carelessness, rather than actual malignant conduct, was insufficient to establish willfulness. The court found that the district court could have fairly concluded that there was a good-faith disagreement between the employer and the Department of Labor about their legal obligations; or that the employer reasonably interpreted a DOL investigator’s prolonged departure and absence for several years as a sign that its practices were
legal; or that the employer, though neglectful in learning its legal obligations, was nonetheless not reckless in its failure to learn its obligations under the law.

**Dent v. Cox Communications Las Vegas, Inc.,** 2007 U.S. App. LEXIS 21641 (9th Cir. Sept. 10, 2007). Plaintiff filed an FLSA claim for unpaid overtime wages. Prior to the filing of the case, plaintiff had accepted overtime compensation that was owed to him by his former employer pursuant to a settlement supervised by the U.S. Department of Labor. Plaintiff had signed a WH-58, a standard form evidencing receipt for payment of lost or denied wages. The WH-58 form was prepared by DOL and certified by the employer, acknowledging receipt of payment of unpaid wages for the period beginning with the workweek ending May 4, 2002 through the workweek ending October 11, 2003. Based on the government-supervised settlement, the employer moved to dismiss, and the district court granted the motion.

On appeal, plaintiff argued that the DOL-supervised settlement waived his right to pursue any claim for the time period referenced in the WH-58, but that it did not bar him from seeking compensation earned prior to that date. The Ninth Circuit held that the claim for compensation earned prior to April 28, 2002 which was the start of the workweek ending May 4, 2002 was not barred.

**Renfro v. Indiana Michigan Power Co.,** 397 F.3d 573 (6th Cir. July 18, 2007). The Court of Appeals held that technical writers employed by the defendant power company exercised sufficient independent judgment and discretion when performing their jobs such that they should be classified as administrative employees exempt from the overtime provisions of the FLSA.

**Pontius v. Delta Fin. Corp.,** 2007 U.S. Dist. LEXIS 50980 (W.D.Pa. Mar. 20, 2007). Plaintiff, a Mortgage Analyst, argued that Defendant Company improperly classified him and other employees as exempt under the FLSA and therefore failed to pay overtime. The company was not found to be a “retail or services establishment.” Thus, the court evaluated the Plaintiff’s claim under the administrative exemption analysis. The court granted summary judgment in favor of the Defendant for the first prong of the administrative exemption (i.e., salary) but remanded for further consideration as to the primary duty and discretion and independent judgment prongs. The DOL’s September 2006 Opinion Letter was not found to be controlling and was not given substantial deference by the court.

**Pontius v. Delta Fin. Corp.,** 2007 U.S. Dist. LEXIS 34393 (W.D. Pa. May 10, 2007). The court followed the report and findings of the Magistrate Judge in her March 20, 2007 opinion. See **Pontius v. Delta Fin. Corp.,** 2007 U.S. Dist. LEXIS 50980 (W.D.Pa. Mar. 20, 2007). The court noted that the employees at issue, Mortgage Analysts, seemed to lack discretion and independent judgment due to the established operating procedures of the employer. Furthermore, the DOL September 8, 2006 Opinion Letter regarding loan officers obtained no substantial deference because it was an application rather than an interpretation of the regulations. Last, the court distinguished between an employee providing expert financial services requiring a small amount of sales activity (as described in the DOL November 27, 2007 Opinion Letter), from basic sales employees engaging in a small amount of financial services activity.
Takacs v. A.G. Edwards and Sons, Inc., 444 F.Supp.2d 1100 (S.D. Cal. 2006). The court relied upon the DOL March 4, 1971 Opinion Letter, later withdrawn by the DOL November 27, 2006 Opinion Letter. The holding in Takacs stated that a “draw” deduction, where deficit commissions were carried forward and deducted from later months’ salaries, was impermissible.

Hein v. The PNC Fin. Servs. Group, Inc., 2007 U.S. Dist. LEXIS 44569 (E.D. Pa. June 20, 2007). The court held that Senior Financial Consultants are exempt under the FLSA, examining only if the employee’s primary work duty was “directly related to the management or general business operations of defendant or customers.” Factors examined by the court included the employee’s salary (over $100,000 per year), the minimal supervision received by him while supervising three other employees, and the complexity of his work. Furthermore, the court noted that the FLSA exemption was intended to protect lower wage workers from “substandard wages and oppressive working hours,” a policy which the Plaintiff did not satisfy.

In re Farmers Ins. Exchange, 481 F.3d 1119 (9th Cir. 2007). The court held that insurance adjusters met the FLSA administrative employee exemption under 29 C.F.R. Sect. 541.203, regardless of the type or size of the claims handled. The adjusters all were required to “use discretion to determine whether the loss is covered, set reserves, decide who is to blame for the loss and negotiate with the insured or his lawyer.”


NEED SUMMARY


May 17, 1999 DOL Opinion Letter, 1999 DOLWH LEXIS 54. The opinion concludes that a mortgage company’s loan officers’ activities “appear to require the use of skills and experience in applying techniques, procedures, or specific standards rather than the exercising of discretion and independent judgment, within the meaning of the regulations.” Furthermore, they “are engaged in carrying out the employer’s day-to-day activities rather than in determining the overall course and policies of the business.” Thus, “[s]uch employees must be paid in accordance with the minimum wage and overtime provisions of the FLSA.”

February 16, 2001 DOL Opinion Letter, 2001 DOLWH LEXIS 5. Upon reconsideration of its May 17, 1999 opinion letter, the Department of Labor found that loan officers’ work is “directly related to the management policies or general business operations of the employer or the employer’s customers.” However, the loan officers do not “customarily and regularly exercise discretion and independent judgment” as required in order for the exemption to apply; rather, they use their skills and knowledge to assist customers in choosing an “already established loan package.”

127
March 31, 2006 DOL Opinion Letter, 2006 DOLWH LEXIS 14. Sales force mortgage loan officers do qualify for the FLSA exemption because they typically spend a large portion of their working hours away from the employer’s place of business. However, each loan officer must be evaluated on an individualized basis to determine if he or she meets the outside sales exemption.

September 8, 2006 DOL Opinion Letter, 2006 DOLWH LEXIS 42. Mortgage loan officers are exempt under the FLSA as administrative employees, so long as the majority of their time at the employer’s place of business is not spent making sales. Use of software programs which “enhance the mortgage loan officer’s ability” to satisfy the customer’s needs do not undercut the mortgage loan officer’s exercise of discretion and independent judgment. The 2004 revisions to the regulations are substantially the same as the former rule’s criteria.

November 27, 2006 DOL Opinion Letter, 2006 DOLWH LEXIS 57. The DOL found that certain registered representatives qualify for the administrative exemption, so long as they pass a qualification examination, exercise diligence in researching clients’ financial status, and recommend and execute transactions specifically tailored to the clients’ needs. Further, the registered representatives’ salaries must meet or exceed $455 per week, which can include commissions and fees. The opinion expressly stated that prior inconsistent opinions were withdrawn, such as the DOL March 4, 1971 Opinion Letter.


If you settle an FLSA claim and have it supervised by the US Department of Labor, pursuant to 29 U.S.C. Section 216(c), the settling employee may end up signing off on a government form entitled WH-58 "Receipt for payment for lost or denied wages, employment benefits, or other compensation." In a recent opinion, the Ninth Circuit teaches us that the language contained in that form can either extinguish a claim or merely extinguish some portion of a claim. See, e.g., Dent v. Cox Communications Las Vegas, Inc., 502 F.3d 1141 (9th Cir. 2007) in which Mr. Dent signed a WH-58 acknowledging receipt of payment of unpaid wages for the period beginning with the workweek ending May 4, 2002 through the workweek ending October 11, 2003. Thereafter Dent claimed unpaid wages for a time period prior to May 4, 2002. The district court dismissed his claim, accepting the employer's argument that the unpaid overtime wage claim had
been settled in full. The Ninth Circuit reversed, finding that his claim was released only with regard to the time period specified in the WH-58.


The California Federal District Courts are battling over the question whether police officers are entitled to compensation under the FLSA for time spent donning and doffing their uniforms and equipment. Judge Breyer, in Martin v. City of Richmond, 2007 WL 2317590, 2007 U.S. Dist. LEXIS 61442 (N.D. Cal., Aug. 10, 2007), denied any compensation, holding that a "police officer's uniform, in and of itself, does not assist the officer in performing his duties". Judge Sabraw, in Abbey v. City of San Diego, 2007 WL 4146696 (S.D. Cal., Nov. 9, 2007), stated that "The relevant inquiry is not whether the uniform itself or the safety gear itself is indispensable to the job - they most certainly are - but rather, the relevant inquiry is whether the nature of the work requires the donning and doffing process to be done on the employer's premises." And, finally, Judge Patel, in Lemmon v. City of San Leandro, 2007 U.S. Dist. LEXIS 902 (N.D. Cal., Dec. 7, 2007), held that officers were entitled to compensation. These police officer donning and doffing opinions are a continuation of the debate that filtered up to the Supreme Court two terms ago in IBP, Inc. v. Alvarez, 546 U.S. 21 (2005), 126 S. Ct. 514, 163 L. Ed. 2d 288, 2005 U.S. LEXIS 8373 (2005), aff'g, Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), and aff'g in part, rev'g in part, remanding, Tum v. Barber Foods, Inc., d/b/a Barber Foods, 331 F.3d 1 (1st Cir. 2003).

Anderson v. Sara Lee Corp., 2007 U.S. App. LEXIS 26723 (4th Cir., Nov. 19, 2007). The Court held in a FLSA case that state claims for breach of contract, negligence and fraud should have been dismissed as preempted by the FLSA. Judge King, writing for the panel, held that, because the FLSA's enforcement scheme is an exclusive one, the state contract, negligence and fraud claims were precluded under a theory of obstacle preemption. In contrast, the Eleventh Circuit in Avery v. City of Talladega, 24 F.3d 1337, 1348 (11th Cir. 1994), allowed a claim for breach of contract which was coterminous with the FLSA claim. Presumably, Paukstis v. Kenwood Golf &
Country Club, Inc., 241 F.Supp. 2d 551, 559-60 (D. Md. 2003), which held that a state negligence claim did "not necessarily conflict with the purpose of the FLSA's remedial scheme, at least where a plaintiff seeks identical damages under both federal and state law", is no longer good law in the Fourth Circuit in light of the Sara Lee decision.

The Plaintiff has been issued by his/her employer a Blackberry, and prior to arrival at the office at the appointed hour, Plaintiff both receives and sends work-related emails. Plaintiff’s lawyer contends that this is compensable time under the FLSA. See Jeffrey M. Schlossberg, “Tech-Tock: Are employees who check devices off hours entitled to overtime pay?”, http://online.wsj.com/public/resources/documents/TechTock.pdf? mod=WSJBlog (last visited May 19, 2008).


Singh v. City of New York, 524 F.3d 361 (2nd Cir. 2008) (The 2nd Circuit, in a case involving city fire alarm inspectors who were required to transport to work an assortment of documents in a file, did not transform commuting time into compensable time under the FLSA. The court stated: “carrying a briefcase during a commute presents only a minimal burden on the inspectors, permitting them freely to use their commuting time as they otherwise would have without the briefcase”).

FLSA – Donning and Doffing

Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860 (W.D. Wis. 2007) (The District Court, in denying the employer’s motion for summary judgment held that the donning and doffing of employer-required safety equipment and sanitary clothing is compensable time. The court held: “[The plaintiff’s] donning of equipment is performed for the purpose of protecting the employee from work-related hazards and occurs immediately before entering the production area.” “Because Plaintiffs need to put on the equipment in order to perform their job safely, their doing so is “an integral and indispensable part” of a ‘principal activity.’ It is indispensable and integral in another sense as well because plaintiffs are required by both company policy and federal law to don and doff the equipment.

De Asencio v. Tyson Foods, Inc., 500 F.3d 361 (3rd Cir. 2007) (The workers contended that, under the FLSA, they were entitled to be paid for the time spent putting on and taking off, as well as washing, their work gear. The employer required its employees to put on and take off safety and sanitary clothing, and engage in washing activities, six times a day, before and after their paid shifts and two daily meal breaks. When instructing the jury in this case, the district court stated that, in considering whether the donning, doffing, and washing was "work" under the FLSA, the jury had to consider whether the activities involved physical or mental exertion. The jury decided the issue of work against the workers. On review, the court concluded that the jury instruction on donning and doffing was erroneous as a matter of law in that it directed the jury to consider whether the gear was cumbersome, heavy, or required concentration to don and doff. This language impermissibly directed the jury to consider whether the workers had demonstrated some sufficiently laborious degree of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer BOB REVIEW).


FMLA

Bhd. of Maint. of Way Emples. v. CSX Transp., Inc., 478 F.3d 814 (7th Cir. 2007). The Seventh Circuit ruled that railroad workers with collective bargaining agreements which allow them to choose when and how to spend their leave cannot be required to substitute this contractual leave for leave under the Family and Medical Leave Act (FMLA). The Railway Labor Act forbids railroads from making unilateral changes to collective bargaining agreements. The FMLA permits (but does not command) employers to require substitution of paid leave for unpaid-FMLA leave. Thus, the railroads remain free to bargain for these provisions with the unions.

Minard v. ITC Deltacom Commc’ns., Inc., 447 F.3d 352 (5th Cir. 2006). The court followed the Supreme Court’s holding in Arbaugh (546 U.S. 500 (2006)) and found that the FMLA’s numerosity requirement was not jurisdictional.

Hite v. Vermeer Mfg. Co., 446 F.3d 858 (8th Cir. 2006). This is a FMLA retaliation case, involving an employee who suffered depressive episodes and attempted to work with intermittent leave. Employee and her prior manager had negotiated an arrangement where she came in for light work and occasionally took days off due to her depressive episodes. Her new manager reacted negatively to her use of leave and eventually terminated her on grounds found by the jury to be a pretext for retaliation. The jury returned a verdict against the employer and the manager personally.

The employee, a machine operator, too leave intermittently to address sporadic bouts of her major depression. Allegedly the supervisor complained continuously of the employee’s use of FMLA leave and treated the employee different as a result of the use of the leave. The employer allegedly took no action and terminated the employee on improper phone usage. The Court upheld the retaliation finding by the jury that the termination was retaliation even though he termination took place two months after the last leave. The plaintiff demonstrated that the reason the employer gave was pretextual when she demonstrated she had been given permission to use the phone and showed the employer was scolding her for activities that other employees were doing while failing to scold them for those same activities. The jury made a credibility decision when it heard the evidence and the Court was not in a position to undermine whether that decision was a good one.

Yashenko v. Harrah’s NC Casino Co., 446 F.3d 541 (4th Cir. 2006). The court holds in a FMLA case that covered employee does not have an absolute right to be restored to his previous job after taking approved leave. Court discusses the substantive rights in the FMLA as prescriptive protections for employees that are expressed as substantive statutory rights and that alleged violations of these prescriptive rights are known as “interference” or “entitlement” claims, and that the Act contains proscriptive provisions that protect employees from discrimination or retaliation for exercising their substantive rights and that claims of violations of those rights are
known as “retaliation” or “discrimination” claims. The court held that the plaintiff had only a limited right to restoration to his previous employment position and that the employer can avoid liability under the FMLA if it can prove that it “would not have retained an employee had the employee not been on FMLA leave.” In other words, plaintiff has no claim regarding the failure of the employer to restore him to his prior job if he would have been discharged had he not taken FMLA leave. The court found that this was consistent with the DOL regulation, 29 C.F.R. § 825.216.

Sullivan v. Cato Corp., 2006 U.S. Dist. LEXIS 14605 (D.S.C. Feb. 10, 2006). The court held that summary judgment for the employer is not appropriate in case where the employee was able to display indirect evidence showing his supervisor’s dissatisfaction with the employee’s taking of FMLA leave.

Harrell v. U.S. Postal Serv., 445 F.3d 913 (7th Cir. 2006). The employee was covered by a national collective bargaining agreement (National Agreement). The court first found that the employer may argue that the National Agreement incorporated the postal handbooks and manuals that related to employees' return to work. The court also found that Article 19 of the National Agreement was sufficient to incorporate the postal handbooks and manuals relating to wages, hours or working conditions into the National Agreement. Next, the court found that because the Department of Labor's regulations reasonably interpreted 29 U.S.C.S. § 2614(a)(4) to allow a collective bargaining agreement to impose stricter return-to-work restrictions than those otherwise incorporated into the Family and Medical Leave Act (FMLA), it deferred to that interpretation and held that the employer did not violate the FMLA when it required the employee to comply with the return-to-work provisions set forth in the handbooks and manuals incorporated into the National Agreement.

Willis v. Coca-Cola Enters., 445 F.3d 413 (5th Cir. 2006). The court affirmed the lower court’s grant of summary judgment to the defendant as to employee’s FMLA and Title VII claims. Plaintiff called in one morning saying that she was sick and might be pregnant. She said that she had an appointment for next Wednesday, but due to a miscommunication, the employer thought that she meant the next day. Plaintiff did not call or contact the company for interim week and was terminated. This case raised the novel question of whether there can be involuntary FMLA leave. The court found that the plaintiff did not show that her employer fired her for taking FMLA leave or other unlawful discriminatory intent. Nor did she show that her violation of the company’s “No Call/No Show” policy was used as a pretext for a discriminatory employment action.

Cobb v. Contract Transport Inc., 452 F.3d 543 (6th Cir. 2006). The FMLA requires employment for at least twelve months for one to be considered to be an “eligible employee.” The Sixth Circuit held that a truck driver who had worked for his current employer for only six months was nonetheless an “eligible employee” because the driver’s current employer was the successor in interest to his previous employer for which he had worked more an additional six months.

Kauffman v. Federal Express Corp., 426 F.3d 880 (7th Cir. 2005). The Court of Appeals held that an incomplete doctor’s certificate which revealed a diagnosis of bronchitis was sufficient to
satisfy the notice requirement of the FMLA even though the doctor, in the certificate form, failed to indicate the exact duration of the incapacity.

_**Brumbalough v. Camelot Care Centers**, 427 F.3d 996 (6th Cir. 2005)._ The Court of Appeals held that the DOL regulation regarding fitness-for-duty certification needs state only that the employee can return to work, and therefore the employer was required to reinstate the employee under the FMLA when the employee provided a note from her physician written on a prescription pad. The court held that is the employer believed the note to be insufficient or unclear, it should have sought clarification from the physician.

_**Sommer v. The Vanguard Group**, 461 F.3d 397 (3d Cir. 2006)._ The court of appeals held that it was permissible under the FMLA for an employer to prorate a partner’s annual bonus to account for his absence on FMLA leave during the bonus time period. The court held that the employer’s prorating of the employee’s bonus did not violate the FMLA even though the employer did not prorate the bonuses of other employees who had taken vacation or sick leave. In doing so, the court stated that the FMLA “does not require...equal treatment of those who take unpaid forms of FMLA leave and those who take paid leave.”

_**Toeller v. Wisconsin Dept. of Corrections**, 461 F.3d 871 (7th Cir. 2006)._ The court of appeals, acknowledging that the Supreme Court has ruled that the states do not have immunity from a claim under the FMLA brought under § 2612(a)(1)(C), held that the states were immune from suit under the FMLA’s self-care provision contained in § 2612(a)(1)(D). The holding of the Seventh Circuit is in accord with decisions with the Sixth and Tenth Circuits.

_**Tellis v. Alaska Airlines**, 414 F.3d 1045 (9th Cir. 2005)._ The court held that the FMLA’s provisions that permit an employee to take FMLA leave “to care for” a serious ill family member, only applies to engaging in the actual care of such a person, and not to activity that, although psychologically beneficial, provides only indirect benefit to the ill family member. Here, an employee’s cross-country trip to drive back to Seattle a more reliable family car for his pregnant wife and his regular telephone calls to her during the trip did not constitute “caring for” his wife under the FMLA.

_**Taylor v. Progress Energy, Inc.**, 415 F.3d 364 (4th Cir. 2005)._ *vacated and remanded by Taylor v. Progress Energy*, 2006 U.S. App. LEXIS 15744 (4th Cir. 2006) (rehearing granted) The Fourth Circuit, disagreeing with the Fifth Circuit’s holding in _Faris v. Williams WPCI, Inc._, 332 F.3d 316 (5th Cir. 2003), held DOL regulation that prohibits waivers of FMLA claims absent DOL or court approval should be upheld. The Fifth Circuit had held that the regulation only barred the prospective waiver of substantive FMLA rights; whereas the Fourth Circuit held that the regulation applied to all waivers, both retrospective and prospective. In addition, the Fourth Circuit held that the regulation applies to all FMLA rights, both substantive and proscriptive, the latter preventing discrimination and retaliation. In _Taylor v. Progress Energy, Inc._, 2007 U.S. App. LEXIS 15846 (4th Cir. July 3, 2007), re-aff’g 415 F.3d 364 (4th Cir. 2005, *vacated and remanded by* 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006), the Fourth Circuit, on rehearing and now with the benefit of an amicus brief from the Department of Labor, which disagreed with the Court’s interpretation of a DOL regulation prohibiting waivers of FMLA claims, nonetheless reaffirmed its earlier ruling. Judge Duncan dissented. The Fourth Circuit,
disagreeing with the Fifth Circuit’s holding in Faris v. Williams WPCI, Inc., 332 F.3d 316 (5th Cir. 2003), held DOL regulation that prohibits waivers of FMLA claims absent DOL or court approval should be upheld. The Fifth Circuit had held that the regulation only barred the prospective waiver of substantive FMLA rights; whereas the Fourth Circuit held that the regulation applied to all waivers, both retrospective and prospective. In addition, the Fourth Circuit held that the regulation applies to all FMLA rights, both substantive and proscriptive, the latter preventing discrimination and retaliation.

Repa v. Roadway Express Inc., 477 F.3d 938 (7th Cir. 2007) Seventh Circuit holds that an employer cannot require an employee to use paid vacation and sick time while taking FMLA leave and simultaneously receiving disability benefits.

Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282 (10th Cir. 2007). In a FMLA case, where the plaintiff-employee was terminated after her return from FMLA leave and the employer, in doing so, relied exclusively on factors predating the employee’s return to work, the Tenth Circuit held that the plaintiff could pursue both a retaliation claim and an interference claim under the FMLA, holding that the plaintiff was not foreclosed from bringing an interference claim in these circumstances and that “[t]o hold otherwise would create a perverse incentive for employers to make the decision to terminate during an employee’s FMLA leave, but allow the employee to return for a brief period before terminating her so as to insulate the employer from an interference claim.”

Csicsmann v. Sallada, 2006 U.S. App. LEXIS 30490 (4th Cir., Dec. 12, 2006). When plaintiff was reinstated to a different position, after taking FMLA leave, the plaintiff argued that the position was not an “equivalent position” under the FMLA requirements. The court, in rejecting plaintiff’s contention, held that the “concrete and measurable aspects of . . . his positions were exactly the same.” The court found that the plaintiff continued to work the same schedule at the same physical office. The court rejected plaintiff’s argument that the new position was “less prestigious and less visible than the pre-leave position” on the ground that these are intangible aspects to be excluded from the equivalency determination. The court found that the concrete and measurable aspects of the position were exactly the same, later referring to them as “metrics”. The district judge, sitting by designation on the panel, dissented, finding that there was a loss of supervisory or managerial authority which could not be classified as de minimus, intangible, or unmeasurable.

The court also rejected plaintiff’s retaliation claim under the ADA on the ground that his transfer to the equivalent position was not an adverse action.

Mellen v. Trustees of Boston University, 2007 U.S. App. LEXIS 22518 (1st Cir., Sept. 21, 2007). Relying upon Section 825.200(f) of the DOL’s FMLA regulations, the Court of Appeals held that holidays are to be counted under the FMLA against intermittent leave taken in an interval of a week or more.

had held in Chittister v. Department of Community and Economic Development, 226 F.3d 223, 227-28 (3d Cir. 2000) (Alito, J.), that the FMLA did not abrogate state sovereign immunity with respect to the self-care provision. Subsequent to the Chittister decision, the Supreme Court in Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 740 (2003), held that Congress validly abrogated state sovereign immunity with respect to the family-care provision of the FMLA. The district court in Wampler rejected the argument that Hibbs trumped Chittister, reasoning that Hibbs was based upon a finding that the Congress, in passing the family-care provision, relied on evidence of gender-based stereotypes; whereas there is nothing in the record to suggest any such reliance when it considered the self-care provision. As the district court noted, the Sixth, Seventh, and Tenth Circuits had reached a similar result with respect to the FMLA self-care provision. On August 14, 2007, the Utah Supreme Court affirmed a state district court decision, holding that Congress did not validly abrogate state sovereign immunity when it enacted the self-care provision of the FMLA. Nicholas v. Attorney General, 2007 UT 62 (Utah, August 14, 2007). In a concurring opinion in Nicholas, Justice Nehring found that Congress had linked the FMLA’s self-care provision to the right to be free from gender discrimination with regard to unpaid leave, but as Congress had not compiled an adequate record of discrimination by state employers, the Justice agreed that Congress had not validly abrogated sovereign immunity.

Nicholas v. Attorney General, 2007 Utah LEXIS 145 (Utah Aug. 14, 2007). The Utah Supreme Court held that the self-care provision of the FMLA is unconstitutional, holding that the Congress had not validly abrogated state sovereign immunity. The plaintiff, a lawyer in the state’s Attorney General’s office, had taken self-care leave for PTSD on account of the unexpected death of her daughter-in-law. But see Lee v. Iowa, no. LACL-100974 (Iowa Dist. Ct. Polk County, Oct. 26, 2007) (relying on Montgomery v. Maryland, 72 Fed. Appx. 17 (4th Cir. 2003) and Bylsma v. Freeman, 346 F.3d 1324 (11th Cir. 2003)). The Polk County, Iowa district court found that Congress had properly abrogated sovereign immunity.

Stevenson v. Hyre Electric Co., 2007 U.S. App. LEXIS 24197 (7th Cir. Oct. 16, 2007). The Court of Appeals, in reversing summary judgment for the employer, held that the plaintiff’s behavior was so bizarre that it may have amounted to constructive notice to the defendant-employer that the employee had a serious health condition under the FMLA and needed leave.

Brown v. E. Me. Med. Ctr., 2007 U.S. Dist. LEXIS 76967 (D. Me. Oct. 15, 2007). The district court held that the FMLA does not protect chronic tardiness as “intermittent leave” even if a doctor later opines that the tardiness was due to a medical condition.

Bryson v. Regis Corp., 498 F.3d 561 (6th Cir. 2007). The Court of Appeals reversed the district court’s grant of summary judgment, and held that plaintiff’s claim of retaliation under the FMLA could proceed against the defendant hair salon.


Lewis v. School District # 70, 2008 US App LEXIS 8248 (7th Cir. April 17, 2008) (The 7th Circuit held that a grant of leave was illusory where the employee was required to perform full duties while on intermittent FMLA leave).

Farrell v. Tri-County Metropolitan Transp. Dist., 2008 U.S. App. LEXIS 13574 (9th Cir. 2008) (“Here, the jury’s verdict reflects that Farrell was not awarded FMLA damages for emotional distress, but rather “for days of work that he missed because of stress or other mental problems resulting from the wrongful denial of FMLA leave.” (Emphasis added). Unlike emotional distress, which requires valuating an intangible, see, e.g., [Brumbalough v. Camelot Care Ctrs., Inc., 427 F.3d 996, 1007-08 (6th Cir. 2005)], this calculation can easily be quantified, in accordance with [29 U.S.C. § 2617], as an “actual monetary loss[ ],” Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003), by determining the wages Farrell would have earned on the days he could have worked, but was unable to do so because of TriMet’s violation.”).

**Foreign Corrupt Practices Act**


**Foreign Sovereign Immunities Act (FSIA)**

*El-Hadad v. United Arab Emirates*, 2007 U.S. App. LEXIS 17904 (D.C. Cir. July 27, 2007). The Court of Appeals, Circuit Judge Brown writing, found that plaintiff, a former employee at the Embassy of the United Arab Emirates, was not barred from proceeding with his breach of contract and defamation claims by the Foreign Sovereign Immunities Act (FSIA), finding that his work was not diplomatic or ministerial, and thus FSIA immunity did not apply. The court found that the distribution of the Local Employees Regulations may overcome the at-will employment presumption and may be contractual in nature, citing *Byrne v. National R.R. Passenger Co.*, 184 Fed. Appx. 6 (D.C. Cir. 2006). The court further affirmed the district court’s finding of bad faith which vitiates the common interest privilege in a defamation case. Finally, the court reversed in part and remanded solely for the district court to discount plaintiff’s future lost earning to present value.

**Garcotti**

*Currans v. Cousins*, 509 F.3d 36 (1st Cir. 2007) (The 1st Circuit held that the public employees First Amendment free speech rights were not violated where the sheriff fired the plaintiff correctional officer for posting disrupted speech concerning the office on a union website. While arguably the employee was speaking as a citizen on a public website and arguably some of the speech involved a topic of public concern, the 1st Circuit held that, taken as a whole, the speech was so insubordinate, confrontational, subversive and disruptive that the sheriff was justified in terminating the employee).

**Gender Identity Discrimination**


New York City’s Human Rights Law prohibits sex discrimination and defines that term to include actual or perceived sex” as well as “gender identity, self image, appearance, behavior, or
expression”, regardless whether or not those characteristics are associated with the individual’s sex at birth. New York City’s Human Rights Law NYC Administrative Code § 8-102.


Etsitty v. Utah Transit Auth., 2007 U.S. App. LEXIS 22989 (10th Cir. September 20, 2007). The Court of Appeals, unlike the district court in Schroer v. Billington, 424 F.Supp.2d 203 (D.D.C. 2006), held that transsexuals are not a protected class under Title VII. Also, unlike the Schroer court, the Court of Appeals in Etsitty declined to reach the Price Waterhouse sex stereotyping issue, and instead addressed the pretext question, finding insufficient evidence of pretext, and on that basis granting summary judgment.

The Employment Non-Discrimination Act, (HR 2015), available at http://thomas.loc.gov/home/gpoxmlc110/h2015_ih.xml. ENDA would prohibit employment discrimination on the basis of sexual orientation and gender identity. ENDA is modeled after the new New Jersey Amendment and defines gender identity and “the gender-related identity, appearance, or mannerisms, or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”


For employers who are considering putting in place a corporate non-discrimination policy, banning discrimination against gays, lesbians, bisexuals and the transgendered, see Dupont's policy a copy of which can be found at: http://www.dupontbglad.com/Policies/SAFE_SPACE.pdf.

Zachary A. Kramer, “Heterosexuality and Title VII” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103095 (last visited May 20, 2008) (In his law review on sexual orientation and Title VII, Professor Kramer argues that there is a double standard at work in employment discrimination cases. His double standard is that the courts frequently reject sex discrimination claims by lesbian and gay employees on the ground that sexual orientation is not protected under Title VII, but no court has ever held that a heterosexual employee is not protected under the Act).

**Genetic Information Non-Discrimination Act**

Genetic Information Nondiscrimination Act of 2005 (“GINA”) (S.306) which is proposed legislation barring discrimination by employers and insurers based on genetic information, since the opening of the new, now democratic-controlled Congress, has begun to move towards possible passage. The bill was approved by the House Committee on Education and Labor on February 14, 2007, and it is anticipated that it will pass the full House. The Senate has previously passed this legislation on two occasions.
and is expected to vote on it soon. President Bush has indicated that he will sign the legislation. To follow the progress of the Act, see http://www.govtrack.us/congress/bill.xpd?bill=s109-306.


Harassment

Andreoli v. Gates, 482 F.3d 641 (3d Cir. 2007). The Court of Appeals held in a hostile work environment case that, based on the evidence presented, a jury could find that management did not take prompt and adequate remedial action after learning about the alleged discrimination. The court held that the lower court had improperly applied Ellerth when the lower court held that the employer had to establish that it took prompt remedial action and the plaintiff had to take advantage of the preventative opportunities offered to her. The court held that Ellerth does not apply where, as here, a co-worker’s, rather than a supervisor’s conduct is at issue. In a co-worker case the court held that the plaintiff only had to show that management knew about the harassment and failed to take prompt and immediate action. The court then found “scant evidence” that the defendant took “prompt and immediate action when the evidence showed that the plaintiff had to speak to five different supervisors about [the] behavior in order to elicit any response from management...”

Vickers v. Powell, 2007 U.S. App. LEXIS 16025 (D.C. Cir. July 6, 2007). Following the Supreme Court’s reasoning in Amtrak v. Morgan, the DC Circuit reversed the district court’s grant of summary judgment on the plaintiff’s Title VII claim. The plaintiff was the victim of gender and race-based harassment by her former supervisor at the FDIC. The district court granted summary judgment, reasoning that the incidents involving her former supervisor could not be used as the incidents were too long ago and the supervisor had been replaced.

Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287 (11th Cir. 2007). The Eleventh Circuit affirmed the District Court’s decision that Plaintiff was not entitled to relief under hostile
work environment, invasion of privacy, intentional infliction of emotional distress, and negligent supervision and training. On at least four different occasions, Plaintiff had the opportunity to transfer or partake in counseling, however, because Plaintiff declined each time, there was no “tangible employment action” by Defendant as required to overcome the Faragher-Ellerth defense. In addition, the court found the Defendant’s investigation of the matters “reasonable”.

Jordan v. Alternative Res. Corp., 458 F.3d 332 (4th Cir. 2006). The circuit court affirmed a grant of summary judgment for employer for failure to state a claim. This is a Title VII retaliation case. The plaintiff was watching the news on television with his boss when it was announced that the police had arrested two African-American men, suspected of being the snipers who had randomly killed ten people in the Washington, DC area. The boss remarked: “They should put those two black monkeys in a cage with a bunch of black apes and let the apes f**k them.” The plaintiff was offended and discussed the matter with two other coworkers who told him that the employee had made similar comments before, none of which plaintiff had heard. Jordan reported the incident to management, and a month later, plaintiff was fired for reasons that he contends are a pretext for retaliation. Plaintiff sued for retaliation and contended that his complaint was about an “incipient violation” of Title VII and should be protected to encourage the early reporting of violations. The circuit court, on rehearing, held that the complaint did not describe a hostile work environment and that the plaintiff could not reasonably have believed that one inappropriate remark constituted a workplace that was permeated by racism.


Demoret v. Zegarelli, 451 F.3d 140 (2d Cir. 2006). The court found allegations did not amount to a hostile work environment, but found, when considered as evidence of a disparate treatment claim, there was a genuine issue of material fact as to pretext. The court stated: “These actions must be seen in the context of Douglas’s micromanaging and offensive comments and [Mayor] Zegarelli’s failure to respond to her expressed concerns. As discussed above, although the treatment complained about by plaintiffs does not rise to the level of a hostile work environment, it does support Pell’s [co-plaintiff] claim of disparate treatment on the basis of gender.”

Lyle v. Warner Bros. Television Prods., 132 P.3d 211 (Cal. 2006). The court affirmed a lower court ruling that the writers for the television show “Friends” who had been sued by a writers’ assistant for sex harassment based upon the sexually explicit talk and gestures at writers’ meetings was not sexual harassment because the talk and gestures were not aimed at the plaintiff or any other woman in the workplace. The court ruled that such actions were within “the scope of necessary job performance” and not engaged in for purely personal gratification or out of meanness or bigotry or other personal motives and that defendants may be able to show their conduct should not be viewed as harassment….”

Herrera v. Lufkin Industries, 474 F.3d 675 (10th Cir. Jan. 4, 2007). In this national origin harassment case, many of the manager’s bigoted remarks were uttered out of the plaintiff-employee’s earshot and only disclosed to him at a later time, and the defense argued that thus there was no liability. The majority stated: “It cannot be, as the dissent suggests, see Dissent at
4-5, that the fact that the harasser makes racially derogatory references about the victim to others shields the harasser from any Title VII liability. This is not a case where Herrera was completely unaware of Moore’s racially derogatory references about Herrera. Rather, viewing the evidence in the light most favorable to Herrera, he clearly was aware of these references served to buttress the racially charged treatment Moore specifically directed at Herrera.”

**Harassment – Religious**

EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306 (4th Cir. 2008) (The 4th Circuit Judge Wilkinson writing for the court, reversed the district court’s grant of summary judgment in a Title VII action brought by the EEOC on behalf of a black Muslim employee who was subjected to repeated, crude harassment in the workplace based on his religion. In doing so, the court stated the following: “If Americans were forced to practice their faith under the conditions to which Ingram was subject, the Free Exercise Clause and the Embodiment of its values in the Title VII protections against workplace religious prejudice would ring quite hollow. Title VII makes plain that religious freedom in America entails more than the right to attend one’s own synagogue, mosque, or church. Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work. In this regard, Title VII helps ensure the special nature of American unity, one not promised on homogeneity but upon the common allegiance to and customary practice of our constitution ideals of mutual respect.” The court also held that an employee can use evidence of comparable harassment of customers to support the claim of workplace-harassment).

**Hedonic Damages**

McGee v. A.C. and S., Inc., 933 So.2d 770 (La. 2006). In an asbestos survival action brought by the decedent’s wife, the court held that plaintiff could seek separate damages for loss of enjoyment of life, called hedonic damages. The court defined hedonic damages as, “detrimental alterations of a person’s life or lifestyle or a person’s inability to participate in the activities or pleasures of life that were formerly enjoyed.” The court limited hedonic damages to the period of decedent’s lifetime, and precluded his survivors from asserting their own hedonic damages claim caused by his illness.

Frontier Ins. Co. v. Blaty, 454 F.3d 590 (6th Cir. 2006). The Sixth Circuit held that the state wrongful death law allows recovery of hedonic damages only for the moments before death occurred, when the deceased lost enjoyment of life due to the tortious acts of another. Death itself is not loss of enjoyment of life.


**HIPAA**

Sorensen v. Barbuto, 143 P.3d 295 (Utah Ct. App. 2006). The Utah Court of Appeals, citing HIPAA standards, held that a physician owed a duty of confidentiality to his patients.

Holmes v. Nightingale, 2007 OK 15, 158 P.3d 1039 (2007). The Oklahoma Supreme Court held that it did not contravene HIPAA’s confidentiality requirements for the lower court to permit oral communications with the plaintiff’s healthcare providers as the individual had clearly placed his mental and physical conditions in issue.

Hostile Work Environment
Patane v. Clark, 508 F.3d 106 (2nd Cir. 2007) (A secretary’s claim of hostile work environment and retaliation was supported by her supervisor’s predilection for pornography. The plaintiff secretary alleged that one of her supervisors kept hard-core pornographic movies in his office and spent one to two hours a day viewing them; that he used her work computer on weekends to view hard-core pornographic websites; and that he had video tapes concerning masochism and sadism shipped to the office, where she was responsible for opening them and delivering them to his mailbox. The 2nd Circuit held that “the mere presence of pornography in a workplace can alter the ‘status’ of women therein and is relevant to assessing the objective hostility of the environment.”).

H. R. Litigation
Skirchak v. Dynamics Research Corp., 508 F.3d 49 (1st Cir. 2007) (The 1st Circuit held that a provision barring class action claims in an employment arbitration program is unconscionable under Massachusetts’s contract law).

Idea-Submission Claims
Gross v. Miramax Film Corp., 383 F.3d 965 (9th Cir. 2004). The court held that a writer who failed to prove that Miramax infringed on his copyrighted script could sue under a state contract claim because federal copyright laws did not pre-empt contractual claim.

Immigration

The three ordinances at issue were the Illegal Immigration and Relief Act Ordinance and the Official English Ordinance, and Tenant Registration Ordinance. The district court in an extensive analysis of the law found the ordinances unenforceable as they are preempted by federal law, finding that the ordinances disrupted the federal scheme for regulating the presence and employment of immigrants. As such, they violated the Supremacy Clause and were found to be unconstitutional. The court also found that they violated the 14th Amendment by penalizing landlords, tenants, employers, and employees without providing them federal procedural protections. Finally, the court found that they violated 42 U.S.C. § 1981 by burdening illegal
aliens’ rights, as “persons,” to contract. Recently, the city of Hazleton filed an appeal to the Third Circuit.

AFL-CIO v. Chertoff, No. 07-4472 (N.D. Cal., Aug. 31, 2007). On August 15, 2007 the Department of Homeland Security published its final rule regarding Social Security “no-match” letters. The rule was to become effective on September 14, 2007. Homeland Security and the Social Security Administration proposed to mail “no-match” letter packets to employers that would include a separate DHS guidance letter about compliance with the final rule. The guidance letter would inform employers that, pursuant to the final rule, they face civil and criminal liability under the immigration laws for knowing employing unauthorized workers unless the “no-match” is resolved. The guidance letter further states that employers should fire workers who cannot resolve a “no-match” with SSA within 90 days.

