Discrimination and Harassment in the Workplace

by

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<u>DISCRIMINATION AND HARASSMENT IN THE WORKPLACE</u>

by Robert B. Fitzpatrick[1]

I. <u>Gross v. FBL Financial Services, Inc.</u>

129 Ct. 2343; 2009 U.S. LEXIS 4535 (Mar. 31, 2009)

1. <u>The *Gross* Opinion</u>

a. <u>Summary of the Holding</u>

Plaintiff Jack Gross, a fifty-four-year-old employee of FBL Financial Services, sued for age discrimination when he was demoted from a managerial position and some of his job duties were reallocated to a younger female employee. The United States Court of Appeals for the Eighth Circuit overturned a $46,945 jury verdict in Gross's favor, ruling that the jury had been improperly instructed under the *Price Waterhouse v. Hopkins* (i.e., mixed-motives) standard, as Gross admitted that he failed to present any direct evidence of age discrimination. Presumably, the Eighth Circuit would allow a mixed-motives instruction where the evidence of age discrimination was direct rather than circumstantial. The Supreme Court vacated the decision of the court of appeals and remanded the case.

The Supreme Court noted that the plain language of the ADEA requires a plaintiff to 'prove that age was the "but-for" cause of the employer's adverse decision.' For that reason, the Court held that the mixed-motives burden-shifting framework does not apply in ADEA claims; therefore, it would never be proper to instruct the jury that a plaintiff may establish age discrimination 'by showing that age was simply a motivating factor.'

Vijay K. Mago et al., *Labor and Employment Law*, 44 U. Rich. L. Rev. 513, 523-24 (Nov. 2009).

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[1] This article was prepared with assistance by Donald R. McIntosh, an associate with Robert B. Fitzpatrick, PLLC. Mr. McIntosh is a May 2008 graduate of Georgetown University Law Center and a member of the Virginia State Bar.

b. **Votes & Opinions**

i. 5-4 decision.

ii. Majority opinion written by Justice Thomas.

iii. 2 dissenting opinions, written by Justices Stevens and Breyer.

c. **Briefs**

i. For a copy of all of the briefs and other documents in this case, see: http://www.scotuswiki.com/index.php?title=Gross_v._FBL_Financial_Services%2C_Inc.

d. **For a Sampling of Secondary Sources Discussing this Opinion, *see***

i. Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc.*, and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 Buff. L. Rev. 69 (Jan. 2010).

ii. Martin J. Katz, *Gross Disunity*, 114 Penn. St. L. Rev. 857 (2010).

iii. Note, *A Close Look at ADEA Mixed-Motive Claims and* Gross v. FBL Financial Services, Inc., 68 Fordham L. Rev. 399 (Oct. 2009).

iv. Workplace Prof Blog, *SCOTUS Issues Decision in* Gross v. FBL Financial Service*s*, June 18, 2009, http://lawprofessors.typepad.com/laborprof_blog/2009/06/scotus-issues-decision-in-gross-v-fbl-financial-services.html.

v. Faegre & Benson Blog, *Supreme Court Decides* Gross v. FBL Financial Services, Inc., June 18, 2009, http://www.faegre.com/showarticle.aspx?Show=9880.

vi. Weil Gotshal Blog, Gross v. FBL Financial Services, Inc., June 22, 2009, http://www.weil.com/gross-v-fbl/.

vii. Dorsey & Whitney Blog, Gross v. FBL Financial Services, Inc.*: Age Discrimination Cases are a Different Breed*, June 26, 2009, http://www.dorsey.com/age_discrimination_cases_different_breed/.

e. **<u>For a Sampling of U.S. Circuit Courts of Appeals Cases Applying and Following this Opinion, *see*</u>**

i. *Mora v. Jackson Memorial Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010) (holding that because "an ADEA plaintiff must establish 'but for' causality, no 'same decision' affirmative defense can exist: the employer either acted 'because of' the plaintiff's age or it did not").

ii. *Baker v. Silver Oak Senior Living Mgmt. Co., L.C.*, 2009 U.S. App. LEXIS 20376 (8th Cir. 2009) (applying *Gross*, but holding that, under the ADEA, the record supported the plaintiff's showing of pretext, regardless of the standard that applied).

iii. *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009) (applying *Gross*, holding that "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law").

iv. *Geiger v. Tower Auto.*, 2009 U.S. App. LEXIS 19966 (6th Cir. 2009) ("The 'burden of persuasion does not shift to the employer to show that they would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.").

v. *Hunter v. Valley View Local Sch.*, 2009 U.S. App. LEXIS 19141 (6th Cir. 2009) ("*Gross* thus requires us to revisit the propriety of applying Title VII precedent to the FMLA by deciding whether the FMLA, like Title VII, authorizes claims based on an adverse employment action motivated by both the employee's use of FMLA and also other, permissible factors. We conclude that it does.").

vi. *Leibowitz v. Cornell Univ.*, 584 F.3d 487, n.2 (2d Cir. 2009) (under *Gross*, finding that a claimant bringing suit under the ADEA must show that age was the "but-for" cause of the adverse action; Title VII, however, does authorize a "mixed motive" discrimination claim).

vii. *Martino v. MCI Commc'ns Servs., Inc.*, 574 F.3d 447, 454 (7th Cir. 2009) ("In the wake of [*Gross*] it's not enough to show that age was a motivating factor. The Plaintiff must prove that, but for his age, the adverse action would not have occurred.").

viii. *Wellesley v. Debevoise & Plimpton, LLP*, 346 Fed. Appx. 662 (2d Cir. 2009) (citing *Gross*, holding that because plaintiff did not provide evidence of "but-for" age discrimination, her claims should be dismissed).

ix. *Fuller v. Seagate Technology*, 651 F. Supp. 2d 1233 (D. Colo. 2009) (in dismissing plaintiff's ADEA claim for failure to prove direct causation, the court

noted that “[a]fter *Gross*, it is no longer sufficient for Plaintiff to show that age was a motivating factor in Defendant’s decision to terminate him”).

x. *Woehl v. Hy-Vee, Inc.*, 637 F. Supp. 2d 645 (S.D. Iowa 2009) (finding that the burden of persuasion does not shift to the employer “even when plaintiff has produced some evidence that age was one motivating factor in that decision”).

f. The Issue in *Gross*

i. The issue on which the Court took cert was whether direct evidence was a necessary predicate in an ADEA case for the trial court’s use of mixed-motive analysis.

ii. Surprisingly, the Court went beyond that issue, holding that, regardless of the type of evidence presented, the ADEA did not provide for mixed-motive analysis.

g. Justice Thomas’ Opinion for the Majority

i. Justice Thomas in *Gross* stated: “Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not.”

ii. In Title VII cases, courts, in light of the Civil Rights Act of 1991’s inclusion of a specific mixed-motive provisions, have used mixed motive analysis. *Fogg v. Gonzales*, 492 F.3d 447 (D.C. Cir. 2007); *Wright v. Murray Guard, Inc.*, 455 F.3d 702 (6th Cir. 2006); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310 (4th Cir. 2005); *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027 (9th Cir. 2005).

iii. Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motive Claims and* Gross v. FBL Financial Servs., Inc., 78 Fordham L. Rev. 399 (2009).

h. The Dissents

i. Justice Stevens, in his dissent for the four dissenters, focused on the issue on which the Court had taken cert, as well as the ultimate holding of the majority that mixed-motive analysis did not apply.

ii. Justice Breyer, in dissent for himself, as well as Justices Souter and Ginsburg, focused on the meaning of the words “because of,” rejecting that those words require that a plaintiff prove that age was the “but-for” cause of the employer’s adverse employment action.

2. ***Gross* Developments**

a. **Does the *Gross* Holding Apply to the Americans with Disabilities Act?**

i. Old ADA does not contain mixed-motive language in its text.

ii. In *Serwatka v. Rockwell Automation, Inc.*, 2010 U.S. App. LEXIS 948 (7th Cir. Jan. 15, 2010), the court applied *Gross* to the old ADA and required "but for" causation.

iii. ADA Amendments Act deleted "because of" and substituted "on the basis of." Query whether this would change the outcome in cases like *Serwatka*.

iv. In *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 457 (6th Cir. 2004), the court held that plaintiff's burden in an ADA case was to establish that disability discrimination was the sole reason for the adverse employment action.

v. *Parker v. Columbia Picture Indus.*, 204 F.3d 326, 336 (2d Cir. 2000) (J. Sotomayor) ("the ADA includes no explicit mixed-motive provision").

vi. *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033 (7th Cir. 1999) ("Congress omitted the ADA from the purview of Section 107[(a) of the Civil Rights Act of 1991]").

vii. *Bassett v. Potter*, 2010 U.S. Dist. LEXIS 22349, at *36 (C.D. Ill. Mar. 10, 2010) (applying *Serwatka*, holding that "In the case before this Court, all the relevant conduct predated the [ADA Amendments Act], so but for causation is required . . . This case does not even approach but-for causation").

viii. John L. Flynn, *Note, Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 Geo. L.J. 2009, 2042 (1995).

b. **Does *Gross* Apply to the FMLA?**

i. In *Hunter v. Valley View Local Schools*, 579 F.3d 688 (6th Cir. 2009), the Sixth Circuit, relying upon a DOL regulation (29 C.F.R. § 825.220(c)) interpreting the FMLA, found that mixed-motive theory applied to the FMLA. The DOL regulation provides that an employer may not use FMLA leave as a "negative factor" in employment decisions. And because the Sixth Circuit previously found the regulation to be a reasonable interpretation of the FMLA, the *Hunter* court found that mixed-motive analysis continued to apply. The *Hunter* court did not, however, apply *Gross*. *See also Crouch v. J.C. Penney Corp., Inc.*, 2009 U.S. App. LEXIS 14362 (5th Cir. 2009) (in an ADA and FMLA case, cautioning that "the Supreme Court's recent opinion in *Gross v. FBL Financial Services, Inc.*

raises the question of whether mixed-motive framework is available to plaintiffs alleging discrimination outside the Title VII framework").

ii. In *Rasic v. City of Northlake*, 2009 U.S. Dist. LEXIS 88651, at *17 (N.D. Ill. Sept. 25, 2009), an FMLA case, the United States District Court for the Northern District of Illinois noted the following:

"We suspect that there is more than a passing chance that if presented with the question, the Seventh Circuit would find that this statutory formulation [29 U.S.C. § 2615(a)(2) of the FMLA] ("for opposing") is not distinguishable in any meaningful way from the ADEA formulation ("because of") that *Gross* held requires proof of causation."

iii. The Seventh Circuit in *Serafinn v. Local 722, Int'l Bhd. of Teamsters*, 2010 U.S. App. LEXIS 5279 (7th Cir. Mar. 12, 2010), in review of a mixed-motive instruction in a retaliation suit brought by a former union member under the Labor-Management Reporting and Disclosure Act, which contains nearly identical statutory language ("for exercising") to the FMLA. Finding the mixed-motive instruction inappropriate, the court pointed to Webster's dictionary's definition of "for"—"because of." Id. at *5.

