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**Employment Discrimination Law and
its Application to Common Workplace
Issues – Title VII, ADEA, ADA, and
Harassment**

**Delner Franklin-Thomas
U.S. Equal Employment Opportunity Commission**

**Justin M. Swartz
Outten and Golden, LLP**

**Charles A. Powell IV
Baker Donelson Bearman Caldwell & Berkowitz, P.C.**

Table of Contents

INTRODUCTION1

TITLE VII OF THE CIVIL RIGHTS ACT, 42 U.S.C. §§ 2000E ET SEQ.2

SECTION 1981, 42 U.S.C §§ 1981-1988.....14

OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA).....18

AMERICANS WITH DISABILITIES ACT OF 1990 (“ADA”).....25

THE EQUAL PAY ACT OF 1963 (“EPA”).....32

RETALIATION.....34

HARASSMENT.....43

EEOC PROCEDURES.....47

Introduction

Today's workplace is a complex environment. A multitude of federal, state, and local laws touch upon virtually every conceivable aspect of the employee/employer relationship. Daily, these issues present workplace challenges and opportunities involving, among other issues, hiring, discharge, workplace misconduct, and termination. How these situations are resolved often is the difference between a productive working relationship and litigation. This paper will provide an overview of the requirements of Title VII, the ADEA, the ADA, and harassment. In our presentation, our goal is to apply these legal standards to common workplace issues and provide practical advice for employers and employees to address and hopefully resolve these issues.¹

¹ This paper is based, in part, on the EEO Basics Program materials developed by the ABA Section of Labor and Employment Law's Equal Employment Opportunity Committee. Those materials are the collaborative effort of Tarik Ajami, Elizabeth Alexander, Lisa Bornstein, David Cook, Barbara D'Aquila, Elaine Koch, and Charles A. Powell IV. In addition, we would like to thank Wayne Outten, Adam Klein, Renike Moore, Scott Moss, Tara Lai Quinlan, Anjana Samant, and Catherine Long for their contributions to this paper.

**Title VII of the Civil Rights Act,
42 U.S.C. §§ 2000e et seq.**

A. Who is covered under Title VII?

The following entities are covered under 42 U.S.C. § 2000e:

1. Employers and their agents that “affect commerce” and have “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[.]”² The definition includes American employers (including foreign corporations controlled by American employers) outside U.S. territorial jurisdiction, with respect to treatment of U.S. citizens, unless otherwise required by host country’s law.³
2. State and local government employers.
3. The federal government’s executive branch and units of judiciary and legislature subject to competitive civil service and Congressional entities.⁴
4. Employment agencies and their agents (“any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer”).
5. Labor organizations (“engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization”).⁵

² Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202 (1997) (all employees on employer's payroll count toward 15-employee threshold); EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 712 (7th Cir. 2002) (same).

³ 42 U.S.C. §2000e(f); §2000e-1(b)(c).

⁴ Protections of Title VII and certain other worker protection laws were extended to employees of the House, Senate, Capitol Police, Congressional Budget Office, inter alia, by the Congressional Accountability Act (“CAA”), Pub. L. 104-1 (1995), 2 U.S.C. §1301 et seq.

⁵ Pursuant to 42 U.S.C. § 2000e(e),

- [a] labor organization shall be deemed to be engaged in an industry affecting commerce if
- (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or
 - (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is
 - (A) twenty-five or more during the first year after March 24, 1972, or
 - (B) fifteen or more thereafter, and such labor organization—

6. Training programs (“joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training”).

The definition of employer excludes:⁶

1. A bona fide membership club (“(other than a labor organization) which is exempt from taxation under section 501 (c) of title 26”).
2. Indian tribes.
3. The United States and wholly owned corporations.
4. “Any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5)[.]”
5. Religious organizations (“with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities”). See, e.g., Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 623 (6th Cir. 2000) (acknowledging Congress’ “recognition of the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions”); Killinger v. Samford Univ., 113 F.3d 196, 198 (11th Cir. 1997) (finding religious educational institution exempt); Little v. Wuerl, 929 F.2d 944, 945 (3d Cir. 1991) (recognizing that Congress “intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's religious activities.”).

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

⁶ 42 U.S.C. § 2000e-1(a).

B. What classes are protected?

The following classes are protected under 42 U.S.C. § 2000e-2:

1. Race.
2. Color.
3. Religion.
4. Sex (which includes sexual harassment⁷ and discrimination based on pregnancy, childbirth or related medical conditions.⁸).
5. National origin.