Plaintiffs sought to enjoin the new rule and the issuance of the guidance letters. On August 31, Judge Maxine M. Chesney of the Northern District of California directed the SSA to suspend the mailing of some 140,000 guidance letters. A further hearing is scheduled on the matter for October 1.

Ramroop v. Flexo-Craft Print, Inc., 41 A.D.3d 1055 (N.Y. App. Div., June 21, 2007). A New York appellate court held that an injured worker who tried to reopen his claim was denied benefits because he was not authorized to work in the United States.

Coma Corp. v. Kan. Dep’t of Labor, 154 P.3d 1080 (Kan. 2007). The Supreme Court of Kansas held that an undocumented worker’s employment contract was enforceable under state law. The state law’s plain text did not exclude undocumented workers from the definition of “employee”, and the Immigration Reform and Control Act (IRCA) did not preempt state law. Kansas joins a growing list of state courts finding in favor of protecting undocumented employees.

Incalza v. Fendi N. Am., Inc., 479 F.3d 1005 (9th Cir. 2007). The Ninth Circuit held that the Immigration and Reform and Control Act (IRCA) did not conflict with California’s requirement that employees may not be discharged for anything other than good cause. The Plaintiff came to the U.S. to work for the defendant under a specific type of work visa. However, when the Defendant-company was bought by a foreign owner, the Plaintiff’s work visa was revoked, and he was fired, despite his argument that he was soon to be married to a U.S. citizen and thus legally allowed to work. The IRCA prohibits knowingly employing unauthorized workers. The court pointed out, however, that it does not bar placing an employee on unpaid leave while the employee corrects his authorization issues. Because there were “remedies short of discharge that were permissible under federal law,” the employer was required to follow those remedies or suffer the consequences of a breach of contract suit under California law.

EEOC v. The Restaurant Company d/b/a Perkins Restaurant and Bakery, (D. Minn. 2006) No. 05-1656; available at: http://www.eeoc.gov/press/8-22-06.html. The district court held that the plaintiff, an undocumented alien, who alleged that she had been subjected to sexual harassment, was not barred from suing her employer under Title VII.
Design Kitchen & Baths v. Lagos, 882 A.2d 817 (Md. 2005). A so-called “undocumented worker” injured in the course of his employment is a “covered employee” eligible to receive workers’ compensation benefits according to the Maryland Court of Appeals.

Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007) (en banc). The court vacated the earlier panel opinion and affirmed the district court decision to grant the employer summary judgment. Previously, in Zamora v. Elite Logistics, Inc., 449 F.3d 1106 (10th Cir. 2006), the Tenth Circuit held that the plaintiff had produced enough evidence to go to trial on the issue of whether the employer’s actions were motivated by national origin discrimination or simply by a desire to comply with I-9 requirements. The employer, in the instant case, rechecked its employees’ documents in anticipation of an immigration investigation. Plaintiff, a native of Mexico, had provided a Social Security card when he had been hired. During its “due diligence” in anticipation of an immigration investigation, the employer demanded that the plaintiff produce I-9 documentation again after the employer had discovered that someone else had used the plaintiff’s Social Security number in California in 1989, 1995, and 1997. Plaintiff then produced more documents, including a naturalization certificate. Nonetheless the employer declined to accept these documents and suspended plaintiff until he produced proof that he was using the correct Social Security number. Plaintiff then did so, but was nevertheless fired when he requested an apology before returning to work. According to the Tenth Circuit, a jury could determine that the employer was motivated to fire the plaintiff at least in part by plaintiff’s Mexican heritage, and accordingly remanded the case for trial. The Tenth Circuit agreed to rehear the case en banc in Zamora v. Elite Logistics, Inc., 194 Fed. Appx. 496, 497 (10th Cir. 2006).

On September 24, 2007 the Department of Homeland Security, in The United States of American v. The State of Illinois, filed suit in federal district court for the Central District of Illinois against the state of Illinois to enjoin a new Illinois statute that would bar employers from using the federal verification database program, formerly known as the Basic Pilot and now known as E-Verify, until such time as the federal government certified that the database used to verify employees’ eligibility are ninety-nine percent accurate. The Illinois statute was designed to take effect on January 1, 2008.


RICO (A number of RICO suits have been filed by workers alleging that the defendant employers were members of a conspiracy to knowingly bring illegal immigrants into the country and employ them in violation of federal law, and by doing so, the employers were thus able to pay less than the going market wage to their employees. In *Tollinger v. Tyson Foods, Inc.*, 2008 US DIST LEXIS 11243 (E.D. Tenn. Feb. 13, 2008), the District Court found that the plaintiffs failed to produce evidence to satisfy their burden of proof. In doing so, the court found, in the wake of *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), that an allegation of depressed wages was a valid injury upon which to predicate a RICO claim. Plaintiffs failed to survive summary judgment because they could not establish a direct causal link between their depressed wages and the predicate offense conduct, that is, concealing illegal immigrants in Tyson Facilities from INS inspections. *See also Trollinger v. Tyson Food, Inc.*, 370 F.3d 602 (6th Cir. 2004); *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006)).


Illegal Immigration Reform Act, S.C. H. 4400, Session 117 (signed by governor on 4, 2008).


**Implied Contract – Employee Handbook**

Defontes v. Mayflower Inn, 2007 U.S. Dist. LEXIS 88375 (D. Conn. 2007) (The District Court held that whether or not the plaintiff was an at-will employee in light of language in the employer’s handbook that suggests that the first 90 days of employment are “probationary” is an issue to be decided by a jury, not a judge. “It is not at all clear what the Handbook promised the Inn's employees. For example, does the use of the term “Probationary-At-Will Period” imply that after 90 days an employee is no longer at will? It is undisputed that [the employee] worked at the Inn for more than 90 days. Did he then become something other than an at-will employee? Was he, at a minimum, entitled to a performance review before termination? It is undisputed that [the employee] was summarily fired without any explanation of the reasons for his termination or whether his performance was inadequate in any way. Given the ambiguity of the Handbook language (coupled with the fact that no party has provided the Court with any evidence regarding the Inn's course of performance under it), the question of whether the Handbook gives rise to an implied promise that after 90 days employment will not be terminated without cause, is one for a jury, not this Court. As the Connecticut Supreme Court stated in Gaudio, "In the absence of [express contractual] language . . . the determination of what the parties intended to encompass in their contractual commitments is a question of the intention of the parties, and an inference of fact. Because it is an inference of fact, determining the intent of the parties is within the province of the jury . . . ").

**Imputation of Liability – Cat’s Paw**

EEOC v. BCI-Coca Cola, 450 F.3d 476 (10th Cir. 2006), cert. dismissed, 127 S. Ct. 1931, 167 L. Ed. 2d 583, 2007 U.S. LEXIS 4333 (Apr. 12, 2007). In this case, it was undisputed that the human resources official who made the decision to terminate the African-American employee on whose behalf EEOC sued, worked in a different city, had never met the dischargee, and did not even know that he was an African-American. In making the decision to terminate, the human resources official relied exclusively on information provided by the dischargee’s immediate supervisor, who not only knew his race but allegedly had a history of treating black employees unfavorably and making disparaging racial remarks in the workplace. The court, in reversing the district court’s grant of summary judgment, discussed extensively the two doctrines used to impute the racial animus of the supervisor to the ultimate decision maker, i.e., the “cat’s paw” doctrine and the “rubber stamp” doctrine. The court discussed the “lenient approach” of the Seventh Circuit and the “opposite extreme” of the Fourth Circuit, and aligned itself with the Seventh Circuit, finding the Fourth Circuit’s approach to be “inconsistent with the normal analysis of causal issues in tort litigation.” The court held that the plaintiff must demonstrate that the actions of the biased subordinate caused the employment action and that an employer can avoid liability by conducting an independent investigation of the allegations against the employee.).

Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000). After a jury found for the plaintiff at trial, the district court granted the defendant judgment as a matter of law. The Court of Appeals reversed the district court, finding that the plaintiff presented sufficient evidence for the jury to find in her favor. This evidence showed that the employee with discriminatory intent wielded enough influence with the innocent formal decision-maker that the employer could be liable for her termination.
Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004). The Court of Appeals refused to apply a “substantial influence” test, where the employer would be liable for an employee’s adverse employment action if the subordinate employee, the one with allegedly discriminatory animus, merely had a substantial influence over the formal decision-maker. The court further refused to apply the EEOC’s recommendation of holding the employer liable when the influence is “sufficient to be a cause,” even if the formal decision-maker did not “rubber-stamp the biased subordinate’s recommendation.” Rather, the court adopted a test in which the employer is liable when the actual decision-maker or the one principally responsible holds discriminatory animus toward the plaintiff. This test includes subordinate employees, but is far narrower than many other circuits.

Lust v. Sealy, Inc., 383 F.3d 580, 584 (7th Cir. 2004). The Seventh Circuit stated the cat’s paw test in the following manner: “the prejudices of an employee, normally a subordinate but here a coequal are imputed to the employee who has formal authority over the plaintiff’s job . . . where the subordinate, by concealing relevant information from the decision-making employee or feeding false information to him, is able to influence the decision.” In this case, the subordinate employee had recommended another individual for the promotion, and the actual decision-maker stated that he felt he did not need to interview anyone else because of the weight the subordinate placed on his sole recommendation.


Poland v. Chertoff, 494 F.3d 1174 (9th Cir. 2007). The Ninth Circuit, in an amended opinion, held that a subordinate’s animus could be imputed to an employer if the plaintiff could show that the subordinate “influenced or was involved in the decision or decisionmaking process.” The court rejected the Fourth Circuit’s jurisprudence that imputes a subordinate’s impermissible motive to the employer only when the subordinate dominates the underlying investigation and the ultimate decision is little more than a rubber stamp reflecting the subordinate’s animus.

Inadvertent Disclosure

Rico v. Mitsubishi Motors Corp., 42 Cal. 4th 807 (Cal. Sup. Ct. 2007) (Where a lawyer receives documents of a privileged nature from opposing counsel through inadvertence, the California Supreme Court held that the receiving lawyer must stop reading the document upon realizing that it is privileged, and here, where the lawyer did not do so, the lawyer was properly disqualified from continuing to serve as counsel in the case. The Supreme Court unequivocally endorsed the standard set out in State Comp. Ins. Fund v. WPS, Inc., 1999 Cal. App. LEXIS 189 (Cal. App. 1999), for what action is required of an attorney who receives privileged documents through inadvertence).
**Indemnification**

_Vergopia v. Shaker_, 922 A.2d 1238, 191 N.J. 217 (N.J. 2007). The New Jersey Supreme Court found that outside counsel who also served as an assistant secretary for a Delaware-incorporated company was entitled to indemnification as an officer of the company under its certificate of incorporation. The certificate of incorporation stated that a person sued by reason of the fact that he is or was a director or officer shall be indemnified and held harmless by the corporation. The Supreme Court held that the resolution of the issue only required that it look to the certificate of incorporation, and given the breadth of this contractual right, the court held that there was no need to address the scope of the lawyer’s rights under the Delaware code which, _inter alia_, permits corporations to indemnify corporate actors who successfully defend against a lawsuit as was done here by the lawyer.

_Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am._, 448 F.3d 252 (4th Cir. 2006). The court held that the district court properly denied the insurance company reimbursement for defense costs incurred by defending the insured against a class action suit, but the issue of the insurer’s responsibility for indemnification from the $10 million settlement was remanded to the district court to rectify the district court’s error that conflated the insurer’s duty to defend with its duty to indemnify under Maryland law.

_U.S. v. Stein_, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). Judge Kaplan, in the KPMG former employee prosecution, finds that the government's conduct in “coercing” corporate employers not to advance legal fees to employees during criminal investigations violates the constitutional rights of those employees. And in _Stein v. KPMG, LLP_, 2007 U.S. App. LEXIS 12023 (2d Cir. May 23, 2007), Judge Kaplan’s decision that the government’s forcing KPMG to decline to indemnify several executives being prosecuted by the government was unconstitutional is reversed by Second Circuit, finding it was not a proper exercise of Judge Kaplan’s ancillary jurisdiction. See Paul Davies and David Reilly, _In KPMG Case, the Thorny Issue of Legal Fees, Wall St. J._, June 12, 2007 at C5, available at http://www.nacdl.org/public.nsf/whitecollar/WCnews074?opendocument.


_Leroy v. Haack_, 2007 Wisc. App. LEXIS 943 (Wis. Ct. App. 2007). The court held that a school’s insurance company must pay the attorneys’ fees and expenses of an administrative employee who had been sued for defamation by a coworker.

**Independent Contractors**

The new Restatement (Third) of Agency has eliminated the term “servants” as well as the term “independent contractors.” The term “employees” has been substituted for the term “servants.” With regard to the term “independent contractors,” the Restatement now substitutes two new terms: “nonemployee agents” and “nonagents.” The Restatement provides the following explanation: “the common term ‘independent contractor’ is equivocal in meaning and confusing in usage because some termed ‘independent contractors’ are agents while others are nonagent
service providers. The antonym of ‘independent contractor’ is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider.” The Restatement refers to individuals who are not employees as “nonemployees” and includes within this group “nonemployee agents” and “nonagents.” See http://www.theconglomerate.org/2007/09/restatement-thi.html.

The General Accounting Office (GAO) issued a report that estimates that the misclassification of employees as independent contractors has reduced federal income tax revenue by $4.5 billion annually. NEED CITE

A new Illinois Law penalizes employers who deliberately misclassify employees has independent contractors. NEED CITE

Individual Liability

Cooper v. Albacore Holdings, Inc., 204 S.W. 3d 238 (Mo. Ct. App. 2006). The court of appeals for the eastern district held that a CEO may be individually liable for sexual harassment under the Missouri Human Right Act, which defines an “employer” as including “any person directly acting in the interest of an employer…”

Modica v. Taylor, 465 F.3d 174 (5th Cir. 2006). The Court of Appeals held that a public official may be subject to individual liability for having violated the FMLA. Its decision is in accord with the Eighth Circuit and contrary to decisions form the Sixth and Eleventh Circuits.

See also Devore v. City of Phila., 2005 U.S. Dist. LEXIS 3438 (E.D. Pa. 2005)(Officer’s claims against city officials survived summary judgment because the Penn. Human Relations Act (43 P.S. § 955(e) provided for individual liability); Holocheck v. Luzerne County Head Start, Inc., 385 F. Supp. 2d 491 (M.D. Pa. 2005)(PHRA provided for individual liability claims against executive director and manager); Snyder v. Teamsters Local No. 249, HBC Serv. Corp., 2005 U.S. Dist. LEXIS 19010 (D. Pa. 2005)(No individual liability was found against the management employees because they took prompt and adequate remedial action); and Dici v. Pennsylvania, 91 F.3d 542 (3d Cir. 1996);


Bradstreet v. Wong, 2008 Cal. App. LEXIS 553 (Cal. Ct. App. Apr. 16, 2008) (The Court of Appeals held that individual owners of a defunct corporation were not the employers of, and did not owe restitution for unpaid wages to, the employees of the defunct corporation).

Jones v. The Lodge at Torrey Pines Partnership, 177 P.3d 232 (2008) (The California Supreme Court held that the state anti-discrimination statutes reference to “person” was not intended to apply to individual supervisors, and, in holding that individual supervisors were not liable under the state statute, the Court stated that to do so would be inappropriate because “corporate decisions are often made collectively by a number of persons.... Imposing individual liability for collective decisions might place the individuals in an adversarial position to eachother (as well as
to the corporation”). See also Richard M. Escoffery and Douglas J. Miller, “Supervisors may be held liable under some laws”, The National Law Journal, May 19, 2008).

**Injunctive Relief - Mootness**

*Sheely v. MRI Radiology Network*, 2007 U.S. App. LEXIS 24889 (11th Cir. Oct. 24, 2007). The Court of Appeals held, over a vigorous dissent, that the defendant’s voluntary cessation of its unlawful “no animals” policy which had been relied upon to exclude the plaintiff’s service animal, did not render the claim for injunctive relief moot.

**Insurance Coverage**


Victoria Pynchon, *Negotiating Coverage: You Have Insurance for This?*, SETTLE IT NOW NEGOTIATION BLOG, June 15, 2008, [http://www.negotiationlawblog.com/2008/06/articles/insurance-coverage/negotiating-coverage-you-have-insurance-for-this/](http://www.negotiationlawblog.com/2008/06/articles/insurance-coverage/negotiating-coverage-you-have-insurance-for-this/).


Westrec Marina Management, Inc. v. Arrowood Indemnity Co., 2008 Cal. App. LEXIS 914 (Cal. Ct. App. June 16, 2008) (“Where policy defined a "claim" as a written demand for civil damages or other relief commenced by the insured’s receipt of such demand, a letter from a third-party claimant’s attorney to insured informing insured that the third-party claimant had been subjected to discrimination and received a right-to-sue letter and suggesting a settlement constituted a claim. Although the letter did not expressly demand payment or refer to any specific amount, the meaning was clear that, absent some form of negotiated compensation, the claimant would sue. Where policy stated that all claims arising from the same events or series of related facts could be deemed a single claim, and third-party claimant filed litigation authorized by the right-to-sue notice mentioned in the letter, the lawsuit was part of the same claim as the letter under the policy. Where insured did not notify insurer of the claim until after the lawsuit was filed, insurer’s notification was untimely, and insurer was not required to tender a defense.”).
Intentional Infliction of Emotional Distress

Griffin v. Acacia Life Ins. Co., 2007 D.C. App. LEXIS 266 (D.C. May 24, 2007). The D.C. Court of Appeals held that the tort claim of negligent supervision could not be predicated on a violation of the D.C. Human Rights Act as a common law claim of negligent supervision may be predicated only on common law causes of action or duties otherwise imposed by the common law and not by duties imposed by statute. Thus, a negligent supervision claim could be predicated on a battery, for example, but not the Human Rights Act. The Court emphasized that it did not intend to suggest that the Human Rights Act preempts or otherwise abolishes common law causes of action based on the same set of operative facts. The Court also emphasized that its holding was limited to the tort of negligent supervision and its earlier decisions permitting common law claims for intentional infliction of emotional distress to be predicated on violations of the Human Rights Act were unaffected by this decision.

Hatfill v. New York Times Co., 416 F.3d 320 (4th Cir. 2005). Hatfill, an Army scientist, sued for defamation after a New York Times columnist implicated him in the fall 2001 federal investigation of mailing letters with anthrax. The Fourth Circuit reversed and remanded finding that the complaint adequately alleged a basis for defamation: the column’s allegation that the FBI should have investigated Hatfill more thoroughly and that all of the evidence pointed to him. The court found that the newspaper’s conduct qualified as extreme and outrageous because of its severity and also noted the lack of opportunity for the plaintiff to respond. The court also held that Hatfill’s allegations were sufficient to move forward with his claim for intentional infliction of emotional distress.

Alcazar-Anselmo v. City of Chicago, 2008 US Dist LEXIS 32042 (N.D. Ill. April 18, 2008) (The District Court held that the denial of FMLA leave or the discharge of an employee for having requested FMLA leave is “not egregious enough conduct to be considered extreme and outrageous” to support an employee’s claim of intentional infliction of emotion distress).

International Employment Law


Felix Palacios de la Villa v. Cortefiel Servicios SA, Case C-411/05 (European Court of Justice). Opinion available at: [http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79928983C19050](http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79928983C19050). The European Court of Justice ruled that compulsory retirement on the basis of an employee’s age is permissible where there are legitimate national employment and social aims, such as promoting wider access to labor markets and where the provision of a pension was linked to retirement. The court, in this case arising out of Spain, held that a mandatory retirement on the basis of age was in keeping with the Spanish aim of promoting employment across different age groups. The court also said that Spanish pension benefits provided adequate financial compensation for retired workers.

Sarei v. Rio Tinto, 499 F.3d 923 (9th Cir.). This case was filed with the Ninth Circuit on August 20, 2007, on appeal from the California District court, 221 F. Supp. 2d 1116 (C.D. Cal. July 9, 2002).


Cadman v. Health & Safety Executive, C-17/05 [2006] IRLR 969.


Internet

Healthcare Advocates, Inc. v. Harding, Early, Follmer & Frailey, 2007 U.S. Dist. LEXIS 52544(E.D. Pa., July 20, 2007). On July 20, 2007, Judge Kelly of the Eastern District of Pennsylvania issued his decision in the much discussed wayback machine litigation. The wayback machine, in its simplest terms, allows one to locate screen shots of websites that have subsequently been revised or deleted. The wayback machine reviews archived images, and makes them available to the searcher unless the website owner has blocked access to the archived web pages. The lawyers at the Harding firm had web research done on Plaintiff's historic websites. Unbeknownst to Harding, Plaintiff had followed the procedures to block access, but the blocking mechanism, over which the Harding firm had no control, malfunctioned and allowed them access to archived images of the Plaintiff's website. Plaintiff sued alleging that this violated the Digital Millenium Copyright Act, the Computer Fraud and Abuse Act as well as being a copyright infringement. After some 39 pages of analysis, Judge Kelly granted the Harding firm's motion for summary judgment. Anyone who intends to use the wayback machine for web research needs to carefully parse Judge Kelly's opinion to hopefully avoid the assertion by the website owner of potential claims.


Internet Applicants


Dr. Michael Harris, “The OFCCP’s Final Definition of an Internet Applicant: Issues and implications for companies and recruiters,” ELECTRONIC RECRUITING EXCHANGE (Nov. 1, 2005)


Internet Service Providers
State v. Reid, 914 A.2d 310 (App. Div. 2007). In a criminal case, the New Jersey Appellate Division held that by defendant’s use of an anonymous ISP address, she manifested an intention to keep her identity publicly anonymous and, having chosen anonymity, she had manifested a reasonable expectation of privacy in her true identity, known only to the ISP. In so holding, the court found the subpoena used by the police to be invalid.

Intersectional Discrimination

Jeffries v. Harris County, 615 F.2d 1025, 1032-33 (2d Cir. 1980) (The Court of Appeals said “discrimination against black females can exist even in the absence of discrimination against black men or white women.”); Smith v. AVSC, 148 F. Supp. 2d 302 (S.D.N.Y. 2001) (Sex discrimination plus additional characteristic); Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) (Court stated: “the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.”); Virginia W. Wei, “Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin,” 37 B.C. L. REV. 771 (1996); Sabina Crocette, “Considering Hybrid Sex and Age Discrimination Claims by Women,” 28 GOLDEN GATE U. L. REV. 115 (1998).

Investigation


Joint Defense Agreements

Hanover Insurance Co. v. Rapo & Jepsen, 870 N.E. 2d 1105 (Mass. 2007). The Massachusetts Supreme Judicial Court recognized the validity of joint defense agreements as an exception to a waiver of the attorney-client privilege. In the trial court, one of the defendants objected to the plaintiff’s document request regarding communications between that defendant and another defendant, asserting attorney-client privilege based on the defendant’s oral joint defense agreement. The Trial Court ordered production of the documents on the ground that oral joint defense agreements were not recognized, and the Supreme Judicial Court reversed. In doing so, the Court stated “. . . because the attorney-client privilege does not depend on a writing, the common interest doctrine does not require a writing.”

Thola v. Henschell, 2007 Wash. App. LEXIS 2360 (Wash. Ct. App. Aug. 7, 2007). The Washington Court of Appeals held that a future employer could be vicariously liable for the misappropriation of client information by a future employee. The defendant chiropractic clinic had agreed to hire an employee of a competing chiropractor. The defendant promised the new employee a $100 bonus for each new client the employee added to the practice. Before leaving his old job, the employee misappropriated a confidential client list and used it to solicit many of said clients to transfer their business to his soon-to-be new employer. The former employer sued the new employer and the employee for violating Washington’s Trade Secrets Act, as well as for unjust enrichment and tortious interference with a business expectancy. The defendant argued that the state statute did not expressly provided for vicarious liability and that the Trade Secrets Act preempted the state common law tort claims. The Court of Appeals found “that vicarious liability is a general theory of civil liability that is not based on trade secret misappropriation,
and, therefore, the [Act] does not preempt it.” The Court of Appeals found that the statute’s preemption provision did not bar the common law claims to the extent that they did not rely on conduct constituting trade secret misappropriation.


Leave Law – State and Federal
D.C. Accrued Sick and Safe Leave Act of 2008, D.C. Code § 32-131.01 et seq. (2001) (In March 2008, the D.C. Council passed and Mayor Fenty signed into law the Accrued Sick and Safe Leave Act (“ASSLA”). The Act requires all D.C. employers to provide their employees with paid sick and protective leave, which can be used for their own and/or their family members’ health and safety needs.

The law goes into effect on November 13, 2008. The Act will be administered by the Department of Employment Services. The Department may propose regulations to implement ASSLA on or before July 13, 2008.

I. Applicability: Who is covered by ASSLA?

1. Employers: ASSLA applies to all D.C. employers, regardless of size, including the District government.
   a. Hardship exemption: The Mayor may issue regulations to exempt businesses that can demonstrate “hardship” as a result of complying with the Act’s requirements.

2. Employees: ASSLA adopts the definition of employee used in the DC FMLA.1
   a. Employees accrue paid leave as provided by the Act’s formula, and they can begin using their accrued paid leave after 90 days of employment.2
   b. Exclusions: The Act expressly excludes independent contractors, students, health care workers who choose to participate in a premium pay program (e.g., per diem nurses), and restaurant wait staff and bartenders who work for a combination of tips and wages from its definition of employee.

3. Family Members of Employees: Family members include:
   a. Spouses/Domestic Partners;

---

1 (“Individuals employed by the same employer for one year without a break in service and who have worked at least 1000 hours during the preceding 12 month period”).

2 If an employee is terminated after 90 days, then rehired within 12 months, the employee may access accrued leave immediately upon returning to work.
b. Person with whom employee is in a committed relationship (i.e., a familial relationship between two individuals that is characterized by mutual caring and the sharing of a mutual residence);

c. Children and Spouses of Children (including foster children, grandchildren, children who live with the employee and for whom employee discharges permanent parental responsibility);

d. Parents of Employee and Spouse/Domestic Partner; and

e. Brothers and Sisters

II. Accruing ASSLA Leave

The amount of leave accrued varies according to the number of employees employed:

- If the employer has 100 or more employees, the employee accrues one hour of paid leave for every 37 hours worked up to 7 calendar days per year.
- If the employer has between 25 and 99 employees, the employee accrues one hour of paid leave for every 43 hours worked, up to 5 calendar days per year.
- If the employer has 24 or fewer employees, the employee accrues one hour of paid leave for every 87 hours worked, up to 3 calendar days per year.

For purposes of calculating accrual rates, the number of employees is based on the average monthly number of full-time employees employed during the previous calendar year. 3

Employees who are exempt from overtime may not accrue ASSLA leave for “hours worked beyond a 40-hour work week.” § 3(a) (5).

Employees may carry over unused ASSLA leave at the end of the year; however, employees may only use the maximum amount of paid leave they are eligible for in any given year. For example, a full-time employee who works for an employer with over 100 employees may only use up to seven days of ASSLA leave per calendar year.

Employees are not entitled to a payout of unused ASSLA leave upon termination.

III. Using ASSLA Leave

Employees may use their paid ASSLA leave for physical or mental illness, injury, diagnosis or treatment for themselves or a family member. Additionally, if the employee or employee’s family member is a victim of domestic violence, sexual abuse, or stalking, the employee may take ASSLA leave to obtain certain social or legal services related to the domestic violence, sexual abuse or stalking.

3 “The average monthly number shall be calculated by adding the total monthly full-time equivalent employees for each month and dividing by 12.”
**IV. Requesting ASSLA Leave**

If the leave is foreseeable, the employee must give the employer written notice at least 10 days in advance or as early as possible in advance of the absence.

If the leave is unforeseeable, the employee must provide the employer with oral notice prior to the start of their shift, or in emergency situations where prior oral notice is not feasible, within 24 hours of the onset of emergency.

Requests must include the reason for absence and the expected duration.

If the employee takes paid ASSLA leave for three or more consecutive days, the employer may require the employee to provide reasonable certification upon their return to work. The employer must keep the certification confidential.

**V. Prohibited Acts/ASSLA Violations**

Under ASSLA, employers are prohibited from discriminating and/or retaliating against employees for invoking their rights under the Act. Employers who willfully violate the Act are subject to a $500 fine for the initial offense, a $750 fine for the second offense, and a $1,000 fine for each subsequent offense.

ASSLA does not provide a private cause of action for employees; however, employees might have a possible cause of action for ASSLA violations under common law (e.g., wrongful discharge).

**VI. Posting Requirements/Penalties**

Employers must “post and maintain in a conspicuous place” a notice summarizing the employee’s rights and responsibilities under the Act, including information on filing a complaint. § 10 (a). Employers who fail to post notice will be assessed a civil penalty not to exceed $500.

Posters will be provided by the Mayor’s office, although they are not yet available. Employers will not be liable for posting violations until the posters are issued.

**VII. Compliance**

To ensure ASSLA compliance, employers should modify their policies to permit employees to access and accrue paid leave at a rate that is equal to, or greater than, that provided by the Act. Employee policies must permit employees to take paid ASSLA leave for all of the reasons listed in the act.

Employers must comply with any collective bargaining agreement (CBA) that provides for greater paid leave rights than those provided by ASSLA. If an employer’s CBA does not provide for ASSLA leave, the requirements of the Act do not go into effect until November 2009, or the date the CBA expires, whichever is earlier.

**Legislation - Federal**

Employee Free Choice Act (H.R. 800, S. 1041), available at http://www.govtrack.us/congress/bill.xpd?bill=h110-800: On June 26, 2007, the Senate voted 51-48 on a motion to move the EFCA, a bill which would make it easier for employee to form
unions, to the Senate floor. Because the bill’s supporters needed 60 votes to avoid a Republican filibuster, the bill will likely remain in committee for the rest of this congressional session. Supporters may offer amendments to the bill as an attempt to get the requisite votes needed for a full Senate debate.

Civil Rights Tax Relief Act of 2007 (H.R.1540, 110th Cong. (2007)), available at [http://www.govtrack.us/congress/billtext.xpd?bill=h110-1540](http://www.govtrack.us/congress/billtext.xpd?bill=h110-1540). This bill would end taxation of non-economic damages awarded to plaintiffs in employment cases and would reduce the taxes that employees pay on monies awarded as back-pay in a lump sum by allowing the employee-taxpayer to average their recoveries over the years in which they would have earned them.

S. 494 On June 22, 2006, the Senate passed legislation as an amendment to the 2007 National Defense Authorization Act, addressing in part, the Supreme Court’s decision in Garcetti v. Ceballos, 126 S. Ct. 1951 (2006), the constitutional free speech/retribution case involving the rights of government employees. See [http://www.whistleblower.org/content/press_detail.cfm?press_id=514](http://www.whistleblower.org/content/press_detail.cfm?press_id=514) (last visited Jan. 30, 2007). The House of Representatives’ Government Reform Committee has passed two whistleblower bills (H.R. 1317 and H.R. 5112) that provide, for example, for jury trials under the Whistleblower Protection Act and extend its protections to national security employees and government contractors. It is expected that the differences between the Senate and House legislation will be resolved in conference in the fall.


Public Safety Employer-Employee Cooperation Act of 2007, 110th Cong. (June 20, 2007), available at [http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.980.IH:](http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.980.IH:) On June 20th, the House Education and Labor Committee, by a vote of 42 to 1, approved legislation to guarantee the rights of firefighters, police officers, and emergency medical service workers in all 50 states to collectively bargain for better wages, benefits and working conditions. About twenty states do not fully protect the collective bargaining rights of public safety employees, and two states, North Carolina and Virginia, prohibit public safety employees from collectively bargaining.

The bill would provide basic labor protections for public safety workers, including the right to join a union, the right to have their union recognized by their employer, the right to bargain collectively over hours, wages and terms and conditions of employment, a mediation or arbitration process for resolving an impasse in negotiations, and enforcement of the bill’s provisions through the courts.

Shareholder Vote on Executive Compensation Act (H.R. 1257), [http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.01257:](http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.01257:) The House of Representatives on April 20th passed legislation that would give shareholders a non-binding, advisory vote on executive pay packages.

Lilly Ledbetter Fair Pay Act (H.R. 2831), http://www.govtrack.us/congress/billtext.xpd?bill=h110-2831. This bill, which is intended to overturn the recent Supreme Court decision, was approved on June 27th by the House Education and Labor Committee by a 25-20 party-line vote. The bill would amend Title VII, the ADEA, the ADA, and the Rehabilitation Act to specify that the time limit for filing pay discrimination claims begins to run each time an employee receives a paycheck that evidences discrimination, not when the employer makes a discriminatory pay decision.

Workplace Religious Freedom Act, Congress has been considering a bill, called the Workplace Religious Freedom Act (H.R. 1445, S. 677) which would amend Title VII to require employers to be more accommodating to the religious observances of their employees. See http://thomas.loc.gov/cgi-bin/query/R?r109:FLD001:S51408 (last visited Jan. 30, 2007). Full text of the proposed bill can be found at http://www.govtrack.us/congress/billtext.xpd?bill=s109-677 (last visited Jan. 30, 2007). The Bill was read twice and referred to Committee on February 17, 2007. To track the Bill’s progress, see http://www.govtrack.us/congress/bill.xpd?bill=s110-677.

Whistleblower Protection Enhancement Act of 2007 (H.R. 985) passed on March 14, 2007 (for a breakdown of the voting, see http://www.govtrack.us/congress/vote.xpd?vote=h2007-153) and allows federal-employee whistleblowers federal jury trials, with compensatory damages available, if the Merit Systems Protection Board should fail to issue a timely, final decision. In addition to numerous other changes in the Federal Whistleblower Protection Act, the legislation overrules the decision of the Federal Circuit, holding that whistleblowing that is a part of the job duties of the federal employee is not protected activity, and would recognize that denial of a security clearance constitutes an adverse employment action. The legislation was approved on February 14, 2007 by the House Oversight and Government Reform Committee by a vote of 28-0.


ADA Restoration Act of 2007, H.R. 3195, available at http://thomas.loc.gov/home/gpoxmlc110/h3195_ih.xml. The bill, as of October 4, 2007, had more than 218 House co-sponsors. The first legislative hearing on the proposed legislation was held on October 4, 2007 before the House Judiciary Committee and the first witness was the Majority Leader. The hearing is available at http://judiciary.house.gov/hearings.aspx?ID=182. This proposed legislation would dramatically rewrite the Americans with Disabilities Act. It
contains, for example, a rule of construction which states that the determination of whether an individual has a physical or mental impairment shall be made without considering the impact of any mitigating measures. The legislation was introduced by Congressman Hoyer of Maryland.

The new IRS whistleblower provisions are contained in 28 U.S.C. § 7623. The new statute provides as follows:

(a) In general.—The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for—

(1) detecting underpayments of tax, or
(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

(b) Awards to whistleblowers.—
(1) In general.—If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) Award in case of less substantial contribution.—
(A) In general.—In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action, taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

(B) Nonapplication of paragraph where individual is original source of information.—Subparagraph (A) shall not apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).

(3) Reduction in or denial of award.—If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If
such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

(4) Appeal of award determination.--Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(5) Application of this subsection.--This subsection shall apply with respect to any action--

(A) against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds $200,000 for any taxable year subject to such action, and

(B) if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000.

(6) Additional rules.--

(A) No contract necessary.--No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection.

(B) Representation.--Any individual described in paragraph (1) or (2) may be represented by counsel.

(C) Submission of information.--No award may be made under this subsection based on information submitted to the Secretary unless such information is submitted under penalty of perjury.


Proposed reauthorization of the Office of Special Counsel, and the Merit Systems Protection Board, H.R. 3551, 110th Cong. (2007), available at http://thomas.loc.gov/cgi-bin/query/z?q=c110:H.R.3551:. Contained within this bill is the following statement: “In order to dispel any public confusion, Congress repudiates any assertion that federal employees are not protected from discrimination on the basis of sexual orientation.” In addition, H.R. 3551 would add a joinder provision for subsequent retaliatory personnel actions in an individual right of action before the MSPB, would add criteria for granting a stay an in individual right of action case as well as a provision for filing an interlocutory appeal for expedited MSPB review when an Administrative Judge rejects a stay request, and allows recovery of attorneys’ fees where the employee or applicant is not necessarily the prevailing party, but the case resulted in “providing some relief or benefit.”


163
Act and to “overrule” Rockwell. The bill clarifies the scope of FCA liability; clarifies the conditions under which a federal employee can file a qui tam action; and clarifies the public disclosure bar.

TSA Employees Collective Bargaining Rights (S.4) is legislation contained within a bill designed to enact certain recommendations of the September 11 Commission, which would provide for collective bargaining rights for federal T.S.A. employees, specifically airport screeners. See “House Votes to Grant TSA Screeners Bargaining Rights”, Jan. 9, 2007, at http://www.govexec.com/dailyfed/0107/010907r2.htm (last visited Mar. 8, 2007). Under the proposal, the security officers would not have the right to strike, and the union would not have the power to negotiate wages. But, the union would be authorized to bargain on behalf of employees to establish work rules to govern overtime and temporary transfers, as well as to protect them in the event they file a grievance. Legislation has passed both houses of Congress, and is going to conference. The President’s senior advisors have indicated they will recommend a veto. The Bill has passed the Senate on March 13, 2007. See http://www.govtrack.us/congress/bill.xpd?bill=s110-4.

The Uniform Code of Military Justice (H.R. 5122, Pub. L. No.109-364), available at http://www.govtrack.us/congress/bill.xpd?bill=h109-5122, has been amended to expand its coverage to include defense contractors. It is believed that the legislation means that private military contractors, including those operating, for example, in Iraq, would face the possibility of court martial proceedings. The legislation stripped them of immunity from military prosecution.

Mental Health Parity Act of 2007 (S. 558). The Senate Health, Education, Labor and Pensions Committee considered a bill that would require businesses with 50 employees or more to offer the same medical benefits for mental health care as they offer for other conditions. The bill would require that such benefits be equal in all respects to all other medical benefits, including deductibles and annual coverage limits. To follow the progress of the Bill, see http://www.govtrack.us/congress/bill.xpd?bill=s110-558.

Support for Injured Service Members Act, H.R. 3481, S. 1894, 110th Cong. (2007) available at: http://www.thomas.gov/cgi-bin/query/z?c110:H.R.3481.IH:. This legislation would expand the FMLA from twelve weeks to six months for family/medical leave for the families of wounded military personnel. Both this bill and a similar provision, introduced by Senator Obama, that amends USERRA to include family members caring for wounded service members among those whose jobs are protected, were included in the final version of the State Children’s Health Insurance Program (SCHIP) Reauthorization Bill that was vetoed by the President on October 3, 2007.

Equal Remedies Act of 2007, S.1928, on August 1, 2007, available at http://thomas.loc.gov/cgi-bin/query/z?c110:S.1928:. The intent of this proposed legislation is to remove the damage caps in Title VII and the ADA which are based on the number of employees of the defendant employer. The statute also would extend the Title VII statute of limitations and eliminate the requirement that Title VII plaintiffs file with the EEOC.
On August 1, 2007, the House passed the SAFETEA-LU Technical Corrections Act by a vote of 422-1. The bill did not include any language reinstating the Motor Carrier Act Exemption to the FLSA for drivers of vehicles of less than 10,001 pounds.

The Independent Contractor Proper Classification Act of 2007, S. 2044, 110th Cong. (1st Sess. 2007). The Independent Contractor Proper Classification Act of 2007, which was introduced on September 12, 2007, would:

- allow the IRS to require employers to reclassify workers misclassified as independent contractors;
- authorize the IRS to issue regulations and revenue rulings establishing standards for properly classifying workers as independent contractors;
- eliminate the ability of employers to rely on industry practices as a reasonable basis for classifying workers as independent contractors;
- require the IRS to develop a procedure by which employees could challenge their classification as independent contractors;
- provide protections against retaliation for workers who take advantage of the challenge procedure;
- require IRS audit of employers that have misclassified workers and require misclassifications to be reported to the Department of Labor;
- require DOL to investigate industries that are revealed by IRS data to have high rates of misclassifications;
- require the DOL’s FLSA poster to inform workers of their right to challenge their classification as independent contractors;
- require employers to notify independent contractors of their federal tax obligations, of their right to obtain a determination of their independent contractor status from the IRS, and of the labor and employment law protections that apply only to employees; and
- require employers to keep certain records relating to independent contractors for three years.