iv. In a recent opinion from the United States District Court for the District of Columbia, *Breeden v. Novartis Pharmaceuticals Corp.*, *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv0625-87, Judge Robertson was confronted with not an issue of liability, the issue presented in *Gross* and its progeny, but rather he was presented with an issue of damages under the FMLA and the sufficiency of plaintiff's evidence in light of the statutory language of the FMLA, which states: "[t]he employer is liable only for compensation and benefits lost 'by reason of the violation,' [or] for other monetary losses sustained 'as a direct result of the violation'." 29 U.S.C. § 2617(a)(1)(A)(i)(I). Interestingly, in the briefing to the court on this issue, the defense relied entirely on post-*Gross* cases construing the phrase "*for opposing* any practice made unlawful" by the FMLA contained in § 2615(a)(2) (emphasis added). None of the briefs focused on the phraseology "by reason of the violation" contained in § 2617(a)(1)(A)(i)(I).

v. Nonetheless, Judge Robertson instead focused on the remedial / damages language of the FMLA, and its particular phrase "by reason of." Focusing on that phrase, Judge Robertson was led to a series of cases under various other federal statutes with identical phraseology that have been construed to require not only so-called factual causation (but-for causation), but also legal causation (proximate causation). *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68 (1992) (RICO civil suits); *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-36 (1983) (Clayton Act § 4); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709-10 (3rd Cir. 1910) (Sherman Act § 7); *Rothstein v. UBS AG*, 647 F. Supp. 2d 292, 295 (S.D.N.Y. 2009) (Anti-Terrorism Act); *but see*

Boim v. Holy Land Found. for Relief & Development, 549 F.3d 689, 695-98 (7th Cir. 2008) (en banc) (adopting "relaxed" causation standard, based on policy considerations, for Anti-Terrorism Act).

vi. Plaintiff (Breeden) was a sales rep for Novartis. At the time in 2005 when Plaintiff went on an FMLA leave on account of a pregnancy, Novartis realigned her sales force and assigned a smaller territory to her. She complained about the realignment, and a supervisor assured her that she would be "made whole" upon her return to work. But, when she returned, there was no change in her diminished sales territory. Despite that fact, her merit-based income was greater than it had been before the realignment, and her "sales rank" among her peers improved. In 2008, there was yet another realignment, and Plaintiff's territory was merged with that of another sales rep. Plaintiff, whose territory was the smaller of the two, was declared redundant and terminated.

vii. Plaintiff claimed that the unlawful acts were the 2005 realignment and the company's failure to restore her pre-FMLA leave customer base. She claimed that her termination, which occurred three years thereafter in 2008, was as a result of these violations. Focusing on the statutory language "by reason of," Judge Robertson found that Plaintiff's evidence was not legally sufficient to satisfy that standard. In his opinion of May 26th, Judge Robertson briefly discussed two approaches to "proximate cause," the ex-ante perspective, and the ex-post perspective, citing Prosser. As the newer lawyers will vividly recall and the older lawyers will only vaguely recall, the ex-ante perspective asks whether the harm was reasonably foreseeable by the wrongdoer at the time of the wrongful act, and the ex-post perspective asks whether the harm was a direct result of the wrongful act. Judge Robertson ruled as follows: "Regardless of which approach is taken, the record of this case does not contain legally sufficient evidentiary basis for a reasonable jury to find that Novartis' 2005 realignment was the proximate cause of Breeden's termination in 2008." Indeed, Judge Robertson goes on to state as follows: "If the record establishes anything, indeed, it is that the 2005 and 2008 realignments were completely disconnected from one another… there is no evidence that the 2008 realignment was foreseeable from 2005 (ex ante), and because the 2008 realignment was a substantial intervening cause, Breeden's termination cannot be said to have been the direct result (ex post) of the 2005 realignment…" (footnote omitted).

viii. A reading of the cases cited by Judge Robertson finds one catapulted back to the first year of law school. For example, *Holmes v. Sec. Investor Prot. Corp.*, a RICO opinion, authored by Justice Souter, has extended discussion of "proximate cause" with citation to Prosser. Justice Stevens' opinion in *Associated Gen. Contractors* also has extensive discussion of proximate cause even with citation to every law student's nightmare – *Palsgraf*! And, Judge Posner's opinion in *Boim* discusses necessary causation, sufficient causation, the two fires hypothetical that every law student suffered through, and every law student's favorite torts case, *Summers v. Tice*, 33 Cal. 2d 80, 199 P. 2d 1 (Cal. 1948). In

light of the extended discussion of proximate cause, it may be wise for counsel to call the trial courts' attention to Justice Ginsburg's recent admonition in her concurring opinion in *Norfolk Southern Ry. V. Sorrell*, 549 U.S. 158, 179 (Ginsburg, J. concurring):

> If the term "proximate cause" is confounding to jurists, it is even more bewildering to jurors. Nothing in today's opinion should encourage courts to use "proximate cause," or any term like it, in jury instructions. " [L]egal concepts such as 'proximate cause' and 'foreseeability' are best left to arguments between attorneys for consideration by judges or justices; they are not terms which are properly submitted to a lay jury, and when submitted can only serve to confuse jurors and distract them from deciding cases based on their merits." *Busta v. Columbus Hospital Corp.*, 276 Mont. 342, 371, 916 P.2d 122, 139 (1996). *Accord Mitchell v. Gonzales*, 54 Cal.3d 1041, 1050, 1 Cal. Rptr. 2d 913, 819 P.2d 872, 877 (1991) ("It is reasonably likely that when jurors hear the term 'proximate cause' they may misunderstand its meaning."). *See also* Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vand. L. Rev. 941, 987 (2001) ("[T]he inadequacy and vagueness of jury instructions on 'proximate cause' is notorious."); Cork, *A Better Orientation for Jury Instructions*, 54 Mercer L. Rev. 1, 53-54 (2002) (criticizing Georgia's jury instruction on proximate cause as incomprehensible); Steele & Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N. C. L. Rev. 77 (1988) (demonstrating juror confusion about proximate-cause instructions).

c. **Does the *Gross* Holding Apply to § 1983 Litigation?**

i. In *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 4346 (May 24, 2010) (No. 09-745), the Seventh Circuit applied *Gross* to Section 1983 cases, requiring "but for" causation.

d. **Does the *Gross* Holding Apply to § 1981 Cases?**

i. In *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 (3d Cir. Sept. 11, 2009), where the defense conceded the point, the majority held that *Gross* had no impact on § 1981 cases; Judge Jordan, concurring, stated that *Gross* "may well have an impact on our precedent concerning the analytical approach to be taken in employment discrimination cases under § 1981."

e. **Does the *McDonnell-Douglas* Burden-Shifting Evidentiary Framework Still Apply?**

i. Justice Thomas for the majority in *Gross* (129 S. Ct. at 2349 n.2) said that it is an open question whether the burden-shifting evidentiary framework used in

circumstantial evidence Title VII cases under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) still applies.

ii. The Court in *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441 (1st Cir. 2009) held *McDonnell-Douglas* still applied.

iii. One district court (*Bell v. Raytheon Co.*, 2009 U.S. Dist. LEXIS 67016 (N.D. Tex. July 31, 2009)) held that even after plaintiffs established a prima facie case of age discrimination, the burden did not shift to the defendant to articulate a legitimate non-discriminatory reason because they did not prove that age was the but-for cause of the adverse decision. As the courts continue to address this issue, it will be interesting to see whether, like the *Bell* court, they incorporate into the prima facie stage of *McDonnell-Douglas* a heightened but-for requirement.

iv. In *Love v. TVA Bd. of Dir.*, 2009 U.S. Dist. LEXIS 65121 (M.D. Tenn. July 28, 2009), the plaintiff brought a failure to promote claim alleging both race and age discrimination. The court noted that under Title VII a plaintiff could prevail "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence"; or, applying *Gross*, under the ADEA by "proving that his age was *the* reason for his nonselection." As a result of a disparity in the burden of proof between his race and age claims, the court found for the plaintiff on his race claim but dismissed his age claim with prejudice.

v. In *Holowecki v. Fed. Express Corp.*, 644 F. Supp. 2d 338 (S.D.N.Y. 2009), the court found that *Gross* altered the way *McDonnell Douglas* applies to the ADEA, stating, "[w]hether *Gross*, by implication, also eliminates the *McDonnell Douglas* burden-shifting framework in ADEA cases was left open by the court . . ." However, the court did not confront the issue as the plaintiffs failed to make even a pre-*Gross* case of age discrimination.

vi. In *Fuller v. Seagate Technology, LLC*, 651 F. Supp. 2d (D. Colo. 2009), in granting summary judgment for the employer, the court noted that, "Although the Tenth Circuit Court of Appeals has not addressed it, this Court interprets *Gross* as elevating the quantum of causation required under the ADEA. After *Gross*, it is no longer sufficient for Plaintiff to show that age was a motivating factor in Defendant's decision to terminate him. Instead, Plaintiff must present evidence that age discrimination was the 'but for' cause of Plaintiff's termination."

vii. *Wagner v. Geren*, 2009 U.S. Dist. LEXIS 58636 (D. Neb. July 9, 2009):

"While it is unclear whether the *McDonnell Douglas* Title VII evidentiary analysis applies to discrimination claims under the ADEA . . . this Court need not address that issue, because Wagner has not presented sufficient evidence from which a reasonable finder of fact could conclude that his age was the 'but-for' cause of any adverse action."

f. **Continued Viability of the *McDonnell-Douglas* Paradigm**

i. Most courts that have addressed the issue post-*Gross* have held that the *McDonnell-Douglas* burden-shifting framework still applies to disparate treatment claims under the ADEA. *See, e.g., Leibowitz v. Cornell Univ.*, 584 F.3d 487 (2009); *Faison v. Dist. of Columbia*, 2009 WL 3300484 at *3 (D.D.C. Oct. 15, 2009); *Geiger v. Tower Automotive*, 579 F.3d 614, 620-23 (6th Cir. 2009); *Milby v. Greater Philadelphia Health Action*, 2009 WL 2219226 at *1 (3d Cir. July 27, 2009); *Martino v. MCI Communications Servs., Inc.*, 574 F.3d 447, 449 (7th Cir. 2009); *Woods v. Boeing Co.*, 2009 WL 4609678 (10th Cir. Dec. 8, 2009) (unpublished); *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441 (1st Cir. 2009).

g. **Does the *Teamsters* Pattern-or-Practice Framework Apply in ADA Cases?**

i. Chief Judge Scirica said so in *Hohider v. UPS, Inc.*, 574. F.3d 169 (3d Cir. 2009).

h. **Does the *Teamsters* Pattern-or-Practice Framework Apply in ADEA Cases?**

i. The phrase "pattern-or-practice" does not appear in the text of the ADEA.

ii. In *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 1130-31 (10th Cir. 2009), the court held that *Gross*'s rejection of mixed-motive analysis does not affect the pattern-or-practice burden-shifting framework in ADEA cases.

i. **Alternative or Intersectional Motives**

i. *Culver v. Birmingham Bd. of Educ.*, 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009):

"The only logical inference to be drawn from *Gross* is that an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was any other proscribed motive involved. For this reason, the court required [plaintiff] to choose between his ADEA alternative, which would require him to prove age as the only reason for the adverse employment action, and his Title VII claim."

ii. *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 U.S. Dist. LEXIS 60720 (E.D. Pa. Aug. 11, 2009):

"The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the only reason for

discrimination . . . Even if [plaintiff's] assertion that the City's motion for summary judgment rests solely on unsubstantiated evidence is correct, the City has no burden to refute her claim until she presents direct evidence that her age was the sole reason for the discrimination . . . Because she cites multiple bases for her discrimination claim, including her gender, race, and disability, [plaintiff] is foreclosed from prevailing on a claim for age-related discrimination."