The Fair Home Health Care Act of 2007 (S.2061). This legislation, introduced on September 18, 2007, is designed to “overturn” the Supreme Court’s decision in Long Island Care at Home LTD v. Coke, 2007 U.S. LEXIS 7717 (U.S., June 11, 2007).
Rep. Jim Cooper of Tennessee’s bill about Inspector Generals would give 7 year terms and could only be removed for cause.


When researching congressional legislation, the Flash Tutorials at the UC Berkeley Library can help you find the Bill, the Hearings, and the Congressional Debate. See UC Berkeley Library’s Congressional Research Tutorials, UC Berkeley Library website, http://sunsite3.berkeley.edu/wikis/congresearch/index.php (last visited June 10, 2008).


Marketing Inc. v. Major League Baseball Advanced Media LP, 505 F.3d 818 (8th Cir. 2007)


Lilly Ledbetter Fair Pay Act, H.R. 2831, 110th Cong. (2007) available at http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02831: (motion by Senator Reid to reconsider the vote by which cloture was not invoked on April 23, 2008)


Renewable Energy and Job Creation Act of 2008, H.R. 6049 Sec. 311, 110th Congress (passed house on May 5, 2008) (Section 311 of this bill, which has passed the House, provides for uniform treatment of attorney-advance expenses and court costs in contingency fee cases. The text would amend Sec. 162 of the Code to insert a new subsection (q), reading as follows: “Attorney-Advanced Expenses and Court Costs in Contingency Fee Cases- In the case of any expense or court cost which is paid or incurred in the course of the trade or business of practicing law and the repayment of which is contingent on a recovery by judgment or settlement in the action to which such expense or cost relates, the deduction under subsection (a) shall be determined as if such expense or cost was not subject to repayment.” Under current law, the tax treatment of attorney-advanced expenses and court costs in contingency fee cases depends on whether the contingency fee is structured as a “net” fee (i.e., the attorney’s compensation is based on a percentage of the gross recovery in the litigation net of the advanced litigation costs) or as a “gross” fee (i.e., the attorney’s compensation is based on a percentage of the gross recovery without regard to the amount of advanced litigation costs). Where the contingency fee is structured as a “gross” fee, the attorney is allowed to take a current deduction for advanced litigation costs as they are paid. Where the contingency fee is structured as a “net” fee, the attorney is not allowed to take a current deduction for advanced litigation costs. The bill would
conform the tax treatment of “net” fee arrangements to the tax treatment of “gross” fee arrangements by allowing all advanced litigation costs to be deducted currently by the attorney).

ADA – Amendment Act
SECTION 2. FINDINGS AND PURPOSE

(a) FINDINGS --Congress finds--

(4) the holdings of the Supreme Court in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) and its companion cases, and in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect; and

(5) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.

(b) PURPOSES--The purposes of this Act are--

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled,’ and that to be substantially limited in performing a major life activity under the ADA ‘an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives’; and

(5) to provide a new definition of ‘substantially limits’ to indicate that Congress intends to depart from the strict and demanding standard applied by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams and by numerous lower courts.

SEC. 3. DEFINITION OF DISABILITY.

As used in this Act:

(1) DISABILITY.—The term ‘disability’ means, with respect to an individual—

(A) a physical or mental impairment that
substantially limits one or more major life activities of such individual;

(2) SUBSTANTIALLY LIMITS.—The term ‘substantially limits’ means materially restricts.

(5) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.—

The definition of ‘disability’ in paragraph (1) shall be construed in accordance with the following:

(A) To achieve the remedial purposes of this Act, the definition of ‘disability’ in paragraph (1) shall be construed broadly.

(B) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(C) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(D)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eye glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.


Airline Flight Crew Technical Corrections Act, H.R. 2744, 110th Cong. (Passed House on May 20, 2008; Received in the Senate and referred to the Committee on Health, Education, Labor, and Pensions on May 21, 2008) (The House of Representatives on May 20, 2008 approved H.R. 2744 by a 402-9 vote. The legislation would extend coverage under the FMLA to flight attendants and pilots. A companion bill (S. 2059) was introduced in the Senate in September 2007.).


Paul Wellstone Mental Health and Addiction Equity Act of 2007, H.R. 1424, 110th Cong. (Passed House on March 5, 2008)


Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (Senate Committee on the Judiciary held hearings on this bill on September 18, 2007).


SAVE (Secure America Through Verification and Enforcement) Act of 2007, H.R. 4088, 110th Cong. (Motion to Discharge Committee filed by Mrs. Drake, Petition No: 110-5, March 11, 2008).


**Legislation - State**

S.B. 5659, 2007 Wash. Legis. Serv. 357: The state of Washington recently enacted a new law implementing paid family leave. Employers with fewer than 25 employees are excluded, and leave under the new statute must be taken concurrently with FMLA leave to avoid stacking
leave one after the other. This law makes Washington only the second state after California to offer paid leave, and it will not be available until 2009.

Civil Rights Tax Fairness Act. The District of Columbia has enacted the Civil Rights Tax Fairness Act (§ 47-1803.02; § 47-1806.03; § 47-1806.10) which exempts from local taxation emotional distress damages and attorney’s fees as well as permitting income averaging of back and front pay awards.


A bill in New Jersey would give an individual the right to seek as much as $25,000 in damages if an employer created “an abusive work environment.” Assemb. 3590, 2006 Leg., 212th Sess. (N.J. 2006), available at: http://www.njleg.state.nj.us/2006/bills/a4000/3590_11.htm.

California Sexual Harassment Training Statute: California recently mandated that any employer in the United States with 50 or more employees, which has at least one supervisor in California, must give its employees sexual harassment training, with updates every two years. The law applies to companies even outside the state, so long as some of its employees work within California. See CAL. GOV’T CODE § 12950 (2007).

Paid Sick And Safe Days Act: This bill was introduced on May 1, 2007 at the D.C. Council. The proposed legislation provides that paid sick days and safe days are available for a variety of uses, including: When the employee or his/her family member is sick; When the employee or his/her family member needs routine or preventative medical care; When the employee who is a domestic violence victim needs time off to seek medical care, shelter, counseling, a court order, or other services related to the domestic violence; or When the employee needs to take time off to attend a school-related activity that their child is involved in, as long as this would not disrupt the employer's business. See Tresa Baldas, “Mandatory paid sick leave may spur suits”, Nat’l L.J. Online, Feb. 7, 2007, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1170842566768 (subscription needed).
Days off are accrued based on the number of hours worked. For every 26 hours worked, the worker will earn one hour of Paid Sick and Safe time. For a full time employee this will equal 10 days within a year. Accrual of hours begins the first day of employment; however, the employee must work 60 days before he/she can access the days.

Protections for Employees are included:
An employee may not be retaliated against for using their days. An employer may not fire, retaliate against, or reprimand an employee for taking their days. An employee's employment benefits and seniority must be protected. An employee can enforce his or her rights through an administrative procedure or by filing suit in civil court.

Protections for Employers are included:
An employer may reserve the right to request certification of the need to miss work from the worker if the worker misses more than 3 days in a row. For businesses with 5 or fewer employees, the amount of leave earned is capped at 5 days per year. Businesses with fewer than 20 workers will have an additional 2 years to prepare before the bill applies to them. Paid Sick and Safe Days must be used while the employee is on the job. Employees will not be paid for any unused days when their job ends, unless the employer chooses to do so. Businesses will get credit for leave they already provide. Businesses already providing 10 or more days of paid time off will not have to offer more, as long as the employee can use them as described in the legislation. If an employer provides paid time off for the reasons listed above but for fewer days, the employer would need to match the amount of paid days off provided in the bill. If an employer provides the same amount of paid time off as listed in the bill, but does not cover all of the reasons one can take leave, that employer would need to revise the reasons people can use that paid time. Paid Sick and Safe Days cannot be carried over from year to year, but leftover days can be accessed at the beginning of the next year.

The bill sets a minimum standard of paid time off that is available in a 12-month period, and employers are not required to allow unused leave to be carried over from one year to the next. However, if someone does not use leave in Year 1, she would not have to re-earn that leave in Year 2. It would immediately be available for her to use, but the leave left over would be in place of, not in addition to, leave in Year 2.
Example: Worker Carol uses 5 days of paid time off in Year 1. As of the first day of Year 2, she has 5 days of paid time available to her. During Year 2, she will earn the other 5 days, for a total of 10 days. She will not be able to combine 5 days from Year 1 with 10 days from Year 2.

Collective Bargaining Agreements: In the case of a CBA, the parties may agree to waive the provisions of this bill.

The actual text of the bill can be found at:

Maryland, as of October 1, 2007, has provided for a private cause of action so that individuals and the Maryland Commission on Human Relations can bring actions in state circuit court to enforce Article 49B, the state law against discrimination. The state anti-discrimination law prohibits discrimination based upon, among other characteristics, sexual orientation, marital
status, and any age. The state law covers employers of fifteen or more, provides for enhanced damage awards, and jury trials. The law makes it unlawful to “aid and abet” discrimination.

A report which summarizes 2007 legislative activity at the state level notes the following new state employment laws:

- New Mexico, Iowa, New Hampshire and South Dakota enacted minimum wage rates that are greater than the federal minimum wage. According to the Progressive States Network, there are now 34 states that have done so.
- Maryland enacted the nation’s first statewide “living wage” law.
- Oregon expanded its employment discrimination statute, including providing for compensatory and punitive damages.
- Colorado amended its unpaid wages law to provide for a penalty of 200% of unpaid wages plus attorney fees.
- New Jersey created new criminal penalties for knowing misclassification of employees as independent contractors for the purpose of avoiding state and federal taxes.
- Colorado passed a law requiring independent contractors on construction sites to be covered by workers’ compensation.
- Minnesota passed a law tightening the definition of independent contractor and requiring independent contractors to register with the state.
- Washington passed legislation requiring paid family leave for new parents.
- New Hampshire now prohibits mandatory overtime for nurses and hospital assistants.
- Oregon and New Mexico enacted laws giving mothers the right to pump breast milk at work during breaks.
- Oregon enacted legislation making locked out employees eligible for unemployment benefits.


A new Virginia statute requires employers to grant leave to employees who have been victims of a crime in order to be present at any criminal proceeding. The law took effect on July 1, 2007. The statute prohibits employers from discharging or taking adverse action against an employee who takes leave from work because he or she was the victim of a crime. The statute defines a “criminal proceeding” to include several phases, including initial appearance, post-arrest release, sentencing, post-conviction release, and probation revocation.

Maryland enacted the Clean Air Act of 2007, expanding its smoking ban to include bars, restaurants, and private social clubs. The new law becomes effective February 1, 2008, and provides that employers can have civil penalties imposed upon them ranging from $2,000 to $10,000 for terminating or discriminating against an employee who complained or participated in complaining about violations of the anti-smoking law.
Effective January 1, 2007, Maryland employers are prohibited from printing an employee’s Social Security Number on wage payment checks. In addition, employers may not print employee's Social Security Numbers on related wage payment documents, including attachments to the wage payment check, direct deposit notices, and credit notices to debit or credit card accounts. See Maryland Code: Labor and Employment §3-502. Failure to comply could trigger misdemeanor liability.

Maryland passed a law requiring Maryland businesses to safeguard personal information of their customers and the law established required notification procedures in the event of a security breach relative to such information. The law becomes effective January 1, 2008.

Lactation in the Workplace:
Governor Spitzer of New York has signed into law legislation which requires that mothers be given the opportunity to express milk or nurse their children up to three years after they give birth to a child. The actual text of the statute can be found at: http://caseprepplus.com/Research/issueindex.aspx?id=55&page=2. Posting of Paul Secunda to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2007/08/nursing-mothers.html (August 30, 2007).

Over five years ago Connecticut passed a law which protects mothers breast-feeding in the workplace. Conn. Gen. Stat. § 31-40w provides “an employee may express breast milk or breastfeed at her workplace during a meal or break period.” This text of the statute if available at http://www.cga.ct.gov/2007/pub/Chap557.htm#Sec31-40w.htm.

Recently a Harvard Medical School student and new mother requested extra break time during her licensing exam to breastfeed. Superior Court Judge Patrick Brady denied the request, but Judge Gary Katzmann of the Massachusetts appeals court overturned that decision stating: “she must be provided with sufficient time to pump breast milk.” NEED CITES

Definition of Disability, 2007 WASH. SESS. LAWS Ch. 317(amending WASH. REV. CODE § 49.60.040 and explicitly overruling McClarty v. Totem Electric, 137 P.3d 844 (Wash. 2006)).

Broadcast Employees Freedom to Work Act, N.Y. Bill A02124, 2007-2008 Regular Sessions (Passed on June 24, 2008) (This is huge news for radio and television anchors and reporters who are often required to sign non-compete agreements, which forbid them from working in a particular city for a certain length of time after their employment ends.).

Illegal Immigration Reform Act, S.C. H. 4400, Session 117 (signed by governor on 4, 2008).


Flexible Leave Act, Md. H.B. 40, 2008 Regular Session (signed by governor on May 2, 008).


The Business Security and Employee Privacy Act, Ga. H.B. 89, 2007-2008 Legislative Session (signed by Governor on May 14, 2008), available at http://www.legis.ga.gov/legis/2007_08/fulltext/hb89.htm (The Georgia legislature enacted and the governor signed into law an act providing that Georgia residents who lawfully possess a concealed weapon may store it in a locked vehicle in the parking lot of their employer. The act prohibits both public and private employers from searching the private vehicles of employees or invited guests and from conditioning employment based on a policy that restricts weapons from company property. The Georgia Chamber of Commerce opposed the legislation and the National Rifle Association stated that the new law “represents the most comprehensive pro-gun reform measure to be enacted in nearly 20 years.”).

An Act Concerning Identity Fraud, Maryland House Bill 1113, 2008 Regular Session, 2008 Bill Text MD H.B. 1113 (Lexis cite), available at http://mlis.state.md.us/2008rs/chapters_noln/Ch_355_hub1113T.pdf (last accessed June 16, 2008) (This new Maryland statute takes effect October 1. Among other things, the statute provides that “a person may not intentionally, willfully, and without authorization, access, attempt to access... a computer or copy, attempt to copy... the contents of... a computer database.”)

Life Insurance

Tillman v. Camelot, 408 F.3d 1300 (10th Cir. 2005). Employer purchased life insurance polices on employees, but, did not inform the insured employees of the policies. When one particular employee passed away, the employer tried to collect, however, the Court of Appeals held that an employer lacks an insurable interest in a “rank and file” employee’s life and that the insured or his/her representative could recover the proceeds.

Lifestyle Discrimination


NEED MORE ON LIFESTYLE DISCRIMINATION

Liquidated Damages

Barrie School v. Patch, 2007 Md. LEXIS 643 (Md Ct. App. Oct. 5, 2007). In this non-employment case, the Maryland Court of Appeals held that parties to a contract containing a liquidated damages clause do not have a duty to mitigate their damages in the event the other party breaches the agreement.

Metadata

ABA Formal Opinion 06-442. In Formal Opinion 06-442, the ABA Standing Committee on Ethics and Professional Responsibility concluded that the Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. Available on a complimentary basis for one year at www.abanet.org/cpr/pubs/home.html. See also Florida Bar Opinion 06-2, available at www.floridabar.com, click “Ethics Opinions”; New York State Bar Association formal opinions 749 and 782, discussing metadata, available at www.nysba.org, click “Publications”.

Alabama State Bar Disciplinary Commission, Opinion 2007-02 (March 14 2007). http://www.alabar.org/ogc/fopDisplay.cfm?oneId=412. The Alabama state Bar’s ethics panel advised that the unauthorized mining of “metadata” to uncover confidential information in electronic documents constitutes professional misconduct. See also New York State Ethics Opinion 749 (2001); contra American Bar Association Formal Opinion 06-442 (2006) (Lawyers have no ethical duty to refrain from reviewing and using metadata imbedded in email and other electronic documents received from opposing counsel or adverse parties. The ethics panel also advised that attorneys that send electronic documents must use reasonable care to avoid revealing secrets hidden in metadata.); See also New York State Ethics Opinion 782 (2004). The Alabama panel stated: “Lawyers have a duty under Rule 1.6 to use reasonable care when transmitting electronic documents to prevent the disclosure of metadata containing client confidences or secrets.”

Op. Prof’l Ethics of the Fla. Bar. 06-1 (April 10, 2006) available at www.floridabar.org (select Ethics Opinions, search 06-1). The Florida Bar’s Board of Governors directed the Bar’s Professional Ethics Committee to issue an opinion determining the ethical duties where lawyers “mine” for metadata in documents that they receive from opposing counsel. The proposed opinion was open for comment at the Bar’s annual meeting in June.

D.C. Bar Ethics Opinion 341 (Sept. 2007). Available at: http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm. The District of Columbia Bar’s Ethics Committee issued an opinion regarding metadata, both metadata in e-mail and in digital evidence produced in discovery. The Committee opined that a receiving lawyer who is informed by the sending lawyer of an inadvertent disclosure before the receiving lawyer reviews the document is considered to have actual prior knowledge of the inadvertent disclosure, and the receiving attorney must cease reviewing the metadata. The Committee also considered that the receiving lawyer has actual knowledge where that lawyer notices upon review of the metadata that it is clear that protected information is unintentionally included. See also D.C. Ethics Opinions 256 and 318. And, in contrast, see Maryland Opinion No. 2007-09. NEED CITES TO ETHICS OPINIONS

Mediation
BBS Technologies, Inc. v. Remington Arms Co., Inc., 2005 U.S. Dist. LEXIS 29412 (E.D. Ky. Nov. 22, 2005). The defendant failed to comply with a mediation requirement which was a part of a multi-step dispute resolution agreement, leading ultimately to arbitration. The question before the court was whether the court or the arbiter decided whether the alleged failure to
comply with the mediation requirement had occurred and that thus a condition precedent to arbitration had not been fulfilled. The Eastern District of Kentucky held that in light of the Supreme Court’s holding in Howsam v. Dean Witter Reynolds, 537 U.S. 79, 84 (2002) that procedural questions are “presumptively not for the judge but for an arbitrator, to decide” the issue here was procedural and thus should be decided by the arbiter. But see In re Pisces Foods, L.L.C., 228 S.W.3d 349 (Tex. App. 2007).


Harris v. Euronet Worldwide, Inc., 2007 U.S. Dist. LEXIS 39247 (D.Kan., May 29, 2007). The district court declined to allow the taking of the deposition of the plaintiff’s attorney. It was argued that plaintiff’s attorney was the only individual present at the mediation who could corroborate that plaintiff was identified as a witness willing to testify on behalf of another individual in a race discrimination case against the company. The district court found that the party endeavoring to take the lawyer’s deposition had not satisfied that portion of the test used in determining whether the lawyer should be deposed, that is, the taking party had failed to show no other means to obtain the information other than to depose opposing counsel. The court did not address whether it could compel the mediator to submit to deposition, but did indicate that an argument could be made that any claim of confidentiality had been waived by both parties in this case.


Motion for a More Definite Statement
Presidio Group, LLC v. GMAC Mortg., LLC, 2008 U.S. Dist. LEXIS 49401 (W.D. Wash. June 27, 2008) (In granting a motion for a more definite statement, the Court stated: “On page 117, Plaintiff embarks on an odyssey through his claims for relief. While the Court understands that asserting 54 claims requires some space, the 341 pages used to do so is unreasonable.” The court went on to wax poetic as follows:

“Plaintiff has a great deal to say,
But it seems he skipped Rule 8(a),
His Complaint is too long,
Which renders it wrong,
Please re-write and re-file today.”)

National Identification Card
Nelson v. NASA, 2007 U.S. App. LEXIS 23916 (9th Cir. 2007). NEED TO SUMMARIZE

National Origin
Salas v. Wis. Dep't of Corr., 2007 U.S. App. LEXIS 16986 (7th Cir. July 18, 2007). The Court of Appeals found that Hispanics qualify to assert claims of national origin discrimination. The Court stated that "[a]lthough the EEOC does not define the term 'national origin group,' Hispanics would qualify as such a group."

Gonzalo v. All Island Transp., 2007 U.S. Dist. LEXIS 13069 (E.D.N.Y. Feb 26, 2007). The district court held that a taxi company’s English-only policy in its dispatch office was a business necessity and thus did not violate Title VII. The court stated: “requiring employees to converse in English in the main office, except when the needs of a customer dictate otherwise serves an essential business purpose by making sure that communications are not misunderstood.”

Daud v. Gold’n Plump Poultry, Inc., 2007 U.S. Dist. LEXIS 43352 (D. Minn. May 11, 2007). Among other reasons, the court held that plaintiffs, Somali Muslims, had not alleged that they were discriminated against on the basis of their national origin. Rather, they had alleged religious discrimination. Thus, their claims were not actionable under § 1981, which protects only racial and national origin bases.

Olibrices v. Florida, 929 So. 2d 1176 (Fla. 4th D.C.A. 2006). The appeals court held that Pakistani Muslims are a recognized ethnicity group for the purposes of peremptory challenges to a potential jury member. Thus, it was error for the trial court to facially dismiss an objection to the challenge.

EEOC v. Go Daddy Softward, Inc., 2006 U.S. Dist. LEXIS 44708 (D. Ariz. 2006). The court held that the plaintiffs claims of discrimination on the basis of religion and national origin survived a summary judgment motion. The plaintiff, a Muslim, alleged various comments made
by his supervisor, which the court held to be sufficiently discriminatory to pass the initial motion to dismiss.


Negligence
Crump v. Morris I, (VLW 007-8-068)(Rockingham Cir. Ct., VA) and Crump v. Morris II, (VLW 007-8-069, 3-12-07)(Rockingham Cir. Ct.). In these decisions the Court holds that an employer may be liable for punitive damages for allegedly failing to respond to an employee’s threats against a co-worker. The employee making the threats subsequently brought two handguns to work and killed the co-worker with whom he allegedly had become obsessed.

Negligent Hiring
James v. Kelly Trucking Co., 2008 S.C. LEXIS 73 (S.C. Sup. Ct. March 10, 2008) (The Court held that the plaintiffs could sue for negligent hiring even though the employer admitted that it was vicariously liable for its employee’s actions).


Negligent Infliction of Emotional Distress
Ware v. ANW Special Educational Coop., 2008 Kan. App. LEXIS 59 (Kan Ct. App. April 11, 2008) (In a non-employment case, the Kansas Court of Appeals held that PTSD did not qualify as a “physical injury” for the purposes of a negligent infliction of emotional distress claim).

NLRA

NLRB
Guardsmark, LLC v. NLRB, 374 U.S. App. D.C. 360 (D.C. Cir. 2007). The DC Circuit held that the National Labor Relations Board (NLRB) had correctly held two rules promulgated by the employer, a private security firm, to be unfair, but that a third rule which the Board had approved was overbroad. The first rule required employees to address complaints solely through the chain of command. The Board struck it down as expressly prohibiting protected activity under the National Labor Relations Act (NLRA), and the court agreed. Employees’ right to generate support from the public and customers is statutorily protected under the NLRA. The second rule prohibited solicitation of literature while on duty or in uniform. The Board found this rule overbroad and restrictive, and the court agreed. The third rule prohibited fraternization, both on- and off-duty. The Board found this rule to be acceptable due to the surrounding words in the
rule, which referred to dating. The court, however, held that the rule would likely be understood to forbid protected union activity, and thus must be struck down.

**U-Haul Co. of California and Machinist District Lodge 190, Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL-CIO #32-CA-20665-1 (June 8, 2006)**

available at [www.nlrb.gov/nlrb/shared_files/decisions/ALJ/JD(SF)-13-04.pdf](http://www.nlrb.gov/nlrb/shared_files/decisions/ALJ/JD(SF)-13-04.pdf). An NLRB 2-1 panel ruling invalidates a mandatory arbitration policy for employees and orders the reinstatement of two terminated employees, in part because the policy could be interpreted to ban complaints under the NLRA.

On September 29, 2006, the NLRB, in a 3-2 decision, set forth new guidelines for determining who is a supervisor and thus not entitled to have union representation. The majority adopted an expansive interpretation of what employee tasks qualify as supervisory duties. **Oakwood Health Care Inc., 348 N.L.R.B 37.** That same day, the board issued two other decisions in which it applied its new guidelines. **In Beverly Enterprises-Minn, Inc., d/b/a Golden Crest Healthcare Center, 348 N.L.R.B. 39** held that charge nurses who lacked the authority to assign and responsibly direct other employees, were not supervisors. Also, in **Croft Metals Inc., 348 N.L.R.B. 38,** the Board held that lead persons who did not have the authority to assign other employees but had authority to responsibly direct other employees, were not supervisors as they did not exercise independent judgment in directing other employees. In doing so, the Board adopted the Supreme Court’s interpretation of “independent judgment” set forth in **NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001).**


**Phoenix Transit Sysm., 337 NLRB 510 (2002).** The Board ruled that an employer had violated section 8(a)(1) “by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves.” In **Phoenix Transit,** several employees had complained about sexual harassment by a supervisor and had met as a group with the employer to complain. The employer informed the employees that the meeting was confidential and was not to be discussed, even among themselves. Thereafter, a second employee independently complained about the same supervisor to his co-workers. Then, one of the original group of complaining employees published an article in a union newspaper about the supervisor, accusing management of doing nothing. In response, the employer terminated that employee. The Board concluded that the terminated employee had a right to discuss the harassment complaints and ordered his reinstatement. See also **Caesar’s Palace, 336 NLRB 271 (2001)** where the Board found no violation of the Act where the employer had maintained and
enforced a confidentiality rule prohibiting discussion of an ongoing investigation into alleged drug dealing.


Cintas Corp. v. NLRB, 482 F.3d 463 (D.C. Cir. 2007). This case involves a challenge by the union UNITE HERE to the confidentiality provision in the Cintas employee handbook which provided: “We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.” (emphasis in original). The challenge was part of a long standing effort by the union to organize Cintas employees. The NLRB held that employees who read the policy could construe it to mean they could not discuss the terms and conditions of their employment with fellow employees or with union. The NLRB found this could chill the rights of employees under the National Labor Relations Act to “engage in other concealed activities for the purposes of collective bargaining or other mutual aid or protection. . .” and was unlawful and the D.C. Circuit agreed.

Media General Operations, Inc. v. NLRB, 2007 U.S. App. LEXIS 6129 (4th Cir. 2007). The Fourth Circuit held that an employer had violated the National Labor Relations Act when it had permitted its employees to utilize the company e-mail system for personal reasons, but prohibited its use for the discussion of union matters. The company’s official written e-mail policy restricted the use of the company e-mail to business related e-mails. In reality, employees routinely used the e-mail system for a wide variety of non-business related communications. For a considerable period of time, the company did little or nothing to enforce its official policy. It then announced to the union during collective bargaining negotiations that it would no longer permit the use of the e-mail system for union business. When the union complained to the NLRB, the Board found the policy to be discriminatory and ordered the company to cease its refusal to allow the e-mail system to be used for union matters.

Anheuser-Busch Inc., 351 N.L.R.B. No. 40 (Sept. 29, 2007), available at http://www.nlrb.gov/research/decisions/board_decisions/template_html.aspx?file=http://www.nlrb.gov/shared_files/Board%20Decisions/351/v35140.htm&size=170. In a 3-2 decision, the Board limited employees’ ability to enforce their rights under the NLRA. The case involved an employer’s unlawful surveillance of its employees, surveillance that disclosed activity, including drug use, that resulted in termination and discipline of certain employees. In an earlier decision, the Board had refused to provide make-whole relief to the employees, and the D.C. Circuit reversed. Now, on remand, the Board reinstates its denial of make-whole relief on the basis that Section 10(c) precludes the Board from granting a make-whole remedy to employees disciplined for misconduct uncovered through an unlawfully-conducted investigatory interview.

The Board held: “The contention that a discriminatee has failed to make a reasonable search for work generally has two elements: (1) there were substantially equivalent jobs within the relevant geographic area, and (2) the discriminatee unreasonably failed to apply for these jobs. Current Board law places on the respondent-employer the burden of production for going forward with evidence as to both elements of the defense. As to the first element, we reaffirm that the respondent-employer has the burden of going forward with the evidence. However, as to the second element, the burden of going forward with the evidence is properly on the discriminatee and the General Counsel who advocates on his behalf to show that the discriminatee took reasonable steps to seek those jobs. . . .”


**Toering Electric**, 351 N.L.R.B. No. 18 (Sept. 29, 2007), available at http://www.nlrb.gov/research/decisions/board_decisions/template_html.aspx?file=http://www.nlrb.gov/shared_files/Board%20Decisions/351/v35118.htm&size=287. In a 3-2 decision, the Board ruled that an applicant for employment must be genuinely interested in seeking to establish an employment relationship with the employer to qualify as a Section 2(3) employee and therefore be afforded protection against hiring discrimination based on union affiliation or activity.

**Ryder Memorial Hospital**, 351 N.L.R.B. No. 26 (Sept. 28, 2007), available at http://www.nlrb.gov/research/decisions/board_decisions/template_html.aspx?file=http://www.nlrb.gov/shared_files/Board%20Decisions/351/v35126.htm&size=197. The Board announced that it will be modifying the ballot form used in secret-ballot representation elections. The revised official election ballot will now include language that asserts the Board’s neutrality in the election process and disclaims the Board’s participation in the alteration of any sample ballot.

**BE & K Construction Co.**, 351 N.L.R.B. No. 29 (Sept. 29, 2007) available at http://www.nlrb.gov/research/decisions/board_decisions/template_html.aspx?file=http://www.nlrb.gov/shared_files/Board%20Decisions/351/v35129.htm&size=188. Five years after the Supreme Court’s 2002 decision remanding this matter to the Board, the Board, in yet another 3-2 decision, held that “the filing and maintenance of a reasonably based lawsuit does not violate [NLRA], regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for initiating the lawsuit.”


Washington State Nurses Association v. National Labor Relations Board, 2008 U.S. App. LEXIS 10698 (9th Cir. 2008) (The Ninth Circuit held that the NLRB had no evidence to support its finding that a hospital could prohibit nurses from wearing a union button in hospital areas where
they might encounter patients or family members. The Circuit found that the NLRB’s finding regarding the disruptive effect of the button was not supported by substantial evidence. Indeed, the Circuit found that “… it is not supported by any evidence.”

NLRB Memorandum GC 08-07, May 15, 2008, available at http://www.nlrb.gov/shared_files/GC%20Memo/2008/GC%2008-07%20Report%20on%20Case%20Development.pdf (The NLRB General Counsel issued a memorandum on May 15, 2008 discussing various board decisions, particularly employees’ use of their employer’s email system for union activities. The memorandum discusses Guard Publishing d/b/a The Register Guard 351 N.L.R.B. 70 2007, a 3-2 board decision, holding that the employer did not commit an unfair labor practice by maintaining a policy prohibiting employees from using the company e-mail system for non-job-related solicitations.).


**Non-Competition Agreements**

**Harrison v. Sarah Coventry Inc.**, 184 S.E.2d 448; 228 Ga. 169 (Ga. 1971). The Georgia Supreme Court ruled that non-recruitment clauses in employment contracts are valid and legally binding because they do not qualify as “negative covenants.” This was the first state supreme court ruling on the subject, and in the following years, other states have ruled in various ways and for differing reasons.

**Loral Corp. v. Moves**, 1985 Cal. App. LEXIS 2738; 174 Cal. App. 3d 268 (Cal. Ct. App. Nov. 8, 1985). A California appeals court ruled that non-recruitment clauses were valid under the state’s non-competition clause because they do not create a “significant” restraint on the ability of the former employee to practice his or her trade, and only affect the employee’s former colleagues insofar as they must contact the employee rather than the other way around.

**Baker Petrolife Corp. v. Spicer**, 2006 U.S. Dist. LEXIS 41535 (S.D. Tex. 2006). A district court in Texas ruled that non-recruitment clauses are not “in restraint of trade” and thus are not prohibited by the state’s non-competition statute.

**Marsh & McLennan Cos. v. Palmer & Cay, Inc.**, 404 F.3d 1297 (11th Cir. 2005). The 11th Circuit held that a non-solicitation agreement between an insurance executive and his former employer, which prevented executive from accepting unsolicited business from former clients of his former employer, is invalid and unenforceable under Georgia law because the state’s courts refuse to enforce employment non-competition agreements that bar employee from accepting unsolicited business from former clients after leaving employment. Because Georgia does not attempt to limit its declaratory judgments in cases involving such non-competition agreements declaratory relief cannot be limited to that state under principles articulated in Semtek Int’l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2000), that under federal common law, enforcing court
should apply law of state courts in state where rendering federal court sits, unless state’s law conflicts with federal interests.

**Murfreesboro Med. Clinic, P.A. v. Udom**, 166 S.W.3d 674 (Tenn. 2005). The Tennessee Supreme Court held that covenants not to compete with other healthcare providers are unenforceable and void in Tennessee except in two specific circumstances spelled out in the state statute. In doing so, the court stated: “The right of a person to choose the physician that he or she believes is best able to provide treatment is so fundamental that we can not allow it to be denied because of an employer’s restrictive covenant.

**Mohanty v. St. John Heart Clinic**, 866 N.E.2d 85; 225 Ill. 2d 52 (Ill. S.Ct. 2006). The Illinois Supreme Court held that a cardiology clinic could enforce a non-compete agreement against two doctors formerly employed by it.


### Protocol for Broker Recruiting

A number of brokerage houses have entered into an agreement that outlines what customer information brokers may take with them when they terminate their employment with one brokerage to accept employment elsewhere. Copies of the “Protocol for Broker Recruiting” may be obtained from Ted Levine at [talevine@wlrk.com](mailto:talevine@wlrk.com).


Access Organics, Inc. v. Hernandez, 175 P.3d 899 (Montana Sup. Ct. 2007) (The Montana Supreme Court held that a non-compete agreement, which was signed after hiring the employee, was unenforceable as the only consideration was continued employment. The Court stated: “'[A]fterthought agreements' – non-compete agreements signed by employees after the date of hire – are not automatically invalid . . . for example, an employer may provide an employee with a raise or promotion in exchange for signing a non-compete agreement.” In the instant case, the employee “did not receive a promotion, a raise, or access to confidential information in exchange for signing this agreement. Nor did [he] receive any additional training or any promise of continued employment for a specified period of time. In short, [he] did not receive any benefit, and [the employer] did not incur any obligation or detriment that would serve as consideration to support this non-compete agreement.”).

Central Indiana Podiatry, P.C. v. Krueger, 882 N.E.2d 723 (Indiana Sup. Ct. March 11, 2008) (The Indiana Supreme Court held that non-compete agreements between a medical practice group and its physicians are not void per se as against public policy, but must be reasonable in scope to be enforceable. The Court stated: “We hold that noncompetition agreements between a physician and a medical practice group are not per se void as against public policy and are enforceable to the extent they are reasonable. To be geographically reasonable, the agreement may restrict only that area in which the physician developed patient relationships using the practice group’s resources.”).

Carr v. Entercom Boston, LLC, 2007 WL 2840363 (Mass. Super. Sept. 19, 2007) (The court, in the first judicial interpretation of G.L.c. 149, § 186, which renders void any agreement that restricts the right of radio or television broadcasters to obtain subsequent employment in a specific geographic area for a specific period of time following termination, voided an agreement which prohibited the Plaintiff from performing broadcasting services for 90 days after terminating employment with defendant. The agreement further granted defendant a right of first refusal with respect to Plaintiff’s services if he received another offer of employment within 180 days after termination. The court held that if the right of first refusal was exercised after termination, then it would appear to be barred by the statute, but as the right of first refusal was exercised in this case before the termination, the right of first refusal did not function as a restriction on post-employment activity. Rather, the court held that it merely extended the term of the original employment agreement. The court acknowledged the potential merit of Plaintiff’s claim that he could not be forced to work for the defendant).
OWBPA

Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847 (D. Minn. 2007). The district court held that under the Older Workers Benefits Protection Act (OWBPA), employers are required to make information in release forms reasonably clear, so that workers can determine if they could have an age discrimination claim. In this case, it was unreasonably difficult to determine if ADEA claims existed, and thus the waivers all the employees had signed were held to be invalid.

Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006). The court held that a release from all ADEA claims that an employer made all released employees sign in order to obtain their severance packages did not conform to the statutory requirements for a release under the ADEA. The agreement did not confirm because the employer failed to provide the correct, “mandated information when it informed plaintiffs that the “decisional unit” included all salaried employees of the mills.” As such, the release was ineffective and plaintiffs did not waive their right to pursue claims under the ADEA.

Burlison v. McDonald’s Corp., 455 F.3d 1242 (11th Cir. 2006). The court held that a severance agreement that included a waiver for all ADEA claims was structured so that appellees were aware of the rights they were waiving and knowingly did so. The OWBPA only requires employers to give terminated employees detailed information about layoffs in their own decisional unit, and not nation-wide. The court held that to require employers to provide nationwide information would obfuscate the data and make it harder to detect patterns of alleged age discrimination.

Syverson v. IBM Corp., 461 F.3d 1147 (9th Cir. 2006) The Court of Appeals found non-compliance with the OWBPA’s requirement that the waiver of rights under the ADEA must be “written in a manner calculated to be understood” by the average employee. The waiver agreement contained a release and a covenant not to sue. The court held that a covenant not to sue is a term unfamiliar to lay people and as the employer did not explain how the release and the covenant not to sue dovetail, the comprehension requirement of the OWBPA had been violated. Syverson v. IBM Corp., 2007 U.S. App. LEXIS 16 (9th Cir. Jan. 3, 2007). On rehearing, the court modified its earlier decision (461 F.3d 1147 (9th Cir. 2006)) and joined with the Eighth Circuit in Thomford v. IBM Corp., 406 F.3d 500 (8th Cir. 2005), finding that IBM’s release was invalid and unenforceable as a matter of law under the OWBPA on account of its confusing phraseology which the court found was not calculated to be understood by an ordinary employee.

Linton v. KB Home Ind., 2007 U.S. Dist. LEXIS 48780 (S.D. Ind. 2007). The court granted the defendant’s motion to compel arbitration when the employee had signed a contract waiving her rights to a judicial forum for claims arising out of her employment. The Older Workers Benefits Protection Act does not render the arbitration clause unenforceable.

Ricciardi v. Elec. Data Sys. Corp., 2007 U.S. Dist. LEXIS 11758 (E.D. Pa. 2007). The court found in favor of defendant’s motion to dismiss, ruling that the employer had appropriately followed all guidelines under the OWBPA. The waiver which the plaintiff signed as part of a severance package was valid. See also Wells v. Xpedx, a Div. of International Paper Co., No. 8:05-CV-2193, 2006 WL 3133984 (M.D. Fla. Oct. 31, 2006).
Baker v. Washington Group Int’l, Inc., 2008 WL 351396, 2008 U.S. Dist. LEXIS 9115 (M.D. Pa. Feb. 7, 2008) (The District Court held that the Older Workers Benefits Protection Act does not provide a separate cause of action for failure to meet the requirements of the OWBPA. The Court held that the OWBPA “is styled as a ‘waiver’ provision that contains no rights-creating language and merely creates that unknowing and involuntary waivers are unenforceable [ADEA] claims.”).


Kurt H. Decker, Refining Pennsylvania’s Standard for Invalidating a Non-Competition Restrictive Covenant When an Employee’s Termination is Unrelated to the Employer’s Protectible Business Interest, 104 DICK. L. REV. 619 (2000).

OFCCP

The Office of Federal Contract Compliance Programs has released its final guidelines for evaluating systemic compensation discrimination, as well as guidelines for federal contractors to self-audit their compensation systems. These guidelines were initially proposed in November of 2004. The OFCCP expressly declined to agree to a “grace period” for implementation and enforcement of these final guidelines. Accordingly, they are effective immediately. United States Department of Labor, OFCCP Issues First Compensation Discrimination Standards, Publishes New Guidelines for Compensation Self-Analysis, Oct. 6, 2006, available at http://www.dol.gov/esa/ofccp/compfs.htm.

Websites with information on OFCCP:

- Interpretive Standards:

- Voluntary Guidelines:

- Internet Applicant Frequently Asked Questions:

**OSHA**


*Century Steel, Inc. v. Nevada*, 137 P.3d 1155 (Nev. 2006). The Nevada Supreme Court ruled the Nevada legislature intended to adopt federal standards when enacting their own occupational health and safety regulations for construction sites. The case turned on whether the employer committed a “willful” violation of the standard. The state law was silent as to the definition of “willful” violation. The court held that since the regulations were clearly modeled on the federal code, the Nevada legislature must have intended to adopt the federal definition, which defined “willful” as “intentional, deliberate, knowing, and voluntary manner, and if the action is taken with either intentional disregard or plain indifference to the relevant safety requirements.”

Occupational Safety and Health Administration’s final personal protective equipment rule - Employer Payment for Personal Protective Equipment, 72 Fed. Reg. 64,342 (November 15, 2007)

Documents from Edwin G. Foulke, Jr., Assistant Secretary of Labor for OSHA re: review of employment waiver clauses in settlement agreements under OSHA whistleblower protection programs, provided to The United States Law Week, BNA, Inc.(July 26, 2007).

**Personnel Files**

*Commission on Peace Officer Standards and Training v. Sup. Ct.*, 165 P.3d 118 (Cal. 2007). The California Supreme Court addressed whether the California Public Records Act required the Commission to disclose the hiring and firing date, names, and employing departments of
California police officers. Under the Public Records Act, it appeared that the information had to be disclosed, but a provision of the Penal Code stated that personnel information generally could not be disclosed. The majority held that the employment history was “confidential” and so excluded from disclosure. Two justices dissented.

Physician’s Peer Review

Adkins v. Christie, 2007 U.S. App. LEXIS 13715 (11th Cir. June 12, 2007). The Court of Appeals held that a doctor who sued a hospital for an allegedly discriminatory peer-review can gain access to the peer review documents of all the doctors on staff because there is no recognized peer review privilege. The defendant-hospital had argued that the peer review records should be protected by the “medical peer review privilege”. The court stated: “we conclude that the medical peer review process does not warrant the extraordinary protection of an evidentiary privilege in federal civil rights cases.”

Poliner v. Tex. Health Sys., 2006 U.S. Dist. LEXIS 66819 (N.D. Tex. Sept. 18, 2006). This case involved the unwarranted summary abeyance/suspension of Dr. Lawrence Poliner in 1998. Dr. Poliner then sued Presbyterian Hospital of Dallas and three physicians, who Dr. Poliner claimed engaged in sham peer review, thus leading to his unwarranted suspension. A jury found that the three physicians violated medical staff bylaws, failed to comply with reasonableness standards of the Health Care Quality Improvement Act (which, if they had been followed, would have given the three physicians immunity from suit), and suspended Dr. Poliner’s privileges although there was no evidence of imminent danger to patients, which is required to implement a legitimate summary suspension. The jury awarded Dr. Poliner $366,211,159.30 in compensatory and exemplary damages. Dr. Poliner then settled with two of physicians, both of whom were dismissed from the lawsuit. Later, the court granted defendants’ motion for a remitter, finding that the jury award was excessive and reducing the award to $22,542,106.20 under Texas’ “maximum recovery rule,” which states that the verdict must be reduced to the maximum amount the jury could have properly awarded the plaintiff.

Kadlec Medical Center v. Lakeview Anesthesia Associates, 2005 U.S. Dist. LEXIS 10328 (E.D. La., May 19, 2005). The District Court for the Eastern District of Louisiana found that hospitals have a duty to disclose information about their physicians to other health care providers to protect future patients when those doctors change jobs.

Lakeview Anesthesia Associates fired a physician based on suspicions he was stealing medication. When Kadlec Medical Center requested information about the physician, Lakeview merely sent a reply stating that the physician had been on its medical staff for four years. Shortly thereafter, a patient at Kadlec suffered extensive brain damage allegedly as a result of the physician’s gross negligence. Kadlec settled the resulting lawsuit for $7.5 million. Kadlec then sued Lakeview claiming that they would not have hired the physician had they been provided with complete information.

In finding that Lakeview had a duty to disclose the information, the court focused on the special relationship between the Lakeview and Kadlec due to the partial disclosure, the fact that
Louisiana law supports imposing a duty to disclose, and that policy considerations supported the imposition of such a duty.

**Polygraphs**

*Fernandez v. Mora-San Miguel*, 462 F.3d 1244 (10th Cir. 2006). The Tenth Circuit held that a polygraph examiner who administered polygraph tests to employees suspected of internal company theft could not be considered an “employer” under the Employee Polygraph Protection Act (EPPA) and, therefore, could not be held liable for violations of the act. The court implemented a four-factor economic reality test to determine if an examiner is an employer under the EPPA. The tests asks whether the examiner (1) decided that the polygraph test should be given; (2) decided who would undergo testing; (3) advised the employer on EEPA compliance or if the employer relied on the examiner to ensure EPPA compliance; or (4) decided that the employee should be subject to discipline. The court found that the examiner was not sufficiently involved in the proceedings and could not be considered an employer.

*Croddy v. FBI*, 2006 U.S. Dist. LEXIS 71823 (D.D.C. Sept. 29, 2006). The District Court dismissed an action brought by unsuccessful applicants for employment with the FBI and the Secret Service, who had been rejected because they “failed” polygraph examinations. Among its holdings, was one that being denied a job with the federal government does not implicate a “liberty interest” for the purposes of a due process claim.


**Preemption**

*Chamber of Commerce v. Lockyear*, 463 F.3d 1076 (9th Cir. 2006) (en banc), *petition for cert. filed*, 75 U.S.L.W. 3369 (U.S. Jan. 5, 2007) (No. 06-939). On October 19, 2007, the Solicitor General recommended that the Supreme Court grant certiorari to hear the challenge to state financial accountability acts which prohibit public and private employers from using state monies “to assist, deter, or promote” union organizing. For example, California prohibits California employers who receive state grants or funds in excess of $10,000 from using such monies to “to assist, promote, or deter union organizing.” Cal. Gov’t Code §§ 16645-16649. The en banc Ninth Circuit found the California statute not to be preempted by the National Labor Relations Act. The Chamber of Commerce, in its petition for certiorari argued that the NLRA preempts the California statute, and that the en banc panel of the Ninth Circuit created a Circuit split in holding otherwise. See *Health Care Ass’n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87 (2nd Cir. 2006). See also Paul M. Secunda, “Towards the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States,” Comparative Labor Law & Policy Journal, Vol. 29, No. 1, 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=993960#PaperDownload.

In *Chamber of Commerce of the U.S. v. Lockyear*, 2006 U.S. Dist. LEXIS 41782 (E.D. Cal. June 9, 2006), the court held that Section 17538.43(b)(1) of the California Business and Professions
Code is preempted by the Federal Communications Act. This law required a facsimile sender to obtain express prior consent before transmitting any faxes into or out of the state of California. The court rejected the claim that the FCC had exclusive authority to regulate interstate telecommunications, however, SB 833 eliminated the established business relationship exception codified by Congress and the Court held the part of SB 833 that tried to regulate the interstate transmission of unsolicited facsimile advertisements violated the Supremacy Clause.

Drake v. Laboratory Corp. of America Holdings, 458 F.3d 48 (2d Cir. 2006). The Ninth Circuit affirmed the district court’s refusal to grant summary judgment for defendants It held that state law claims challenging drug tests given to aviation employees under Federal Aviation Administration regulations were are not preempted unless they cover the same subject matter as the federal regulations or their relationship to the regulations is “so substantial as to interfere with the consistency and uniformity of the federal regulatory scheme.”

Montgomery v. Board of Trustees of Purdue University, 849 N.E.2d 1120 (Ind. 2006). The Indiana Supreme Court held that government entities with 20 or more employees are subject to federal age discrimination law. As an employee of the university, plaintiff’s age discrimination claim had to be brought under the federal Age Discrimination in Employment Act (ADEA) and not the Indiana Age Discrimination Act. The injunctive and EEOC remedies available under the ADEA were a meaningful and appropriate remedy.

Fasano v. Federal Reserve Bank of New York, 457 F.3d 274 (3d Cir. 2006). An employee’s state law employment discrimination claims against the Federal Reserve Bank of New York are preempted by the Federal Reserve Act. The court held that the FRA preempts state antidiscrimination and whistleblower laws to the extent that they provide additional remedies or liability beyond those provided by federal antidiscrimination laws. The court reasoned that the state laws thwarted Congressional intent to give Federal Reserve Banks wide-ranging employment discretion.

Griffin v. Acacia Life Ins. Co., 2007 D.C. App. LEXIS 266 (D.C. May 24, 2007). The D.C. Court of Appeals held that the tort claim of negligent supervision could not be predicated on a violation of the D.C. Human Rights Act as a common law claim of negligent supervision may be predicated only on common law causes of action or duties otherwise imposed by the common law and not by duties imposed by statute. Thus, a negligent supervision claim could be predicated on a battery, for example, but not the Human Rights Act. The Court emphasized that it did not intend to suggest that the Human Rights Act preempts or otherwise abolishes common law causes of action based on the same set of operative facts. The Court also emphasized that its holding was limited to the tort of negligent supervision and its earlier decisions permitting common law claims for intentional infliction of emotional distress to be predicated on violations of the Human Rights Act were unaffected y this decision.

There is an interesting law review that comprehensively covers the subject of preemption. See Jarod S. Gonzalez, State Anti Discrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law, 59 S.C.L. Rev. 115 (Fall 2007).
Pregnancy Discrimination

Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Employment Practices Litig.), 479 F.3d 936 (8th Cir. 2007). Denial of coverage for female contraceptives unless they are medically needed is not discrimination under the Pregnancy Discrimination Act (PDA). The court held that contraceptives are not “related to” pregnancy under the PDA because it inherently occurs before a pregnancy. Second, contraception is not gender-specific, as it applies to both males and females. Third, the plain language of the PDA does not mention contraception. The express exclusion of abortions in the statute does not imply that contraception coverage is included because contraception is not pregnancy-related; thus there was no reason for Congress to expressly exclude it. Last, although the EEOC had interpreted the PDA to require coverage if “other prescription drugs and devices, or other types of services, that are used to prevent the occurrences of other medical conditions” are covered, the court stated that the EEOC had no rulemaking authority on the issue and the agency’s reasoning was unpersuasive.

Yarden v. Sisters of St. Francis, Inc., 2007 U.S. App. LEXIS 13010 (7th Cir. 2007) (per curiam). The Seventh Circuit held that a man who claimed to have been fired because his girlfriend was pregnant could not sustain a suit under the Pregnancy Discrimination Act (PDA). The action was not taken because of his sex, and thus his termination was not protected under the PDA. The man’s pregnant girlfriend also sued after being terminated, but her suit was dismissed because she did not dispute that her primary job functions ceased after her termination.

Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233 (N.J. 2005). The employer, a casino, fired a female employee whose pregnancy caused her to run out of leave time. In a 4-3 ruling, the court, in reversing the lower court, held the defendant-employer had treated the plaintiff no differently than other employees whose medical conditions caused them to miss more than six months of work in a year.

Reeves v. Swift Transp. Co., 446 F.3d 637 (6th Cir. 2006). The plaintiff, a truck driver claimed her employer unlawfully terminated her when she became pregnant. Her job required her to lift up to 75 pounds. Three months into the job, the plaintiff discovered that she was pregnant and, when her doctor restricted her to lifting twenty pounds, she applied for light duty work for the remainder of her pregnancy. The employer declined to place her on light duty on the grounds that light duty was available only to individuals on workers’ compensation and stated, on a daily basis, that no light duty was available. She was terminated from the position and sued under the Pregnancy Discrimination ACT. The court held that the Act did not require a reasonable accommodation of pregnant employees, and that “Swift’s light-duty policy is indisputably pregnancy-blind. It simply does not grant or deny light duty on the basis of pregnancy, childbirth, or related medical conditions. It makes this determination on the non-pregnancy-related basis of whether there has been a work-related injury or condition.” The opinion noted that while pregnancy-blind policies can be tools of discrimination, challenging them as such “requires evidence and inference beyond such policy’s expressed terms.”

Spivey v. Beverly Enters., 196 F.3d 1309 (11th Cir. 2006). The court held that an employer’s modified duty policy, offering light duty only to those injured on the job, did not violate the
Pregnancy Discrimination Act as long as the employer treated all employees not injured on the job in the same manner.

_Urbano v. Continental Airlines_, 138 F.3d 204 (5th Cir. 1998). This case has substantially similar facts and reasoning as the case above. The pregnant plaintiff started having back pain on the job. Here, like in the above case, the Court found the employer was not injured on the job and did not qualify for light duty. According to this Court—most courts have held that the PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women.

_Stocking v. AT&T Corp._, 436 F. Supp. 2d 1014 (W.D. Mo. 2006). Female employees whose health care coverage excludes prescription birth control can bring claims against their employer under both Title VII of the 1964 Civil Rights Act and the Pregnancy Discrimination Act. The court distinguished contraception from fertility treatments and stated that while fertility treatment have only social significance for men and women, contraception has social and physical significance for women.

_In re Union Pacific Railroad Employment Practices Litigation_, 378 F. Supp. 2d 1139 (D. Neb. 2005). The district court held that an employee benefit plan that excludes coverage for prescription contraceptives used to prevent pregnancy discriminates on the basis of sex in violation Title VII. The court held that the policy violates Title VII “because it treats medical care women need to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employees’ health than is pregnancy.” See also _Erickson v. Bartell Drug Co._, 141 F. Supp.2d 1266 (W.D. Wash. 2001); _Cooley v. Daimler Chrysler Corp._, 281 F. Supp.2d 979 (E.D. Mo. 2003).

_Callahan v. Edgewater Care & Rehabilitation Center, Inc._, 872 N.E.2d 551 (Ill. App. Ct. 2007). The Illinois Court of Appeals held that a former nursing home admissions clerk who alleged that she had been fired because she alerted her superiors that a resident of the nursing home was being kept involuntarily could pursue a claim for retaliatory discharge. The court held that the Illinois Whistleblower Act did not preempt the plaintiff’s common law cause of action, and allowed her to proceed.


Doe v. C.A.R.S. Protection Plus Inc., 2008 U.S. App. LEXIS 11519 (3rd Cir. 2008) (The Third Circuit held that a female employee who alleged that she had been terminated because she had an abortion may proceed with a discrimination claim under the Pregnancy Discrimination Act. The Sixth Circuit had previously so held in Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1996). The Third Circuit held that the temporal proximity in the Doe case between the date on which she notified her supervisor that she would have to undergo an abortion and her termination was sufficient to meet Doe’s minimal prima facie case burden as to the causal connection element.).


**Pregnancy - Reduction in Force (RIF)**

Asmo v. Keane, Inc., 471 F.3d 588 (6th Cir. 2006). In this reduction-in-force (RIF) case, Plaintiff alleged that she was terminated as part of a RIF as soon as her employer discovered that she was pregnant with twins. The majority modified the indirect prima facie test, holding that temporal proximity of the employee’s termination and the employer’s discovery of her pregnancy alone would satisfy the “nexus” requirement. There is a vigorous dissent by Judge Griffin.

**Premises Liability**

Taboda v. Daly Seven, Inc., 626 S.E.2d 428 (Va. 2006). The court held that an innkeeper has a “heightened duty of care” to his guests and that fact that he had to call police to his inn 96 times in a 3 year period means he should have informed guests of the inherent risks associated with their stay. Additionally, the court ruled that the innkeeper must display the “utmost levels of care and diligence” in order to avoid liability for any harm inflicted on his patrons.

**Preservation Orders**

Del Campo v. Kennedy, 2006 U.S. Dist. LEXIS 96313 (N.D. Cal. Dec. 5, 2006). The District Court ordered the preservation of audio files of voicemails in a case where the plaintiffs alleged that the company violated the Fair Debt Collection Practices Act and wanted to obtain tapes of phone calls made to the company.

**Pretexting**


Privileges

Adkins v. Christie, 2007 U.S. App. LEXIS 13715 (11th Cir. June 12, 2007). The Court of Appeals held that a doctor who sued a hospital for an allegedly discriminatory peer-review can gain access to the peer review documents of all the doctors on staff because there is no recognized peer review privilege. The defendant-hospital had argued that the peer review records should be protected by the “medical peer review privilege”. The court stated: “we conclude that the medical peer review process does not warrant the extraordinary protection of an evidentiary privilege in federal civil rights cases.”

Zurich Am. Ins. Co. v. Rite Aid Corp., 345 F. Supp. 2d 497 (E.D. Pa. 2004). The court held that an employee, charged with large-scale accounting fraud, cannot seal pertinent documents; the presumption of public access to these documents overrides the employee’s attempt to shield the documents from public view, given the employee’s failure to evince a serious and specific harm that would result from public access to the documents.


Privilege Waiver

PTSD

Ware v. ANW Special Educational Coop., 2008 Kan. App. LEXIS 59 (Kan Ct. App. April 11, 2008) (In a non-employment case, the Kansas Court of Appeals held that PTSD did not qualify as a “physical injury” for the purposes of a negligent infliction of emotional distress claim).

Public Employment

Sciolino v. City of Newport News, 480 F.3d 642 (4th Cir. 2007). This case involves a probationary police officer who was terminated because the police chief believed he had advanced the odometer of his police cruiser by 10,000 miles to get a new car. The police chief wrote a letter to the officer calling this a deliberate destruction of police property. This letter was placed in the employee’s personnel file. A split Fourth Circuit panel held 2-1 that the probationer could sue under 42 U.S.C. 1983 if he could establish it was “likely” that either the public or a possible employer would see the filed letter. This decision, along with Raytheon Technical Services v Hyland 641 S.E.2d 84 (Va. 2007) which permitted an employee’s suit against her employer for a defamatory performance evaluation, creates a dilemma for employers. The dilemma is whether to document employee problems to establish legitimate non-discriminatory reasons for an employment action versus the risk of being sued over the documentation. While documentation is generally useful, these cases do show that documentation can carry its own risks.

Michael D. Simpson, The New Class of One Equal Protection Theory (the Author is in the Office of the General Counsel of the National Educational Association and copies can be obtained from him at msimpson@nea.org).

Public Employment - Garcetti

Foraker v. Chaffinch, 2007 U.S. App. LEXIS 20739 (3d Cir. Aug. 30, 2007). The Third Circuit held that Delaware state troopers who complained up the chain of command and to a state auditor about problems at a shooting range are not protected from retaliation under the Constitution’s petition clause or the First Amendment. Each of the three judges on the panel wrote separate opinions, finding that the plaintiffs were barred under the Supreme Court’s Garcetti decision from suing for retaliation because their job as shooting range operators included reporting safety concerns.

O’Dea v. Shea, 2007 U.S. Dist. LEXIS 65101 (D.Conn., Sept. 4, 2007). The district court found that the plaintiff-social worker had complained, as a part of her job, about the purchase of refurbished used furniture for use in a hospital detoxification unit which she believed raised health care issues, contending that the use of such furniture would lead to more insect infestations. The district court, Judge Droney, granted summary judgment on her free speech retaliation claim, relying on the holding in Garcetti.

Reilly v. City of Atlantic City, 2008 U.S. App. LEXIS 13808 (3rd Cir. July 1, 2008) (A public employee’s truthful in-court testimony constitutes speech on a matter of public concern, even if made in the course of official duties).

Regulatory Developments
Eradicating Racism and Colorism from Employment (E-RACE): E-RACE is a new initiative by the EEOC to eliminate racism from employers’ hiring practices. Because racism is the leading complaint made to the EEOC each year, the agency has decided to take steps in a new direction. The initiative will identify issues and barriers which contribute to racism, attempt to find strategies which improve processing and litigation of racism claims, and work to improve public awareness of the problem. The initiative will also combine with existing EEOC initiatives to broaden the scope of its effectiveness. See www.eeoc.gov/initiatives/e-race/index.html for more information.


The EEOC has issued a proposed new rule, in light of General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004), regarding reverse age discrimination claims. The proposed rule would clarify that “favoring an older individual over a younger individual because of age is not an unlawful discrimination under the act, even if the younger individual is at least 40 years old.” 29 C.F.R. 1625 (specifically 1625.2; 1625.2(b); 1625.4(a); and 1625.5). In Cline the Court held that favoring an older employee vis-à-vis a younger individual, even one over the age of 40, was not a violation of 1625. The changes merely change the specific language of 1625 so it more clearly states that reverse age discrimination is not a violation of 1625.

All comments were required to be received by October 10, 2006.

Job Announcements-EEOC Guidance at http://www.eeoc.gov/foia/letters/2007/titlevii_affirmaction.html. The EEOC, in response to correspondence from the Center for Equal Opportunity regarding language that would be appropriate for colleges to use in their job advertisements, specifically endorsed the use of language that does not indicate a particular welcome to certain groups, e.g., females or minority applicants. The letter does not bar colleges from indicating that they welcome female or minority applicants.

“We commented that job advertisements typically should not indicate a preference based on race, sex, or ethnicity. We noted that there are circumstances under which focused recruiting is used in order to eliminate barriers to employment opportunity and attract a more diverse applicant pool. We also noted that the legality of a particular practice cannot be assessed outside the context of particular facts that have been fully investigated,” the letter said.

“Of course, there are different ways to develop a diverse applicant pool and particular circumstances will determine which methods are both lawful and efficacious. You suggested that a way for employers to signal that they welcome applications from all individuals without regard to race, color, religion, sex, or national origin, but without indicating a preference for any group, would be to use language such as the following: ‘Men and women, and members of all racial and ethnic groups, are encouraged to apply.’ We agree, and such a statement is lawful regardless of
the surrounding circumstances, even if an employer had no need to diversify its applicant pool,” the letter added.


Equal Employment Opportunity Commission, the EEOC approved for circulation to other agencies proposed changes to regulations governing the handling of federal employees’ discrimination complaints, June 2, 2008 (On June 2, 2008 the EEOC approved revisions to the federal sector discrimination complaint handling rules contained in 29 C.F.R. Part 1614, and circulated the proposed revisions to other federal agencies which have 60 days to comment. Thereafter, the EEOC would submit the proposed revisions to OMB for review prior to Federal Register publication. Among the proposed changes, the EEOC addresses the limitations period for federal employees to file suit under the ADEA, and endorses the position taken in Rossiter v. Potter, 357 F.3d 26 (1st Cir. 2004) where the First Circuit held that the FLSA, on which the ADEA was modeled, should provide the deadline for federal sector ADEA lawsuits, that is, two years (or three years when alleging a willful violation).).

Office of Inspector General, U.S. Department of Labor, Semiannual Report to Congress (Vol. 59, Oct. 1, 2007 – Mar. 31, 2008), available at http://www.oig.dol.gov/SAR-59-FINAL.pdf (In a report to the Congress, the U.S. Department of Labor’s Office of Inspector General urged the Congress to authorize DOL to verify the accuracy of information provided on foreign labor certification applications and to clarify the standards for state financial reporting under the Workforce Investment Act. The OIG report state: “If DOL is to have a meaningful role in the H-1B specialty occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications.”).


Regulatory Policies
OSHA policy on no re-employment clauses in settlement agreements, available at http://www.osha.gov/dep/oia/whistleblower/settlements_future_employment.html. On July 23, 2007 the OSHA administrator issued a memo regarding OSHA's policy for approving settlement agreements containing future employment waiver clauses in whistleblower cases, stating that
OSHA will decide on a case-by-case basis whether or not to approve such settlements under the fourteen federal whistleblower statutes that it administers.


On August 8, 2007, the OFCCP published its final rule implementing the 2002 Jobs For Veterans Act. With the final rule effective September 7, 2007, the text of the final rule is at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-15385.htm.

The SEC has sent letters to some three-hundred companies criticizing executive pay disclosures in this year’s proxy statements and demanding more information. For example, in the case of Pfizer Inc., the SEC has asked the company to more fully describe the work performed by the Board’s so-called independent pay consultant. The SEC letters which were issued in late August, 2007 constitute the SEC’s first review of new disclosure rules governing executive pay. See Jeremy Grant, “SEC Seeks Greater Clarity on Top Pay,” FinancialTimes.com (August 31, 2007); Kara Scannell and Joann S. Lublin, “SEC Asks Firms to Detail Top Executives’ Pay,” B1, The Wall Street Journal (August 31, 2007).

Owner-Operator Independent Drivers Assoc., Inc. v. Federal Motor Carrier Safety Administration, 494 F.3d 188 (D.C. Cir., July 24, 2007). The Court of Appeals for the D.C. Circuit, Judge Garland writing for the panel, invalidated a rule issued by DOT’s Federal Motor Carrier Safety Administration which allowed truckers to drive eleven hours straight, rather than the previous limit of ten hours. The FMCSA rule issued in August 2005, the court held had been issued without adherence to proper procedures. For example, public comment on the eleven-hour limit was not provided.

The Department of Labor has issued new regulations concerning the procedures for handling nuclear and environmental whistleblower retaliation claims. The rules can be found at http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/FEDERAL_REGISTER/72_FED_REG_44956.PDF.


Rehabilitation Act

Hollingsworth v. Duff, 444 F. Supp. 2d 61 (D.D.C. 2006). The District Court held that the Rehabilitation Act did not apply to employees of the federal judiciary. The plaintiff was employed by the Administrative Office of the United States Courts, and was pursuing a sick-building syndrome claim.
Castro v. Secretary of Homeland Security, 472 F.3d 1334 (11th Cir. 2006). The court of appeals held that a disabled applicant for a security screening position with the Transportation Security Administration, cannot sue under the Rehabilitation Act as the Aviation and Transportation Security Act specifically exempted the Department of Homeland Security from the Rehabilitation Act.


American Council for the Blind v. Paulson, 2008 U.S. App. LEXIS 10711 (D.C. Cir. 2008) (A split D.C. Circuit held that the federal government’s failure to print paper money that is readily distinguishable to the visually impaired violates the Rehabilitation Act, rejecting the government’s argument that changing the paper money supply would impose an undue financial burden. Judge Randolph dissented, stating that the majority had failed to identify “a single accommodation that is undisputedly ‘reasonable, effective, and feasible,’ ... and for which there is no material issue about an undue burden.” Interestingly while the plaintiff was the American Council for the Blind, the National Federation of the Blind filed an amicus brief supporting the federal government’s position.). see also Appeals Court: Paper Money Discriminates Against Blind, FoxNews.com, http://www.foxnews.com/story/0,2933,356727,00.html (last visited July 1, 2008).

Release

Nilsson v. City of Mesa, 2007 U.S. App. LEXIS 21912 (9th Cir. Sept. 13, 2007). The plaintiff applied for a police officer position with the city of Mesa, and in conjunction with her employment application, she agreed to waive all her legal rights and causes of action to the extent that the Mesa Police Department’s background investigation violated or infringed upon her legal rights. She further agreed to hold harmless and release from liability the city for any statements, acts, or omissions in the course of the investigation into her background, employment history, health, family, personal habits, and reputation. Plaintiff was not hired, and filed a charge with EEOC, alleging violations of the ADA and Title VII. She later sued the city asserting various state and federal claims. The Ninth Circuit approved the prospective waiver of her ADA and section 1983 claims, but did not approve the waiver of her Title VII claims. The Title VII claim was not barred, according to the court, because the language of the waiver did not encompass a claim which rested upon plaintiff’s assertion that she was not hired because she had filed an EEOC claim against the city.

Religion

Fairchild v. Riva Jewelry Mfg., Inc., No. 0101169, 2007 NY Slip Op 31857 (N.Y. Sup. Ct., N.Y. County June 28, 2007). The central issue in this New York state trial court discrimination case was whether a homophobic employer must answer certain questions about his religious beliefs as they pertain to homosexuals. One day after discovering an employee was gay, the employer stated that the employee was doomed to eternal damnation and then fired him without giving any
reasons. The employer refused to answer interrogatories about his beliefs on homosexuality because he claimed this interfered with his free exercise of religion. However, the court ordered the defendant to answer the interrogatories, refusing to allow the employer to use the first amendment “as a cloak for acts of discrimination or as a justification of practices inconsistent with the protections against invidious discrimination proscribed in New York State law.”

Good News Emple, Ass'n v. Hicks, 2007 U.S. App. LEXIS 5514 (9th Cir. Mar. 5, 2007). The 9th Circuit affirmed summary judgment in favor of city officials in a §1983 action, in which the plaintiffs, city employees, alleged the defendants violated their free speech rights when they removed from an office wall a flyer which promoted the employee’s unincorporated association, the Good News Employee Association. The flyer stated that the association “is a forum for people of Faith to express their views on contemporary issues of the day with respect for the Natural family, Marriage and Family values”. The city had allowed employees to post political, religious, and social views on the employee bulletin board and inter-office email system.

Archdiocese of Wash. v. Moersen, 2007 Md. LEXIS 348 (Md. June 14, 2007) The Maryland Court of Appeals held that the discrimination claim of an organist employed by the Catholic Church was not barred by the “ministerial exception,” a legal exception carved out in deference to the Free Exercise Clause of the First Amendment that precludes government interference, or judicial involvement, in the employment decisions of religious organizations. The Court held that the exception only applies to employees whose primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.”

O'Connor v. Roman Catholic Church of the Diocese of Phoenix, 2007 U.S. Dist. LEXIS 38141 (D. Ariz. May 24, 2007). The District Court held that a counselor employed by the Catholic Church to assist sex abuse victims was barred from suing the church by the ministerial exception. The plaintiff alleged that she was fired after marrying outside of the church. One of the plaintiff’s job requirements was to be an active participating Catholic in full communion with the church. The court stated: “the requirement in being in full communion with the church, which entails marrying in accordance with the Catholic Church’s teaching regarding the Sacrament of Marriage, is a matter of religious doctrine insulated from the adjudicatory or interpretative powers of the court by the 1st Amendment of the Constitution.”


Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006). The court held that a contractual relationship between the state prison and a prison ministry violated Establishment Clause rights under the First Amendment of non-
Evangelical Christian inmates, and permanently enjoined the program from further operation so long as it was supported by government funding.

**Curry-Cramer v. Ursuline Acad. of Wilmington**, 450 F.3d 130 (3d Cir. 2006). A Catholic school teacher was fired after she signed her name to a pro-choice advertisement in a local newspaper. Teacher proceeded under Title VII arguing that Title VII’s opposition clause protected any employee who has had an abortion, who contemplates having an abortion or who supports the rights of women who do so. The court did not reach that issue, finding first that the teacher did not engage in protected activity when she signed the pro-choice advertisement as the advertisement did not mention employment, employers, pregnancy discrimination, or even gender discrimination. In short, the court held that the pro-choice advocacy here did not constitute opposition to an allegedly illegal employment practice. The court stated that it was “not aware of any court that has found public protests or expressions of belief to be protected conduct absent some perceptible connection to the employer’s alleged illegal employment practice.” When plaintiff argued that she opposed her employer’s practices at the time of her termination, the court stated “that an employee may not insulate herself from termination by covering herself with the cloak of Title VII’s opposition protections after committing non-protected conduct that was the basis of the decision to terminate.” With respect to plaintiff’s argument that she was treated more harshly than male employees who engaged in “similar conduct,” the court held that a determination of that issue raised a substantial constitutional question under the First Amendment’s Religion Clauses as the court would have to measure the degree of severity of various violations of Catholic doctrine. The court emphasized repeatedly that its holding was fact specific and that many claims of discrimination against a religious employer under Title VII will not raise serious constitutional questions. The court held that requiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer’s ability to create and maintain communities of the faithful. Finally, the court stated that it was not holding that a plaintiff seeking to establish pretext by a religious employer need establish that the comparators engaged in precisely the same conduct as that said to support the adverse employment action against the plaintiff.

A teacher at a private Catholic School was fired after she signed her name to a pro-choice advertisement in the local school paper. The District Court granted defendants’ motions to dismiss under 12(b)(6) and the Circuit Court affirmed. The plaintiff claims that Title VII’s opposition clause protects any employee who has had an abortion, who contemplates having an abortion, or who supports the rights of women who do so. Although the Sixth Circuit has ruled that “an employer may not discriminate against a women employee because “she may have exercised her right to have an abortion.” **Turic v. Holland Hospitality, Inc.**, 85 F.3d 1211, 1214 (6th Cir. 1996) this Court has not ruled on the issue.

The Court finds that the plaintiff failed to state a claim because she did not engage in protected activity when she signed the advertisement that did not mention employment, employers, pregnancy discrimination of even gender discrimination. The defendants argue that basic pro-choice advocacy does not constitute opposition to an illegal employment practice and the Court agrees. The Court notes that when deciding whether a plaintiff has engaged in opposition conduct, they look to the message being conveyed rather then the means of conveyance. The Court was looking for a perceptible

203
connection to the employers’ illegal employment practice and did not find one. They say that to “turn pro-choice activity unconnected to employment practices, into conduct protected by Title VII would inappropriately stretch the concept of protected activity.

Two other important points the Court made in response to the plaintiffs allegation that males at the school were treated differently then female employees the Court noted that “requiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer’s ability to create and maintain communities of the faithful.” The Court states that “whether the proffered comparable conduct is sufficiently similar to avoid raising substantial constitutional questions must be judged on a case by case basis.”

*Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006) (This case involves the defendants’ rearrangement of plaintiff’s work schedule and assigning him to Sunday duty so that his schedule would conflict with his duties as a minister, the motivation for rearranging the schedule being retaliation for his membership in the union and his invocation of collective bargaining rights. Among the rulings by the court is a holding that the Free Exercise Clause applies to executive action, with the court stating that “the First Amendment applies to exercises of executive authority no less than it does to the passage of legislation.” Further, the court, referencing *Employment Division v. Smith*, 494 U.S. 872 (1990), held that “the mere failure of a government employer to accommodate the religious needs of an employee where the need for accommodation arises from a conflict with a neutral and generally applicable employment requirement does not violate the Free Exercise Clause...” The court went on to state that the religious accommodation requirements of Title VII extend beyond the dictates of the Free Exercise Clause, as interpreted by *Smith*. Finally, the court held that the defendants’ asserted neutral reasons in this case were disputed and that the Free Exercise Clause applies when government officials interfere with religious exercise not out of hostility or prejudice, but for secular reasons. In short, the court held that the Free Exercise Clause is not confined to actions based on animus.).

The employee, a minister and a police office, alleged that the defendants rearranged his work schedule and assigned him to work on Sundays so that his schedule would conflict with the his duties as a minister forcing him to chose between the two jobs and alleged that it was in retaliation for his membership in the Union and his invocation for collective bargaining rights.

-Freedom of Association: With regard to free speech claims by public employees the Supreme Court has formulated a four-part balancing test of under Pickering. One of the prongs is whether the speech addresses public concern. The Supreme Court has not decided whether this prong should be applied to freedom of association. Five Circuits have adopted the public concern requirement for freedom of association claims and two have not. On remand the Court says the lower Court should not require “public concern.”

-Applicability of the Free Exercise clause to Executive Action: The Court rules that the First Amendment applies to exercises of executive authority no less than it does to the passage of legislation.

-Neutrality and General Applicability: The defense argues that “the transfer of an officer to the day shift, without more, is neutral on its face. The Court agrees with the defendant that “the mere failure to
accommodate the religious needs of an employee where the need for accommodation arises from a conflict with a neutral and generally applicable employment requirement does not violate the free exercise clause. But the Court notes that plaintiff alleges he was moves precisely because of the Chief’s knowledge of his religious commitment. But the reasons for the transfer are disputed. So the lower Court upon remand should look to whether the officer’s religious commitments was motivating factor in the actions taken against him.

- Substantive Due Process: The Court upholds summary judgment on this claim because they have not decided which property interests in employment are protected by substantive due process.

Petruska v. Gannon Univ., 448 F.3d 615 (3d Cir. 2006), petition for reh’g granted, 2006 U.S. App. LEXIS 15088 (3d Cir.2006) [note: rehearing is by another panel; the original two-member majority is unable to participate, as one judge is deceased and the other is recused]. In an opinion written by the late Judge Becker, the court held: “[W]here a church discriminates for reasons unrelated to religion we hold that the Constitution does not foreclose Title VII suits. Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects. Furthermore, in adjudicating suits that do not involve religious rationales for employment action, courts need not consider questions of religious belief, religious doctrine or internal church regulation, a process that would violate the Establishment Clause by entangling courts in religious affairs.” The plaintiff, who was the first woman ever to be appointed chaplain at the university, alleged that she was replaced with a male chaplain because she disclosed to the provost that the university president was having an affair with a female subordinate. The court found that the so-called ministerial exception said to arise from the First Amendment did not preclude plaintiff’s case because the Constitution only bars an EEO case where it implicates a religious belief, doctrine, or regulation. The court stated: “[U]nder the Free Exercise Clause the ministerial exception will not bar Title VII claims by ministerial employees when an employment decision is not motivated by religious belief, religious doctrine, or church regulation. This version of the ministerial exception also comports with the Establishment Clause because courts will not be forced to consider religious questions, a process that would entangle the government in religious affairs.”).

The plaintiff, a Chaplin of a Catholic University, sued the University Sex Discrimination and retaliation under Title VII. She alleged that she was demoted because she was a woman and because she opposed sexual harassment by officials at the University. The ministerial exception to Title VII, exempts religious organizations from employment discrimination suits brought by ministers. But because the exception was developed to avoid entangling regulation then the Constitution does not foreclose Title VII suits under the Court’s reasoning the government in religious affairs, if the discrimination is not related to religious beliefs, religious doctrine or church.

Petruska v. Gannon Univ., No. 05-1222, 462 F.3d 294 (3d Cir. 2006). The Third Circuit held that a church’s right to determine who will perform spiritual functions is protected by the “ministerial exception” to Title VII of the 1964 Civil Rights Act. In a prior ruling the court held that the exception did not bar claims alleging bias that was unrelated to a religious motive. During the rehearing, the court stated that since the minister had a crucial role in the church that selection process of a minister is a “per se” religious exercise. Thus, any restriction affecting the minister selection process infringes
upon the free exercise of religion. The court therefore dismissed the claims of gender discrimination and retaliation in her discharge from her duties.

**Elvig v. Calvin Presbyterian Church**, 375 F.3d 951 (9th Cir. 2004). A harassment claims by minister against pastor fell outside of ministerial exception. The minister could proceed with her claims to the extent that the relevant facts did not implicate the ministerial exception to Title VII. Her claims could succeed if she was able to prove that she was subjected to a hostile work environment and defendants could not prove that she neglected to take advantage of measures available to eliminate that environment and her retaliation claim could succeed if she proved that she was harassed because she complained.

**Tomic v. Catholic Diocese of Peoria**, 442 F.3d 1036 (7th Cir. 2006). A termination claim by the church music director/organist under the ADEA was held to be barred by the ministerial exception on the grounds that the dispute with the Roman Catholic Bishop’s Assistant over the music Easter services implicated church liturgical practices and would involve the court in internal church affairs in violation of the First Amendment.

**Hankins v. Lyght**, 441 F.3d 96 (2d Cir. 2006). The Ministerial exception to the ADEA is superseded by the Religious Freedom Restoration Act. Plaintiff Hankins, a minister, appealed from the district court’s dismissal of his age discrimination action. The minister was forced into retirement by the defendant, a church, when he attained the age of 70. He claimed that the church’s mandatory retirement policy violated the ADEA. The bishop at the Church told Hankins that he had the authority to reappoint Hankins as a pastor despite his age but that it was his “personal policy” never to reappoint members of the clergy who have attained age seventy. The Church raised a 12(b)(6) motion based on the “ministerial exception” to the ADEA, which is a rule adopted by several circuits that civil rights laws cannot govern church employment relationships with ministers without violating the free exercise clause because they substantially burden religious freedom. The Court vacated the lower Court’s ruling and remanded the case back for consideration of the plaintiffs claim under the Religious Freedom Restoration Act.

**Berry v. Dep’t of Soc. Servs.,** 447 F.3d 642 (9th Cir. 2006). Here, the employee wanted to talk scripture and pray with his “clients” who were unemployed adults transitioning out of welfare programs. The employee filed suit alleging that his employer was violating his first amendment and Title VII right by prohibiting him from discussing religion with clients, displaying religious items in his cubicle, and using a conference room for prayer meeting. The district court granted summary judgment in favor of the defense. The plaintiff appealed and the lower court’s ruling was affirmed. The Court held that the public employer’s interests in avoiding violations of the establishment clause and in maintaining the conference room as a non public forum outweigh the resulting limitation on the plaintiffs free exercise of his religion at work and that the public employer was not required to accommodate the plaintiffs religious beliefs under Title VII.