j. **Divided Fifth Circuit Holds that *Gross* Does Not Apply to Title VII Retaliation Claims**

i. In *Smith v. Xerox Corp.*, 2010 U.S. App. LEXIS 6190 (5th Cir. March 24, 2010), Judge Reavley, writing for himself and Judge Wiener, held that the rationale of Gross does not apply to Title VII, specifically to Section 704(a) of Title VII, which is the retaliation provision of that statute. Judge Jolly wrote a vigorous dissent, in which he characterizes as "lame" the majority's distinction between age discrimination cases under the ADEA and retaliation cases under Title VII. With this decision from the 5th Circuit, there now is a circuit split, with the 7th Circuit having twice stated that "unless a statute… provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law." *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) (ADA) (citing *Fairley v. Andrews*, 578 F.3d 518, 525-26, *rehearing denied*, 2009 U.S. App. LEXIS 21263 (7th Cir. 2009) (42 U.S.C. § 1983)).

k. **Legislative Reaction: The Protecting Older Workers Against Discrimination Act of 2009, H.R. 3721, 111th Cong.**

i. The Protecting Older Workers Against Discrimination Act of 2009 (H.R. 3721) (introduced Oct. 6, 2009), http://www.govtrack.us/congress/bill.xpd?bill=h111-3721.

ii. The Act proposes to "restore vital civil rights protections for older workers in the face of the Supreme Court's decision in *Gross v. FBL Financial*," specifically:

1. The Act reverses the Gross decision and restores the law to what it was for decades before the Court rewrote the rule. The Act makes clear that when a victim shows discrimination was a "motivating factor" behind a decision, the burden is properly on the employer to show it complied with the law. Further, the Act makes clear that the "motivating factor" framework applies to all anti-discrimination and anti-retaliation laws.

2. The Act would cover all claims filed since the *Gross* decision (June 18, 2009).

3. The Act is modeled on the Civil Rights Act of 1991, which passed the Senate 93-5 on a bipartisan basis. Among other things, the

Civil Rights Act of 1991 codified the "motivating factor" framework for race, sex, national origin and religion discrimination claims under Title VII of the Civil Rights Act of 1964.

iii. Video of Senate Judiciary Committee Hearing – "Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed to Protect American Workers from Discrimination" (Oct. 7, 2009), http://www.judiciary.senate.gov/hearings/hearing.cfm?id=4096. (Hearing starts at about the 21st minute of the video).

iv. Lawffice Space Blog, *Senate to Examine* Gross v. FBL, September 30, 2009, http://www.lawfficespace.com/2009/09/senate-to-examine-gross-v-fbl.html.

v. Ellen Simon, *New Supreme Court Age Discrimination Decision Will Be Gone in a Flash*, June 22, 2009, http://www.employeerightspost.com/2009/06/articles/supreme-court/new-supreme-court-age-discrimination-decision-will-be-gone-in-a-flash/.

vi. The Act makes clear that this "motivating factor" framework applies to all anti-discrimination and anti-retaliation laws – treating all workers, and all forms of discrimination, equally.

vii. On May 5, 2010, the House Subcommittee on Health, Employment, Labor, and Pensions held a hearing on the Protecting Older Workers Against Discrimination Act (POWADA) (the bill and hearing materials are *available at* http://edlabor.house.gov/newsroom/2009/10/bicameral-legislation-will-pro.shtml). This proposed legislation is designed to reverse the Supreme Court's holding in *Gross* that claims under the Age Discrimination in Employment Act must be established under a "but-for" causation model, not a "motivating factor" model.

viii. The next day, May 6th, the full Senate Committee on Health, Education, Labor, and Pensions took its own look at POWADA. EEOC Chair Jacqueline Berrien was given her own panel, and Ms. Helen Norton of the University of Colorado Law School was also added for the Senate's iteration. Re-testifying were Mr. Jack Gross, the plaintiff in the underlying *Gross* case; Mr. Eric Dreiband, former General Counsel with the EEOC; and Ms. Gail Aldrich, of the AARP Board of Directors. The prepared testimony and a video replay of the proceedings are *available at* http://help.senate.gov/hearings/hearing/?id=466c8557-5056-9502-5d37-67384ccdc18a.

II. Lilly Ledbetter Fair Pay Act of 2009

Pub. L. No. 111-2; 123 Stat. 5 (2009)

42 U.S.C.S. § 2000e-5(e)(3)

1. *Ledbetter v. Goodyear Rubber and Tire Co. Inc.*, 550 U.S. 618, 127 S. Ct. 2162, 2007 U.S. LEXIS 6295 (2007), *aff'g*, 421 F.3d 1169 (11th Cir. 2005)

Title VII of the Civil Rights Act prohibits employment discrimination on the basis of "race, color, religion, sex or national origin." Employees suing under Title VII must (as relevant here) bring their claims no more than 180 days after "the alleged unlawful employment practice occurred." In a 5-4 decision, authored by Justice Alito, the Supreme Court delivered a victory for employers in discriminatory pay cases by holding that the unlawful decision to set an employee's pay, rather than the subsequent issuance of a paycheck reflecting the earlier discrimination, counts as the "unlawful employment practice" for purposes of triggering Title VII's limitations period.

Petitioner Lilly Ledbetter worked for nineteen years at respondent Goodyear Tire & Rubber Company's plant in Gadsden, Alabama. At the end of her career, her salary – the product of a series of annual raise decisions, ostensibly based on merit – was significantly (between fifteen and forty percent) lower than her male counterparts. Ledbetter filed an EEOC charge alleging, inter alia, sex discrimination with regard to her pay. She then sued in the U.S. District Court for the Northern District of Alabama, where she prevailed.

The Eleventh Circuit reversed, holding that Ledbetter's current low pay did not justify reaching back to challenge pay decisions that occurred years ago. Instead, the Eleventh Circuit held, plaintiffs may only challenge pay decisions within the limitations period. Finding that no jury could conclude that either of Ledbetter's last two pay decisions was intentionally discriminatory, the Eleventh Circuit dismissed her claim.

The Supreme Court agreed with the Eleventh Circuit that Ledbetter's claim was time-barred. Emphasizing that discriminatory intent is the "central element" of any disparate treatment claim, the Court distinguished between past discriminatory acts (pay decisions) and the present effects of those acts (paychecks), and concluded that "current effects alone cannot breathe life into prior, uncharged discrimination." Instead, the majority held, Ledbetter should have challenged the intentionally discriminatory pay decision within 180 days of the discriminatory pay decision itself. The Court deemed controlling its prior decision in *United Airlines v. Evans* (and its progeny), in which the Court held that a flight attendant who had been dismissed on the basis of marital status but was then later rehired without being restored to her former seniority level had no claim against the airline because the unlawful practice occurred when she was discharged, rather than when her seniority was decided according to

facially neutral rules. The Court distinguished its decision in *Bazemore v. Friday*, which held that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII," by cabining it to cases in which the pay structure itself is discriminatory, i.e. where the official pay guideline is that blacks are to be paid less than whites.

The majority expressed a concern that if the Court were to adopt a contrary rule, "a single discriminatory pay decision made 20 years ago [that] continued to affect an employee's pay today" could give rise to a suit, "even if the employee had full knowledge of all the circumstances relating to the 20-year-old decision at the time it was made." Although the Court acknowledged that the 180-day limitations period is "short by any measure," these concerns with repose for employers, with the quick resolution of employment suits, and with the need to weed out stale claims permeated the Court's opinion.

In a relatively rare dissent from the bench, Justice Ginsburg – joined by Justices Breyer, Souter, and Stevens – argued primarily that pay discrimination cases are more analogous to hostile environment claims (which build up over time) than to firings, denials of promotion, or other "discrete acts" that should give rise to immediate suit. She emphasized that pay decisions build on each other over time, that information about pay disparity may not often be readily available until several pay decisions have been made, and that the intent to discriminate is still there as long as an employer knowingly perpetuates past discrimination.

In Justice Ginsburg's view, the need to further the broad remedial purpose of Title VII outweighs any potential prejudice to employers: "Congress never intended to immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption." Moreover, she noted, the Courts of Appeals (with the approval of the EEOC) have generally relied on *Bazemore* to apply Ledbetter's proposed rule, and in any event employers have access to an array of equitable defenses – such as laches – to deter strategic delay. Finally, she contended, the Court's decision is likely to strip many racial and religious minorities of the ability to redress the effects of pervasive historical discrimination.

Because (as Justice Ginsburg noted), eight circuits have applied the *Bazemore* rule to disparate pay claims, the Court's decision may have a substantial effect on disparate pay suits, effectively precluding relief under Title VII for a large number of potential litigants whose salaries are the products of past discrimination. However, the Court left for another day the question of a "discovery rule" that would toll the limitations period until employees discover (or should discover) the unlawful pay decision, thereby leaving open the possibility that employees will bring claims alleging that they learned of discriminatory pay decisions only when they receive notice of the decision, perhaps in the form of a paycheck.

More on Today's Decision in Ledbetter, Posting of Tejinder Singh to SCOTUSblog, http://www.scotusblog.com/2007/05/more-on-todays-decision-in-ledbetter/ (May 29, 2007, 14:59 EST).

2. <u>**Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2; 123 Stat. 5 (2009), 42 U.S.C.S. § 2000e-5(e)(3)**</u>

a. <u>**Overview**</u>

> "The *Ledbetter* decision prompted a Congressional response, and on January 28, 2009, the 'Lilly Ledbetter Fair Pay Act of 2009' was signed into law. The Act amends Title VII—specifically 42 U.S.C. § 2000e-5(e)(3)—by adding the following provision:
>
> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. Lilly Ledbetter Fair Pay Act of 2009, Pub.L. No. 111-2, § 3, 123 Stat. 5, 5-6.
>
> [The Act also amends the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. *Id.* at 6-7.]
>
> The Fair Pay Act of 2009 only affects the *Ledbetter* decision with respect to the timeliness of discriminatory compensation claims. The more general rule announced in *Ledbetter*—that the charging period is triggered when a discrete unlawful practice takes place—reaffirmed the principles set forth in *Ricks*, 449 U.S. at 258, and *Morgan*, 536 U.S. at 113. Courts have applied this rule, as well as the rule that a plaintiff may not sue for a prior discriminatory act outside the charging period based on the continuing effects of that act into the charging period, to other types of discrimination claims not involving compensation. *See, e.g., Jackson v. City of Chicago*, 552 F.3d 619, 624 (7th Cir. 2009) (applying *Ledbetter* to a failure to promote claim); *Bennett v. Chatham County Sheriff Dept*., 315 Fed. Appx. 152, 2008 U.S. App. LEXIS 23897, 2008 WL 4787139, at *7 (11th Cir. Nov. 4, 2008) (applying *Ledbetter* to failure to promote claim). The rule set out in *Ledbetter* and prior cases—that 'current effects alone cannot breathe new life into prior uncharged discrimination'—is still binding law for Title VII disparate treatment cases involving discrete acts other than pay."

Leach v. Baylor Coll. of Med., 2009 U.S. Dist. LEXIS 11845 (S.D. Tex. Feb. 17, 2009).

b. <u>**Legislative History**</u>

i. For the full text of the Act, see http://www.govtrack.us/congress/billtext.xpd?bill=s111-181.

ii. For the full legislative history of the Act, see http://www.govtrack.us/congress/bill.xpd?bill=s111-181.

iii. For debate and discussion on this Act before its passage in the Senate, see http://www.govtrack.us/congress/bill.xpd?bill=s111-181&tab=speeches.

iv. For debate and discussion on this Act before its passage in the House, see http://www.govtrack.us/congress/bill.xpd?bill=h111-11&tab=speeches.

c. **US Court of Appeals Decisions**

i. *Miller v. Kempthorne*, 2009 U.S. App. LEXIS 27952 (2d Cir. Dec. 21, 2009).

  a. Held that plaintiff's claim regarding his wage grade classification was rendered timely by the retroactive application of the Act (reversing the District Court on that issue), but nevertheless upheld the District Court's grant of summary judgment to the defendant employer, based on the merits of the case.

ii. *Hester v. N. Ala. Ctr. For Educ. Excellence*, 2009 U.S. App. LEXIS 25225 (11th Cir. Nov. 17, 2009).

  a. Reversed and remanded the District Court's dismissal of plaintiff's Title VII wage discrimination claims as untimely, because those claims were saved by the retroactive application of the Act.

iii. *Mikula v. Allegheny County*, 583 F.3d 181 (3d Cir. Sept. 10, 2009).

  a. Held that plaintiff's Title VII pay discrimination claims were timely under the Act as to those paychecks that plaintiff received within 300 days before she filed her administrative charge, if those paychecks reflected a periodic implementation of a previously made intentionally discriminatory employment decision or other practice.

  b. Held that the employer's failure to answer a request for a raise qualified as a compensation decision.

  c. Held that the employer's letter in response to plaintiff's complaint about raises was not a pay decision or "other practice" because it merely provided the results of an internal investigation.

iv. *Rzepiennik v. Archstone-Smith, Inc.*, 331 Fed. Appx. 584, 589 n. 3 (10th Cir. June 1, 2009).

  i. Noting that "[t]here is no indication in [the LLFPA] that Congress intended [the] change to affect [SOX] retaliation claims."

d. **<u>Federal District Court Decisions</u>**

i. *Tomlinson v. El Paso Corp.*, 2009 U.S. Dist. LEXIS 77341 (D. Col. Aug. 28, 2009) (applying the Act to methods of determining accruals under pension plans).

ii. *Richards v. Johnson & Johnson*, 2009 U.S. Dist. LEXIS 46117 (D.N.J. June 2, 2009) (holding that the Act "only affects the *Ledbetter* decision with respect to the timeliness of discriminatory compensation claims" and "does not save otherwise untimely claims outside the discriminatory compensation context"; but also that the Act does not change the fact "that Title VII and the ADEA do not bar an employee from using time-barred acts as background evidence in support of other timely claims").

iii. *Aspilaire v. Wyeth Pharm., Inc.*, 612 F. Supp. 2d 289 (S.D.N.Y. 2009) (discussing the scope of the act in a footnote and concluding under the act that plaintiff's pay discrimination claim was timely, but dismissing that claim on other grounds).

iv. *Gentry v. Jackson State Univ.*, 2009 U.S. Dist. LEXIS 35271 (S.D. Miss. Apr. 17, 2009) (holding that a denial of tenure to a university professor qualified as a compensation decision or other practice affecting compensation within the Act, and that the professor's Title VII claim based on that tenure denial was thus timely even though it was filed well after the 180 day deadline under Title VII for timely submission of claims).

v. *Rowland v. Certainteed Corp.*, 2009 U.S. Dist. LEXIS 43706 (E.D. Pa. May 21, 2009) (holding that plaintiff's untimely "failure to promote" claim was not saved by the Act, because it was not a discriminatory compensation claim, and thus was not within the scope of the Act).

vi. *Gilmore v. Macy's Retail Holdings*, 2009 U.S. Dist. LEXIS 7894 (D.N.J. Feb. 4, 2009) (holding that the Act saved some of plaintiff's claims which would have otherwise been time-barred under Title VII, but did not save those of plaintiff's claims which failed on summary judgment for evidentiary reasons or those brought under a state anti-discrimination law).

vii. *Rehman v. State Univ. of New York*, 596 F. Supp. 2d 643 (E.D.N.Y. 2009) (applying the Act to find plaintiff's wage discrimination claims timely even though they were based upon actions occurring outside the limitations period).

viii. *Leach v. Baylor Coll. of Med.*, 2009 U.S. Dist. LEXIS 11845 (S.D. Tex. Feb. 17, 2009) (holding that the LLFPA did not apply to the plaintiff's race

discrimination claim as the plaintiff only alleged that he had a heavier workload than his colleagues without any evidence of a corresponding pay differential).

ix. *Vuong v. New York. Life Ins. Co.*, 2009 U.S. Dist. LEXIS 9320 (S.D.N.Y. Feb. 6, 2009) (finding a failure to promote claim time-barred because the plaintiff pressed no discriminatory compensation claim with respect to the failure to promote claim).

x. *Bush v. Orange County Corr. Dep't*, 597 F. Supp. 2d 1293 (M.D. Fla. 2009) (holding that the LLFPA covered the plaintiffs' claim with respect to position transfers as plaintiffs asserted that the transfers they received in 1990 "had been recorded as a voluntary demotion and their pay had been reduced without their knowledge").

e. **For further discussion of the Act and its application in courts, *see***

i. Howard Nassiri, PC, California Employment Lawyers Blog, "Equal Pay for Women – Third Circuit Reverses Decision in Pay Discrimination Case", September 25, 2009, *available at* http://www.californiaemploymentlawyersblog.com/2009/09/equal-pay-for-women--third-circuit-court-reverses-decision-in-pay-discrimination-case.html.

ii. Thomas Wade Young, Tom Appeals Blog, "Lilly Ledbetter Saves the Day (Again)", September 16, 2009, *available at* http://tomappeals.com/?p=106.

iii. Workplace Prof Blog, "Sullivan on Textualism and the Ledbetter Act", June 20, 2009, *available at* http://lawprofessors.typepad.com/laborprof_blog/2009/06/sullivan-on-textualism-and-the-ledbetter-act.html.

iv. Walsh& Walsh P.C., California Wage Law Blog, "Supreme Court Opinion Offers No Analysis on Ledbetter Act", May 29, 2009, available at http://www.californiawagelaw.com/wage_law/2009/05/supreme-court-opinion-offers-no-analysis-on-ledbetter-act.html.

v. Philip Miles, Lawffice Space Blog, "Does the Ledbetter Act Extend Failure to Promote Claims?", May 21, 2009, available at http://www.lawfficespace.com/2009/05/does-ledbetter-act-extend-failure-to.html.

vi. Charles A. Sullivan, "Raising the Dead? The Lilly Ledbetter Fair Pay Act", Seton Hall Pub. L. Research Paper No. 1418101 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418101.

f. **Lilly Ledbetter Fair Pay Act and § 1981 Claims**

i. Judge Frederick Martone of the District of Arizona issued an interesting opinion recently in *Ekweani v. Ameriprise Financial, Inc.*, 2010 U.S. Dist. LEXIS 24219, 108 Fair Empl. Prac. Cas. (BNA) 1266 (D. Az. Mar. 3, 2010), where Plaintiff argued that the LLFPA applied to his compensation claim predicated on the denial of a promotion, said claim being pursued under 42 U.S.C. § 1981.

ii. In rejecting the claim, the court made one interesting observation and one interesting holding.

iii. First, the Court observed that the LLFPA arguably might not have any impact on claims under Section 1981, as the LLFPA amended Title VII, the ADEA, the ADA, and the Rehabilitation Act, but not specifically Section 1981. But while the Court suggested that "Congress did not amend § 1981 through the Ledbetter Act," it noted that the courts use Title VII as a guide in resolving Section 1981 claims. At any rate, the Court went on to state that it "need not decide whether the legal principles from the Ledbetter Act apply to Section 1981 compensation discrimination claims, because Plaintiff did not bring one." This issue is, in different clothing, the same issue in *Prairie View A&M Univ. v. Chatha*, 2010 Tex. App. LEXIS 2318 (1st Dist. Ct. App. Houston Apr. 1, 2010), *available at* http://www.1stcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=87650, where Texas courts have read the LLFPA into the state anti-discrimination statute. Further, note that Judge Yvette Kane of the Middle District of Pennsylvania has adopted essentially the same reasoning, reading the LLFPA into the Pennsylvania Human Rights Act. *Summy-Long v. Pa. State Univ.*, 2010 U.S. Dist. LEXIS 27953 (M.D. Pa. Mar. 24, 2010).

iv. The Court in *Ekweani* skirted this issue, and disposed of the LLFPA case by adopting the reasoning of the panel of the D.C. Circuit, Judge Daniel Ginsburg writing, in *Schuler v. PriceWaterhouseCoopers, LLP*, 595 F.3d 370, 375 (D.C. Cir. Feb. 16, 2010), in which it was held that "the decision whether to promote an employee to a higher paying position is not a 'compensation decision or other practice.'" On this issue, the courts remain divided. *See, e.g., Barnabas v. The Board of Tr. of the Univ. of the District of Columbia*, 2010 U.S. Dist. LEXIS 17711 (D.D.C. Mar. 1, 2010) (finding, in light of *Schuler*, a failure to promote to full time professor is not a compensation decision or other practice); *Bush v. Orange County Corrections Dep't*, 597 F. Supp. 3d 1293, 1295 (M.D. Fla. 2009) (holding that while plaintiff's complaint about demotions and pay reductions that occurred sixteen years before EEOC charge was filed would plainly be barred under Supreme Court's Ledbetter decision, "with the passage of the [LLFPA] Plaintiff's Title VII claims [were] no longer administratively barred"); *Rehman v. State Univ. of New York at Stony Brook*, 596 F. Supp. 2d 643, 651 (E.D.N.Y. 2009) (in case involving allegations that defendant refused to propose the plaintiff for appointment to associate of full professor with tenure, court held that although plaintiff filed his EEOC charge on April 13, 2007, under LLFPA, his wage discrimination claims based upon actions occurring on or after April 13, 2005, two years prior to his EEOC charge, were timely, which claims

presumably included the defendant's refusal to consider him for tenure); *Rowland v. Certainteed Corp.*, 2009 U.S. Dist. LEXIS 43706 (E.D. Pa. May 21, 2009) (holding that plaintiff's untimely "failure to promote" claim was not saved by the Act because it was not a discriminatory compensation claim and thus was not within the scope of the Act); *Gentry v. Jackson State Univ.*, 2009 U.S. Dist. LEXIS 35271 (S.D. Miss. April 17, 2009) (holding that a denial of tenure to a university professor qualified as a compensation decision or other practice affecting compensation within the Act, and that the professor's Title VII claim based on that tenure denial was thus timely even though it was filed well after the 180-day deadline under Title VII for timely submission of claims); *Shockley v. Minner*, 2009 U.S. Dist. LEXIS 31289 (D. Del. Mar. 31, 2009) (applying LLFPA to find failure to promote claim timely).

v. Presumably *Ekweani* will now be the subject of an appeal to the 9th Circuit.