**Chaplaincy of Full Gospel Churches v. England**, 454 F.3d 290 (D.C. Cir. 2006). The circuit court held that the Navy’s alleged favoritism in violation of the establishment clause is sufficient to establish the irreparable harm element of preliminary injunctive relief. Citing **Elrod v. Burns**, 427 U.S. 347 (1976), the court stated that even a temporary loss of First
Amendment freedoms “unquestionably constitutes irreparable injury” but that, upon remand, the plaintiffs must still demonstrate the other elements of preliminary injunctive relief.

Fassl v. Our Lady of Perpetual Help, 2006 U.S. Dist. LEXIS 11054 (E.D. Pa. Mar. 13, 2006). The court applied the ministerial exception in a FMLA case where the plaintiff was employed as the Director of Music for the Church. The court recognized that the church considered the plaintiff to be a lay liturgical minister who played an important role in the church’s pastoral mission. The court also noted that plaintiff herself referred to her functions as ministerial.

Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007). The court found that the plaintiff’s claim under the ADA could not proceed on account of the “ministerial exception”.

Diana Henriques, Where Faith Abides, Employees Have Few Rights, N.Y. Times, Oct. 9, 2006 available at www.nytimes.com/2006/10/09/business/09religious.html?_r=1&oref=slogin. Courts are expanding the ministerial exception, which gives religious institutions broad discretion over employment decisions that are related to “core expressions of religious belief,” beyond application to priests, rabbis, ministers, and other traditional applications, to include a broader range of employees that are not as involved in direct ministry (i.e. administrators, secretaries, and overseers).

Baker v. Home Depot, 445 F.3d 541 (2d Cir. 2006). The court vacates summary judgment granted below to the defendant-employer where the plaintiff declined to work at all on Sundays on account of an allegedly sincere religious belief requiring him to abstain from Sunday employment. The court held that the offered accommodation was not reasonable because it did not eliminate the conflict between the employment requirement and the religious practice. The court left for the lower court to determine whether the employer’s offer of part-time employment or an exchange of shifts with other employees would constitute reasonable accommodations. The court does state that an accommodation may be unreasonable if it causes an employee to suffer a diminution in his employee status or benefits.

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n, 2007 U.S. App. LEXIS 22328 (3d Cir. Sept. 19, 2007). Plaintiff, an evangelical Christian, was employed as a bookkeeper by the Jewish Community Center (“JCC”). See was terminated, and thereafter alleged that her termination was retaliation and that she had been discriminated against on the basis of her religion. The Third Circuit affirmed the District Court’s determination that the JCC was exempt under section 702(a) of Title VII which excludes from coverage a “religious corporation, association, educational institution, or society.”

Webb v. City of Philadelphia, 2007 U.S. Dist. LEXIS 46872 (E.D. Pa. June 27, 2007). The Eastern District of Pennsylvania held that the police department’s refusal to permit a female Muslim police officer to wear a traditional headscarf while on duty did not violate Title VII.

requirements. Interestingly, the court relied not on the language of the statute, but rather legislative history to buttress its conclusion that Title VII is the exclusive remedy for employees’ claims of religion-based employment discrimination. The Religious Freedom Restoration Act was enacted to restore the “compelling interest” test set forth in Sherbert v. Verner and Wisconsin v. Yoder. The RFRA, enacted in 1993, applies to “all Federal law”. The Supreme Court in 1977 in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977), held that Congress, in enacting the religious discrimination provisions of Title VII, intended to make it unlawful “for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.” Judge Stapleton, in a concurring opinion, states that the language in RFRA providing that it applies to “all Federal law” must include Title VII, seemingly suggesting that while one must exhaust administrative remedies under Title VII and proceed under the aegis of Title VII, the holding in Hardison may no longer be the substantive law, but rather the mandate of RFRA, restoring the “compelling interest” test may now be the substantive law.

Tepper v. Potter, 2007 U.S. App. LEXIS 24090 (6th Cir. Oct. 15, 2007). The Court of Appeals held that a postal employee, who for approximately ten years had been allowed to avoid Saturday work assignments so that he could observe his Sabbath and who contended cessation of that accommodation constituted religious discrimination in violation of Title VII, was held to have failed to establish discrimination.

New Jersey has amended its Law Against Discrimination and expanded it to require that employers reasonably accommodate sincerely held religious beliefs unless to do so would impose an undue burden. The statute now defines "undue hardship" as an accommodation requiring unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system or a violation of any provision of a bona fide collective bargaining agreement. Further, the statute states that, in determining whether an accommodation constitutes an undue hardship, the factors considered shall include:

- The identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer.
- The number of individuals who will need the particular accommodation for a sincerely held religious observance or practice.
- For an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

The other statute concerns employment protections for employees on military leave in time of war or emergency.


Hedum v. Starbucks Corp., 2008 U.S. Dist. LEXIS 9867 (D.Or. Feb. 7, 2008) (The District Court held that an employee who alleged that she was repeatedly told to remove a Wiccan pendant or, alternatively, tuck it inside her clothes, stated a claim of religious discrimination under Title VII).

Francis v. Mineta, 505 F.3d 266 (3rd. Cir. Oct. 10, 2007) (The 3rd Circuit found that Title VII was the exclusive remedy for religious discrimination in the federal sector, and that Plaintiff could not proceed under the Religious Freedom Restoration Act).


**Restatement of Employment Law**

Retaliation

Czekalski v. Peters, 475 F.3d 360 (D.C. Cir. 2007). The Court of Appeals held that a lateral transfer could be an adverse employment action under Burlington Northern, and that determination is generally an issue to be determined by the jury. The Court also found that evidence that the male supervisor turned his back on a female subordinate who disagreed with him was admissible to establish that he held discriminatory attitudes toward women. Finally, the court held that the fact that the supervisor had promoted the plaintiff in the past could not immunize him from liability for discrimination.


King v. Jackson, 2007 U.S. App. LEXIS 12341 (D.C. Cir. May 29, 2007). The Court of Appeals held that opposition by the plaintiff to the federal agency’s failure to renew its affirmative employment plan did not state a claim for retaliation because the employee could not objectively have had a reasonable belief that the agency’s failure constituted and unlawful employment practice under Title VII. The court said it found it, “quite unreasonable”, for the plaintiff to have believed that a violation of 42 U.S.C. § 2000e-16(b)(1) which requires federal agencies to maintain such a plan qualified as an unlawful employment practice.

Carmona v. Resorts Int'l Hotel, 915 A.2d 518, 189 N.J. 354 (N.J. 2007). The New Jersey Supreme Court held that a plaintiff in a retaliation case must show that the underlying discrimination complaint was made reasonably and in good faith.

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 211 Fed. Appx. 373 (6th Cir. 2006). The 6th Circuit held that the anti-retaliation provisions of Title VII were not violated by the employer’s allegedly retaliatory discharge of plaintiff who had cooperated in the employer’s internal investigation of a co-worker’s sexual harassment allegations against a supervisor, where there was no pending charge with the EEOC.

Phelan v. Cook Co., 463 F.3d 773 (7th Cir. 2006). In a discrimination case, where the plaintiff had been terminated and then four months later reinstated with full backpay, the court held that the termination was an adverse employment action, finding that the four-month termination was long enough for the plaintiff, despite the reinstatement with full backpay, to have suffered considerable financial and emotional injuries.

Crawford v. City of Fairburn, Ga., 2007 U.S. App. LEXIS 3748 (11th Cir. Feb. 21, 2007). The Court of Appeals held that participation in EEOC conciliation is not protected activity within the scope of Title VII’s participation clause. The court stated: “Because the participation clause protects only participation ‘in an investigation, proceeding, or hearing under this subchapter,’ an employee’s participation in only the conciliation process is not protected activity under that clause.” However, in Crawford v. City of Fairburn, 482 F.3d 1305 (11th Cir. 2007), The appeals court sua sponte vacated their former opinion in the case and substituted this one. It held that the
employee plaintiff had failed to rebut the defendant’s legitimate and nondiscriminatory reasons for his termination. He failed to show pretext for all the reasons given by the city; thus his mixed motive claim failed, as the city would still have terminated him on another legitimate basis.

Jensen v. Potter, 435 F.3d 444 (3d Cir. 2006). In an opinion authored by then-Judge Alito, the Third Circuit reverses and remands a grant of summary judgment to an employer on claims of retaliation and sex discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The court stated that the district court incorrectly held that coworker harassment could not violate Title VII and that a reasonable jury could find that the alleged coworker harassment was in retaliation for the employee’s protected activity in reporting an incident of sexual harassment which led to supervisor’s termination.

Cotton v. Cracker Barrel Old Country Store, Inc., 434 F.3d 1227 (11th Cir. 2006). The court held that summary judgment for the defendant was appropriate in this case where a seasonal employee sued for retaliation when her hours were reduced after she complained about the advances of one of the retail chain’s general managers. The employee failed to causally link her reporting to her decrease in hours, a decrease she fully expected after the holidays; furthermore, the general manager from another store does not set the schedule for employees at a different store, and plaintiff failed to connect these events as well.

Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006). The court held that the alleged retaliation need not be related to the plaintiff’s employment. The court held that the plaintiff had pled actionable retaliation when he alleged that, contrary to its normal policy, the FBI, his employer, took no steps to investigate a death threat by a prison inmate against the plaintiff-agent and his wife. Interestingly, the Supreme Court in Burlington Northern relied heavily on Rochon.

Slagle v. County of Clarion, 435 F.3d 262 (3d Cir. 2006). The court holds that a facially invalid discrimination charge is not protected activity under the participation clause of §704(a). The employee in question alleged antagonism in the workplace from his employer in the form of work criticism, cancellation of scheduled vacation and unwarranted disciplinary action. The court found that all that is required for the participation clause of Title VII to protect an employee was that the employee allege in the filed charge that the employer violated Title VII by discriminating against him in any manner. The employee in this case did not do so, and therefore had no right to assert a claim for retaliation for filing the charge.

Loew v. Dodge County Soil & Water Conservation District, 2006 Minn. App. Unpub. LEXIS 450 (Minn. Ct. App. May 9, 2006). Where the plaintiff complained in the context of a law designed to ensure comparable-worth pay for female-and-male-dominated positions, even though the plaintiff never used the magic words “sex discrimination,” she clearly articulated that she felt that male employees were being unfairly favored, and the court thus concluded that her complaints constituted protected activity.

Broderick v. Donaldson, 437 F.3d. 1226 (D.C. Cir. 2006). The court of appeals, in determining whether plaintiff engaged in protected activity under Title VII, stated that no “magic words” were required, and that the plaintiff must in some way allege unlawful discrimination, and not just frustrated ambition.
Szymanski v. County of Cook, 468 F.3d 1027 (7th Cir. 2006). The Court of Appeals held that a reference that was “decent,” but “not a great reference,” was not actionable. The court went on to note that the threat of losing a “great reference” well might “. . . dissuade a reasonable employee from lodging a discrimination charge.”

Harper v. Potter, 456 F. Supp. 2d 25 (D.D.C. 2006). The district court held that a seven-day suspension was not actionable because the employer did not require the plaintiff to be absent from work or to reduce his pay, and rescinded the suspension six weeks later.

Gardner v. District of Columbia, 448 F. Supp. 2d 70 (D.D.C. 2006). The district court held that a plaintiff could not sue when she was “treated . . . badly,” because “‘purely subjective injuries,’ such as dissatisfaction with a reassignment, public humiliation, or lost of reputation, are not adverse actions,” even though her treatment “left her feeling alone and . . . [believing] she could [not] rely upon anyone’s assistance in the performance of her duties.” The court stated that one might think such treatment “well might . . . [dissuade] a reasonable worker from making or supporting a charge of discrimination,” but the court rejected that argument, quoting Burlington for the proposition that “‘snubbing by supervisors and co-workers are not actionable’ under the retaliation provisions [of Title VII].”

Tisdale v. Fed. Express Corp., 415 F3d 516 (6th Cir. 2005). The Court of Appeals held that a retaliation claim that is based on conduct that occurred before the filing of the EEOC charge must be included in the charge.

Martinez v. Potter, 347 F.3d 1208 (10th Cir. 2003). The Court of Appeals held that discrete acts which occur after the EEOC charge is filed must be exhausted on their own, that is, must be the subject of a separate or amended charge.

Weeks v. Harden Manufacturing Corp., 291 F.3d 1307 (11th Cir. 2002). The prima facie case for a retaliation claim (to be included in jury instructions) has both a subjective and an objective component. A plaintiff must demonstrate that they, in good faith, believed that their employer was engaged in unlawful employment practices and that there belief is objectively reasonable in light of the facts and record. The two requirements combine to form the standard of “reasonable belief.” See also Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo, 123 Fed. Appx. 558 (4th Cir. 2005); Peters v. Jenney, 327 F.2d 307 (4th Cir. 2003); Roland v. American General Finance, Inc., 340 F.3d 187 (4th Cir. 2003); Bryant v. Aikens Regional Medical Center, 333 F.3d 536 (4th Cir. 2003); Kubicko v. Ogden Logistics Services, 181 F.3d 544 (4th Cir. 1999); Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

Beinlich v. Curry Development, Inc., 1995 U.S. App. LEXIS 12109 (4th Cir. 1995). For the purposes of a retaliation claim, to determine whether plaintiff had a “reasonable belief” that she was being discriminated against, courts must consider the context of statements made by employers; the statements “cannot be divorced” from the context in which they were made.

retaliation claim. The court held that the plaintiff-employee had proven her reasonable belief through her own conduct of repeated complaints and expressions of concern and that the totality of employer’s behavior towards the plaintiff was sufficiently serious to demonstrate that her belief was reasonable.

Thompson v. North American Stainless, LP, 2006 WL 1707259 (E.D. Ky. 2006). In a third-party retaliation case, the district court granted summary judgment to the employer where the plaintiff alleged that he was discharged in retaliation for his then fiancée’s filing of a gender discrimination EEOC complaint against the company for which the plaintiff and his fiancée (now wife) worked.

Rayner v. Smirl, 873 F.2d 60 (4th Cir. 1989). The circuit court held that intra-corporate complaints are protected under the anti-retaliation provisions of the Federal Railroad Safety Act (FRSA) 45 U.S.C. § 441. The court rejected a narrow interpretation of the provision stating that construing the statute to protect complaints to outside agencies while refusing protection to intra-corporate complaints would create an “artificial” distinction and would deprive employees of the protection that the FRSA was intended to provide. See also Moore v. The City of Chattanooga, 355 F.3d 558 (6th Cir. 2005); Valerio v. Putnam Ass. Inc., 173 F.3d 35 (1st Cir. 1999); Lambert v. Ackerly, 180 F.3d 997 (9th Cir. 1999); EEOC v. White & Sons Enterprises, 881 F.2d 1006 (11th Cir 1989), Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987); Love v. Re/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984); Brennan v. Maxey’s Yamaha, Inc., 513 F.2d 179 (8th Cir. 1975); McMillin v. Foodbrands Supply Chain Services, Inc., 272 F. Supp. 1211 (D. Kan. 2003); Strickland v. MICA Information Systems, 800 F. Supp. 1320 (M.D.N.C. 1992).

Lambert v. Ackerly, 180 F.3d 997, 1004 (9th Cir. 1999). The Ninth Circuit warned against a narrow interpretation of the FLSA anti-retaliation provision stating that it would “jeopardize the protection promised by the provision and discourage employees from asserting their rights.”

Yanowitz v. L’Oreal, 116 P.3d 1123, 36 Cal. 4th 1028 (Cal. 2005). The plaintiff employee, a sales manager, presented evidence that she was directed to fire a female sales associate because the associate was not sufficiently physically attractive. The plaintiff alleged that after she asked for justification and refused to fire the associate, she was frequently criticized in front of her subordinates and received negative performance evaluations. The court held that a trier of fact could have found that the supervisor was aware that plaintiff’s refusal to fire the associate was based on her belief that the action would constitute sex discrimination, even if the plaintiff did not explicitly state her belief to her supervisors. The court also held that the appropriate standard for defining an adverse employment action was whether that action materially affected the terms and conditions of employment and that the continuing violation doctrine was applicable. In this case, the plaintiff demonstrated that the adverse incidents occurred with sufficient frequency to qualify as a continuous course of conduct that placed her career in jeopardy and, therefore, she alleged sufficient prima facie evidence of an adverse employment action.


Spriggs v. Diamond Auto Glass, 242 F.3d 179 (4th Cir. 2001). The appeals court vacated the district court’s grant of summary judgment, holding that the plaintiff made out a prima facie case of retaliation under § 1981.

Parsons v. Wynne, 2007 U.S. App. LEXIS 5657 (4th Cir. 2007). In a retaliation case, the court found that an adverse performance evaluation and a work scheduling change did not constitute actions which “might have dissuaded a reasonable person from making or supporting a charge of discrimination,” the Burlington Northern standard for actionable retaliation.

Niswander v. The Cincinnati Ins. Co., 2007 U.S. Dist. LEXIS 28911 (N.D. Ohio Apr. 19, 2007). The district court held that the plaintiff had not engaged in protected activity where the plaintiff already had defendant’s confidential client and claims documents in her possession by virtue of the fact that she worked out of her home, and began looking through those files for specific information relevant and helpful to her future claim of retaliation and provided these confidential documents to her attorney without defendant’s permission in clear violation of defendant’s confidentiality policies of which she was aware. See also Watkins v. Ford Motor Co., 2005 U.S. Dist. LEXIS 33140 (S.D. Ohio Dec. 15, 2005) (unpublished). (The plaintiff-employee admitted in a deposition that he had copied and given his attorney unmarked confidential personnel information that had been left out in plain view in a common area of the salaried personnel office of the company’s plant. Plaintiff, relying on language in Kempske v. Monsanto Co., 132 F.3d 442, 445-47 (8th Cir. 1998), that he had “innocently acquired” the information because it was out in plain view. After the defendant discovered that the plaintiff had copied and disclosed this confidential information to his attorney, it terminated plaintiff’s employment, precipitation a second lawsuit against defendant for retaliation. The district court found that the plaintiff copying and disclosure of the confidential personnel files was not protected activity under Ohio’s anti-retaliation statute.); O’Day v. McDonald Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996) (The Court of Appeals held the plaintiff had not engaged in protected activity when he rummaged through a supervisor’s desk and found documents in a closed drawer marked “personal/sensitive” and copied the documents and provided them to an employee who was going to be laid off. The Court of Appeals held that plaintiff’s conduct was not protected activity because he “had committed a serious breach of his employer’s trust, not only in rummaging through his supervisor’s office for confidential documents, but also in copying those documents and showing them to a co-worker.” 79 F.3d at 763 The Court of Appeals stated that it was “loathe to provide employees an incentive to rifle through confidential files looking for evidence that might come in handy later in litigation. The opposition clause [of the ADEA] protects reasonable attempts to contest an employer’s discriminatory practices; it is not an insurance policy, a license to flaunt company rules or an invitation to dishonest behavior.” 79 F.3d at 763-64).

Greer-Burger v. Temesi, 2007 Ohio 6442, 2007 Ohio LEXIS 3049 (Ohio, Dec. 12, 2007). The Ohio Supreme Court rejected the lower court's holding that the mere act of filing a lawsuit by an employer is per se retaliatory. Instead, the Ohio Supreme Court's majority held that the employer must be afforded an opportunity to show that there is an objective basis for the lawsuit. The
Supreme Court's litmus test for establishing an objective basis, is that the employer must demonstrate that its case can survive a motion for summary judgment. In other words, the employer must establish that there are genuine issues of material fact, such that summary judgment could not be granted, in order to establish that its lawsuit is not actionable retaliation. The dissent would hold that the filing raises retaliation as a prima facie issue to be rebutted, and that the employer's rebuttal must show that the employee's previous discrimination claim was totally without merit, i.e., frivolous.


Darveau v. Detecon Inc., 515 F.3d 334 (4th Cir. Jan. 31, 2008) (The Court of Appeals held that plaintiff had stated a claim for retaliation under the FLSA when he alleged that after he had sued the company under the FLSA, it sued him for fraud and breach of contract. The Court of Appeals adopted the Supreme Court’s Title VII retaliation definition set forth in Burlington Northern, 548 U.S. 53 (2006), and applied it to the FLSA).

Niswander v. Cincinnati Ins. Co., 2008 U.S. App. LEXIS 13284 (6th Cir. 2008) (The 6th Circuit addressed the issue of whether the disclosure of confidential, proprietary documents by an employee to her attorneys constitutes protected activity for which the employee cannot be terminated or otherwise disciplined. The Court held that delivery of such documents to plaintiff’s lawyers did not constitute participation in the underlying lawsuit, noting that while providing relevant documents during the discovery process might constitute participation, the disclosure of irrelevant, confidential information cannot be viewed as participating in the proceeding. The Court then discussed whether plaintiff’s delivery of the documents to her lawyers constituted opposition to unlawful conduct, and found that it could be viewed as opposition. In doing so, the court applied a balancing test to weigh the employer’s need to protect its confidential business and client information against the employee’s need to be properly safeguarded against retaliatory action by the employer).

Imwalle v. Reliance Medical Products, Inc., 515 F.3d 531 (6th Cir. 2008) (The 6th Circuit affirmed the district courts judgment in this retaliation case, relying in part on temporal proximity and in part on the jury’s reasonable disbelief of the company’s explanation for terminating the plaintiff).

**Retaliation – Workers’ Compensation**

Touchard v. La-Z-Boy Inc., 148 P.3d 945 (Utah 2006). The Utah Supreme Court, in answering a question certified from the U.S. District Court, recognized a public policy basis for permitting a suit for retaliatory discharge for filing a workers’ compensation claim. The Supreme Court also decided that, for purposes of a wrongful discharge claim, a constructive discharge should be treated the same as an actual termination. The opinion collects the cases from other jurisdictions on this important issue.

**RICO - Racketeer Influenced and Corrupt Organizations Act (RICO)**

Abraham v. Singh, 480 F.3d 351 (5th Cir. 2007). The Fifth Circuit held that the plaintiffs, employees recruited from India for jobs as steelworkers in Louisiana, had properly pled claims under RICO, alleging that the defendant employer had committed visa fraud, immigration violations, extortion, and other illegal acts. The plaintiffs alleged that the defendants engaged in a scheme involving repeated international travel to convince more than 200 Indian citizens to borrow thousands of dollars to travel to the United States to find upon their arrival that things were not as they had been promised.

Canyon County, Idaho v. Syngenta Seeds Inc., 2008 U.S. App. LEXIS 5904 (9th Cir. Mar. 21, 2008) (The Court of Appeals found that an Idaho county could not use RICO to sue employers who hired undocumented workers on the ground that the county spent funds on healthcare and law enforcement relative to the undocumented workers).

**Right of Publicity**

CAL. CIV. CODE § 3344-3344.1 (2008) (Prohibits the unauthorized commercial use of name, voice, signature, photograph or likeness. The rights of a deceased personality (the Astaire Celebrity Image Protection Act) provides for a right that continues for 70 years after the death of the personality.).

FLA. STAT. § 540.08 (2008) (Prohibits the unauthorized publication or use for commercial or advertising purposes, of the name or likeness of any person. This right continues for 40 years after death.).

765 COMP. ST. ANN. 1075/1 et seq (2008) (Each individual is recognized as having a right in controlling whether and how to use their identity for commercial purposes. The right continues for 50 years after death.

IND. CODE § 32-36-1-1 et seq. (2008) (Prohibits the unauthorized “commercial use” of a personality’s name, voice, signature, photograph, image, likeness, distinctive appearance, gestures or mannerisms. Several exceptions are listed, e.g. literary works, musical compositions, fine art. The right continues for 100 years after death.)
KY. REV. STAT. § 391.170 (2008) (Prohibits the unauthorized commercial use of the name or likeness of a “person who is a public figure.” This right continues for 50 years after death.)

MASS. ANN. LAWS ch. 214, § 3A (2008) (Prohibits the unauthorized use of name, portrait or picture of a person for advertising or trade purposes. The law does not appear to grant rights after death.)

NEB. REV. STAT. § 20-202 (Prohibits the exploitation of a natural person’s name, picture, portrait, or personality for advertising or commercial purposes, as an invasion of privacy. The law does not appear to grant rights after death.)

NEV. REV. STAT. § 597.770-597.810 (Prohibits the unauthorized commercial use of any person’s name, voice, signature, photograph or likeness during life and continuing for 50 years after death.)

N.Y. CIV. RIGHTS LAW § 50-51 (2008) (Prohibits the unauthorized use for advertising or trade purposes, of the name, portrait or picture of any living person. The law does not appear to grant rights after death.)

OHIO REV. CODE ANN. § 2741.01 et seq. (2008) (Prohibits the unauthorized use of “any aspect of an individual’s persona” for commercial purposes during life and 60 years after death.)

OKLA. STAT. tit. 12, § 1448-1449 (2008) (Prohibits the unauthorized use of another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods for the purposes of advertising or selling. This right continues for 100 years after death.)

42 PA. CONS. STAT. § 8316 (2008) (Unauthorized use of name or likeness)

R.I. GEN. LAWS § 9-1-28 (Prohibits unauthorized use of any person’s name, portrait, or picture for advertising or trade purposes. The law does not appear to grant rights after death.)

TENN. CODE ANN. § 47-25-1102 et seq. (2008) (Prohibits the unauthorized use of an individual’s name, photograph or likeness in any medium for the purposes of advertising, fund raising, or solicitation of donations or purchases. The right continues for 10 years after death.)

TEX. PROP. CODE ANN. § 26.001 et seq. (2008) (Prohibits the unauthorized use of a deceased individual’s name, voice, signature, photograph, or likeness in any manner, including commercial and advertising uses. This right continues for 50 years after death. Strangely, the law is written to specifically address a deceased individual’s rights, but does not apply to living individuals)

UTAH CODE ANN. § 45-3-1 et seq. (2008) (Prohibits unauthorized commercial use of an individual’s personal identity in a way that expresses or implies approval or endorsement of a product or subject matter. The law does not appear to grant rights after death.)
VA. CODE § 8.01-40 (2008) (Prohibits the unauthorized use of a persons name, portrait or picture for advertising or trade purposes. The right continues for 20 years after death.)

WASH. REV. CODE ANN. § 63.60.010 et seq. (2008) (Recognizes that every individual or personality has a property right in the use of their name, voice, signature, photograph or likeness. This law distinguishes between an Individual: a natural person; and a Personality: any individual whose “publicity” has commercial value. The rights of an Individual continue after death for 10 years, but the rights of a Personality continue for 75 years after death.)

WIS. STAT. § 895.50(2)(b) (2006) (Prohibits the unauthorized use for advertising or trade purposes of the name, portrait or picture of any living person. The law does not appear to grant any rights after death.)

Rule 35 Mental Exams

Koch v. Cox, 2007 U.S. App. LEXIS 14019 (D.C. Cir. June 15, 2007). The plaintiff sued the SEC, alleging that he suffered from cardiovascular disease, hypertension, gout, and obstructive sleep apnea. The SEC sought otherwise privileged communications between the plaintiff and his psychoanalyst, arguing that “as a matter of medical science... a plaintiff’s mental condition... maybe a cause of his physical condition, or even just aggravate that condition”, and therefore plaintiff “necessarily has put his mental state in issue and thereby waived the psychotherapist-patient privilege.” The Court of Appeals rejected the argument, holding that the communications remained privileged and non-discoveable.


Douris v. County of Bucks, 2000 WL 1358481 (E.D. Pa. Sep. 21, 2000). The court granted a motion to compel a Rule 35 medical exam of plaintiff, as his disability was in dispute and providing medical records was insufficient.

Morton v. Haskell Co., 1995 WL 819182 (M.D. Fla. Sep. 12, 1995). A plaintiff with depression did not place her physical condition in controversy and thus there was no good cause to conduct a physical examination; although depression may have a medical component, there was no allegation in this case that any physical impairment constituted a disability or serious medical condition. The plaintiff’s mental condition within the meaning of Rule 35 is not necessarily placed in controversy merely because plaintiff seeks recovery for emotional distress. However, the plaintiff went beyond mere claim for emotional distress because crux of his claims relate to the existence and severity of his clinical depression. The fact that issue in controversy was plaintiff’s depression in 1993 did not rule out a Rule 35 exam in 1995, because the plaintiff alleged that he continued to suffer from depression, and
physician is able to provide a retrospective opinion of plaintiff's condition even though he did not examine plaintiff until after the relevant date.

The plaintiff was ordered to submit to Rule 35 mental exam, but his treating physicians/psychologists/psychiatrists could be present, the exam would include “routine procedures for such an examination,” and would focus on the matters relating to the depression alleged by plaintiff in his complaint or deposition and the mental and emotional injury and damages resulting from the misconduct alleged of defendant.

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. The plaintiff was ordered to submit to Rule 35 mental exam, but his treating physicians/psychologists/psychiatrists could be present, the exam would include “routine procedures for such an examination,” and would focus on the matters relating to the depression alleged by plaintiff in his complaint or deposition and the mental and emotional injury and damages resulting from the misconduct alleged of defendant.

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). The plaintiff waived federal psychotherapist privilege, but her mental state was in controversy for purposes of Rule 35 exam only to extent that she alleged that depression had long-term impact on her mental state

Shumaker v. West, 196 F.R.D. 454, 457 (S.D. W.Va. 2000). An employer did not have good cause for Rule 35 medical exam of plaintiff who claimed her PTSD was a disability under the Rehabilitation Act, because plaintiff had provided various psychological test results and other information to the employer, including some tests performed by the employer itself.


Herb Kutchins and Stuart A. Kirk, Making Us Crazy: DSM: The Psychiatric Bible and the Creation of Mental Disorders, New York: The Free Press.

Sandra R. McCandless and Mark I. Schickman, “In Sexual Harassment Cases, Examining the Psychotherapist at Trial,” The Brief 41 (Spring 1989).


James J. McDonald, Jr., “My Life’s a Mess and It’s All Your Fault,” Vol. 29, No. 1 Emp. Rel. L. J. 68 (Summer 2003).


Access to medical records has not been unlimited:

- Even in cases where mental health records have been produced, they have been reviewed *in camera* and redacted prior to disclosure to defendants. *Bottomly v. Leucadia National*, 163 F.R.D. 617 (D.Utah 1995).

Where plaintiff apparently did not contest an examination per se, but only the use of two specific tests, the MMPI-2 and a Rorschach test, the court declined a protective order, state it was “hesitant to dictate diagnostic procedures”. *Breda v. Wolf Camera Inc.*, 1998 U.S. Dist. LEXIS 17667 (S.D.Ga. 1998).


**Same-Sex Marriages**

In re Marriage Cases, 43 Cal. 4th 757 (Cal. May 5, 2008).

National Pride at Work, Inc. v. Governor of Michigan, 2008 Mich. LEXIS 915 (Mich. May 7, 2008) (The Michigan Supreme Court, in dismissing a petition for a declaratory judgment, held that the state marriage amendment to the state constitution, which prohibits the recognition of same-sex marriages and “similar unions”, barred public employers from providing benefits to same-sex domestic partners of their employees).

Sanctions
Maldonado v. Ford Motor Co., 719 N.W.2d 809, 476 Mich. 372 (Mich. 2006). The Michigan Supreme Court, in a 4-3 decision, affirmed the dismissal of a sexual harassment case after plaintiff’s counsel publicized certain evidence that the trial court had excluded. The Supreme Court, in addressing the constitutional issues, found the lower court’s order a “narrow and necessary limitation aimed at protecting potential jurors from prejudice.”

Weaver v. ZeniMax Media, Inc., 923 A.2d 1032 (Md. Ct. Spec. App. 2007). The Maryland Court of Special Appeals held that the trial court, which had dismissed Plaintiff’s employment law suit as a sanction for the employee’s misconduct, had abused its discretion in so doing. The Plaintiff-employee, an officer of the Defendant corporation, a Delaware corporation, went into the offices of other employees and took documents and emails, which he believed supported his position in the employment dispute with the defendant. The Court of Special Appeals found that the sanction of dismissal, the ultimate sanction, was too harsh, stating that Plaintiff’s “conduct and the implication of that conduct are not so egregious as to warrant the ultimate sanction.”

The Court also held, as had been recently explained in Storetrax.com, Inc v. Gurland, 915 A.2d 991 (2007), that the so-called “internal affairs doctrine” is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation’s internal affairs because otherwise a corporation could be faced with conflicting demands. Thus, the Defendant being a Delaware corporation, the Court held that the internal affairs doctrine applied to the breach of duty of loyalty counterclaim brought by the Defendant against the Plaintiff. Delaware, quite recently, in In re Walt Disney Co. Derivative Litigation, 907 A.2d 693, 751 (Del. Ch. 2005), has addressed the rule that requires an undivided and unselfish loyalty to the corporation, i.e., the duty of loyalty. Then, holding that the issue of whether a corporate director or officer breached his or her duty of loyalty is “fact dominated” the court held that the trial court erred in granting summary judgment to the Plaintiff on the corporation’s counterclaim.

In reversing the sanction of dismissal, the Court held in essence that the misconduct had to threaten to interfere with the rightful decision in the case, and that the trial court had relied upon cases where the Plaintiff had improperly obtained documents during the discovery process; whereas here the documents obtained by the Plaintiff were discoverable and did not give the Plaintiff an unfair advantage in the litigation.

Sarbanes-Oxley Act

Kimpson v. Fannie Mae Corp., 2007 U.S. Dist. LEXIS 23920 (D.D.C. 2007). The employer submitted a motion to compel arbitration with a whistle-blower under Sarbanes-Oxley. The district court granted the motion because the existing employment agreement contained a broad arbitration for claims against the company, with a few specific exceptions.

Carnero v. Boston Sci. Corp., 433 F.3d 1 (1st Cir. 2006). The court held that the whistle-blower protection provisions of Sarbanes-Oxley Act do not apply to foreign citizens working outside of the United States for the foreign subsidiaries of covered companies. The plaintiff, a citizen of Argentina, was hired by an Argentinean subsidiary of a Delaware corporation and subsequently accepted a position within a Brazilian subsidiary of the same corporation. The plaintiff claimed that he was terminated after reporting to his superiors that the corporation’s Latin American subsidiaries were overcharging their customers. He sued the corporation under the whistle-blower provisions of the Sarbanes-Oxley Act and state law.

The district court found that the provisions did not have extraterritorial effect, and dismissed the employee's claims. On appeal, the First Circuit noted that the stated facts would have raised a valid claim if they had occurred within the United States, but agreed that the Sarbanes-Oxley whistle-blower provisions did not have an extraterritorial effect and affirmed the dismissal of the claims.

Bobreski v. EPA, 284 F. Supp. 2d 67 (D.D.C. 2003). The District Court held that ALJs do not have the power to issue or enforce subpoenas. In Childers v. Carolina Power & Light Co., ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec. 29, 2000), the ARB held that, given the ALJ’s authority to preside over formal trial-type hearings, such power implicitly encompassed subpoena power.

Platone v. FLYi, Inc [Atlantic Coast Airlines], 2003-SOX-27 (ARB 9-29-2006) available at www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/04_154.SOXP.HTM. The ARB found that protected activity under SOX, where allegations of mail or wire fraud are made, the alleged fraudulent conduct must at least be of a type that would be adverse to investors’ interests. The ARB noted that the mail and wire fraud statutes referenced in SOX, 18 U.S.C. §§ 1341 and 1343, are not by their terms limited to fraudulent activity that directly or indirectly affects investors’ interests. Nonetheless, the ARB stated that “when allegations of mail or wire fraud arise under the employee protection provisions of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be adverse to investors’ interests” (footnote omitted).

Bechtel v. Competitive Technologies, Inc., 448 F.3d 469 (2d Cir. 2006). In this much litigated SOX whistle-blower case, the OSHA investigator issued a determination finding that the employee’s termination violated SOX and ordered that the employee be reinstated with full pay and benefits. Thereafter, an ALJ declined to vacate the reinstatement order, and rather held that the employee should be preliminarily reinstated. When Bechtel refused to obey during the continuing administrative review of the matter, the employee than filed suit in federal court to obtain an injunction directing that he be reinstated. The district court entered a preliminary injunction, restoring the employee to his job. The Second Circuit vacated the district court’s order, finding that Section 806 of SOX does not extend federal jurisdiction to preliminary orders, and that federal jurisdiction is limited to actions brought by DOL and private parties only when a
final order has been issued or when DOL has not issued a final decision within 180 days of the filing of the original complaint. Judge Straub dissented, contending that the statute should be read to provide federal jurisdiction.

Neer v. Pelino, 389 F. Supp. 2d 648 (E.D. Pa. 2005). The district court held that Section 304 of SOX which provides for the forfeiture of bonuses and profits by corporate officers when an accounting restatement is necessary due to misconduct by the issuer, cannot be enforced through an implied private right of action.

Ede v. The Swatch Group Ltd, DOL ARB, Dkt No. 05-053 (June 27, 2007). FIND CITE

Windhauser v. Trane, ARB Case No. 05-127, 2007 DOL SOX LEXIS 82 (Oct. 31, 2007). The Review Board held that the Administrative Law Judges did not have the power to sanction an employer that declines to obey the ALJ's order to reinstate the complainant in a SOX section 806 case. Instead, any enforcement remedies are reserved for the Federal District Court to impose. Here the employer terminated Windhauser, who thereafter filed a complaint with DOL, alleging a violation of section 806 of SOX. After investigation, the agency issued its findings and a preliminary order of reinstatement. The employer then, among other things, requested a stay of the preliminary order of reinstatement, and the ALJ issued an order denying the employer's motion for a stay. Thereafter, the employer filed a petition for review with the ARB which was viewed as an interlocutory appeal. Thereafter, the parties settled and the ALJ requested briefing on the consequences of the employer's refusal to comply with the preliminary order of reinstatement. The ALJ then issued an order imposing monetary sanctions against the employer, which then petitioned the ARB to review the ALJ's imposition of monetary sanctions. The ARB held that, absent statutory authority, the DOL had no power to impose monetary sanctions, indicating that the appropriate forum would be the Federal District Court.

In re Ibasis Inc. Derivative Litigation, 2007 U.S. Dist. LEXIS 89989 (D. Mass., Dec. 4, 2007). The District Court held that in a stock option grant date manipulation case section 304 of SOX does not provide a private right of action. Judge Woodlock adopted the analysis of this question articulated by Judge Dalzell in Neer v. Pelino, 389 F.Supp. 2d 648 (E.D. Pa. 2005) where the Court relied heavily on the fact that section 306 explicitly provides for a private right of action, suggesting, by implication that as section 304 is silent in that regard, that Congress did not intend to provide for a private right of action under section 304.

Allen v. Administrative Review Board, (5th Cir. Jan. 22, 2008). The Fifth Circuit affirmed the ARB’s decision that the plaintiff did not engage in protected conduct, and Circuit established the following standards for assessing whether a SOX whistleblower engaged in protected conduct:

- “Reasonable Belief” Standard Protects a Mistaken Belief That an Employer Violated an SEC Rule. Consistent with the plain meaning of Section 806, which requires a plaintiff to demonstrate only a “reasonable belief” that there was a violation of one of six enumerated categories of protected conduct (not an actual violation), the Allen Court held: “Importantly, an employee’s reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected.” This is significant because it counters a popular defense contention that a SOX whistleblower must demonstrate
that shareholders have been harmed by the SEC violation or other misconduct about which the whistleblower complained.

• **“Objective Reasonableness” is Not Solely a Question of Law.** In Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (ARB May 31, 2007), the ARB erroneously held that objective reasonableness is a question of law. That decision is pernicious because it encourages ALJs who lack knowledge of securities law to determine prior to trial whether a SOX whistleblower engaged in protected conduct. The Allen Court, however, has held that while the objective reasonableness of an employee’s belief can be decided as a matter of law in some cases, “the objective reasonableness of an employee’s belief cannot be decided as a matter of law if there is a genuine issue of material fact . . . . [and if] reasonable minds could disagree on this issue,” the objective reasonableness of an employee’s belief should not be decided as a matter of law.”

• **SOX Protects a Disclosure About a Reasonably Perceived Violation of “Any Rule or Regulation of the SEC.”** Although the plain language of Section 806 protects an employee who provides information to a person with supervisory authority over the employee related to a violation of “any rule or regulation of the SEC,” many employers continue to argue that protected conduct is limited to disclosures about shareholder fraud. The Fifth Circuit has rejected that tortured construction of SOX, holding that a disclosure about a violation of any SEC rule is protected.