g. **Lilly Ledbetter Act Judicially Incorporated into the Texas Commission on Human Rights Act**

a. In *Prairie View A&M University v. Chatha*, 2010 Tex. App. LEXIS 2318 (1st Dist. Ct. App. Houston Apr. 1, 2010), *available at* http://www.1stcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=87650, the Houston Court of Appeals concluded that it would apply the terms of the Lilly Ledbetter Act to a suit under the Texas Human Rights Act.. The plaintiff, Professor Chatha, was promoted to full professor in 2004. On September 25, 2006, she filed an administrative complaint with the EEOC, alleging discrimination. Thereafter, the Texas Workforce Commission – Civil Rights Division issued a right-to-sue letter, and she filed suit in state court, under the Texas Commission on Human Rights Act ("TCHRA"), alleging that she is discriminatorily underpaid.

b. The University claimed that she did not file her administrative complaint on a timely basis, as the alleged adverse action occurred in 2004 when she was promoted to full professor at a lower pay rate, substantially more than 180 days before she filed suit under the Texas statute.

c. Plaintiff argued, in response, that her complaint was timely filed under the Lilly Ledbetter Fair Pay Act, which amended Title VII to allow for claims based on her most recent paycheck at the lower rate. Arguing that the Ledbetter Act is applicable to the Texas statute, Plaintiff contended that her claim was timely and a waiver of the state's immunity was established.

d. Relying on the reasoning of two federal district court decisions (*Klebe v. Univ. of Texas Sys.*, 649 F. Supp. 2d 568, 570-71 (W.D. Tex. 2009) (Magistrate Judge Andrew W. Austin), and *Lohn v. Morgan Stanley D.W., Inc.*, 652 F. Supp. 2d 812, 829 (S.D. Tex. 2009) (District Judge Melinda Harmon)), the court in *Chatha* held that, to achieve the Texas statute's purpose, a Texas state court would apply the

terms of the Lilly Ledbetter Fair Pay Act to a suit under the Texas Commission on Human Rights Act. The TCHRA states that one of its purposes is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments…" Tex. Lab. Code Ann. § 21.001. All three courts rely on that statutory language for the decisions to incorporate the LLFPA into the TCHRA.

III. ***Ricci v. Destefano***

129 S. Ct. 2658; 2009 U.S. LEXIS 4945 (June 29, 2009)

1. **The *Ricci* Opinion**

a. **Summary of the Case**

In March 2004, the City of New Haven, Connecticut faced a difficult choice. In late 2003, the City had just administered a firefighting promotion exam that called for seventeen of nineteen available positions to be filled by whites, despite the fact that more than 42% of test takers were racial minorities. Worse, this racial disparity occurred in the context of the firefighting profession, a line of work historically hostile to nonwhites, and a New Haven fire department in which only 18% of senior officers are black or Hispanic, despite a city population that is approximately 60% black and Hispanic. As a result, the City's legal counsel warned that if it certified the results of the exam, it would face liability under a provision of Title VII of the Civil Rights Act that proscribes employment practices that have a disparate impact on the basis of race.

On the other hand, if the City discarded the results of the exam, the predominately white firefighters who had done well on it might sue under a different provision of Title VII that prohibits employers from engaging in disparate treatment on the basis of race or taking adverse employment actions against a person because of her race. These firefighters would argue that they deserved the promotions because of their hard work to prepare for and succeed on the exam, including, in the case of Frank Ricci, impressive efforts to overcome dyslexia. After hearing from these two competing perspectives, the City decided in March 2004 to set aside the results of the exam, promote no one at that time, and start over again.

After this decision, seventeen white firefighters and one Hispanic firefighter who passed the examination sued the City, its mayor John DeStefano, and others, alleging violations of the disparate-treatment provision of Title VII and the U.S. Constitution's Equal Protection Clause. In September 2006, the district court granted summary judgment for the City. A panel of the Second Circuit then summarily affirmed.

In June 2009, the Supreme Court reversed and held, five to four, that New Haven had violated the disparate-treatment provision of Title VII by discarding the results of the test. The majority established the standard that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." As the Court applied this standard, the City did not have enough evidence to believe it would be liable under the disparate-impact provision if it accepted the results

because, according to the majority, there was strong evidence that the exam was job related and little evidence of equally valid and less discriminatory alternatives.

Luke Appling, *Recent Development:* Ricci v. DeStefano, 45 Harv. C.R.-C.L. L. Rev. 147 (Winter 2010).

b. **Votes & Opinions**

i. 5-4 decision.

ii. Majority opinion written by Justice Kennedy.

iii. 2 concurring opinions, written by Justices Scalia and Alito. A dissenting Opinion written by Justice Ginsburg.

c. **Briefs**

i. For a copy of all of the briefs and other documents in this case, *see*: http://www.scotuswiki.com/index.php?title=Ricci%2C_et_al._v._DeStefano%2C_et_al.

d. **For a Sampling of Secondary Sources Discussing this Opinion, *see***

i. Joseph A. Seiner & Benjamin N. Gutman, *The New Disparate Impact*, 90 B.U. L. Rev. __ (2010) (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564244.

ii. Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After* Ricci *and* PICS, 16 Mich. J. Gender & L. 397 (2010).

iii. Kerri Lynn Stone, Ricci *Glitch? The Unexpected Appearance of Transferred Intent in Title VII*, 55 Loy. L. Rev. 751 (Winter 2009).

iv. Charles A. Sullivan, Ricci v. DeStefano*: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 Nw. U. L. Rev. Colloquy 201 (Nov. 2009).

v. George's Employment Blawg, Ricci v. DeStefano*, a/k/a The New Haven Firefighters' Case, Part I: The Basics: the Facts and Holding of the* Ricci *Case*, *available at* http://www.employmentblawg.com/2009/ricci-v-destefano-aka-the-new-haven-firefighters%E2%80%99-case-part-ithe-basics-the-facts-and-holding-of-the-ricci-case/.

vi. Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 Green Bag 2d 413 (2009), *available at* http://www.greenbag.org/v12n4/v12n4_chemerinsky.pdf.

vii. Richard A. Epstein, Ricci v. DeStefano*, Getting Back to First Principles of Affirmative Action*, June 29, 2009, http://www.forbes.com/2009/06/29/ricci-destefano-new-haven-supreme-court-affirmative-action-opinions-columnists-firefighters.html.

viii. Sheppard Mullin, Ricci v. DeStefano*: Supreme Court Articulates Anti-Discrimination Standard for Employers*, July 10, 2009, http://www.laboremploymentlawblog.com/discrimination-ricci-v-destefano-supreme-court-articulates-antidiscrimination-standard-for-employers.html.

ix. Stanley Fish, *Because of Race:* Ricci v. DeStefano, July 13, 2009, http://fish.blogs.nytimes.com/2009/07/13/because-of-race-ricci-v-destefano/.

x. Nixon Peabody Blog*, Pre-Employment Testing after* Ricci v. DeStefano, July 27, 2009, http://www.nixonpeabody.com/publications_detail3.asp?ID=2857.

2. ***Ricci* Developments**

a. *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469 (2nd Cir. Apr. 27, 2010) (The Court remanded the case to the district court so that it could review its pre-*Ricci* decision in light of *Ricci's* holding that "an employer may not take the greater step of discarding [a] test altogether to achieve a more desirable racial distribution of promotion-eligible candidates-- absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision.").

b. *Brown v. Ala. DOT*, 597 F.3d 1160 (11th Cir. Feb. 23, 2010) (Citing to *Ricci*, the Court held that an employer's invalidating the results of an employment test and making hiring decisions based on "uniformly applied but unofficial licensing requirements" suggested "a substantial measure of pretext" and upheld the jury's verdict in employee's favor).

c. *Bouknight v. District of Columbia*, 680 F. Supp. 2d 96 (D.D.C. Jan. 15, 2010) (The Court cited *Ricci* for the proposition that "[acting from a benign motive] would not diminish [a] defendant's liability under Title VII's disparate treatment provisions").

d. *United States v. City of New York*, 2010 U.S. Dist. LEXIS 2506 (E.D.N.Y. Jan. 12, 2010) (The Court ruled that New York City Fire Department had intentionally discriminated against black and Latino applicants by continuing to use entrance exams the City knew were discriminatory. The Court cited *Ricci* for the proposition that "a disparate treatment claim requires additional proof that the challenged policy was adopted with the intent to discriminate against the protected group" and held that, based on depositions and documentary evidence, the City's continued use of the exam was intended to discriminate against a minority applicants.).

e. *Kubicek v. Westchester County*, 2009 U.S. Dist. LEXIS 117061 (S.D.N.Y. Oct. 8, 2009) (Plaintiff alleged that Defendant County's policy of hiring to reflect "the basic composition of the County's general labor force", in practice, led to intentional discrimination against certain applicants, including Plaintiff, based on their race or age. The Court denied Defendant's motion to dismiss Plaintiff's § 1983 claims citing Justice Scalia's concurrence in *Ricci* for the proposition that "even if the discrimination alleged by Plaintiff is not carried out pursuant to an impermissible quota system and is merely intended to avoid disparate impacts on minority groups, it is not beyond doubt that such a diversity-minded policy would withstand constitutional scrutiny" and held that Plaintiff had "adequately alleged that Defendant's hiring policy was the moving force behind the decisions of individual hiring authorities to discriminate against Plaintiff on the basis of her race and age." The Court specifically noted that the same conclusion might not on a motion for summary judgment.)

f. Al Baker, *Judge Cites Discrimination in N.Y. Fire Dept.*, NYTimes.com, Jan. 14, 2010, *available at* http://www.nytimes.com/2010/01/14/nyregion/14fire.html.

g. New York Employment Law Blog, *Federal Judge Rules that New York Fire Department Discriminates Against African-American and Latino Applicants*, July 30, 2009, *available at* http://www.nyemploymentlawyer.com/2009/07/federal_judge_rules_that_new_y.html.

h. Employment Lawyer Blog, *In Case That Bears Echoes of Ricci V. New Haven, Minority Firefighters in NYC Claim Skills Exams Discriminate*, Post by Charles Joseph, August 16, 2009, *available at* http://www.employment-lawyer-blog.com/2009/08/in-case-that-bears-echoes-of-r.html.

i. Workplace Prof Blog, *A Different Firefighter Disparate Impact Case*, July 22, 2009, *available at* http://lawprofessors.typepad.com/laborprof_blog/2009/07/a-different-firefighter-disparate-impact-case.html.

j. Philip Berkowitz, *Pre-employment testing after Ricci v. DeStefano*, Nixon Peabody Employment Law Alert, July 27, 2009, *available at* http://www.nixonpeabody.com/publications_detail3.asp?ID=2857.

k. The Office of Federal Contract Compliance Programs has published as set of FAQ's offering guidance regarding *Ricci*. They can be found at: http://www.dol.gov/ofccp/regs/compliance/faqs/Ricci_FAQ.htm.

l. Panken, Peter, *Supreme Court Ruling in Ricci v. DeStefano Puts Employers Between a Rock and a Hard Place*, Epstein Becker Green Client Alert, July 1, 2009, *available at* http://www.ebglaw.com/showclientalert.aspx?Show=11203.

m. Foreman, Michael, *White Firefighters Win! Disparate Impact Survives?*, ALI-ABA Coursebook for TSRU02 "Ricci: New Haven Fire Department Race Discrimination Case", July 13, 2009.

n. *Websites Related to the Supreme Court's Employment Law Rulings, 2008-2009 Term*, ALI-ABA Coursebook for TSRU02 "Ricci: New Haven Fire Department Race Discrimination Case", July 13, 2009.