• **Consult a Securities Law Expert Before Engaging in Protected Conduct.** Unfortunately, the Fifth Circuit appears to be requiring SOX complainants to become experts in securities law in order to engage in protected conduct. In particular, the Fifth Circuit held that because the plaintiff was a licensed CPA, “the objective reasonableness of [plaintiff]’s belief must be evaluated from the perspective of an accounting expert” and she therefore should have known that internal consolidated financial statements need not be compliant with SAB-101, which prohibits publicly-traded companies from recognizing sales revenue before they deliver merchandise to the customer. Under this decision, complaining to management about internal accounting reports overstating gross profit is not protected conduct because the relevant SEC rule does not technically apply to internal financial statements. This aspect of the Allen Court’s holding completely misses the point of Section 806. As Judge Levin pointed out in Morefield v. Exelon Servs., Inc., 2004-SOX-2 (ALJ Jan. 28, 2004), Section 806 “is largely a prophylactic, not a punitive measure” designed to encourage employees to “head off the type of ‘manipulations’ that have a tendency or capacity to deceive or defraud the public. By blowing the whistle, they may anticipate the deception buried in a draft report or internal document, which if not corrected, could eventually taint the public disclosure.” Section 806 is not a private right of action to enforce SEC rules, but instead is a retaliation action designed to ensure that employees can disclose accounting fraud and reasonably perceived violations of SEC rules without fear of reprisal, before shareholders are defrauded. Blowing the whistle on deceptive or inaccurate draft financial statements should be protected because if left uncorrected, the draft statements will be distributed to shareholders. If an employee is retaliated against for blowing the whistle on misleading internal financial statements, then the employee will not take the risk of blowing the whistle on publicly-filed financial statements. Finally, a SOX whistleblower should not need to consult a securities lawyer in order to engage in protected conduct.
Although Section 806 of SOX has been narrowed by some courts, it continues to afford robust protection to whistleblowers and does not require proof of an actual violation of an SEC rule. The lesson of Allen is that SOX whistleblowers need to plead protected conduct in detail and be prepared to establish a strong link between their disclosure and a reasonably perceived violation of an SEC rule, which in some cases will require expert witness testimony.

SOX contains a provision that makes it a crime to tamper with potential evidence in “contemplation” of a federal investigation. 18 U.S.C. Section 1519. Recently, the United States Attorney for Connecticut charged a lawyer under this provision with obstructing justice and destroying evidence concerning child pornography. The government alleges that the lawyer destroyed a church computer allegedly containing child pornography that had been downloaded by a church employee. It should be noted that under this particular provision of SOX, there need not be an investigation in place or even imminent as a predicate for prosecution. As one blogger noted: “The statute appears to criminalize what was once considered prudence by defense counsel. The mens rea for such crimes is now virtually limitless.” Norm Pattis, Crime & Federalism (Feb. 17, 2007), at http://federalism.typepad.com/crime_federalism/2007/02/index.html (last visited Mar. 8, 2007).

See also John Christoffersen, “Arrest Sparks Worries Over Implications of Corporate Law,” Associated Press (Mar. 4, 2007), available at http://chron.com/disp/story.mpl/headline/biz/4601040.html (last visited Mar. 8, 2007). While the prosecution in this case may correctly be characterized as “boundary-pushing”, as it has been by New York University law professor Stephen Gillers, nonetheless one should take this into account in the employment arena.


Teresa Baldas, “Employers Scoring in Whistleblower Actions,” Nat’l L. J. (October 29, 2007), available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1193303027796. The author’s theme is that SOX, which “was designed to protect whistleblowers who reveal corporate fraud has produced robust victories for employers, which have plaintiffs’ lawyers and employee-rights advocates reeling.”


In researching SOX cases, the Office of Administrative Law Judges has a digest of SOX cases which is posted at http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/ SOX_DIGEST.HTM.


**Miles v. Wal-Mart Stores Inc.,** 2008 U.S. Dist. LEXIS 5781 (W.D.Ark. Jan. 25, 2008) (The District Court found that an employee who refused to shred documents that were the subject of a criminal investigation, had alleged a predicate offense that provides the necessary foundation for whistleblower protection under the Sarbanes-Oxley Act).

Allen v. Administrative Review Bd., 514 F.3d 468 (5th Cir. 2008) (The Fifth Circuit held that the layoff of three employees did not constitute retaliation in violation of the Sarbanes-Oxley Act. The three employees were held not to have had engaged in protected activity as there was substantial evidence that they did not reasonably believe that Stewart Enterprises, their employer, had acted with “a mental state embracing intent to deceive, manipulate or defraud”. The three had claimed that the company failed to comply with SEC staff accounting bulletins that required the company to change its internal accounting practices to recognize revenue at the time the company actually delivered merchandise rather than at the time of sale. The Court held that the bulletins were not rules or interpretations of SEC rules, but rather reflects the SEC’s staff’s views regarding accounting-related disclosure practices. A CPA determined that, in his judgment, the company was not violating an SEC rule or regulation, and accordingly the Court found no requisite intent to defraud).


**Service Contract Act**

*Lear Siegler Servs., Inc. v. Secretary of Defense*, 457 F.3d 1262 (Fed. Cir. 2006). The Federal Circuit reversed the Armed Services Board of Contract Appeals and held that a contractor’s request for price increase from the government cannot be denied on the grounds that the contractor’s defined benefit plan does not state a specific dollar amount for the contractor to pay.

**Settlement**

*Frahm v. United States*, 2007 U.S. App. LEXIS 15255 (4th Cir. June 27, 2007). The court affirmed the dismissal of a suit against the federal government concerning a breach of a federal sector settlement agreement. Dismissal was appropriate because (a) the settlement agreement made no mention of monetary remedies; (b) the government had not waived its sovereign
immunity, and (c) the EEOC regulations provided exclusively for non-monetary alternative remedies.

Stockman v. Oakcrest Dental Ctr., P.C., 480 F.3d 791 (6th Cir. 2007). The court ruled that documents relating to settlement negotiations are not admissible as evidence of mitigation, under Fed. R. Evid. 408, even as “another purpose” under the rule. This decision contributes to an already existing Circuit split on the issue: the First, Fifth, and Seventh allow this type of mitigation evidence as “another purpose,” while the Second and now the Sixth do not.

Atkinson v. Sellers, 2007 U.S. App. LEXIS 12081 (4th Cir. May 23, 2007). The court held that the agreement settling a Title VII claim did not give rise to a Title VII action for breach thereof, but rather a common law breach of contract claim. Plaintiff had asserted internally claims of race and national origin discrimination, and, through mediation, plaintiff and Blue Cross reached a settlement agreement, which was contained in a written agreement. Subsequently, plaintiff filed suit in federal district court, claiming that Blue Cross had violated the settlement agreement. The court of appeals found that it did not have federal subject-matter jurisdiction as plaintiff did not allege that Blue Cross violated Title VII or that it had engaged in any discriminatory conduct. Moreover, the case did not fall within the exception that permits a plaintiff to proceed in federal court where the plaintiff’s right to relief necessarily depends on the resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded claims. Here, plaintiff could obtain relief on his breach of contract claim without reference to federal law at all.

United States EEOC v. Lockheed Martin Corp., 444 F. Supp. 2d 414 (D. Md. 2006). The District Court held that the defendant’s demand that the plaintiff withdraw her EEOC charge as a condition for receipt of severance benefits constituted retaliation under Title VII. The court held that such a condition, that is, the demand for dismissal of the EEOC charge, was facially retaliatory. See David K. Hasse & Emma Sullivan, The Pitfalls of Releases, National Law Journal, October 23, 2006. Available at: http://www.nlj.com.

White v. Jungbauer, 128 P.3d 263 (Colo. Ct. App. 2005). The court held that a litigant may bring a legal malpractice suit against his or her attorney even though the underlying action settled. Facts indicating the lack of coercion were irrelevant to the question of whether defendants' conduct constituted legal malpractice. Defendants had not, by expert testimony or affidavit, produced evidence indicating that $350,000 was a reasonable settlement value for the client's case. Nor had they presented any expert testimony or affidavits that would have supported the conclusion that their decision not to subpoena the client's doctors and their preparation of the client for trial, was reasonable. Because defendants failed to meet their burden on the issue of negligence, the district court's entry of summary judgment was erroneous.

The Kellogg Co. v. Sabhlok, 471 F.3d 629 (6th Cir. 2006). The court, while agreeing that an employee may not prospectively waive rights under the ADEA or Title VII, found that a provision in the release at issue precluded a failure to re-hire claim because the court found that the re-hire claim was part and parcel of the wrongful termination claim that the employee had waived.
Brown v. SOH, 909 A.2d 43 (Conn. 2006). The Connecticut Supreme Court held that a driving instructor at a car racing school, who had signed an exculpatory agreement prospectively releasing his employer and others from liability for any injury sustained on the premises, could nonetheless sue for negligence, the court holding that such agreements in the employment context violate public policy.

Baptist v. City of Kankakee, 481 F.3d 485 (7th Cir. 2007). Plaintiffs, who had sued under Title VII, agreed in open court to a settlement, but shortly thereafter attempted to repudiate the settlement, arguing that the settlement was more beneficial to their lawyer than to themselves. The District Court declined to set aside the settlement and the plaintiffs appealed, arguing that their agreement was not knowing and voluntary because their lawyer allegedly failed to adequately advise them on the merits of the settlement in an effort to ensure payment of his $67,000 fee. The Seventh Circuit rejected plaintiffs’ argument, holding that the settlement agreement is presumed to be knowing and voluntary and that the adequacy or propriety of their lawyer’s advice is irrelevant to the question of whether a settlement is knowing and voluntary. The court held that if the lawyer’s conduct was unreasonable under the circumstances, the plaintiffs’ remedy would be against the lawyer for malpractice. Otherwise, the court would be countenancing the visitation of the sins of the plaintiffs’ lawyer upon the defendant. The court noted that the plaintiffs had not claimed that their lawyer colluded with the defendant to fraudulently induce a settlement or that the court had denied them adequate time to consult with their lawyer before agreeing to the terms of settlement.

Myricks v. Federal Reserve Bank of Atlanta, 480 F.3d 1036 (11th Cir. 2007). The plaintiff signed a severance agreement that contained a general release in exchange for enhanced retirement benefits. Plaintiff argued that he did not knowingly and voluntarily release his pending Title VII claim. The Eleventh Circuit enforced the settlement agreement, finding the employee’s waiver was knowing and voluntary and noting that “an educated employee with ample time to consider an agreement cannot profess ignorance about its clear terms after consulting an attorney.”


For a list of severance agreements from companies such as Kmart, OfficeMax, Morgan Stanley, Safeway, and Unocal see http://contracts.onecle.com/type/38.shtml.


Ryan v. Roman Catholic Bishop of Providence, 787 A.2d 1191 (R.I. Sup. Ct. Feb 8, 2008) (On appeal, the plaintiff argued that the trial judges encouragement of settlement talks demonstrated bias such that it was error to deny plaintiff’s motion to recuse the judge. The Rhode Island Supreme Court disagreed, finding that it was entirely appropriate for a judge to suggest that the
parties resolve their claims through mediation, stating: “No less renowned a figure than Abraham
Lincoln recognized the desirability of settlement when possible . . . it borders on the offensive
for a party to claim that a Justice should be recused for adhering to this policy [of encouraging
settlement]”). See also Victoria Pynchon, Trial Mediation and Justice – the Judge Who Urges
Settlement, Settle It Now Negotiation Blog,
http://www.negotiationlawblog.com/2008/02/articles/conflict-resolution/trial-mediation-and
justice-the-judge-who-urges-settlement/ (last visited June 10, 2008); Mike Frisch, No Bias in
Encouraging Settlement, Legal Profession Blog,
http://lawprofessors.typepad.com/legal_profession/2008/02/no-bias-in-enco.html (last visited
June 10, 2008).

THE SCIENCE OF SETTLEMENT, BARRY GOLDMAN (ALI ABA 2008).

Victoria Pynchon, Ten Settlement/Mediation Traps for the Unwary, SETTLE IT NOW
NEGOTIATION BLOG, October 17, 2007,
http://www.negotiationlawblog.com/2007/10/articles/advice-for-young-lawyers/ten-settlement-
confrencemeditation-traps-for-the-unwary/.

Documents from Edwin G. Foulke, Jr., Assistant Secretary of Labor for OSHA re: review of
employment waiver clauses in settlement agreements under OSHA whistleblower protection
programs, provided to The United States Law Week, BNA, Inc.(July 26, 2007)

THE NEGOTIATOR’S FIELDBOOK: A DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR

Negotiations

Studies have shown that parties who negotiate solely through email are four times more likely to
reach an impasse and develop feelings of mistrust and resentment towards the other party than
parties who engage in a “brief, getting-to-know-you phone conversation” prior to negotiation.
While email is easy and efficient, some small effort in an informal phone call may pay large
dividends as negotiations proceed. See, Janice Nadler, Rapport in Legal Negotiation: How Small
Talk Can Facilitate E-mail Dealmaking, 9 Harv. Negotiation L. Rev. 223 (Spring 2004).

Alternative Dispute Resolution

Recent case law suggests that some courts are willing to enforce arbitration clauses, even amidst
claims of economic duress, when the arbitration clause is part of an employment agreement.
Claims of economic duress can invalidate an arbitration clause only if the economic duress was
exerted exclusively regarding the arbitration clause. Economic duress exerted to coerce an
employee to sign an employment agreement containing an arbitration clause cannot be the basis
for escaping the agreement to arbitrate claims. See, e.g., In re RLS Legal Solutions, LLC, 221
S.W.3d 629 (Texas 2007).

Ethical Issues

229
For a discussion of the scope of Rule 5.6 and the ability of attorneys to enter into settlement agreements restricting their use of information obtained in the settled matter see Heather Waldbeser & Heather DeGrave, A Plaintiff’s Lawyer’s Dilemma: The Ethics of Entering a Confidential Settlement, 16 Geo. J. Legal Ethics 815, (2003).

The D.C. bar has been strict in preventing lawyers from agreeing to settlement terms that limits the lawyer’s ability to pursue claims against the same defendant in the future. In In re Hager, 812 A.2d 904 (D.C. 2002), the court upheld a one year suspension of an attorney who achieved a satisfactory settlement for his clients, but agreed not to represent other plaintiffs against the defendant in the future and, without his client’s knowledge, accepted more than $200,000 from the defendant in payment for his legal fees.

While an attorney maintains his or her duty to represent the best interests of their client throughout settlement negotiations, counsel must be careful to not make misleading or deceitful statements. In Ausherman v. Bank of Am. Corp., 212 F. Supp. 2d 435 (D. Md. 2002), the court sanctioned an attorney and recommended professional discipline for his efforts to extract a settlement from an employer for an alleged breach of employee’s credit information. The court found that the lawyer had no evidence of the alleged breach, although he suggested that he did in settlement communications with defense counsel.

Confidentiality

For any settlement agreement containing a confidentiality clause, it is essential that the parties assign a value to the clause for tax purposes. The tax court has ruled that because confidentiality agreements have monetary value a portion of any settlement monies received by a plaintiff is consideration for the confidentiality agreement. If the parties do not designate the amount of consideration paid for the confidentiality clause then the court will undertake to do so. Tax court decisions suggest that the court will be very deferential to the amounts determined by the parties. See, e.g., Amos v. Commissioner of Internal Revenue, T.C. Memo 2003-329, U.S. Tax Ct., 2003.

Counsel for the employee should be sensitive to the fact that the employee may need to disclose the settlement in applying for future employment. This is particularly true for federal employees who require background checks and/or security clearance. An employee’s failure to answer truthfully regarding past employment matters can result in the employee being denied employment later. Any confidentiality clause should provide that the employee is permitted to disclose the fact of a settlement when pursuing future employment, and the parties should agree on what information will be disclosed to future employers who contact the employer when performing a background check on the employee. Bennett v. Chertoff, 368 U.S. App. D.C. 123 (D.C. Cir. 2005).

This is true even if the attorney discloses information regarding the settlement in a court filing or in a suit against the client. See, Baella-Silva v. Hulsey, 454 F.3d 5 (1st Cir. 2006).

The Sixth Circuit in Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976 (6th Cir. 2003), held that settlement communications are privileged and therefore not discoverable by third parties. In Goodyear a third party homeowner sought discovery of a
settlement proposed between the two companies in a separate litigation. The Court held that the public interest in maintaining the confidentiality of settlement negotiations is significant enough to outweigh the probative need of any evidence that could be gained through discovery of such negotiations. The court found that for settlement negotiations to be effective, their confidentiality must be “sacrosanct.”

Some courts are becoming less willing to allow confidential settlement agreements to remain confidential, particularly in areas of public concern. In South Carolina federal courts, the judges have voted to ban all confidential settlements. Several other states are considering adopting such bans. Attorneys must be cognizant of the status of confidential settlements in their jurisdiction, and whether the subject-matter of the dispute could preclude confidentiality under an applicable “sunshine law.” This may be of particular concern in cases involving employee whistleblowers who have information regarding potential threats posed by their employer.

Prohibition on Re-Applying for Employment

Counsel on both sides should be prepared to negotiate if the employer expects the settlement agreement to contain language prohibiting the employee from applying for employment with the employer in the future. The Seventh Circuit has held that no-rehire clauses are not “usual” terms in employment settlement disputes and therefore they must be individually bargained for. *Dhaliwal v. Woods Div.*, 930 F.2d 547 (7th Cir. 1991) (Posner).

Letter(s) of Reference

The employer may find it useful to utilize computer programs that allow the user to input information to a template which then generates a standard reference letter. Often these programs allow the user to determine the level of familiarity and confidence conveyed by the letter. Use of computer-generated reference letters can save the employer time and may shield the employer from accusations of disparagement by former employees.

Verbal References

Employees who are concerned that the employer is breaching the agreement not to disparage the employee may hire a reference checking firm to test the employer. For a small fee reference checking firms will contact the former employer posing as a potential employer seeking a reference for the employee. If it is found that the employer is deviating from the verbal reference agreed upon in the settlement, the employer could face breach of contract claims. See, Diane Cadrain, *Job Detectives Dig Deep for Defamation*, Human Resources Magazine, (October 2004).

Peculiar Problems in Specific Professions

For attorneys, there is a tension between a law firm’s desire to maintain clients after a particular attorney departs, and the ethical rules regarding an attorney’s right to practice and the lawyer-client relationship. Most jurisdictions that have faced this issue have determined that restrictive
covenants in partnership or settlement agreements are not enforceable. See, e.g., Stevens v. Rooks Pitts & Poust, 682 N.E. 2d 1125 (Ill. App. Ct. 1997).

Release

A blanket “boilerplate” release may not provide complete coverage to an employer if the employee later makes a claim based on harm “not contemplated” at the time the release was signed. The employer should be careful to specifically articulate within the language of the release clause all claims the employer intends the release to cover. If the release is intended to exculpate the employer from any liability for past claims which may not be discovered until some time in the future, the release clause should be explicit in stating this. See, Ill. Cent. R.R. v. Acuff, 950 So. 2d 947 (Miss. 2006).

When the employer explains to the employee in “clear terms” that a general release is included in, and requisite to, a severance agreement, and the employee has adequate opportunity to consult an attorney regarding the terms of the agreement, the employee is barred from later claiming that his release was not knowing and voluntary. Myricks v. FRB, 480 F.3d 1036 (11th Cir. 2007).

The Fourth Circuit has interpreted 29 C.F.R. § 825.220(d) as barring both the prospective and retrospective waiver or release of “substantive and proscriptive rights” under the FMLA without the prior approval of a court or the Department of Labor. Taylor v. Progressive Energy, Inc., 415 F.3d 364 (4th Cir. 2005).

California courts have ruled that a release signed as part of the resolution of a grievance releases the employer from all claims relating to that grievance, but, does not release the employer from a separate and distinct claim of discrimination by the same employee. See, e.g., Butler v. Vons Companies, Inc., 140 Cal. App. 4th 943 (Cal. Ct. App. 2006).

See, also, Richardson v. Sugg, 448 F.3d 1046 (8th Cir. 2006).

A retrospective waiver of rights under the ADEA is valid if the language of the waiver specifically releases the employer for retrospective claims under the ADEA, the waiver of ADEA claims is not contradicted by other language in the agreement, and the employee’s waiver is knowing and voluntary. See, Parsons v. Pioneer Seed Hi-Bred Int’l, Inc., 447 F.3d 1102 (8th Cir. 2006); Thiessen v. GE Capital Corp., 232 F. Supp. 2d 1230 (D. Kan. 2002); Wastak v. Lehigh Valley Health Network, 342 F.3d 281 (3d Cir. 2003).

See, also, Hohnke v. United States, 69 Fed. Cl. 170 (Cl. Ct. Cl. 2005) (finding that a waiver of FLSA rights in a settlement agreement is only valid if the agreement is a settlement of a dispute over hours worked or compensation due).

Breach of the Agreement
In jurisdictions that prohibit liquidated damage clauses in contracts, courts have struggled with language in an agreement that requires a party to return any payments made under the agreement in the event of a breach. In Smelkinson SYSCO v. Harrell, 162 Md. App. 437 (Md. Ct. Spec. App. 2005), the Court of Special Appeals of Maryland reversed the lower court’s determination that a “settlement agreement clause” was in fact an impermissible liquidated damages clause. The court determined that language requiring the plaintiff, in the event of a breach, to return all monies paid under the agreement was a stipulated damages clause that was reasonable and enforceable.

Integration Clause

While parties to a settlement agreement are wise to include an integration clause, it is important that the clause be drafted in a way that specifically denotes the types of ancillary agreements which are precluded by the agreement. General or “boilerplate” language may not be sufficient to prevent introduction of evidence of an agreement not found within the “four corners” of the written agreement. See, e.g., Wall v. CSX Transportation, Inc., 471 F.3d 410 (2d. Cir. 2006).

False Claims Act


The Sixth Circuit has ruled that a qui tam plaintiff can share in the settlement of a separate case which the government brought instead of joining the plaintiff’s False Claims Act suit. The government argued that the plaintiff was not entitled to a share of the settlement because the government had not intervened in plaintiff’s suit. However, the court held for the plaintiff citing language in the Act that states “the government may elect to pursue its claim though any alternate remedy available…and…if any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued.” The court found that this language prevented the government from bringing its own claim to avoid sharing the settlement with the qui tam plaintiff. United States ex rel. Bledsoe v. Cnty. Health Sys., 342 F.3d 634 (6th Cir. 2003).

Enforcement of Agreement

Attorneys for both parties to a settlement agreement should be careful to ensure that opposing counsel has express authority to accept any settlement offer. See Covington v. Cont'l Gen. Tire, Inc., 381 F.3d 216 (3d Cir. 2004) (refusing to enforce a settlement agreement which the plaintiff’s attorney had apparent authority, but not express authority to accept.) See, also, Makins v. District of Columbia, 363 U.S. App. D.C. 471 (D.C. Cir. 2004) (finding that a plaintiff was not required to accept a settlement negotiated by her attorney before a magistrate judge at a settlement conference.) But, see, Harris v.Ark. State Highway & Transp. Dep’t, 437 F.3d 749 (8th Cir. 2006) (enforcing a settlement agreement over plaintiff’s objections because plaintiff’s spoken words caused her attorney to believe that he had her express authority to settle on the terms he had presented to her.)
Some courts are unwilling to enforce settlement agreements if the party seeking enforcement cannot show that there has been “accord and satisfaction” between the two parties. Whether there has been accord and satisfaction can be a matter of whether or not all consideration contemplated by the agreement has been delivered to the respective parties. See Sims-Madison v. Inland Paperboard & Packaging, Inc., 379 F.3d 445 (7th Cir. 2004) (vacating decision to enforce a settlement agreement drafted by the plaintiff’s attorney because the defendant employer had not delivered the money due to the plaintiff).

In determining whether to enforce an oral agreement, New York courts undertake an analysis of the so-called Winston factors. Under Winston the courts will consider (1) whether there has been express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. If any of the factors weigh in favor of non-enforcement then the court will not enforce an oral settlement agreement. See, Lindner v. Am. Express Corp., 2007 U.S. Dist. LEXIS 41178 (D.N.Y. 2007).

In some circuits, retention of enforcement power by a court is considered “judicial sanctioning of a change in the legal relationship of the parties” and thereby is sufficient to convey prevailing party status for purposes of fee-shifting statutes. See, Roberson v. Giuliani, 346 F.3d 75 (2d Cir. 2003).

: See, also, Omega Eng'g, Inc. v. Omega, S.A., 432 F.3d 437 (2d Cir. 2005).

Within the District of Columbia, an oral agreement is an enforceable settlement if there is agreement on all material terms and both parties have manifest an intent to be bound. Even if there is no written agreement, if the actions of the parties can be reasonably interpreted to manifest an intent to be bound, the courts will enforce an oral settlement agreement. See, Greene v. Rumsfeld, 266 F. Supp. 2d 125 (D.D.C. 2003).

The Court of Federal Claims has held that it does not have jurisdiction for claims of federal employees seeking enforcement of settlement disputes when the relief requested is non-monetary. In Schnelle v. United States, 69 Fed. Cl. 463 (Ct. Cl. 2006), the court held that it did not have subject matter jurisdiction to enforce the settlement agreement, even though the defendant employer had breached the settlement agreement, because the plaintiff employee did not claim any actual monetary damages from defendant’s breach.

If a case which is before a court is settled prior to a final adjudication, and a Rule 58 order of dismissal is never filed or entered into the docket, then the trial court retains jurisdiction of enforcement of the settlement agreement. See, Bailey v. Potter, 375 U.S. App. D.C. 179 (D.C. Cir. 2007).

Settlements with Federal Government
The now-infamous Thomson Memorandum, written in 2003, listed factors for government prosecutors to consider when determining whether or not to prosecute defendants, particularly corporate defendants. Among the factors to be considered are whether the company has voluntarily waived attorney-client privilege with respect to conversations between its employees who are under investigation and whether the company has discontinued payment of legal fees for employees facing prosecution. The effect of the Thompson Memorandum has been to give the government considerable leverage in settlement negotiations to pressure companies to abandon employees who are facing possible criminal charges. However, recent court decisions have criticized the effects of the Thompson Memorandum and have called into question the ability of the government to continue to consider all the factors outlined in the memorandum when making leniency decisions. See, e.g., United States v. Stein, 2006 U.S. Dist. LEXIS 17586 (D.N.Y. 2006).

**Class Action Settlement**


When settling class action lawsuits, the parties cannot agree on a settlement amount that includes plaintiff’s attorneys’ fees calculated as a percentage of the common fund. Even in cases where there is an applicable fee-shifting statute, the prevailing party must petition the court for a separate award of attorneys’ fees. This rule is designed to prevent attorneys from rejecting a “fair, adequate, and reasonable settlement for their clients in favor of inflated attorneys’ fees.” Staton v. Boeing, 327 F.3d 938 (9th Cir. 2002).

**Sarbanes-Oxley (SOX) Considerations**

If an employee makes a claim of retaliation under SOX any settlement agreement requires approval of either the Assistant Secretary of OSHA or an ALJ, depending on whether the case is still in the investigative stage or not. 29 C.F.R. §1980.111(d). Department of Labor case law suggests that settlement terms cannot be unduly restrictive if the parties hope to receive ALJ approval. Particularly, the settlement cannot prevent the employee from communicating with state or federal government officials regarding investigations into the actions of the company. See, e.g., Michaelson v. Officemax, 2004-SOX-17, slip op at 4 (June 21, 2004).

Parties to a SOX settlement agreement should also be mindful of potential difficulties in maintaining confidentiality. Because any settlement agreement requires ALJ approval, the settlement generally becomes part of the Department of Labor record regarding the case, which is subject to public document requests under FOIA. Seater v. Southern California Edison Company, 1997 WL 144080, 1995-ERA-13 (ARB March 27, 1997). The parties can request that the ALJ seal the settlement agreement to shield it from release under FOIA, and the ALJ may decide to do so if the agreement “constitutes and contains confidential commercial, personal and
financial information, the public release of which by any person or agency could reasonably be expected to cause substantial competitive harm.” *Wilson v. TIAA-CREF*, 2004-SOX-12 (October 7, 2004). The parties must agree in the settlement to jointly request that the record be sealed before the ALJ will consider a motion to do so.

Link v. Department of Treasury, 51 F.3d 157 (Fed. Cir. 1995) (The Federal Circuit reversed on the ground that the Agency failed to comply with a settlement agreement). *Lindstrom v. Norton*, 2007 U.S. App. LEXIS 29172 (10th Cir. 2007) (The 10th Circuit held that the plaintiff could not bring an action to enforce a settlement outside of the administrative process, unless the plaintiff disavowed the settlement, returned all monies received, including attorneys fees, and then moved to reopen the underlying employment discrimination lawsuit).

Frahm v. IRS, 492 F.3d 258 (4th Cir. 2007) (The 4th Circuit held that monetary damages are not available for breach of a settlement agreement).

**Settlement – Apology**

(American Medical Association (Front page of today’s post) has issued an historic policy from excluding them from the medical profession)

Prime Minister of Canada two or three weeks ago in parliament issued a extraordinary apology to the indigenous community of Canada for taking away children and forcing them into Indian schools

Prime Minister of Australia in parliament apologized to indigenous people of Australia for their mistreatment

**Settlement – Attorney’s Fees**

Roberson v. Giuliani, 346 F.3d 75 (2d Cir. Sept. 30, 2003) (The 2nd Circuit held that, where the District Court retained jurisdiction to enforce a settlement agreement, the Court was thus empowered under § 1988 to award attorneys fees in enforcement proceedings).

In the Tenth Circuit, a settlement agreement cannot be considered as evidence of plaintiff’s degree of success when awarding attorneys’ fees if the settlement agreement was not approved by the court. *See Bell v. Bd. of County Comm’rs*, 451 F.3d 1097 (10th Cir. 2006).

**Settlement – Collaborative Law**


**Settlement - Evidence**
Rodriguez-Garcia v. Caguas, 495 F.3d 1 (1st Cir. 2007). The First Circuit reversed in part a retaliation claim as the lower court’s dismissal rested on an erroneous evidentiary ruling involving the application of Federal Rule of Evidence 408 dealing with “compromise and offers of compromise”.

**Settlement - Extortion**

Rendelman v. State, 927 A.2d 468 (Md. Ct. Spec. App. 2007). The Appellant had been convicted below on one count of extortion by economic threat and one count of extortion in writing by economic threat, and sentenced to ten years. The Appellant had written to his former employer, from whom he had embezzled money, and had threatened, in writing, to sue the former employer for damages if he did not pay a $100,000 amount in settlement. The Court found that Appellant’s threat had been made in bad faith, with actual knowledge that he had no factual or legal basis for a claim against his former employer. The Court of Special Appeals overturned the conviction, finding that Appellant’s threat to file a lawsuit unless a settlement amount was paid, even though made in bad faith, was not a “wrongful threat under Maryland criminal law since pursuit of a civil lawsuit was lawful.” The Court also found that litigation was not a wrongful means and, accordingly, Appellant could not be shown to have intended a wrongful purpose by wrongful means. The Court, in a footnote, without any citation of authority, did state that a threat to bring criminal charges unless money or value is paid, even if the criminal charges would be well-based, is a blackmail species of extortion. See 927 A.2d at FN. 15.

**Settlement – Liquidated Damages Clause**

Willard Packaging Co. v. Javier, 899 A.2d 940; 169 Md. App. 109 (Md. Ct. Spec. App. 2006). The Court of Special Appeals held that a $50,000 liquidated damages clause in an employment contract that prohibited an employee from working for a competitor was an unenforceable penalty. The court concluded that the amount of liquidated damages bore no rational relationship to any expected actual damage that the employer might incur in the event of a breach by the employee, and that the provision was not freely negotiated between two parties of equal bargaining power. The court discussed at length the burden of proof, there being no definitive Maryland law on the subject. The court concluded that the burden was to be shouldered by the party seeking to sustain a liquidated damages penalty.

**Settlement of Federal EEO Claim – Breach**

Harris v. Brownlee, 2007 U.S. App. LEXIS 4136 (8th Cir. Feb. 26, 2007). The federal employee-plaintiff entered into a settlement of a Title VII case with the agency which agreed to resubmit plaintiff’s grade level classification to an independent classifier. When the independent classifier arrived at the same classification decision, plaintiff filed a breach action. See 29 C.F.R. § 1614.504(a). The court of appeals found that plaintiff had received the benefit of the bargain as he obtained a full desk audit performed by the classifier, and accordingly the agency did not materially breach the settlement agreement.
Severance Agreements

Maudlin v. Pacific Decision Scis. Corp., 2006 Cal. App. LEXIS 385 (Cal. Ct. App. March 21, 2006). The court held that an employee who negotiates a severance package with a company is not in pari delicto with his former employer if the employer created an illegal tax shelter in order to provide the payments provided for in the severance package to the employee. The court also held that a transaction between the former employee and employer involving the buy-back of the company stocks owned by the employee was legal, even though bought back at 50% of their current value, is valid under California law as long as “if the retained earnings are sufficient to pay the cash at the time it is transferred in satisfaction of an earlier obligation to do so, the distribution is not prohibited.”


Sex Stereotyping

Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004). The Court of Appeals recognized that stereotyping about the qualities of mothers was a form of gender discrimination and further held that a determination of discrimination could be made without evidence as to how the employer treated fathers.

Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006). Male police officer failed to establish that the theory of sex stereotyping was broad enough to encompass the harassment that he endured at the hands of coworkers who allegedly thought his sexual practices did not conform to the traditional male role.

Sexual Discrimination

Jespersen v. Harrah’s Operating, Co., 444 F.3d 1104 (9th Cir. 2006). The Ninth Circuit held that female bartenders could be required to wear makeup, partially because doing so would not place an undue burden on them and would not deprive them of an employee benefit.

Tenge v. Phillips Modern Ag. Co., 446 F.3d 903 (8th Cir. 2006). The court held that it is not illegal under Title VII’s prohibition against discrimination based on “sex” for an employer to terminate an employee “on the basis of an employee’s admitted, consensual sexual conduct with a supervisor.”

Carpenter v. Boeing Co., 456 F.3d 1183 (10th Cir. 2006). The Tenth Circuit affirmed a grant of summary judgment for Boeing against female employees whose statistical analysis showed a large discrepancy in the employer’s assignment of overtime to male and female employees. The court ruled that plaintiff’s had failed to satisfy their burden to establish a prima facie case. The plaintiffs did not establish that their statistical analysis was based on data that was restricted to
qualified employees or, alternatively, that reliable data with respect to that group was unavailable and the analysis used a reliable proxy for qualification. Thus, the female employees did not prove disparate impact.

Scheidemantle v. Slippery Rock University, 470 F.3d 535 (3d Cir. 2006). The Court of Appeals reversed the district court’s decision to bar a hiring claim because the female applicant lacked the posted experience and credentials, even though male candidates without said qualifications, were considered. The Court of Appeals stated: “If an employer could, with impunity, appeal to objective qualifications to defeat any female job applicant’s challenge to its hire of an objectively unqualified male in her place, discrimination law would be reduced to bark with no bite. Title VII demands that employers apply the same standards for hiring women and other protected minorities that they apply to all other applicants.”

Chadwick v. Wellpoint, Inc. 2008 U.S. Dist. LEXIS 36328 (D.Me. May 2, 2008) (The district court held, in a case where the employee alleged sex discrimination, that a mother of four who was denied a promotion cannot claim sex discrimination where the position was filled by another female employee, a mother of two teenagers. The court granted summary judgment, where one of the plaintiff’s supervisors had explained the promotion denial by saying that the plaintiff was going to school, had kids, and had a lot on her plate and even though another supervisor specifically commented on the fact that the employee had triplets, and even though a third supervisor compared disciplining subordinates to dealing with children. The court stated: “[T]he words alone still do not show that the comments reflect sex-based assumptions or stereotypes – that [her supervisor] believed that a working mother with triplets, a forth child, and school would be more overwhelmed than a working father with triplets, a forth child, and school”).

Sexual Favoritism

Miller v. Dep’t of Corrections, 115 P.3d 77 (Cal. 2005). California Supreme Court held that when sexual favoritism on the part of a supervisor toward a female employee with whom the supervisor is having a consensual sexual affair, is sufficiently widespread, it may create an actionable hostile work environment under the California Fair Employment and Housing Act.

Sexual Harassment

Yuknis v. First Student Inc., 481 F.3d 552 (7th Cir. 2007). The Seventh Circuit, in a case where a female bus driver alleged a sexually hostile work environment but experienced little harassment directed at her, found nonetheless that if the “second-hand” harassment is within the target area, then it is actionable. The court coined some new vocabulary for assessing such harassment cases, stating “The fact that one’s coworkers do or say things that offend one, however deeply, does not amount to harassment if one is not within the target area of the offending conduct – if, for example, the speech or conduct is offensive to women and one is a man, or offensive to whites and one is a black. One could be the target, as the plaintiff was in the two incidents we mentioned . . . Or one could be in the target area because a group of which one was a member was being vilified, although one was not singled out . . . Some cases term what we are calling the ‘target area’ form of actionable harassment ‘second-hand harassment’ and intimate, or even state, that it is categorically less serious than harassment specifically aimed at
the plaintiff. But the line that runs between ‘you are a bitch’ and ‘all women are bitches [and you are a woman (understood)]’ is quite a fine one, a point that a belittling term like ‘second hand’ tends to obscure. The term (virtually confined to cases in this circuit) has no analytic function and is better avoided.”

EEOC v. PVNF L.L.C., 2007 U.S. App. LEXIS 11276 (10th Cir. May 14, 2007). The Tenth Circuit held that a sexual derogatory email concerning a female sales manager that was circulated in the office was evidence of harassment, even though the email was not sent to the female manager herself. The court held that the fact that the manager was not the intended recipient “is of no consequence,” because hostile work environment need not be directed at the victim or intended to be received by the victim. The Tenth Circuit held that courts should look at the totality of the circumstances to determine if there is a hostile work environment.

Jennings v. Univ. of N.C., 444 F.3d 255 (4th Cir. 2006), reh’g en banc granted, June 8, 2006. This is a Title IX case, involving sexual harassment where a female soccer player alleged that two male coaches harassed her, and the court found that no reasonable jury could find that the coach sexually harassed the plaintiff. The plaintiff, a seventeen year old member of the women’s soccer team at the University of North Carolina, had a forty-five year old male coach who persistently and openly discussed and pried into the sex lives of his players, using what he learned to degrade and humiliate them. The coach claimed that he was only teasing or jesting. Judge Michaels wrote a blistering dissent.

Nitsche v. CEO of Osage Valley Elec. Coop., 446 F.3d 841 (8th Cir. 2006). The court held that an employee was not subjected to a hostile work environment because the behavior was not sufficiently severe or pervasive to constitute harassment even though the employee was regularly subjected to pictures of nude women, often told to get a Pap Smear, forced to hear jokes about genitalia, and constantly embarrassed in front of coworkers by a single foreman who never engaged in these activities in front of males. Despite a history of twenty years of this type of behavior, the court affirmed summary judgment against the employee.

Howard v. Winter, 446 F.3d 559 (4th Cir. 2006). The Court of Appeals had to determine whether a male staff member of the Navy, who allegedly engaged in sex harassment, was a supervisor for purposes of vicarious liability under Faragher/Ellerth. The court adopted a test requiring that a supervisor must be an individual with the capacity to take “tangible employment actions” against the plaintiff. The court found the staff member not to be a supervisor as he had “only occasional authority... to direct [plaintiff’s] operational duties.” The court thus treated the case as one of co-worker harassment.

Employee provided administrative services to a co-worker. The employees alleged the co-worker sexually harassed her on many occasions, that she reported the harassment to a human resources specialist and that that person told her to write a note to the co-worker and tell the HS person about any subsequent harassment. The plaintiff did as told and the co-worker subsequently sexually harassed her again. After the employees supervisors learned of the harassment they subsequently transferred the co-worker out of the employees working group. The Court affirmed summary judgment with respect to what happened prior to the reporting of the harassment and after the supervisors received notice (because they acted responsibly by transferring the co-
worker) but reversed summary judgment during the period between the HR persons receipt of the information and the relaying of that information to the supervisors because there were questions of whether the response of the HR person were reasonable.