o. **<u>Preliminary Injunction Vacated as Disparate Impact of African Americans of Hiring Practice Benefits Hispanics</u>**

i. In *NAACP v. North Hudson Regional Fire & Rescue*, 2010 U.S. Dist. LEXIS 40067 (D.N.J. Apr. 23, 2010), Judge Debevoise vacated a preliminary injunction which he had issued on February 18, 2009 (*NAACP v. North Hudson Regional Fire & Rescue*, 255 F.R.D. 374 (D.N.J. 2009)), in this disparate impact challenge to the defendant fire department's use of residency requirements for hiring. The defendant fire department, which serves several communities in North Hudson County, New Jersey, requires that job applicants reside in the municipalities of Guttenberg, North Bergen, Union City, Weehocken, or West New York. The plaintiffs, African Americans from Hudson, Essex, and Union Counties, who did not reside in any of the member municipalities, argued that the residency requirement had a disparate impact on African American job applicants. The defendant fire department employed two African Americans, 64 Hispanics, 255 whites, and two individuals identified as being of "other" races. The district court, in its preliminary injunction, ordered that the defendant fire department cease hiring candidates from the existing list and only hire from a list expanded to include residents of Hudson, Essex, and Union counties. The fire department had appealed the issuance of the preliminary injunction, which was entered for the benefit of plaintiffs—African American job applicants. On appeal, Hispanic applicants intervened, arguing that the district court's preliminary injunction disadvantaged them by diluting the likelihood of Hispanics being hired by defendant fire department.

ii. The Third Circuit *sua sponte* remanded (*NAACP v. North Hudson Regional Fire & Rescue*, 2010 U.S. App. LEXIS 4213 (3d Cir. Mar. 1, 2010)) the matter in light of the Supreme Court's decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). On remand, the district court found that "striking down the residency requirement might make the NHRFR [defendant fire department] liable for disparate treatment to the Hispanic intervenors . . ." The district court, on remand, concluded that it was "faced with hiring practices that may cause disparate impact to one minority group [African Americans], but that benefit another minority group [Hispanics]."

iii. In short, the district court found that while the residency requirements disadvantaged African Americans, Hispanic applicants would be disadvantaged by a change in the residency requirements, and taking into account the traditional preliminary injunction factors, the district court concluded that it should vacate the preliminary injunction that it had issued prior to the *Ricci* decision.

IV. **Hostile Work Environment—Single Incident of Harassment**

Can a single incident of harassment satisfy the "sufficiently severe or pervasive" standard (*Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)) required to demonstrate an actionable hostile work environment claim under Title VII and similar statutes?

i. There is no "magic number" that gives rise to an actionable hostile work environment claim. *Harris*, 510 U.S. at 23 ("[W]e can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."). *See also, e.g.*:

   a. *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 400 (5th Cir. 2007) ("Under the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claims as a well as a continuous pattern of much less severe incidents of harassment.").

   b. *Jackson v. County of Racine*, 474 F.3d 493, 499 (7th Cir. 2007) ("It is important to recall that harassing conduct does not need to be both severe *and* pervasive. One instance of conduct that is sufficiently severe may be enough.") (citation omitted); *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003) (noting that the relevant test for harassment is "quality or quantity").

   c. *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) ("[A] sufficiently severe episode may occur as rarely as once, while a relentless pattern of lesser harassment that extends over a long period of time also violates the statute.").

   d. *Bowen v. Missouri Dep't of Soc. Servs.*, 311 F.3d 878, 884 (8th Cir. 2002) ("A claimant need only establish discriminatory conduct which is either pervasive or severe.").

   e. *Smith v. Norwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413 (10th Cir. 1997) ("The [Supreme Court's] test is a disjunctive one, requiring that the harassing conduct be sufficiently pervasive or sufficiently severe . . .").

ii. In fact, courts have found that a single, sufficiently severe "episode" of harassment can create a hostile work environment.

   a. *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000) (finding that a single instance of an "extended barrage of obscene verbal abuse" created a hostile work environment).

b. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998) (finding a one-time event in which a waitress had her hair pulled by a customer, who also grabbed and placed his mouth on her breast, was severe enough to create an actionable hostile work environment).

c. *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998) ("[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment.").

d. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (noting that a "single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment" under Title VII).

e. *Williams v. New York City Housing Auth.*, 154 F. Supp. 2d 820, 825 (S.D.N.Y. 2001) ("Racially motivated physical threats and assaults are the most egregious form of workplace harassment . . . The display of a noose would fall within this category of intimidating conduct.").

f. *Johnson v. Potter*, 177 F. Supp. 2d 961, 965 (D. Minn. 2001) (in finding that the snapping of a bullwhip at the feet of the plaintiff, an African American, created a hostile work environment, the court noted that such an action "raise[s] images so deeply a part of this country's collective consciousness and history, any explanation of how one could infer a racial motive appears quite unnecessary").

g. *Tootle v. Dep't of the Navy*, EEOC No. 07A40127, 106 LRP 8351 (2006) (finding co-worker harassment on a single "noose" incident).

h. *But see, e.g., Hargrette v. RMI Titanium Co.*, 2010 Ohio App. LEXIS 325, at *17 (Ohio Ct. App. Feb. 5, 2010) (neither single "noose incident" nor single use of the "N" word were actionable discriminatory hostile work environment claims).

iii. Further, courts have found that a single, sufficiently severe use of a derogatory word or phrase can create a hostile work environment.

a. *Rodgers v. Western-Southern Life Insurance Co.*, 12 F.3d 668, 671 (7th Cir. 1993) ("Far more than a 'mere offensive utterance,' the word 'ni[**]er' is pure anathema to African-Americans. Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguous racial epithet such as 'ni[**]er' by a supervisor in the presence of his subordinate.") (quoting *Meritor*, 477 U.S. at 67).

b. *Rocha Vigil v. City of Las Cruces*, 119 F.3d 871, 873 n.3 (10th Cir. 1997) (noting that *Harris, supra*, "does not mean that [a] severely degrading, racially derogatory insult of the worst kind escapes actionability under Title VII simply because it is used only occasionally").

c. *Reid v. O'Leary*, 1996 U.S. Dist. LEXIS 10627, at *4 (noting that "it is very possible that the term '[Co[*]n-A[*]s]' is racially derogatory or severe enough, in and of itself, to create a hostile work environment").

d. *Kwiatkowski v. Merrill Lynch*, No. A-2270-06T1 (N.J. Super. Ct. App. Div. Aug. 13, 2008), *opinion available at* http://lawprofessors.typepad.com/laborprof_blog/files/kwiatkowski_v_merrill_lynch.pdf ("[i]n our view, the patent offensiveness of the 'stupid f[*]g' comment renders it quite similar to the [jungle bunny] comment made to the plaintiff in *Taylor [, infra]*. As plaintiff's treating psychiatrist noted, the effect of such a comment was to make him question his identity and his decision to identify himself as a gay man in a straight world. Thus, as in *Taylor [, infra]*, we believe the comment made to plaintiff was the equivalent of a 'receiving a slap in the face" because the injury was 'instantaneous'.").

e. *Taylor v. Metzeger*, 152 N.J. 490 (1998) (finding that the single utterance of the term "jungle bunny" was sufficient to convert plaintiff's work environment into a hostile one).

f. *Gamboa v. U.S. Postal Service*, EEOC Request No. 05890633 (1989) (complainant established a disability harassment claim based upon two derogatory comments to a deaf employee used on one occasion).

g. *See also, e.g.,* Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 452 (1990) ("The experience of being called 'ni[**]er,' 'sp[*]c,' 'J[*]p,' or 'k[*]ke' is like receiving a slap in the face. The injury is instantaneous."); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L.Rev. 2320, 2338 (1989) ("However irrational racist speech may be, it hits right at the emotional place where we feel the most pain.").

h. *But see, e.g., Butler v. Alabama Dep't of Transp.*, 536 F.3d 1209, 1214 (11th Cir. 2008) ("It is objectively unreasonable to believe that the use of racially discriminatory language on one occasion by one co-worker away from the workplace is enough to permeate the work place with 'discriminatory intimidation, ridicule, and insult' and to 'alter the conditions of the victim's employment and create an abusive working environment'.") (quoting *Rojas v. Florida*, 285 F.3d 1339 (11th Cir. 2002)).

i. *Jordan v. Alternative Resources Corp.*, 467 F.3d 378, 379 (4th Cir. 2006) (in dicta, stating, "[w]hile the single racist remark by the fellow employee was an ugly one, not even [the plaintiff] alleged that it had created a hostile work environment as defined by Title VII cases").

iv. Also worth keeping an eye on is the fact that, due to recent publicity garnered by high-level federal government officials' and public personalities' derogatory use of the "R"

word (“re[*]ard”), use of the "R" word may be on the cusp of attaining “one strike, you’re out” status in the harassment context, similar to the “F” and “N” words. *See, e.g.*:

a. Lauren Beckham Falcone, *Rahm Emanuel Deserves a Liberal Scolding*, BostonHerald.com, Feb. 4, 2010, *available at* http://bostonherald.com/entertainment/lifestyle/view.bg?articleid=1230450&chkEm=1 (commenting on White House Chief of Staff Rahm Emanuel’s use of “fu[**]ing re[*]arded” during a White House strategy meeting, the author notes, “the use of the R-word is not an innocuous euphemism. It’s as hateful and belittling and bullying as racial slurs and homophobic epithets and sexual harassment.”).

b. *See also* Jake Tapper and Huma Kahn, *Obama Apologizes for Calling His Bad Bowling “Like the Special Olympics”*, ABCNews.com, Mar. 20, 2009, *available at* http://abcnews.go.com/Politics/story?id=7129997&page=1 (discussing President Barack Obama likening his self-proclaimed sub-par bowling ability to that of a participant in the Special Olympics).

V. **Gender Stereotyping**

Title VII prohibits discrimination on the basis of an individual's race, color, religion, sex, and national origin. 42 U.S.C.S. § 2000e-2(a). Title VII does not prohibit discrimination based on sexual orientation. *See, e.g., Bibby v. Philadelphia Coca Cola Bottling Co*., 260 F.3d 257,261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

However, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court permitted a claim for so-called "gender stereotyping," where a female, who was a homosexual, was passed over for partnership for failing to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry," and otherwise not conform to feminine stereotypes.

To bring a gender stereotyping claim on behalf of a lesbian, gay, bisexual, or transgendered (LGBT) client, plaintiff's counsel must show that her client was discriminated against for not acting like a stereotypical heterosexual, without arguing that her client was discriminated for not being heterosexual. Title VII plaintiffs regularly lose these gender stereotyping claims when attempting to "'bootstrap' protection for sexual orientation into Title VII by framing discrimination targeted at [] sexual orientation as a claim of discrimination based on [] gender-nonconformity" (Zachary A. Kramer, *Heterosexuality and Title VII*, 103 Nw. U. L. Rev. 205, 207 (2009)).

There follows cases in which (1) the plaintiff successfully argued a gender stereotyping claim, (2) the court found that the plaintiff's claim amounted to a claim of non-prohibited discrimination based upon sexual orientation, and (3) secondary sources discussing gender stereotyping:

1. **Successful Claims of Gender Stereotyping**

   a. *Lewis v. Heartland Inns*, 591 F.3d 1033 (8th Cir. 2010) (where plaintiff presented evidence that her second-level supervisor commented to plaintiff's on-site supervisor that the employer wanted front desk workers to be "pretty" and that plaintiff did not have the "Midwestern girl look"; finding that the plaintiff had presented enough evidence to suggest that she was fired for not conforming to sex stereotypes in her appearance,).

   b. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (where the record reflected evidence that the harassment of the plaintiff was due to both the plaintiff's nonconformity to male gender stereotypes and the plaintiff's sexual orientation, the court noted that both explanations for the plaintiff's treatment were plausible; holding that the case presented a question of fact for the jury, which was inappropriate for resolution on summary judgment).

c. *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) (finding that the plaintiff applicant, a male-to-female transsexual, stated a Title VII claim based on sex stereotyping because, "when she presented herself as a woman, she did not conform to [] sex stereotypical notions about women's appearance and behavior").

d. *Smith v. City of Salem, Ohio*, 369 F.3d 912 (6th Cir. 2004) (where a transgendered fire fighter who was born male and came to identify as a woman was told he was not "masculine enough"; holding that transsexuals are protected from discrimination by Title VII; the court said, "employers who discriminate against men because they … wear dresses and makeup, or otherwise act femininely, are … engaging in sex discrimination" in violation of Title VII).

e. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (plaintiff stated a Title VII claim where he was harassed "for walking and carrying his tray 'like a woman'—*i.e.*, for having feminine mannerisms").

f. *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) ("Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.").

g. *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 261, n. 4 (1st Cir. 1999) (dicta recognizes that co-worker harassment violates Title VII if based on victim's failure to meet stereotyped expectation of masculinity).

h. *Doe v. City of Belleville,* 119 F.3d 563, 580-83 (7th Cir. 1997) (male employee harassed because he was perceived as effeminate stated a title VII claim; opinion later vacated and case settled, but holding continues to be followed by district courts within that circuit).

i. *Rhea v. Dollar Tree Stores, Inc*., 395 F.Supp.2d 696 (W.D. Tenn. 2005) (two male employees stated valid Title VII claims for sex discrimination where they alleged a store manager made derogatory statements regarding their sex and gender non-conforming behavior and appearance, and subjected them to discrimination for their failure to conform to male sex stereotypes).

j. *Centola v. Potter*, 183 F. Supp.2d 403 (D. Mass. 2002) (employer violates Title VII by failing to stop co-worker harassment of plaintiff based on his failure to conform to male sexual stereotypes).

k. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (finding that a jury could conclude that the plaintiff was harassed because she did not conform to the harasser's stereotype of how a female should behave).

2. **Sexual Orientation "Bootstrapping" Cases**

a. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (noting that cases interpreting *Price Waterhouse* have interpreted it as applying where gender non-conformance is demonstrable through the plaintiff's appearance or behavior; holding that

the gender non-conforming behavior which the plaintiff claimed supported his theory of sex stereotyping was not behavior observed at work or affecting his job performance but rather harassment "more properly viewed as [] based on [the plaintiff's] perceived homosexuality").

b. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062–65 (7th Cir. 2003) (noting that it can be difficult to distinguish between gender-nonconformity and hostility to homosexuality and finding that "[t]o suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy").

c. *King v. Super Serv., Inc.*, 68 Fed. Appx. 659, 660–64 (6th Cir. 2003) (the plaintiff might have proven discrimination on the basis of sex by showing that "other male employees were harassed in such sex-specific and derogatory terms by another man as to make it clear that the harasser was motivated by general hostility to the presence of men in the workplace"; the plaintiff, however, made no such showing).

d. *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (where the plaintiff was assaulted with homophobic comments, holding that the plaintiff was "discriminated against not because he was a man, but because of his sexual orientation. . . a claim [] non-cognizable under Title VII").

e. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000) (comments directed at the plaintiff, such as "b[(*)]tch," "gay," and "f[(*)]g," "confirms that some of [the plaintiff's] co-workers were hostile to his sexual orientation, and not his sex").

f. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259–61 (1st Cir. 1999) ("[A] man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity" but denying relief because that theory wasn't asserted below).

g. *Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434, 447 (N.D.N.Y. 2002) (where the plaintiff endured offensive and degrading sexual comments, notes, and pictures, the court found that the plaintiff failed to demonstrate that "the harassment [] was, in fact, based on his non-conformity with gender norms instead of his orientation").

h. *Ianetti v. Putnam Invs., Inc.*, 183 F. Supp. 2d 415 (D. Mass. 2002) (summary judgment for employer-defendant on discrimination and harassment claims where plaintiff-employee was twice called a "fa[(**)]ot").

3. **<u>Secondary Sources</u>**

a. For a listing of states that have state-wide laws prohibiting sexual orientation and/or gender identity discrimination, *see* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09_color.pdf (last updated July 1, 2009).

b. Zachary A. Kramer, *Heterosexuality and Title VII*, 103 Nw. U. L. Rev. 205 (2009).

c. Eugene Borgida, Ph.D., Corrie Hunt, and Anita Kim, *On the Use of Gender Stereotyping Research in Sex Discrimination Litigation*, 13 J. Law and Policy 613 (2005) ("Once an individual is categorized as belonging to a gender, the stereotypes of that gender may quickly come to the perceiver's mind, a process known as stereotype activation. Once stereotypes are activated, they are then available for the perceiver to apply in her thinking about and evaluation of the target person.").

d. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1738 (1998) ("Title VII's traditional focus has been to prohibit employer policies and practices that treat workers differently based on gender-based expectations of who men and women are supposed to be.").

e. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1 (1995) ("We have to come to realize that the categories of sex, gender, and orientation do not always come together in neat packages. Not only are they not as binary as we might once have though, they can in fact be disaggregated.").

VI. **Employer Liability for Third-Party Harassment**

a. Case law holds that an employer is legally responsible for harassment of its employees by a non-employee, if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective or preventive action. *See, e.g.,*:

b. *Beckford v. Dep't of Corr., State of Florida*, 2010 U.S. App. LEXIS 9452, at *19 (11th Cir. May 7, 2010) (in finding that prisons may be held liable under Title VII for harassment by inmates when such conduct creates a hostile work environment, the court further noted that "[p]risons cannot, for example, eject unruly inmates like businesses can eject rude customers").

c. *Erickson v. Wisconsin Dep't of Corr.*, 465 F.3d 600 (7th Cir. 2006) ("[F]or purposes of Title VII hostile work environment liability based on negligence, whether the potential harasser is an employee, independent contractor, or even a customer is irrelevant: The genesis of inequality matters not; what *does* matter is how the employer handles the problem. This is because employers have an arsenal of incentives and sanctions . . . that can be applied to affect conduct that is causing the problem.") (quoting *Dunn v. Washington County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005)) (internal quotations omitted) (emphasis in original).

d. *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005) ("An employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it.").

e. *Weston v. Pennsylvania*, 251 F.3d 420, 427 (3d Cir. 2001) ("Prison liability for inmate conduct may indeed apply when, for example, the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior.").

f. *Slayton v. Ohio Dep't of Youth Servs.*, 206 F.3d 669, 677 (6th Cir. 2000) ("[A] general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior").

g. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073-75 (10th Cir. 1998) (finding a one-time event in which a waitress had her hair pulled by a customer, who also grabbed and placed his mouth on her breast was severe enough to create an actionable hostile work environment).

h. *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854 (1st Cir. 1998) (finding that under Title VII "employers can be liable for a customer's unwanted sexual advances, if the employer ratifies or acquiesces in the customer's demands").

i. *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1108-1111 (8th Cir. 1997) (operator of residential facility for developmentally disabled individuals may be held liable for failure to respond appropriately to sexual harassment of caregivers by a mentally incapacitated resident).

j. *Folkerson v. Circus Circus Enter., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997) (employer may be held liable for sexual harassment of employee by casino patron where employer ratifies or acquiesces in the conduct).

k. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1992) ("[T]he environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers in the workplace.").

l. *Lopes v. Caffe Centrale LLC*, 548 F. Supp. 2d 47, 53 (S.D.N.Y. 2008) ("An employer can be held liable for the harassing acts of non-employees if a plaintiff adduces evidence tending to show that the employer either failed to provide a reasonable procedure or that it knew of the harassment by a non-employee, such as a customer and failed to take any action.") (internal quotations omitted).

m. *Martin v. Howard Univ.*, 1999 U.S. Dist. LEXIS 19516, at *7 (D.D.C. Dec. 16, 1999) (in evaluating, *inter alia*, a claim of non-employee-created hostile work environment in violation of Title VII and the D.C. Human Rights Act, noting that "[t]o prevail against an employer in these cases, a plaintiff must show that the employer knew or should have known of the existence of a hostile work environment and failed to take proper remedial action" (citing;); and holding that the sufficiency of the employer's response to the non-employee's harassment was a factual question for the jury).

n. *McGuire v. Virginia*, 988 F. Supp. 980, 989 (W.D. Va. 1997) ("[E]mployer liability for a hostile work environment has been extended to situations in which the harassing conduct comes from nonemployees on the employer's premises.").

o. *Hanlon v. Chambers*, 464 S.E.2d 741, 750 (W. Va. 1995) ("A hostile work environment can be just as oppressive when it is created by co-workers, subordinates, or customers as when it is caused by a superior.").

p. *Otis v. Wyse*, 1994 U.S. Dist. LEXIS 15172, at *7 (D. Kan. Aug. 24, 1994) (finding that in determining whether an employer should be responsible for a hostile work environment caused by a non-employee, courts consider the extent of the employer's control over the harasser and any other legal responsibility the employer may have with respect to the conduct of the non-employees).

q. *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992) (holding that whether two incidents of verbal abuse—"great t[*]ts" and "great legs"—and three incidents of staring by non-employees constituted sexual harassment of plaintiff, was a triable issue of fact).

r. *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369 (W.D.N.C. 1988) (employer liable where he failed to take prompt and adequate remedial action against sexual harassment, including harassment by customer).

s. *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) ("Although section 703(a) [of Title VII of the Civil Rights Act of 1964] makes unlawful only discriminatory employment practices of an 'employer,' this term has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an employee's compensation of terms, conditions, or privileges of employment.").

t. *See also* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(e) (2010) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.").

u. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1372-73 (2009) (collecting cases for the proposition that "[t]hird-party harasser cases apply the same negligence rule as coworker cases: The employer is legally responsible if it knew or should have known about the harassment and failed to take corrective or preventive action").[2]

1. <u>Employees Harassed by Third-Parties: Male Prisoners Harassing Female Correctional Employees</u>

a. The Eleventh Circuit, Judge Pryor writing for the unanimous panel, recognized that a correctional facility is responsible under Title VII for sex harassment of female employees by prisoners. In *Beckford v. Dep't of Corrections, State of Florida*, 2010 U.S. App. LEXIS 9452 (11th Cir. May 7, 2010), the court finds that it is black letter law that employers may be held liable under Title VII for harassment by third-parties when the conduct of the third-parties creates a hostile work environment.

b. Further, the court refuses "the invitation of the Department to treat inmates differently from other third-party harassers and prisons differently from other employers under Title VII." In refusing to exclude prisons from the line of cases holding an employer

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[2] Judge Easterbrook's "managing the macaw" analogy further illustrates the point:

> Indeed, it makes no difference whether the actor is human. Suppose a [hospital] patient kept a macaw in his room, that the bird bit and scratched women but not men, and that the Hospital did nothing. The Hospital would be responsible for the decision to expose women to the working conditions affected by the macaw, even though the bird (a) was not an employee, and (b) could not be controlled by reasoning or sanctions. It would be the Hospital's responsibility to protect its female employees by excluding the offending bird from its premises.