Plaintiff failed to persuade the Court that the alleged harasser was her supervisor and not her co-worker. The Court disagreed but this is important because a supervisor with immediate authority is vicariously liable for the harassment. On the other hand, when the harasser is a co-worker, the employer maybe liable “only if it knew or should have known about the harassment and failed to take effective action to stop it.” In making the determination that the harasser was a co-worker the Court looked to the fact that the authority he possessed over the plaintiff was minimal. Just because a co-worker is superior in rank does not make them a supervisor. The Court found that the HR person did not respond in a reasonable way and that the conversation with the plaintiff may have been enough to put the Navy on notice.

**Lutkewitte v. Gonzales**, 436 F.3d 248 (D.C. Cir. 2006). Although the male supervisor’s sexually harassing conduct was unspeakably offensive and repulsive, the court held that the coercion inherent in the supervisor-employee relationship, without more, is not enough to hold the employer strictly liable for the supervisor’s sexual harassment. An interesting petition for certiorari was filed asking the Court to determine whether the “significant change in employment status” standard in *Burlington Industries Inc. v. Ellerth* or the “official act” standard in *Pennsylvania State Police v. Sudders* applies when the trail court has to determine whether the action of the supervisor is a tangible employment action that renders the employer strictly liable for the sexual harassment of the supervisor. *Lutkewitte v. Gonzales*, 2006 U.S. LEXIS 9556 (U.S., Dec. 11, 2006) (certiorari denied).

**Doe v. Oberweis**, 456 F.3d 704 (7th Cir. 2006). The court of appeals held that a minor, as defined by state law, who “consented” to sex with an adult co-worker, nonetheless may proceed with a sex harassment case against the employer. In doing so, the court stated: “[F]ederal courts, rather than deciding whether a particular Title VII minor plaintiff was capable of single ‘welcoming’ the sexual advances of an older man, should defer to the judgment of average maturity in sexual matters that is reflected in the age of consent in the state in which the plaintiff is employed. That age of consent should thus be the rule of decision initial Title VII cases...”

**Valentine v. City of Chicago**, 452 F.3d 670 (7th Cir. 2006). Court reverses summary judgment on the ground that there was sufficient evidence to create a factual issue as to whether the person that plaintiff informed of the alleged illegal conduct was a “supervisor” as well as whether there was sufficient evidence that the employer knew of the harassing conduct and whether the conduct was sufficiently severe or pervasive.

**Keeton v. Flying J, Inc.**, 429 F.3d 259 (6th Cir. 2005). The court of appeals held that a lateral transfer which required the employee to either relocate or face long commute was properly found by the jury to be a tangible employment action, permitting the jury to find the employer strictly liable for the supervisor’s sex harassment. The lateral transfer did not alter the employee’s pay or job responsibilities. See also *Policastro v. Northwest Airlines, Inc.* 297 F.3d 535 (6th Cir. 2002) (The court held that increased distance to a work location can be a relevant consideration in determining whether the employee has been constructively discharged).
Huff v. Sheahan, 2007 U.S. App. LEXIS 16839 (7th Cir. July 16, 2007). The Court of Appeals reversed a jury verdict in favor of the defendant employer because the jury instructions on the Faragher-Ellerth affirmative defense had not first required the jury to determine whether or not a tangible employment action had occurred.


For more information on sex discrimination, see the Women’s Rights Employment Law Blog, available at http://womensrightsnyc.com/blog/.


Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. Feb. 7, 2008) (The Court of Appeals held that an allegation by a secretary that her boss stared constantly at her breasts supported her harassment claim, and exposed the town to a harassment claim).

Brockington v. Circus Circus Mississippi, Inc., 2008 U.S. Dist. LEXIS 39482 (N.D.Miss. May 15, 2008) ("[A]n employee who made “off-color remarks, repeatedly grabbed the rear end of a female co-worker, gave sexually suggestive gifts to a co-worker, and who made sexually suggestive gestures in order to ‘entertain customers’ can not validly contend that similar actions by her supervisor were either ‘physically threatening or humiliating’ nor that such conduct ‘reasonably interfered’ with her work performance. Indeed, the evidence suggests that plaintiff herself initiated such conduct in the furtherance of her work performance, and she may not establish liability upon the mere fact that a co-worker who engaged in similar conduct with her happened to be a supervisor.").

Caballero v. Rooms To Go Mississippi Corp., No. 1:06cv1087, slip op. (S.D. Miss. Feb. 8, 2008) (The district court found that a reasonable jury could have concluded that the plaintiff was harassed because of sex where the store manager eligibly, upon meeting plaintiff’s daughter, began daily asking plaintiff for her daughter’s telephone number, where he told plaintiff that her daughter was “really hot”, where he discussed “what he want[ed] to do with [her] daughter”, where the store manager referred to other women as “bitch”, “bimbo”, “wicked witch”, where he discussed his interest in an affiliation with strippers, where he referred to one woman as a dog
with he would not have sex, and where he discussed the lack of a sex life between himself and his girlfriend).

Reeves v. C.H. Robinson Worldwide, Inc., 2008 U.S. App. LEXIS 9171 (11th Cir. 2008) (The 11th Circuit held that an offensive work environment not targeted at the plaintiff may nonetheless be actionable. The plaintiff was, on a daily basis, exposed to language and radio programming that are particularly offensive to women. The employer argued that alleged harassment was not “based on” the plaintiff’s sex as men and women in the office were subjected to the same behavior. The court rejected the defense argument, stating: “The language in the office included… ‘sex specific’ words… The subject matter of the conversations and jokes that allegedly permeated the office on a daily basis included male and female sexual anatomy, masturbation, and female pornography, all of which was discussed in a manner that was… more degrading to women than men. The radio programming that [the plaintiff] claims was also similar. Therefore, even if such language was used indiscriminately in the office such that men and women were equally exposed to the language, the language had a discriminatory effect on [the plaintiff] because of its degrading nature”). See also http://www.mmmglawblog.com/tp-080318191354/post-080428142028.shtml (Last accessed 7/9/2008 at 11:21pmEST).

Smoking in the Workplace

Bogden v. Harry's Tap Room of Arlington, Civil action No. 01178-LO-TRJ (E.D.Va). The Federal District Court in Alexandria, Virginia has a fascinating case. The case involves a lawsuit filed under the ADA by James Bogden against several restaurants in which he argues that because he has coronary artery disease and secondhand smoke can increase his risk of another heart attack, the restaurants, by permitting smoking, are discriminating against him on the basis of an alleged disability. See also: Lainie Rutkow, John S. Vernick, Stephen P. Teret, Banning Second-Hand Smoke in Indoor Public Places Under the Americans With Disabilities Act: A Legal and Public Health Imperative, 40 CTLR 409, (December 2007).

Social Networking Sites
It is reported that some 61% of professional services companies, which includes law firms, conduct Google searches on job candidates, according to a survey conducted by the Ponemon Institute. The survey also indicated that more the 50% of the companies also search social network websites, such as Facebook and MySpace. Robert Ottinger and Carrie Kurzon, Biodata: The Measure of an Applicant? , N.Y. Law Journal, Monday May 27, 2007.


Heather Green, “It Isn’t Just YourSpace Anymore,” Business Week, Sept. 24, 2007 at 13 available at http://www.businessweek.com/magazine/content/07_39/c4051003.htm#ZZZP7KTU16F. This article briefly discusses various start-up companies that specialize in tracking people and their reputations, including mining for data on Facebook, MySpace, and Amazon.com’s Wishlists. One company, Rapleaf says that it has built up personal profiles of some 50 million individuals by mining data from, among other places, social networking sites.


The phenomena of social networking sites and similar interactive cyberspace creations increasingly presents fascinating challenges for employment lawyers and eventually the Judges. On Tuesday, February 12, 2008, there was an intriguing article by Sarah E. Needleman in the Wall Street Journal entitled: "Need a New Situation? Check the Internet: Recruiters and Job Seekers Find Each Other Through Facebook, 'Fan' pages, Videos."

At first blush, some of the issues would seem to be:
1. Is a recruitment ad, using Facebook, that targets exclusively "recent graduates and college seniors with majors in specific fields" potentially discriminatory on the basis of age?

2. After decades of assiduously sanitizing the job application process to assure that the employer doesn't know the applicants age or race, doesn't "beam me up, Scotty" take us on a complete about-face, and how do employers protect themselves from the obvious complaint that is to come, that this facilitates discrimination?

3. Assume that statistically a far great percentage of Caucasians job applicants have ready access to the internet, and are statistically more savvy on the net (remember these are merely assumptions - - I am not suggesting that they are necessarily accurate, much less am I suggesting that African-Americans are less intelligent than Caucasians), is reliance on these new online recruiting tools potentially subject to disparate impact attack as racially discriminatory?

There follows a list of citations to various articles about these new forms of recruitment.


In *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*, 2007 US DIST LEXIS 2379 (D. Nev. Jan 9, 2007) the defendant in a sex harassment case moved to compel production of emails from two MySpace.com accounts, contending that the plaintiff sent private messages on MySpace “to facilitate the same type of electronic and physical relationships she characterized as sexual harassment in her Complaint.” The District Court held that the requests were improper. In contrast, in *Ohio v. Gaskins*, 2007 Ohio App. LEXIS 3739 (Ohio App. Aug 13, 2007), the defendant, being prosecuted for statutory rape, sought to introduce evidence that the victim held herself out on MySpace.com as an 18-year old. The trial court admitted the photographs that had been posted on her site, and allowed a witness to testify as to their authenticity. See also Carole Levitt & Mark Rosch, *Making Internet Searches Part of Due Diligence*, 29 Los Angeles Law. 46 (Feb 2007), available at [www.lacva.org/Files/LAL/ Vol29No12/2349.pdf](http://www.lacva.org/Files/LAL/ Vol29No12/2349.pdf).

Steve Bruce, MySpace and Facebook: Routing Reference Checks or Dangerous Data Sources?, HR Daily Advisor, [http://hrdailyadvisor.blr.com/archive/2007/12/03/MySpace_Facebook_Employment_Applicant_Candidate_Background_Checks_Reference_Checks_Web.aspx](http://hrdailyadvisor.blr.com/archive/2007/12/03/MySpace_Facebook_Employment_Applicant_Candidate_Background_Checks_Reference_Checks_Web.aspx) (last visited July 1, 2008).


**Spoliation**

Aloi v. Union Pac. R.R. Corp., 129 P.3d 999 (Colo. 2006). The court, affirmed the lower court, stated that the lower court was correct to give the jury adverse inference instructions where the defendant railroad willfully destroyed relevant documents before the document retention period expired. The court found that it was not necessary to find that the document destruction has been in bad faith before giving the jury adverse inference instructions.

Sears, Roebuck and Co. v. Midcap, 893 A.2d 542 (Del. 2006). In a non-employment case, court found that, without first a determination that Sears acted willfully or recklessly in failing to preserve evidence, a missing evidence adverse inference instruction to the jury was inappropriate; court also addressed collateral source rule, finding that the plaintiff could not use the collateral source rule to prevent the defendant from introducing evidence that the plaintiff was in fact still receiving, at least in part, the decedent's pension payments and Social Security Payments.

Thompson v. United States Dep’t of Housing and Urban Dev., 219 F.R.D. 93 (D.Md. 2003) (mem.). Recognizing adverse inference instructions to be extreme sanctions requiring a “culpable state of mind,” and declining to impose the sanction in a bench trial.

Park v. City of Chicago, 297 F.3d 606 (7th Cir. 2002). Bad faith is required before an adverse inference instruction will be given to the jury.


Kronisch v. United States, 150 F.3d 112 (2d Cir. 1988). One may infer from spoliation that the evidence would have been adverse to the party responsible for the destruction.

Wm T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1442 (C.D. Cal. 1984). Where the defendant has acted in bad faith upon destruction of documents, the court may impose “monetary sanctions in addition to default and dismissal”.

EEOC v. LA Weight Loss, 509 F.Supp. 2d 527 (D. Md. 2007). Judge Quarles of the Federal District of Maryland addressed the question whether EEOC was entitled to an adverse inference instruction because of the defendant's violations of Title VII's document-retention requirements set forth in 29 C.F.R. Section 1602.14.

APC Filtration Inc. v. Becker, 2007 U.S. Dist. LEXIS 76221 (N.D.Ill., October 12, 2007). The court sanctioned a former employee/defendant in a misappropriation of confidential information and diversion of corporate opportunities case for the "crash" of defendant's personal computer. Defendant alleged that he took his computer to a repair shop where he was told that "the motherboard and hard drive were shot, and that the computer was not worth fixing." Defendant testified that he then threw the computer away with "other junk", admitting that he drove twenty miles from his home to a dumpster at a construction site to dispose of the computer. The court, finding that the computer was discoverable and that defendant had reasonable notice that the computer could become the subject of discovery, held that defendant had acted in bad faith and impaired plaintiff's ability to prove its case, warranting sanctions.

Communications Center, Inc. v. Hewitt, 2005 U.S. Dist. LEXIS 10891 (E.D. Cal., Apr. 5, 2005). The Magistrate Judge recommended entry of default judgment on plaintiff's claims relating to misappropriation of trade secrets in a breach of fiduciary duty after the defendant ran a software scrubbing program called "Evidence Eliminator" despite a court order to produce mirror images of the hard drives. Recently, Judge Stohr in Ameriwood Industries, Inc. v. Lieberman, 2007 U.S. Dist. LEXIS 74886 (E.D. Mo., July 3, 2007), arrived at essentially the same result when the spoliating party used the software program called "Window Washer". Judge Stohr stated: "While
the name sounds less reprehensible than the 'Evidence Eliminator' software used in Communications Center, the purpose is the same . . . [D]efendant's knew information on their computers was discoverable and they destroyed it. The discovery process cannot and will not function when a party exhibits such blatant disregard for basic tenets of the system.

Statistics

Carpenter v. Boeing Co., 456 F.3d 1183 (10th Cir. 2006). The Tenth Circuit affirmed a grant of summary judgment for Boeing against female employees whose statistical analysis showed a large discrepancy in the employer’s assignment of overtime to male and female employees. The court ruled that plaintiff’s had failed to satisfy their burden to establish a prima facie case. The plaintiffs did not establish that their statistical analysis was based on data that was restricted to qualified employees or, alternatively, that reliable data with respect to that group was unavailable and the analysis used a reliable proxy for qualification. Thus, the female employees did not prove disparate impact.


Statute of Limitations

O’Connor v. City of Newark, 440 F.3d 125 (3d Cir. 2006). In a retaliation case, the court discussed the Supreme Court’s Morgan decision and the bright-line distinction between discrete acts, which are individually actionable, and acts which are not individually actionable but may be aggregated to make out a hostile work environment claim. The court took from Morgan a non-exhaustive list of discrete acts for which the limitations period runs from the act: termination, failure to promote, denial of transfer, refusal to hire, wrongful suspension, wrongful discipline, denial of training, and wrongful accusation. The court found that the distinction drawn in Morgan between “continuing violations” and “discrete acts” is “not an artifact of Title VII, but is rather a generic feature of federal employment law.” The court described the hostile work environment theory as being designed to address “situations in which the plaintiff’s claim is based on the cumulative effect of a thousand cuts, rather than any particular action taken by the defendant.”


Pruitt v. City of Chicago, 472 F. 3d 925 (7th Cir. 2006). The lower court dismissed this entire hostile-work-environment case, applying the doctrine of laches, a defense that the Supreme Court in Morgan, 536 U.S. 101, 121-22 (2004), had suggested was a viable defense. The court of appeals in rejecting the lower court’s dismissal of the entire claim on the ground that it was stale, said the following: “Dismissing the whole suit because it is no longer feasible to litigate about the most ancient of the asserted wrongs could be functionally equivalent to giving the employer an easement across Title VII. By violating the statute for long enough, the employer would acquire a right to continue indefinitely. That’s the upshot of Chicago’s position and the
district court’s holding: once Jason had made plaintiffs’ lives miserable for a decade or so, laches would bar all litigation no matter what Jason did in the future. That can’t be right. It would be like saying that, if Jason had punched Bernard Pruitt (the lead plaintiff) in the nose every week, he could do so for the rest of Pruitt’s life if two years passed without suit after the first punch. (Two years is the statute of limitations in Illinois for personal-injury suits.)”

Haas v. Lockheed Martin Corp., 914 A.2d 735; 396 Md. 469 (Md. Ct. App. 2007). The Maryland Court of Appeals held that the statute of limitations for discrimination actions commenced to run on the date of the plaintiff-employee’s termination, not the date on which the plaintiff was informed of her impending termination.

Ottenberg’s Bakers, Inc. v. District of Columbia Comm’n on Human Rights, 917 A.2d 1094 (D.C. 2007). While rejecting the argument in this case based upon the facts, the District of Columbia Court of Appeals continued to recognize the so called “serial” continuing violation theory, quoting with favor from Paul v. Howard University, 754 A.2d 297, 312 (D.C. 2000) (quoting Doe v. District of Columbia Comm’n on Human Rights, 624 A.2d 440, 444 n. 5 (D.C. 1993)) where the court said that when the plaintiff can demonstrate a series of related acts, one or more of which falls within the limitations period, all of the discriminatory conduct falls within the statute of limitations. “To be considered continuing in nature, however, the discrimination may not be limited to isolated incidents, but must be pervade a series or pattern of events which continue into the filing period.” Id. (quoting Doe, 624 A.2d at 445 n.5).

Vollemans v. Town of Wallingford, 928 A.2d 586 (Conn. Aug. 14, 2007). The Connecticut Supreme Court joined the minority of state courts that have rejected the so called Ricks-Chardon rule, and held instead that the time limit within which to file suit in an anti-discrimination case under state law, began to run, not when the plaintiff-employee was informed that he/she was terminated with the termination date at a later date, but rather that the time to file began to run on the plaintiff’s last day of work. See also Haas v. Lockheed Martin Corp., 914 A.2d 735 (Md. 2007).

Zuurbier v. Medstar Health, Inc., 895 A.2d. 905 (D.C. 2006). The District of Columbia Court of Appeals held in a disparate pay case that the issuance of the paycheck is a discrete act and that accordingly, under the D.C. Human Rights Act, a claim must be asserted within one year of the discrete act.

Morgenstein v. Morgan Stanley DW Inc., 2007 U.S. Dist. LEXIS 6781 (D.D.C. Jan. 31, 2007) (The D.C. Court of Appeals, among other rulings, held that the plaintiff could not extend the D.C. Human Rights Act one year statute of limitations simply by repeating his requests for accommodation and suing within one year of the most recent denial. In finding that plaintiff’s failure to accommodate claim was time barred, the Court appears to rely on Stewart v. District of Columbia, 2006 U.S. Dist. LEXIS 12991 (D.D.C. 2006), where Judge Kollar-Kotelly held the statute begins to run when the employer first denies reasonable accommodation, and is not reset by the employee’s subsequent requests for the same accommodation).

Stock Backdating

249
Desimone v. Barrows, 2007 Del. Ch. LEXIS 75 (Del. Ch. June 7, 2007). The Delaware Court of Chancery dismissed a stockholder’s breach of fiduciary duty case where the employer’s executives and directors had used improper backdating practices on stock options. The court, in this derivative-options suit, criticized plaintiffs’ level of specificity of the claims, faulting plaintiff’s complaint for its dearth of facts and lack of proof about board members’ knowledge.

**Stock Drop Claims**

DiFelice v. US Airways, 436 F. Supp.2d 756 (E.D. Va. 2006). In an ERISA stock-drop case, the district court ruled that the employer, which administered its employees’ 401(k) fund, did not have a fiduciary duty to change the company stock holdings of its employees who had a multitude of investment options from which to choose. See also In re WorldCom, Inc. ERISA Litigation, 354 F.Supp.2d 423 (S.D.N.Y. 2005); Summers v. State Street Bank & Trust Co., cite (7th Cir., June 28, 2006) (Judge Posner, in a lengthy opinion, discussed economic theories and said that other factors such as a company’s debt-equity ratio would be better measures of determining economic health than exclusive reliance on stock price).

**Stock Options**

Ryan v. Gifford, 918 A.2d 341 (Del. Ch. 2007), a Chancellor in Delaware denied motions by the company to stay or dismiss when the plaintiff stockholder had shown “empirical evidence” of bad faith and pleaded with sufficient particularity to survive a motion to dismiss for failure to make demand. The same Chancellor ruled in In re Tyson Foods, Inc. Consol. S’holder Litig., 919 A.2d 563 (Del. Ch. 2007) that the plaintiffs had sufficiently alleged bad faith to overcome a motion to dismiss, and further, used harsh language against backdating. In In re UnitedHealth Group, Inc. S’holder Derivative Litig., 2007 U.S. Dist. LEXIS 18062 (D. Minn. 2007), the court ordered that the plaintiffs suit survived an initial motion to dismiss, pending the investigation of a Special Litigation Committee (SLC).


Lillis v. AT&T Corp., 2007 Del. Ch. LEXIS 102, (Del. Ch. May 22, 2008) (The Delaware Supreme Court in a stock option case, reiterated basic contract interpretation rules, including when extrinsic evidence would be considered).

Subpoena – Definition of Person

Yousuf v. Samantar, 451 F.3d. 248 (D.C. Cir. 2006). The District of Columbia Circuit held that a federal agency, here the United States Department of State, was a “person” within the meaning of Rule 45 of the Federal Rules of Civil Procedure. See also Watts v. SEC, 482 F.3d. 501 (D.C. Cir. 2007).

Summary Judgment

Albrechtsen v. Board of Regent of Univ. of Wisconsin Sys., 309 F.3d 433, 436 (7th Cir. 2002). The court stated that in a summary judgment proceeding: “Judges are not like pigs, hunting for truffles buried in the record.” The Seventh Circuit stated that “Courts are entitled to assistance from counsel, and an invitation to search without guidance is no more useful than a litigant's request to a district court at the summary judgment stage to paw through the assembled discovery material.”

Gilliam v. SC Dept of Juvenile Justice, 474 F.3d 672 (4th Cir. 2007). In affirming summary judgment for the defense, the court found affidavits of African-American co-workers to not be probative because the averments in them that the manager treated them, as well as the plaintiff, more harshly than white co-workers, had too little detail.
See also Suja A. Thomas, Why Summary Judgment Is Unconstitutional, 93 VA. L. REV. 139 (2007).

Hunter v. Rice, 531 F. Supp. 2d 185 (D.D.C. Jan. 30, 2008) (The District Court states that counsel for the plaintiff “skates dangerously close to a violation” for arguing that summary judgment might be unconstitutional).

Johnson v. District of Columbia, 2008 U.S. App. LEXIS 13289 (D.C. Cir. 2008) (citing Patricia M. Wald, Summary Judgment at Sixty, 76 TEX. L. REV. 1897, 1907 n.57 (1998) (noting "the example that Professor Arthur Miller is reported to have used regularly in his 1-L Harvard Law School civil procedure class of an earlier time, that if a dozen Jesuit priests proffer identical testimony regarding a street fight they all observed, and one disreputable inebriate proffers contrary testimony, summary judgment is inappropriate").)

Supreme Court Employment Docket

On September 25, 2007, the U.S. Supreme Court granted certiorari in four employment cases:

Gomez-Perez v. Potter, 476 F.3d 54 (1st Cir. 2007) cert. granted, 2007 U.S. LEXIS 9085. The First Circuit held that the Postal Service and the Postmaster General had waived sovereign immunity with respect to ADEA suits, but further held that Section 15 of the ADEA, 29 U.S.C. §633a, does not provide a cause of action for retaliation by federal employers.

CBOCS West v. Humphries, 474 F.3d 387 (7th Cir. 2007) cert. granted, 2007 U.S. LEXIS 9079. The Seventh Circuit, 2-1 (Chief Judge Easterbrook dissenting), held that Section 1981 protects against retaliation and thus retaliation claims are cognizable under Section 1981. The panel held that its earlier decision in Hart v. Transit Management of Racine, Inc., 426 F.3d 863, 866 (7th Cir. 2005) is no longer good law in light of the Supreme Court’s decision in Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

Kentucky Retirement System, et al. v. EEOC, 467 F.3d 571 (6th Cir. 2006), en banc, cert. granted, 2007 U.S. LEXIS 9067. The Sixth Circuit, en banc, held that the EEOC had established a prima facie violation of the ADEA. The Kentucky Retirement System disability-retirement-benefits plan (“The KRS plan”) disqualified employees who are still working from receiving disability-retirement benefits if they had already reached normal retirement-benefit age at the time they became disabled. The KRS plan calculated disability-retirement benefits in such a way that an older employee who is eligible to receive disability benefits receives fewer benefits – in the form of lower monthly benefit payments – than a younger disabled employee receiving disability-retirement benefits who is similar to the older disabled employee in every relevant factor other than age. The majority of the en banc Sixth Circuit found The KRS plan to be facially discriminatory on the basis of age, and further found that the standard for a disparate-treatment age-discrimination claim articulated in Lyon v. Ohio Education Assoc. and Professional Staff Union, 53 F.3d 135 (6th Cir. 1995) is inconsistent with Supreme Court
authority as well as the rulings of several other federal circuit courts in cases involving
the similar role of age in employee-benefit plans.

review denied, 2007 Cal. LEXIS 1539, cert. granted, 2007 U.S. LEXIS 9071. The Court
of Appeals of California for the Second Appellate District rejected the argument that the
Federal Arbitration Act preempted California law. A lawyer, defendant Preston, and a
former lawyer and former judge, plaintiff Ferrer, signed a Personal Management
Agreement in which plaintiff agreed to pay defendant twelve percent of his earnings
from a television series in consideration for defendant Preston’s services as a personal
manager. The agreement had a clause providing that any dispute about the terms of the
contract or its “validity or legality” would be arbitrated. Defendant Preston filed a
demand for arbitration with the AAA, seeking damages for breach of contract based on
plaintiff Ferrer’s failure to pay his fees. Plaintiff Ferrer, through counsel, appeared in
arbitration and defended the action for six months, and thereafter filed a petition with the
California Labor Commissioner, alleging that defendant Preston was acting as an
unlicensed talent agent in violation of the California Talent Agencies Act, and claimed
before the Labor Commissioner that the Personal Management Agreement was void.
After the Labor Commissioner declined to stay the arbitration proceedings on the ground
that he lacked jurisdiction to do so, plaintiff Ferrer filed suit in California state court,
seeking to enjoin the arbitration proceedings. The trial court issued a preliminary
injunction staying the arbitration proceedings, and the Second Appellate District
affirmed, and the California Supreme Court denied review.

The Court has asked the Solicitor General for the federal government’s views in four cases of
interest to our members. The four cases are:

AT&T Pension Benefit Plan v. Call, 475 F.3d 816 (7th Cir. 2007), petition for cert filed
(Apr. 23, 2007; 06-1398). This case involves an ERISA plan and the question of what
degree of deference is to be given to the benefit plan administrator’s interpretation of the
plan.

Geddes v. United Staffing Alliance, 469 F.3d 919 (10th Cir. 2006), petition for cert filed
(06-1458); 2007 U.S. LEXIS 10124 (U.S. Oct. 1, 2007). This is an ERISA case involving
the standard for reviewing denials of medical benefits by plan administrators.

Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134 (2d Cir. 2006), petition for
cert filed (06-1505); 2007 U.S. LEXIS 10368 (U.S. Oct. 1, 2007). This is an ADEA case
involving the question as to whether the plaintiff or the defendant in a disparate impact
age case has the burden of showing that the challenged employment action was or was
not done for reasons other than age.

2006), petition for cert filed (06-1595); 2007 U.S. LEXIS 10262 (U.S. Oct. 1, 2007). This
case involves whether the anti-retaliation provisions of Title VII protect an employee
from being terminated because she cooperated with her employer’s internal investigation of sex harassment.

Holowecki v. Fed. Express Corp., 440 F.3d 558 (2d Cir. 2006), cert. granted, 2007 U.S. LEXIS 6823 (June 4, 2007). Question presented: Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue the Supreme Court has examined but not yet decided, that an “intake questionnaire” submitted to the Equal Employment Opportunity Commission (“EEOC”) may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (“ADEA”), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

Hall St. Assocs., LLC v. Mattel, Inc., 2006 U.S. App. LEXIS 19527 (9th Cir., Aug. 1, 2006), cert. granted, 2007 U.S. LEXIS 6100 (May 29, 2007). Questions presented: (1) Are the grounds outlined in the Federal Arbitration Act for vacating an arbitration award - only if “the award was procured by corruption, fraud, or undue means,” “there was evident partiality or corruption in the arbitrators,” the arbitrators were “guilty of . . . misbehavior” that prejudiced the rights of a party, or “the arbitrators exceeded their powers” - the only basis for overturning an arbitration award, even if the parties to the arbitration agreement have agreed to other, broader grounds for vacating the award? And (2) Whether the Federal Arbitration Act precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the act.

Sprint/United Mgmt. Co. v. Mendelsohn, 466 F.3d 1223 (10th Cir. 2006), cert. granted, 2007 U.S. LEXIS 7526 (June 11, 2007). This case presents a recurring question of proof in employment discrimination cases: whether a district court must admit "me, too" evidence - testimony, by non-parties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Tenth Circuit panel majority held that a court commits reversible error by excluding "me, too" evidence. This decision conflicts with those of other circuits. Specifically, four circuits have held "me, too" evidence wholly irrelevant. Five circuits have ruled that "me, too" evidence may be excluded under Federal Rule of Evidence 403.

LaRue v. DeWolff, Boberg & Assocs., 450 F.3d 570 (4th Cir. 2006), cert. granted, 2007 U.S. LEXIS 7731 (June 18, 2007). Questions presented: (1) Whether Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132 a)(2), authorizes a participant in a defined contribution pension plan to sue to recover losses to the plan caused by a fiduciary breach when the losses affected only the participant’s individual plan account; and (2) Whether an action by a plan participant against a fiduciary to recover losses caused by a fiduciary breach seeks “equitable relief” within the meaning of ERISA Section. After cert was granted, the defendant moved to dismiss the grant of cert as improvidently granted, arguing that because plaintiff had cashed out in the plan, the case was moot, he had no standing, and was not a “participant” under ERISA. The court denied that motion on September 25, 2007 at 2007 U.S. LEXIS 9073.
**George Washington Univ. v. Violand**, 940 A.2d 965 (D.C. Sept. 20, 2007) (The D.C. Court of Appeals denied en banc rehearing in this employment discrimination case and modified its prior opinion (932 A. 2d 1109 (D.C. 2007)), allowing the further filing of a petition for rehearing or rehearing en banc directed to the modified opinion finding the defense failed to raise the statute of limitation as an affirmative defense.)

**Surreptitious Taping in the Workplace**

**Feldman v. Allstate Ins. Co.**, 322 F.3d 660 (9th Cir. 2003). Under California law, recording confidential conversations is a crime and the tape recordings are inadmissible.

**Fenje v. Feld**, 301 F. Supp. 2d 781 (N.D. Ill. 2003). “Even recorded conversations that violate state law are admissible in federal proceedings, at least in regard to federal claims, if recordings comport with federal requirement that one party consent.”


**Edna Mae Dev. Co. v. Chicago Title & Trust**, 79 Ill. App. 2d 251 (Ill. App. 1966). “Tape recordings of oral conversation are not admissible against any party who does not consent to recording of conversation.”

Todd Mullins & Andrea D. Farinacci, *A Trial Lawyer’s Guide to Surreptitious Audio Evidence*, 31 Litig. 27 (Spring 2005). In states requiring the consent of all parties to a tape recording, the recording will generally not be admitted if obtained without such consent.

To read about taping in the workplace, see **Heller v. Champion Int’l Corp.**, 891 F.2d 422, 436-37 (2d Cir. 1989) and **Marxe v. Jackson**, 833 F.2d 1121, 1125 (3d Cir. 1987).

In addition, here are a series of websites that discuss taping in the workplace and various states’ laws discussing same.

- http://www.aapsonline.org/judicial/telephone.htm
  (contains a list of the relevant state laws as well as a brief description of each)

  (contains a list of the relevant state laws, and whether each state is a one party or two party consent state)

  (contains detailed information about taping laws)

Taxes

Murphy v. Internal Revenue Service, 460 F.3d 79 (D.C. Cir. 2006) The Court of Appeals held § 104(a)(2) of the Internal Revenue Code to be unconstitutional. The court held that taxing the plaintiff’s award of compensation for a non-physical personal injury because it is unrelated to lost wages or earnings violates the Sixteenth Amendment’s grant to Congress of the power to lay and collect taxes. The IRS petitioned for rehearing. See also Thomas Rhodus and Michelle Sandner, The 'Murphy' Bombshell, Nat’l L.J. Oct. 2, 2006, pg 13. This decision was recently vacated in Murphy v. Internal Revenue Service, 2006 U.S. App. LEXIS 32293 (D.C. Cir., Dec. 22, 2006). Oral argument is scheduled for 9:30 a.m. on Monday, April 23, 2007, and in Murphy v. Internal Revenue Service, 2007 U.S. App. LEXIS 15816. (DC. Cir July 3, 2007), the same panel of the D.C. Circuit reversed its earlier decision, and held that the IRS has the power to tax compensatory damages for economic distress and loss of reputation.

Marrita Murphy brought suit to recover income taxes she paid on the compensatory damages for emotional distress and loss of reputation she was awarded in an administrative action she brought against her former employer. Murphy contended that under § 104(a)(2) of the Internal Revenue Code (IRC), 26 U.S.C. § 104(a)(2), her award should have been excluded from her gross income because it was compensation received "on account of personal physical injuries or physical sickness." She also maintained that, in any event, her award is not part of her gross income as defined by § 61 of the IRC, 26 U.S.C. § 61. Finally, she argued that taxing her award subjects her to an unapportioned direct tax in violation of Article I, Section 9 of the Constitution of the United States.

The panel rejected Murphy's argument in all aspects, holding, first, that Murphy's compensation was not "received ... on account of personal physical injuries" excludable from gross income under § 104(a)(2). Second, that gross income as defined by § 61 includes compensatory damages for non-physical injuries. Third, that a tax upon such damages is within the Congress's power to tax.

In conclusion the panel stated: “(1) Murphy's compensatory award was not received on account of personal physical injuries, and therefore is not exempt from taxation pursuant to § 104(a)(2) of the IRC; (2) the award is part of her "gross income," as defined by § 61 of the IRC; and (3) the tax upon the award is an excise and not a direct tax subject to the apportionment requirement of Article I, Section 9 of the Constitution. The tax is uniform throughout the United States and therefore passes constitutional muster.”

Green v. Comm'r, 2007 Tax Ct. Memo LEXIS 36, 93 T.C.M. (CCH) 917, T.C. Memo 2007-39 (U.S. Tax Court Memos Feb. 20, 2007). The Tax Court held that a jury award of $1.5 million in economic damages and $65,000 in non-economic damages in a retaliation case is includable in gross income and taxable. The Tax Court also found includable in the taxpayer’s income $540,000 that her attorney received in legal fees and an additional $391,000 that she paid her attorney to fulfill her commitment that her attorney receive 40% of the jury award.
Polen v. Comm’r of Internal Revenue, 177 Fed. Appx. 728 (9th Cir. 2006). The court held that payments from a defamation settlement must be taxed as ordinary income pursuant to a 1996 amendment to the IRC even though the settlement predated the amendment.

Polone v. Comm’r, 479 F.3d 1019 (9th Cir. 2007). The Internal Revenue Code at 26 U.S.C. § 104 exempted “the amount of any damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal injuries or sickness” from a taxpayer’s gross income. The term “personal injuries” in § 104 had been interpreted to include damages from settlements of defamation claims. In August 1996, Congress amended § 104 to legislatively overrule those court decisions that had exempted awards for nonphysical injuries, like defamation damages, from a taxpayer’s gross income. The legislative history specifically states that the “personal injury” exclusion from gross income does not apply to damages received due to an injury to reputation. The effective date of the amendment was August 20, 1996 with an exception for any amounts received under a settlement agreement in effect before September 13, 1995. In the instant case the parties settled in May 1996 providing for the payment of $4,000,000 in four installments, one installment prior to August 20, 1996 and the other three after that date. The Tax Court held that the pre-amendment § 104 applied to the first payment and that the post-amendment § 104 applied to the other three payments. The Ninth Circuit held that the Tax Court had correctly applied the statute as the amended statute applies to any damages received after its effective date of August 20, 1996, unless the parties had contracted prior to September 13, 1995.

University of Pittsburgh v. United States, 507 F.3d 165 (3rd Cir. 2007) (The 3rd Circuit, unlike the 8th Circuit, held that early retirement payments to its tenured faculty to be “wages” for FICA purposes when relinquishment of tenure rights is a condition precedent to receiving those payments. The 8th Circuit has held that early retirement payments to faculty who had to give up their tenure rights are not “wages”).

Pettit v. Commissioner, T.C. Memo 2008-87 (T.C. April 7, 2008) (Finding no evidence of physical injuries or physical sickness, the Tax Court held that damages awarded to an age discrimination plaintiff for “severe emotional distress” are not excludable from gross income”).


Telecommuting


Title VII

Merritt v. Albemarle Corp., 496 F.3d 880 (8th Cir. 2007). The Court of Appeals held an employee was not a “supervisor” for Title VII purposes. The court, utilizing the standard announced in Joens v. John Morrell & Co., 354 F. 3d 938 (8th Cir. 2004), held that the individual in this case lacked the authority to take tangible employment actions such as hiring.
firing, or promoting the plaintiff, and could not assign the plaintiff to significantly different duties, and thus was not a “supervisor,” but rather for Title VII purposes should be considered to be a co-worker.

**Tort Claims Act**

Morgan v. Kooistra, 941 A.2d 447 (Me. 2008) (The Maine Supreme Judicial Court held that a paramedic/firefighter, who accused a co-worker of having sexually harassed two female employees, was not entitled to immunity in a defamation case. The defendant, John Kooistra, argued that the Maine Tort Claims Act provided government employees with immunity when performing discretionary functions and provided immunity for any intentional act occurring within the scope of their employment. The Court rejected Mr. Kooistra’s argument that he was entitled to both types of immunity on the ground that most of the statements at issues were made outside the scope of his employment, and, to the extent they were made within the scope of his employment, they did not involved discretionary functions, that is, they were not made while carrying out a governmental policy).

**Trade Secrets**

Evans v. Gen. Motors Corp., 893 A.2d 371 (Conn. 2006). The plaintiff, an inventor, sued General Motors, alleging that it has misappropriated trade secrets in violation of the Connecticut Uniform Trade Secrets Act. Plaintiff sought jury trial on his claims. Following an extensive historical analysis, the Connecticut Supreme Court included that the plaintiff was entitled to jury trial on his trade secrets claims seeking damages. The Connecticut Supreme Court recognized that previously no court had expressly held that a plaintiff had a right to a jury trial on the damages aspects of a trade secrets claim.

O'Grady v. Santa Clara County Superior Court, 2006 Cal. App. LEXIS 802 (Cal. Ct. App. May 26, 2006). The Court of Appeals for the Sixth District held that the unauthorized publication on various Apple rumor blogs about a product Apple had in the works, while problematic under trade secrets law, must nonetheless be permitted in the interests of preserving a free press.

Cenveo Corp. v. Slater, 2007 U.S. Dist. LEXIS 9966 (E.D. Pa., Feb. 13, 2007). The Court underscored an ongoing debate in the federal and state courts as to whether a state trade secrets act preempts common law claims. Judge Golden in *Cenveo Corp.*, a case involving the Pennsylvania Trade Secrets Act (PTSA), reviewed the authorities and the arguments, and concluded that it would be inappropriate to grant a motion to dismiss on the issue, and that he would reconsider the issue on a fully developed summary judgment record. Judge Golden declined to join those courts that have held that the state legislatures, in enacting trade secrets legislation, intended to remove liability for any theft of non-trade secrets. Thus, if the proof establishes in a given case that the information that has been allegedly misappropriated constitutes a trade secret, then, it would appear, most courts would hold that common law claims like conversion, would be preempted. In contrast, if the facts established the theft of non-trade secrets, then the statutory claim under the state trade secrets act would not preempt a claim of conversion based upon the taking of information that, though not a trade secret, was nonetheless of value to the plaintiff. Judge Golden's opinion collects the authorities on this interesting issue.
Al Minor & Associates Inc. v. Martin, 2008 Ohio LEXIS 240 (Feb. 6, 2008) (The Ohio Supreme Court found a violation of the Ohio Trade Secrets Act where the employee did not remove any documents from the employer, but rather memorized confidential client information).