Dunn v. Wash. County Hosp., 429 F.3d 689, 691 (7th Cir. 2005).

responsible for third-party harassment, the court states: "Although some harassment by inmates cannot be reasonably avoided, the Department, on the other hand, cannot refuse to adopt reasonable measures to curtail harassment by inmates."

c. Additionally, the court makes short shrift of the Department's arguments that the harassment of employees by inmates was not based on sex. For example, the court, aligning itself with the Ninth Circuit's holding in *Freitag v. Ayers*, 468 F.3d 528, 540 (9th Cir. 2006), that "exhibitionistic masturbation, especially gunning, is sex based and highly offensive conduct."

d. Finally, the court finds that because the employees in the instant case are complaining of harassment by someone other than a supervisor, the *Faragher* affirmative defense is not available to the Department, relying on the holding in *Erickson v. Wisconsin Dep't of Corrections*, 469 F.3d 600, 604 (7th Cir. 2006) ("One standard exists for harassment by supervisors and another for harassment by co-workers" and third-parties).

VII. **<u>Other Discrimination & Harassment Developments</u>**

1. **<u>Rehabilitation Act—Does Section 504's Sole Causation Standard Apply to Section 501 Claims?</u>**

a. Recently, the Fourth Circuit in *Dank v. Shinseki*, 2010 U.S. App. LEXIS 7824 (4th Cir. Apr. 15, 2010), recognizing that there is a split in the circuits on this issue and no definitive decision from that circuit, found that it was not necessary for its decision in *Dank* to reach the issue. Section 504 of the Rehab Act states specifically that the employer's action must be "solely by reason of" the illicit disability animus; whereas Section 501 of the same Act is silent in that regard. The government argued in *Dank* that this issue had already been resolved in its favor by the Fourth Circuit, relying upon *Spencer v. Early*, 278 F. App'x 254 (4th Cir. 2008) and *Edmonson v. Potter*, 118 F. App'x 726 (4th Cir. 2004). The *Dank* panel held that neither of those cases specified the standard for Section 501 nor addressed the issue of whether it is a different standard from that applicable to Section 504.

b. Judge Duncan, writing for the unanimous panel in *Dank*, noted that the Fifth Circuit is the only circuit that has squarely addressed this issue, holding in Pinkerton v. Spellings, 529 F.3d 513, 515-19 (5th Cir. 2008), that Section 501 requires only that disability be a motivating factor behind the employment action. Further, Judge Duncan notes the decisions of the D.C. Circuit (*Adams v. Rice*, 531 F.3d 936, 944 (D.C. Cir. 2008)) and the Eleventh Circuit (*Nadler v. Harvey*, 2007 WL 2404705, at *4 (11th Cir. Aug. 24, 2007)), where those courts applied the "solely by reason of" standard to claims raised under Section 501 and to Rehabilitation Act claims in general.

c. So, the issue remains largely unsettled, and now clearly is an unresolved question in the Fourth Circuit.

2. **<u>Pattern or Practice Claims</u>**

a. There are several open questions regarding pattern or practice claims. One is whether an individual can maintain a private, non-class action pattern or practice claim. Some courts have suggested that they cannot. See, e.g., *U.S. v. City of New York*, 631 F. Supp. 2d 419, 427 (S.D.N.Y. 2009) ("Courts have held that an individual cannot maintain a private, non-class, pattern-or-practice claim."); *Tucker v. Gonzales*, No. 03 Civ. 3106, 2005 U.S. Dist. LEXIS 21616, 2005 WL 2385844, at *5 (S.D.N.Y. Sept. 27, 2005) (collecting cases holding that pattern or practice claims are limited to class actions); see also *Blake v. Bronx Lebanon Hosp.*, No. 02 Civ. 3827, 2003 U.S. Dist. LEXIS 13857, 2003 WL 21910867, at *5 (S.D.N.Y. Aug. 11, 2003) (doubting the propriety of a pattern or practice claim in a non-class action complaint).

3. **Does Disparate Impact Analysis Apply to Federal Employee Discrimination Cases?**

   a. Judge Urbina in *Aliotta v. Bair*, 576 F. Supp. 2d 113 (D.D.C. Sep. 18, 2008) recognized that it is an open question whether whether ADEA disparate impact cases are legally cognizable against federal employers. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *Koger v. Reno*, 321 U.S. App. D.C. 182, 98 F.3d 631, 639 n.2 (D.C. Cir. 1996) (declining to decide whether such a claim was cognizable because the plaintiff failed to establish a prima facie case).

   b. The court in *Smith v. City of Jackson*, 544 U.S. 228 (2005), applied the Title VII interpretation to 29 U.S.C. § 623, a section that does not apply to federal employers, and there is "good reason to doubt that [federal employee] plaintiffs have a cognizable ADEA disparate impact claim." *Breen v. Mineta*, 2005 U.S. Dist. LEXIS 35416, 2005 WL 3276163, at *7 (D.D.C. Sept. 30, 2005). Members of the D.C. District Court remain divided on the issue.

   c. In *Breen v. Peters*, the court concluded that 29 U.S.C. § 633a, the section prohibiting age discrimination in federal employment, did not preserve sovereign immunity against disparate impact claims because the text of the section prohibits discrimination, not intentional discrimination. 474 F. Supp. 2d 1, 6 (D.D.C. 2005).

   d. "The text of § 633a does not explicitly or implicitly require a plaintiff to prove that the federal employer was motivated by animus or intended to discriminate in violation of the law. In short, the plain language of § 633a does not support the distinction between disparate treatment and disparate impact." *Id.*

   e. In contrast, in *Silver v. Leavitt*, the court relied on "the significant question of sovereign immunity, and the Supreme Court's acknowledgment that the nature of the ADEA differs markedly from that of Title VII" to conclude that a disparate impact claim was not legally cognizable against a federal employer. 2006 U.S. Dist. LEXIS 12949, 2006 WL 626928, at * 13 (D.D.C. Mar. 13, 2006).

4. **Headscarves**

   a. The Wall Street Journal had an interesting article on April 5, 2010, discussing President Sarkozy's push in France to enact a ban on the Muslim veil. Peter Berkowitz, *Can Sarkozy Justify Banning the Veil?*, Wall Street Journal, Apr. 5, 2010, *available at* http://online.wsj.com/article/SB10001424052702304252704575155821111511594.html.

   b. Interestingly, several states, including Oklahoma (H.B. 1645) and Minnesota (N.F. No. 989), have defended rules or proposed laws that would require individuals to

remove religious head coverings as a condition to receiving a driver's license photograph.

c. In response, groups have proposed an amendment to the PASS ID Act (S. 1261) that would explicitly protect the "right" of individuals to wear religious head coverings without removal or modification in a driver's license and other identification photographs.

d. The version of the PASS ID Act recently reported from the Senate's Committee on Homeland Security and Governmental Affairs provides that "religious headgear is acceptable as long as the face is not obscured." S. Rep. No. 111-104 (2009), *available at* http://0-www.gpo.gov.library.colby.edu/fdsys/pkg/CRPT-111srpt104/html/CRPT-111srpt104.htm. For more information on the PASS ID Act, including news and blog coverage, *see* http://www.opencongress.org/bill/111-s1261/show.

5. **Denial of Preferred Office Space May be a Materially Adverse Action for a *Burlington Northern* Retaliation Claim**

a. In *Lockridge v. University of Southern Maine*, 2010 U.S. App. LEXIS 5018 (1st Cir., March 10, 2010), the First Circuit stated that the denial of the employee's request for office space may be an materially adverse action for purposes of a Title VII retaliation claim after *Burlington Northern*.

6. **Standing to Complain of Harassment**

a. In *Dees v. Hyundai Motor Manufacturing Alabama, LLC*, 2010 U.S. App. LEXIS 4064 (11th Cir. Feb. 26, 2010), a panel of the Eleventh Circuit held that a former employee lacked standing to sue regarding harassment. Here is what the court said:

"Assuming without deciding that harassment or hostile work environment is a cognizable claim under USERRA, Dees lacks standing to bring such a claim. Dees admits that he has not suffered any lost wages or employment benefits resulting from the alleged harassment. Further, an injunction requiring HMMA to comply with USERRA would not benefit Dees as he is no longer an HMMA employee. While Dees relies on non-binding cases to establish that he can be granted "equitable relief," he only specifically mentions attorneys' fees. However, the statute provides for three specific remedies for USERRA violations and does not provide for other "equitable relief" or attorneys' fees. 38 U.S.C. § 4323(d)(1)(A)-(C). As such, Dees lacks standing to bring a USERRA harassment claim because he does not allege that he is entitled to any of the relief provided by USERRA. Accordingly, we affirm the district court's grant of HMMA's motion for summary judgment."

7. **How Much Is A Kiss Worth?**

a. In *King v. McMillan*, 2010 U.S. App. LEXIS 2308 (4th Cir. 2010), Judge Michael, writing for the panel, upheld a jury verdict of $50,000 in compensatory damages (remitted to that dollar number from the jury's verdict of $175,000) and $100,000 in punitive damages in a battery claim where a former female deputy sheriff sued the sheriff for forcing her to kiss him. The court describes the incident as follows:

> "At the end of the meeting [wherein the sheriff urged the plaintiff not to quit] McMillan [the then sheriff] asked King [the female deputy sheriff] for a hug, grabbed her around her waist, and pulled her down to sit on his lap. McMillan told King that he would not let her go until she gave him a kiss. King tried to give him a peck on the cheek, but McMillan insisted upon a 'real kiss'... After McMillan forced a full kiss on King's lips, she ran out of the room into a restroom, where she cried for about ten minutes. King submitted a letter of resignation several days later."

b. The Fourth Circuit declined to disturb the judgment for $50,000 in compensatory damages as well as the $100,000 judgment for punitive damages.

c. Of further interest is the holding by the court allowing the testimony of other women describing their own experiences of harassment by the then sheriff. The court held that such testimony was relevant on the question of whether the sheriff's conduct was because of the deputy's sex, and whether the unwelcome conduct was sufficiently severe or pervasive to create a hostile work environment. Further, interestingly, the court approved the lower court's instruction to the jury that the testimony of the other women was only relevant to the "severe or pervasive" element if the deputy "was aware of [the harassment described in the testimony] during the course of her employment." Further, the court approve the lower court's instruction to the jury that the incidents of harassment about which the deputy was unaware of during the course of her employment, could nonetheless be considered by the jury as relevant to the element of whether the sheriff's conduct toward the deputy was because of her sex.

d. Finally, the court rejected the defense of the new sheriff, Sheriff Johnson, a woman, who contended that the district court erred in substituting her as a defendant in place of the former sheriff McMillan in plaintiff's Title VII claim which had been filed against the sheriff in his official capacity. Sheriff Johnson interposed state law provisions which the court rejected on Supremacy Clause grounds, finding that to accept the new sheriff's argument "would permit states to draft laws defining state and local offices in such a way as to limit the liability of their occupants under federal law."

e. The Supreme Court is currently considering a variation on this argument involving the intersection of Federal Civil Rule 23 and a state substantive statute sought to be enforced in federal court under diversity jurisdiction, a state statute that barred class action treatment of claims under it. *Shady Grove Orthopedic Associates, P.A. v.*

Allstate Insurance Co., 549 F.3d 137 (2nd Cir. 2008), cert. granted, 2009 U.S. LEXIS 3340 (May 4, 2009), Docket No. 08-1008.