**Trial Consultants**

In re Cendant Corp. Securities Litigation, 343 F.3d 658 (3d Cir. 2003). The court held that trial consultant’s work was covered by the attorney work-product privilege, stating, “litigation consultants retained to aid in witness preparation may qualify as non-attorneys who are protected by the work-product doctrine.”

Adkins v. Elliott, No. 02-2-15703 KNT (2003). Washington state court judge ordered a trial consultant to submit to deposition.


**Trial Practice**

United States v. Triumph Capital Group, Inc., 2007 U.S. App. LEXIS 12221 (2d Cir. May 25, 2007). The Court of Appeals held that a ban on discussing testimony during a long trial recess may violate the Sixth Amendment, even if the ban only bars discussion between the attorney and the defendant regarding defendant’s testimony.


**Unfair Competition**


**USERRA**

Kirkendall v. Dep’t of the Army, 479 F.3d 830 (Fed. Cir. 2007). A veteran challenged an agency decision not to hire him on disability discrimination and veteran preference grounds. The Merit Systems Protection Board (MSPB) barred the Veteran’s Employment Opportunity Act (VEOA) claim, citing the statute of limitations, and denied the veteran a USERRA hearing for failure to state a claim. A majority of the Federal Circuit held that VEOA is significantly similar to “private actions brought under Title VII of the Civil Rights Act” and thus subject to equitable tolling of the statute of limitation. Further, in a plurality holding, the court stated that the
USERRA statute on its face did not permit the MSPB to deny requested hearings nor adjudications. Concurring opinions in this case may limit or refine the USERRA holding.

Garrett v. Circuit City Stores, Inc., 449 F.3d 672 (5th Cir. 2006). Employer established a nationwide policy that employment disputes would be resolved by arbitration. Employee Garrett was asked to sign an acknowledgement of the policy and had the ability to opt out if done so within a 30-day period. He signed and did not opt-out. When the employer compelled arbitration the plaintiff sued. The Court held that the arbitration rules provided a fair opportunity for the employee to present and prevail upon a claim of a violation of Uniformed Services and Employment and Reemployment Rights Act (USERRA). (USERRA’s antidiscrimination provision prohibits an employer from denying initial employment, reemployment, or any other benefit of employment to a person on the basis of membership in a uniformed service, application for membership, performance of service, application for service, or obligation of service.) § 4323 of USERRA outlines enforcement provisions for private or state employees and § 4324 affords different procedures for federal government employees, which include adjudicating claims in an administrative tribunal, the Merit Systems Protection Board (MSPB). According to the Court, the MSPB option evidences intent to allow alternative means of dispute resolution for employees under USERRA and thus a federal forum is not guaranteed to all employees under USERRA; rather, a federal judicial forum is available to some employees and can be claimed or waived, just as in other antidiscrimination statutes.

Employer established a nationwide policy that employment disputes would be resolved by arbitration. Employee Garrett was asked to sign an acknowledgement of the policy and had the ability to opt out if done so within a 30-day period. He signed and did not opt-out. When the employer compelled arbitration the plaintiff sued. The Court held that the arbitration rules provided a fair opportunity for the employee to present and prevail upon a claim of a violation of Uniformed Services and Employment and Reemployment Rights Act (USERRA). (USERRA’s antidiscrimination provision prohibits an employer from denying initial employment, reemployment, or any other benefit of employment to a person on the basis of membership in a uniformed service, application for membership, performance of service, application for service, or obligation of service.) § 4323 of USERRA outlines enforcement provisions for private or state employees and § 4324 affords different procedures for federal government employees, which include adjudicating claims in an administrative tribunal, the Merit Systems Protection Board (MSPB). According to the Court, the MSPB option evidences intent to allow alternative means of dispute resolution for employees under USERRA and thus a federal forum is not guaranteed to all employees under USERRA; rather, a federal judicial forum is available to some employees and can be claimed or waived, just as in other antidiscrimination statutes.


Francis v. Booz, Allen & Hamilton, Inc., 452 F.3d 299 (4th Cir. 2006). The Court of Appeals held that plaintiff’s USERRA discrimination claim should be rejected because 38 U.S.C. § 4312 applied only to the act of rehiring, and not to a subsequent termination. Moreover, the court
found that the plaintiff was rehired with the same employment benefits and that the changes in her work schedule that occurred after her rehire had not been shown to be motivated because of her military service. Finally, plaintiff’s USERRA wrongful termination claim, under § 4316, was rejected because the proven pattern of misconduct by plaintiff provided a sufficient basis for dismissal.

Landis v. Pinnacle Eye Care, LLC, 2007 U.S. Dist. LEXIS 66118 (W.D. Ky. Sept. 6, 2007). The Western District of Kentucky joined the holding of the Fifth Circuit that a plaintiff, pursuing claims under USERRA, can be compelled to arbitrate his claim, the claim here being that his employer demoted him because of his military service. Two federal district courts have held that USERRA claims cannot be forced into compulsory arbitration.

Safeguarding the Rights of Service members and Veterans (for USERRA claims) available at www.usdoj.gov/crt/military/index.html. This new website is designed to assist individuals in asserting their rights under USERRA. It includes an on-line claim filing procedure, a link to the statute, and a link to cases interpreting the statute.

Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F.3d 1 (1st Cir. 2007). The court of appeals found that the lower court had applied an incorrect burden-shifting analysis and had not applied the provision of the statute which state that the employee “need only show that military service was ‘a motivating factor’ in order to prove liability, unless ‘the employer can prove that the [adverse employment] action would have been taken’ regardless of the employee’s military service”.


Vacation Pay
Lee v. Fresenius Medical Care, Inc., 2007 Minn. LEXIS 682 (Minn., Nov. 15, 2007). The Minnesota Supreme Court, interpreting the state wage payment and collection statute, held that vacation benefits are "wholly contractual." In other words, whether or not an employer is
obligated to pay a discharged employee his/her vacation depends upon the terms of the employer's policy. The Court found that the statute is a "timing statute," and does not mandate what an employer must pay a terminated employee, but rather when an employer must pay a terminated employee. The Court noted that its interpretation conforms to the interpretations of similar statutes in Indiana and Maryland. For its statement regarding Indiana law, it relied upon Indiana Heart Assocs., P.C. v. Rahamonde, 714 N.E. 2d 309, 311 (Ind. Ct. App. 1999). For Maryland, it relied upon Rhoads v. F.D.I.C., 956 F.Supp. 1239, 1259-60 (D. Md. 1997), Rev'd on other grounds, 257 F.3d 373 (4th Cir. 2001). In Rhoads, Judge Kaufman held that a terminated employee was not entitled to accrued vacation pay under the Maryland WPCL because the employee manual in effect at the time of the employee's termination stated that "[i]f you are terminated for cause by the Association, payment for accrued vacation leave is forfeited."

Quite obviously, the Minnesota Supreme Court did not have the unreported decision of the Maryland Court of Special Appeals in Catapult Technology Ltd. v. Wolfe, No. 997, unreported (Md. Ct. Spec. App. 2006) (available at http://www.wagecollection.com/Opinion.pdf). In Catapult, Judge Barbera, with respect to Rhoads, had the following to say: "...Rhoads is a Federal District Court case, and, of course, is not binding authority on this Court. In any event, both Rhoads and Magee, which clearly held that an employer's personnel policies cannot be used to contravene the public policy that employees have a right to be compensated for their efforts." In response, the Maryland Department of Labor, Licensing and Regulation revised its opinion about vacation pay as follows: "When an employee has earned or accrued his or her leave in exchange for work, an employee has a right to be compensated for unused leave upon the termination of his or her employment regardless of the employer's policy or language in the employee handbook." The Catapult case settled, and therefore the issue will not be presented to the Maryland Court of Appeals. The Minnesota Supreme Court noted that Montana in Langager v. Crazy Creek Productions, Inc., 954 P.2d 1169 (Mont. 1998) held that the employer is obligated to pay "earned" vacation. The majority in the Minnesota Lee case noted that if it "held that employees have actually earned an absolute right to vacation pay as they accrue vacation hours for working each pay period, the legality of both the use-it-or-lose-it" policy that many employers have and caps-on-vacation-time-accrual policies would be called into question. Judge Page wrote a vigorous dissent, noting that neither the Indiana or Maryland statutes were as similar as majority suggested.

Visas for Foreign Workers

A number of companies whose sponsorship of visas for foreign workers have been stalled at Homeland Security’s U.S. Citizenship and Immigration Services Agency have proceeded to federal court, seeking writs of mandamus to compel the agency to process such visa applications. See Summit Testing and Inspection Co. v. Chertoff, No. 06-01296 (N.D. Ohio); Tiax LLC v. Chertoff, No. 06-11401 (D. Mass.); Gemini Realty v. Gonzalez, 2006 U.S. Dist. LEXIS 74194 (N.D. Fla.); Global Horizons, Inc. v. Chertoff, No. 06-2495 (C.D. Calif.).

262

Wage and Hour Laws – Federal (FLSA)

Jeffery M. Schlossberg & Kimberly B. Malerba, Tech-Toch, N.Y. L.J. , May 21, 2007 at 2, available at http://lawprofessors.typepad.com/adjunctprofs/files/052107labor1.pdf (Authors discuss whether employee time spent away from the office using technology such as Blackberries, cell phones and laptops, constitutes compensable overtime under the FLSA).

IntraComm, Inc. v. Bajaj, 2007 U.S. App. LEXIS 15951 (4th Cir. July 5, 2007). The Fourth Circuit issued this decision addressing the scope of FLSA minimum wage act claims, specifically the FLSA’s “combination exception.” The court, finding for the plaintiff, Habibi, ruled that the FLSA’s “combination exception” did not apply to the plaintiff because he did not meet either the salary requirement of the administrative exception (as he did not make more than $455 per week) or the outside sales exception (as he worked only in the defendant’s office).

Anderson v. Cagle's Inc., 2007 U.S. App. LEXIS 13654 (11th Cir. June 11, 2007). The Court of Appeals held that employees in a chicken processing plant were not entitled to compensation under the FLSA for time spent donning and doffing protective clothing. The court held that the time spent changing clothes at the beginning and end of the work day had been excluded from working time by the express terms of or by custom or practice under a bona fide collective bargaining agreement.

Bonilla v. Baker Concrete Constr., Inc., 2007 U.S. App. LEXIS 12431 (11th Cir. 2007). The appeals court in Florida rejected claims by airport employee plaintiffs that they should be compensated for time spent traveling or clearing security before arriving at their actual worksites. The court followed similar reasoning to that of Gorman. The court affirmed summary judgment for the employer.

Gorman v. Consol. Edison Corp., 2007 U.S. App. LEXIS 12450 (2d Cir. 2007). The Second Circuit affirmed the dismissal of two cases regarding the Fair Labor Standards Act (FLSA), wherein the plaintiffs alleged that they were entitled to pay for time spent going through security, donning and doffing uniforms and safety gear, and walking to and from the areas

where they worked and where the gear was located. The appeals court, relying on IBP v. Alvarez, 546 U.S. 21 (2005), ruled that these activities were not compensable, as they had to be both integral and indispensable to principal work activities. Merely because something is required by the employer does not make it integral, and donning and doffing uniforms is a “relatively effortless” activity.

Yi v. Sterling Collisions Ctrs., Inc., 480 F.3d 505 (7th Cir. 2007). The Seventh Circuit held that when auto mechanics are paid based on a formula related to hours worked and job performance, their pay is commission-based and thus exempt from overtime under the Fair Labor Standards Act (FLSA). Although the FLSA does not define “commission,” the court stated that “the essence of a commission is that it bases compensation on sales.” The type of formula at issue here is also based on sales, as the rate of pay increases the faster the mechanics work.

Loving v. Johnson, 2006 U.S. App. LEXIS 16968 (5th Cir. July 7, 2006)(per curiam). Plaintiff, an inmate in a Texas working prison, where he worked as a drying machine operator, contended that he was qualified for protections under the FLSA, specifically minimum wage. The court found that prisoners are not employees and are not entitled to minimum wages.

McGavock v. Water Valley Miss., 452 F.3d 423 (5th Cir. 2006). The Court of Appeals held that a Department of Labor regulation had been rendered obsolete by a 1999 amendment to the FLSA. The regulation, 29 C.F.R. § 553.212 held that an employee was not engaged in “fire protection activities” if the employee performed non-exempt work for more than 20% of the employee’s total working time. In 1999, the FLSA was amended to add 29 U.S.C. § 2003(y) which defined employees engaged in “fire protection activities” without reference to the 20% rule set forth in the regulation.

Adair v. County of Wayne, 452 F.3d 482 (6th Cir. 2006). The Court of Appeals held that airport authority officers were not entitled to overtime compensation for the off-duty time that they were required to wear pagers and stay close to home. The court held that for the employees to be entitled to compensation when on call at home, the restrictions on movement must be so onerous as to prevent them from effectively using their time for personal pursuits.

Rogers v. Sav. First Mortgage, LLC, 362 F. Supp.2d 624 (Md. 2005). Judge William M. Nickerson, Senior United States District Judge for the District of Maryland, granted plaintiffs’ motion for partial summary judgment in a case for additional compensation under the Fair Labor Standards Act of 1938 (FLSA) and the Maryland Wage Payment and Collection Law (Maryland Wage Law). Plaintiffs, former loan officers for Defendant Savings First Mortgage, LLC (SFM), sued their former employer for unpaid overtime compensation, as well as underpayments in pay periods where their compensation was below the minimum wage required under the FLSA. Additionally, plaintiffs asked for unpaid commissions and bonuses, along with damages, under the Maryland Wage Law. As loan officers, plaintiffs received no base salary and no hourly wage, but were paid a bi-monthly commission on loans that were closed at the time of payment. If an employee was terminated prior to the closing of a loan, he was not paid the commission on that loan. Plaintiffs were eligible for a year end bonus based on the profit they generated throughout the year. These bonuses were paid on June 30 of the following year, as long as they were still employed by SFM. Also, loan officers received referral bonuses for referring a new
loan officer to the company. The referring employee was entitled to receive 5 percent of the gross profit of the funding that occurred in the second, third, and fourth months of the new officer’s employment.

Under the FLSA, an employee who is paid on commission, in whole or in part, must still be paid an amount at least equal to the minimum wage for all hours worked in a pay period. Plaintiffs were thus entitled to summary judgment on their minimum wage claims. Judge Nickerson also found that SFM did not meet the requirements of a private motor carrier as the file the loan officers carried with them did not constitute the transporting of property. Therefore, SFM was subject to the overtime provisions of FLSA. To avoid liquidated damages, SFM had to show that their failure to follow the statute was in good faith and was based upon reasonable grounds. SFM failed to satisfy their burden and therefore was liable for liquidated damages in an amount equal to the minimum wage and overtime payments. The court relied on Medex v. McCabe, 811 A.2d 297 (Md. 2002), wherein the Maryland Court of Appeals found that an employer cannot avoid paying earned wages to an employee by terminating the employee before the time the wages would have been paid. Employers cannot use a contract with the employee to eliminate this requirement. Plaintiffs were therefore entitled to summary judgment on their claims for year end bonuses. Plaintiffs provided evidence that they were entitled to a referral bonus and defendants failed to sufficiently rebut such evidence. As such, summary judgment was granted on plaintiffs’ referral bonus claim. There were two issues where Judge Nickerson felt that summary judgment would be inappropriate, plaintiffs’ claims on terminal commissions and treble damages. Often additional work was needed on loans up until the time of their closing, and it is unclear how substantial that work was on many of the loans that closed after plaintiffs were terminated. Additionally, on the claim for treble damages, there was sufficient evidence to raise questions as to whether defendants had a legitimate reason for withholding wages upon the termination of the plaintiffs.


Congress passed the Portal to Portal Act (Portal Act), under which the FLSA places a two year statute of limitations on wage and hour claims, although a finding of willful statutory violations will increase that period to three years. Additionally, the FLSA prohibits any employee from pursuing a claim unless he gives his written consent to become a party. The court relies on the Ninth Circuit’s decision in Williamson v. General Dynamics Corp., 208 F.3d 1144 (9th Cir. 2000), wherein it was held that the FLSA, despite the Portal Act amendments, was designed to set minimum wage and maximum hour provisions in order to protect employees. Defendant’s evidence failed to prove that the UCL procedures were a barrier to this central purpose of the FLSA. Further, the purpose of the FLSA’s opt-in requirement is to limit liability for employers threatened by wage and hour claims filed after the enactment of the Portal Act. As plaintiff’s
claim was a state law claim, that purpose was not directly implicated. Therefore, the UCL’s opt-
out procedure did not stand as an obstacle to the FLSA’s central purpose. As neither of the UCL
claims invoked by plaintiff stood as a barrier to the purposes of the FLSA, defendant’s motion
for partial summary judgment was denied.

The case settled for $98 million (reported to be one of the largest involving the financial services
industry) for an estimated 20,000 plus brokers in California, New Jersey, and New York.

McLaughlin v. Murphy, 436 F. Supp.2d 732 (Md. 2005). Judge Catherine C. Blake, United
States District Judge for the District of Maryland, granted summary judgment for defendant in a
case where plaintiff claimed defendant violated the minimum wage and overtime provisions of
the Fair Labor Standards Act (FLSA). Plaintiff Michael McLaughlin, a former employee of
Freedmont Mortgage Corporation (Freedmont), brought suit against Defendants Kevin Murphy
and Freedmont. Cross-motions for summary judgment were filed on the issue of whether
McLaughlin was an “outside salesman” who was not subject to the overtime and minimum wage
provisions of the FLSA. While employed by Freedmont, McLaughlin was paid on a commission
basis on the loans he sold, never receiving hourly wages. Although there was evidence that loan
officers often worked as late as 9 p.m., McLaughlin did not keep any records of his time worked.

Defendant’s liability turns on whether plaintiff is classified as an outside salesman under the
FLSA, and the employer bears the burden of proving an employee’s exempt status. In this case,
there was no independent evidence that established what percentage of his time plaintiff spent
doing sales outside the office as compared to sales done in the office. To satisfy their burden,
defendant must have shown that plaintiff worked on sales inside the office for less than 20% of
the hours worked in a week by nonexempt employees. The evidence did not establish this fact,
and therefore defendant failed to satisfy their burden of proving plaintiff’s exempt status.

Assuming plaintiff was found not to be an outside salesman, the burden was on him to show the
number of uncompensated hours he worked, and that defendant permitted those hours.

Plaintiff was only able to estimate the number of hours he worked, and he was unable to show
that defendant was aware of any specific uncompensated hours that he worked.

Geraldine Soat Brown, United States Magistrate Judge in the Northern District of Illinois,
granted defendants’ motion for summary judgment in a case concerning plaintiff’s eligibility for
overtime pay. Plaintiff Paula Gatto, a former loan officer for Defendant Mortgage Specialists of
Illinois, Inc. (MSI), sued defendant claiming a right to overtime compensation. Loan officers
work solely on a commission basis and receive no draw, salary, base pay, hourly wages, or
overtime compensation. Loan officers are paid bi-monthly, and only on loans that have closed
with approved lenders. Gatto was told that her work was to be completed at the MSI office. She
claims that she was expected to work a minimum of eight hours per day; however, she did not
have to account for her time. Prior to the filing of this lawsuit, Gatto did not submit records to
MSI indicating that she worked more than 40 hours in any particular week. In order to
supplement the record in the case, Gatto provided handwritten documents containing the hours
she claims to have worked each week, and a declaration asserting that she worked more than 40
hours most weeks.
As an initial matter, plaintiff was required to present evidence demonstrating that she performed work which would entitle her to overtime compensation. Then, it was necessary for defendant to establish that there was no issue of material fact regarding plaintiff’s exempt status under the FLSA. Plaintiff failed to provide admissible evidence signifying her performance of eligible overtime work. The documents listing her working hours are inadmissible hearsay, and the declaration alone did not create an issue of fact. Additionally, defendant satisfied the conditions for showing that plaintiff is exempt from the overtime requirements of the FLSA. Defendant meets the requirements of the “retail or service establishment” exemption under the FLSA as it satisfies the requirements of both the FLSA and the Department of Labor. As plaintiff did not produce evidence establishing a genuine issue of material fact regarding her eligibility for overtime compensation, and defendant eliminated any issue of material fact with respect to whether they were exempt from the overtime provisions under the retail or service establishment exception, summary judgment was granted for defendant.

Olivo v. GMAC Mortgage Corp., 274 F. Supp. 2d 545 (E.D. Mich. 2004). Judge Lawrence P. Zatkoff, Chief United States District Judge for the Eastern District of Michigan, denied plaintiffs’ Motion for Court Facilitation of Notice to Potential Plaintiffs. Plaintiffs, former retail loan officers of Defendant GMAC Mortgage Corporation (GMAC), sued their former employer for the failure to pay for overtime work under the Fair Labor Standards Act (FLSA). GMAC loan officers are paid purely on commission, based on their actual production.

The FLSA does not apply to any employee who is considered an outside salesman. Defendant’s loan officers are outside salesmen as they primarily engaged in sales, a substantial percentage of their time was spent generating sales outside the office, and time spent in the office was incidental to their outside sales efforts. Defendant has demonstrated that the individual character of the loan officers’ work excludes them from FLSA coverage. Since the outside sales exemption applied to defendant’s loan officers, plaintiffs were unable to show they were similarly situated with other GMAC loan officers who might have been potential plaintiffs.

Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959), rev’g, 254 F.2d 8 (6th Cir. 1958). Justice Harlan, writing for a unanimous Court, held the respondents were not exempt from the Fair Labor Standards Act (FLSA). Petitioner Mitchell, the Secretary of Labor, brought suit against respondents, Kentucky Finance Company to enjoin them from violating the overtime and record-keeping provisions of the FLSA. Respondents were in the business of making personal loans and in purchasing conditional sales contracts from dealers in furniture and appliances. At issue is whether respondents should be considered “retail and service” establishments engaged in the making of sales of goods or services under the FLSA.

The retail and service establishment exemption has not been held to apply to enterprises in the financial field, regardless of the class of persons with whom they dealt, or with whether they were thought of as engaging in retail financing. Legislative history indicates that Congress has not intended for this to change. Respondents were not a retail or service establishment engaged in the making of sales of goods and services in satisfaction of the “retail and service” exemption. As such, businesses like that of respondents were not intended to be exempted from the overtime and record-keeping provisions of the FLSA.
Casas v. Conseco Finance Corp., 146 Lab. Cas. (CCH) P34,502, 2002 U.S. Dist. LEXIS 5775 (Minn. March 31, 2002). Judge John R. Tunheim, United States District Judge for the District of Minnesota, granted plaintiff’s Motion for Summary Judgment as to Liability as to all non-lead loan originators, and granted defendants’ Motion for Summary Judgment with regard to the dismissal of certain classes of employees. Plaintiffs, current and former loan originators, sued defendant, Conseco Finance Corp (Conseco), alleging entitlement to overtime compensation under the Fair Labor Standards Act (FLSA). Defendant was a financial company that designed, created, and sold lending products. Loan originators were paid a base salary plus commissions. Defendants asserted that plaintiffs fell within an exemption listed under the FLSA, and therefore were not subject to the overtime compensation provisions.

The court held that defendant was not a retail or service establishment and so the retail and service exemption did not apply. Defendant, as a financial company, lacks the retail aspect necessary to fit within the exemption. The administrative employee exemption did not apply because the employees were not administrative employees and lacked discretion and independent judgment. That the plaintiffs’ are the sales force with the duties of soliciting, selling and processing loans established they were involved in carrying out the business, as opposed to running the business. Additionally, any judgment made by the plaintiffs was made within pre-established guidelines. Defendant fails to satisfy its burden in establishing that the loan originators fell within the outside salesperson exception. Conflicting evidence was submitted as to how much time the loan originators spent in the office, and the court could not simply credit the evidence in favor of defendants. An issue of fact was established in determining whether the lead loan originators fell within the executive exemption. There was conflicting evidence as to the time spent conducting duties which may fall under this exemption, and so this was not a matter for summary judgment.


Wage and Hour Laws - State

Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 922 A.2d 710, 2007 LEXIS 599 (N.J. 2007). The New Jersey Supreme Court permitted two former employees of Wal-Mart to proceed with a state-wide class action on behalf of some 72,000 employees in which the class representative allege that they were denied required rest and meal breaks, and were forced to work “off the clock”.

Murphy v. Kenneth Cole Productions, Inc., 155 P.3d 284 (Cal. 2007). California Labor Code § 226.7 provides that for each day an employee is not given a meal or rest period as required by state law, the employer must pay the employee one additional hour of pay. The employer defendant argued that this was a penalty, and thus subject to a one-year statute of limitations, but the California Supreme Court interpreted the “one additional hour of pay” clause as a wage or premium pay, and thus subject to a three-year statute of limitations. The court relied on
textual arguments and administrative and legislative history. Additionally, the trial court was permitted to consider claims raised after an administrative hearing between the parties occurred, if the additional claims are part of the underlying wage dispute.

Overton v. Walt Disney Co., 2006 Cal. App. LEXIS 126 (Cal. Ct. App. Jan. 4, 2006). Plaintiff was a former employee of Disneyland who was assigned a parking spot about a mile from the employee entrance to the park. Disney provided a shuttle from the lot to the entrance. The plaintiff brought a proposed class action on behalf of Disneyland employees who parked in the lot, seeking to be compensated for the travel time from the lot to the entrance. Because the employees were not required to drive to work and take the shuttle the Court ruled that the case falls outside of the California Supreme Court’s decision in Morillion v. Royal Packing Co., 995 P.2d 139 (Cal. 2000), because in that case the employer required the employees to travel to work on employer provided buses. Although this was a state case, the Court noted that a federal case was on point with their reasoning. In Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994) the Court noted that time on employer provided buses was not compensable because the employees were free to choose, rather than required to take the buses to and from work.

Kim v. Citigroup, 856 N.E.2d 639 (Ill. Cir. Ct. 2006). The court held that brokers nationwide who agreed to participate in a discounted stock plan, which allowed employees to receive up to 25% of their pay in restricted Citigroup stock at a 25% discount to market value, could not reclaim unvested compensation forfeited upon their departure from the company. The court agreed with the plaintiffs that the stock constituted compensation under the Illinois Wage Act, but held that the employees’ voluntary agreement to the stock plan bound them to its terms, including forfeiture of stock not vested on departure.


Bottenv. Shorma, 440 F.3d 979 (8th Cir. 2006). The court ruled that a suit by an employee against his employer for failure to receive bonuses and incentives was time-barred as the suit exceeded the statute of limitations. In interpreting, under Minnesota law, that bonuses and incentive monies are wages, the court found that the applicable “missed wages” law applied and that employee had the statutorily defined time limitation of two years in which to bring his suit. The court held that when a contract defines a date for the receipt of payment, the statute of limitations starts when that date passes without delivery of the payment in question.

Paolini v. Albertson’s Inc., 149 P.3d 822 (Idaho 2006). The Idaho Supreme Court, in answering a certified question from the Ninth Circuit, held that the discharge of an employee allegedly because the employee attempted to exercise stock options did not constitute a wrongful discharge claim in violation of the public policy underlying the state’s wage law. The court held that stock options are not “wages” within the meaning of the state law and, therefore, the plaintiffs
discharge for attempting to exercise stock options did not implicate an express public policy justifying an exception to the at-will employment doctrine.

Arias v. Super. Ct. of San Joaquin County, 2007 Cal. LEXIS 10879 (Cal. 3d Ct. App., Oct. 10, 2007). A California Court of Appeals held that one employee could sue on behalf of all employees to recover state penalties for alleged wage and meal-break violations without having to qualify as a class action. The California Private Attorney General Act permits a representative action to enforce California labor law as though a single employee plaintiff were a private attorney general. The law has been called the “bounty hunter” law because the employee who sues successfully retains 25% of the penalty recovered, the remaining 75% going to the state.

Hoffeld v. Shepherd Electric Co., Inc., 2007 Md. App. LEXIS 127 (Md. Ct. Spec. App., Sept. 24, 2007). The Maryland Court of Special Appeals rejected the claim of a salesman who contended that he had been denied commissions in violation of the Maryland Wage Payment and Collection Law. The salesman argued that he was due commissions on sales that he had made before his termination. The court distinguished the fact situation in Hoffeld from that in Medex v. McCabe, 811 A.2d 297 (Md. 2002). The court found that in McCabe the employee had done all the work necessary to earn the commission, and had been denied the commission solely because he was not employed on the scheduled payment date. In distinguishing that case, the court stated: “Unlike Medex, commissions in this case were not linked to the arbitrary factor of employment, but to a reasonable job requirement.” In the instant case, while the salesman had made the sale prior to his departure, the salesman also was responsible for handling change orders and resolving problems for clients before and after orders shipped. Under the company’s unwritten policy, commissions were not considered to have been “earned” until the shipment/invoice date. The company explained that its policy was based on the fact that sometimes orders were modified before shipment, and clients were permitted to cancel orders before shipment.


Gresham v. Lumberman’s Mutual Casualty Co., 426 F.Supp.2d 321 (D.Md. 2005), aff’d, 2006 U.S. App. LEXIS 7430 (4th Cir. 2006). The court held that where severance pay was tied to satisfactory service, it constituted “wages” within the meaning of the Maryland Wage Payment and Collection Act, and, applying an objective standard, held that there was a bona fide dispute as to whether the wages were due on the ground that there was a complex issue regarding ERISA preemption. See also Mazer v. Safeway, Inc., 398 F.Supp.2d 412 (D.Md. 2005) (bonus and stock options that were not expected in return for job performance did not represent “wages” within the meaning of Maryland’s Wage Payment and Collection Act).

Pachter v. Bernard Hodes Group, Inc., 2007 U.S. App. LEXIS 23921 (2d Cir. Oct. 12, 2007). The Court of Appeals certified two questions to the New York Court of Appeals for resolution. The first question is whether, under New York Labor Law, an executive is an “employee” and accordingly covered by that law’s provisions limiting deductions from wages. The second
question certified to the New York Court of Appeals is when are commissions “earned” and consequently “wages” which are subject only to limited subsequent deductions. When a commission becomes “earned” so that an employee has a “vested right” to these monies usually depends on the terms of an agreement providing for the commission. Once “earned”, it is clear that deductions other than those set forth in Section 193 are improper. In this case, no written commission agreement exists, and the issue that the New York Court is asked to resolve is when is the commission “earned”.

Edwards v. JetBlue Airways Corp., 2008 WL 400094, 2008 N.Y. Misc. LEXIS 466 (N.Y. Sup. Ct. Feb. 15, 2008) (Even though airline employees are exempt from the FLSA, the New York Supreme Court held that they could pursue claims under the New York state wage law so long as the dispute does not involved a collective bargaining agreement).


WARN Act

Deveraturda v. Globe Aviation Security Service, 454 F.3d 1043 (9th Cir. 2006). The Court of Appeals held that the 60-day notice requirement of the Worker Adjustment and Retraining Notification Act did not apply to private security screeners who were laid off from their jobs when, pursuant to the Aviation and Transportation Security Act, airport security services were federalized.

Phason v. Meridian Rail Corp., 479 F.3d 527 (7th Cir. 2007). The Seventh Circuit held that an employer violated the WARN Act by closing a manufacturing plant without advance notice to the employees, even though another company had purchased the assets and had offered employment to many of its employees. The court’s reasoning was predicated on the fact that the formal closing of the asset sale did not occur until more than a week after the employees were terminated. The court held that the WARN Act’s exception for situations where a purchaser retains a seller’s employees did not apply in the instance case because the seller’s employees did not remain employed as of the effective date of the sale.

Weight Discrimination

The state of Michigan and the cities of San Francisco and Santa Cruz California, ban weight discrimination. The District of Columbia prohibits discrimination based on appearance. And, Massachusetts is considering legislation to prohibit weight discrimination. An estimated 66% of United States adults are overweight or obese, according to the National Center for Health Statistics. In EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436 (6th Cir. 2006), it was claimed that the defendant-employer violated the ADA by firing the plaintiff because of his morbid obesity. The 6th Circuit held that the plaintiff had failed to show that he had a disability within the meaning of the ADA.
Whistleblower Protection

Gaffney v. Riverboat Servs. of Ind., 451 F.3d 424 (7th Cir. 2006). The court held that the plaintiffs, licensed merchant marine officers, stated a whistleblower claim under 46 U.S.C. § 2114 where they allegedly were discharged in retaliation for engaging in statutorily protected correspondence with the United States Coast Guard about a change in hiring guidelines on their vessel. The court held that Section 2114 protects a seaman who reports a violation committed by a third party, in this instance, the Coast Guard upon application of the employer. The court held that the statutory language evinces a deliberate choice on the part of Congress to protect a seaman who reports a violation by either an employer or a non-employer.

United States ex rel Zaretsky v. Johnson Controls Inc., 457 F.3d 1009 (9th Cir. 2006). The Ninth Circuit reversed a grant of summary judgment and held that the False Claims Act does not require a whistleblower to report fraud to the federal government before publicly disclosing it in a private suit. Individuals may qualify as “original sources” without prior disclosure to the government.


The Congress enacted new Whistleblower protection for public transportation employees, and the provisions went into effect this year. See 6 U.S.C. § 1142. It is being argued that the new statutes language permitting compensatory damages includes emotional distress damages.


Wikipedia

It has long been suspected that various corporations scrub their less than favorable Wikipedia entries. Now a searchable database called the Wikipedia Scanner has been developed which stores the anonymous Wikipedia edits and tracks down the owner of the IP address from which the edits came. See Virgil Griffith, “Wikiscanner: List anonymous Wikipedia Edits From Interesting Organizations” Wikiscanner website, http://wikiscanner.virgil.gr/ (last visited June 10, 2008).

Workers’ Compensation

McGrath v. State Dep't of Pub. Safety, 159 P.3d 239 (Nev. 2007). The plaintiff, a female highway patrol officer, alleged that she had suffered work-related stress on account of harassment by her co-workers over an 18 month period, arguing that she was entitled to workers’ compensation benefits for said stress. The Nevada Supreme Court rejected her claim, interpreting
the term “event” in the statute using its plain and ordinary definition, and found no such “event” here.

Ray Bell Constr. Co. v. King, 642 S.E.2d 841, 281 Ga. 853 (Ga. 2007). The Georgia Supreme Court upheld an administrative law judge’s award of dependency benefits to the former wife of a deceased employee based on the doctrine of “continuous employment,” the decision of the ALJ having been affirmed by the State Board of Workers’ Compensation. The decedent, it was argued, was a “traveling employee” and, as such, there is broader workers’ compensation coverage. Such an employee is, in effect, in continuous employment, day and night, for the purposes of the workers’ compensation act, and activities performed in a reasonable and prudent manner for the health and comfort of the employee, including recreational activities, arise out of and are in the course of employment. In the instant case, while it was undisputed that the decedent engaged in a personal mission unrelated to his employment when he delivered family furniture to his storage shed, the court nonetheless affirmed the state board’s finding that the decedent’s deviation from his employment had ended and he had resumed his employer’s business by the time he sustained the injury.


Coleman v. Armour Swift-Eckrich, 130 P.3d 111 (Kan. 2006). The court reversed course on its decisions regarding the availability of workers’ compensation for workers injured as a result of horseplay while at work. Prior to this decision, workers injured by horseplay were regarded as injured outside of the employment context, but the court held that workers injured in such a way were exposed to harm through no choice of the employee’s own and that he or she was exposed to the harm by virtue of working for the employer.

Engle v. Thompson Murray Inc., 2006 Ark. App. LEXIS 630 (Ark. Ct. App. Sept. 20, 2006). The Arkansas Court of Appeals held that an employee who was injured at a retreat sponsored by the employer was entitled to workers’ compensation. The court held that the plaintiff was acting within the course of her employment as the purpose of the offsite meeting was for employees to bond, refresh, set new goals, and have fun.

Tlumac v. High Bridge Stone, 886 A.2d 660, 185 N.J. 390 (N.J. 2006). The New Jersey Supreme Court held that an employee who worked as a truck driver, and was intoxicated at the time of an auto accident, may nonetheless collect workers’ compensation. Even though the intoxication was the primary cause of the accident, the work-related injuries did not result solely from his intoxication. As there was credible evidence that the intoxication was not the sole cause of the accident, benefits could be awarded.

Khan v. Parsons Global Services Ltd., 428 F.3d 1079 (D.C. Cir. 2005). In a case arising under the District of Columbia’s workers’ compensation statute, which contains a “traveling employee”
exception, held that an accountant kidnapped in the Philippines could bring tort claims against his employer. While the D.C. statute makes workers’ compensation the exclusive remedy with respect to injuries incurred by the employee for whom travel is an integral part of the job, here the employee was injured after having relocated to the Philippines for a two-year assignment. As the employee has relocated, the court held that he was not a “traveling employee” for the purposes of the statute.

Gallipo v. City of Rutland, 882 A.2d 1177, 2005 VT 83 (Vt. 2005). The Court held that an employer did not have a right to reimbursement of workers’ compensation benefits wrongly paid to an employee due to a bank error.

Hilton v. Martin, 2008 Va. LEXIS 18 (Va. Sup. Ct. January 11, 2008) The Virginia Supreme Court issued its decision in this case which was a personal injury action resulting from the death of Ms. Rhoton as a result of an assault by a fellow employee "in the course of" their mutual employment with Highlands Ambulance Service, Inc. As one of the company's ambulances was returning, after lunch, to the company office, defendant Martin took a cardiac defibrillator, and accidentally struck Ms. Rhoton, shocking her, leading to a seizure. Ms. Rhoton never regained consciousness and died of the electrocution and cardiac arrest caused by the charged defibrillator. The Court found that the assault was personal to the employee and not directed against her as an employee or because of her employment, and that therefore her resulting death did not arise out of her employment, and thus the worker's compensation exclusivity doctrine did not preclude the claim. The court rejected the so-called "positional risk" test, and adhered to the "actual risk" test, under which the injury comes within the Worker's Compensation Act only if there is a causal connection between the employee's injury and the conditions under which the employer causes the work to be done.

McCamey v. D.C. Dept. of Employment Serv., 2008 D.C. App. LEXIS 239 (D.C. May 15, 2008) (en banc) (The D.C. Court of Appeals, sitting en banc, unanimously held that whether a Workers’ Compensation claimant had a pre-existing medical condition is not a bar to a Workers’ Compensation claim based on an allegation that workplace conditions aggravated or exacerbated those pre-existing conditions).


The D.C. Department of Employment Services has launched a web-based search engine that provides access to worker’s compensation decisions. The Department’s website (www.does.dc.gov) has a link to the free search engine. Decisions issued by the ALJs in the Office of Hearings and Adjudication from January 2007 through March 2008 are available, and decisions rendered before 2007, as well as decisions issued by the D.C. Court of Appeals will be available by the end of September, 2008. For more information call (202) 671-1555.


**Workplace Violence**


The Business Security and Employee Privacy Act, Ga. H.B. 89, 2007-2008 Legislative Session (signed by Governor on May 14, 2008), *available at* [http://www.legis.ga.gov/legis/2007_08/fulltext/hb89.htm](http://www.legis.ga.gov/legis/2007_08/fulltext/hb89.htm) (The Georgia legislature enacted and the governor signed into law an act providing that Georgia residents who lawfully possess a concealed weapon may store it in a locked vehicle in the parking lot of their employer. The act prohibits both public and private employers from searching the private vehicles of employees or invited guests and from conditioning employment based on a policy that restricts weapons from company property. The Georgia Chamber of Commerce opposed the legislation and the National Rifle Association stated that the new law “represents the most comprehensive pro-gun reform measure to be enacted in nearly 20 years.”).


Plona v. UPS, 2007 U.S. Dist. LEXIS 10345, 2007 WL 509747 (N.D.Ohio Feb. 13, 2007) (The district court held that employees are protected from being discharged for off-employer-property (and presumably off-duty and lawful) possession of guns. Plaintiff had been discharged allegedly because the employer discovered that he had a handgun in his vehicle while at work, which plaintiff alleged was disassembled and unloaded and locked in his car in a public-access parking lot used by both UPS employees and non-employees/customers of UPS. The plaintiff proceeded on a “public policy” wrongful termination theory, relying upon the provision of the Ohio constitution which states that “[t]he people have the right bear arms for their defense and security….” The district court denied UPS’s motion to dismiss on the ground that the court presumed that plaintiff’s possession of the handgun was not on UPS property, and UPS did not have a policy prohibiting employees from possessing a firearm at that location). See also http://volokh.com/archives/archive_2007_02_25-2007_03_03.shtml#1172468861 (Last accessed 7/9/2008 at 10:37pmEST).