C. What conduct does Title VII prohibit?

Title VII's employment protections cover the following types of conduct under 42 U.S.C. § 2000e-2:

1. For an employer, it is unlawful to discriminate based on a protected class in matters involving:
 - a) hiring;
 - b) discharge;
 - c) compensation; and
 - d) terms, conditions, and privileges of employment.

It is also unlawful for the employer to “limit, segregate, or classify his [her] employees or applicants in any way which would deprive or tend to deprive any individual of opportunities or which would otherwise affect his [her] status as an employee” because of membership in a protected class. See, e.g., Phillips v. Cohen, 400 F.3d 388, 397 (6th Cir. 2005); Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 298 (7th Cir. 2000).

2. For an employment agency, it is unlawful to “fail or refuse to refer” a person for employment or “otherwise discriminate” against an individual because of his/her protected class. It is also unlawful to classify or refer an individual for

⁷ See Chapter on Sexual Harassment.

⁸ Title VII was amended in 1978 to prohibit discrimination based on pregnancy, childbirth, and related medical conditions. 42 U.S.C. §2000e(k). This statutory provision is referred to as the Pregnancy Discrimination Act (“PDA”).

employment on the basis of his/her protected class. See, e.g., Greenlees v. Eidenmuller Enters., 32 F.3d 197, 198 (5th Cir. 1994); Fair Employment Council v. BMC Mktg. Corp., 28 F.3d 1268, 1272 (D.C. Cir. 1994).

3. For a labor organization, it is unlawful to:
 - a) “exclude or expel from its membership, or otherwise discriminate” against an individual because of his/her protected class;
 - b) “limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual’s” membership in a protected class;
 - c) “cause or attempt to cause an employer to” unlawfully discriminate. See, e.g., Thorn v. Amalgamated Transit Union, 305 F.3d 826, 832 (8th Cir. 2002); Sears v. Atchison, T. & S. F. R. Co., 645 F.2d 1365, 1374 (10th Cir. 1981).
4. For any training program (of “any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining,”) it is unlawful to “discriminate against any individual because of his [her] race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.”

Note: Under 42 U.S.C. § 2000e-2(f), it is not unlawful to take action because of membership in a Communist-based organization. There is also a national security exception under 42 U.S.C. § 2000e-2(g).

Note: Under 42 U.S.C. § 2000e-2(h), among other things, it is not unlawful to take different action “pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate” based on a protected class. Under the Equal Protection Act, it unlawful to pay members of the opposite sex differently for “equal work . . . which requires equal skill, effort, and responsibility, and which are performed under similar working conditions” unless one of the following exceptions applies: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” 29 U.S.C. § 206; see, e.g., Lavin-Mceleney v. Marist College, 239 F.3d 476, 483 (2d Cir. 2001) (“The Equal Pay Act and Title VII must be construed in harmony, particularly where claims made under the two statutes arise out of the same discriminatory pay policies . . . A key difference between them, of course, is that a Title VII disparate treatment claim requires a showing of discriminatory intent, while an Equal Pay Act claim

does not.”); Peters v. Shreveport, 818 F.2d 1148, 1153 (5th Cir. 1987) ([Under the EPA] “[a] showing of ‘equal work’ requires only that the plaintiff prove that the ‘skill, effort and responsibility’ required in the performance of the jobs compared are substantially equal . . . Unlike the showing required under Title VII’s disparate treatment theory, proof of discriminatory intent is not required to establish a prima facie case under the Equal Pay Act.”).

Note: Under 42 U.S.C. § 2000e-2(i), the discrimination provisions do not apply “to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.”

D. What is the “bona fide occupational qualification” exception?

Under 42 U.S.C. § 2000e-2(e)(1), it is generally not an “unlawful employment practice” for an employer, an employment agency, a labor organization, or a training program to base an employment decision on an individual’s protected class “where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise[.]” See e.g. Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132 (3d Cir. 1996) (finding that the BFOQ defense is narrowly interpreted, and is a permissible defense “only if those aspects of a job that allegedly require discrimination fall within the ‘essence’ of the particular business,” or, alternatively, where the employer can show that “the essence of the business operation would be undermined if the business eliminated its discriminatory policy”); Reed v. County of Casey, 184 F.3d 597, 599 (6th Cir. 1999) (same); Knight v. Nassau County Civil Service Com., 649 F.2d 157, 162 (2d Cir. 1981) (recognizing the BFOQ exception, but noting that Congress specifically excluded race from the exception).

Under 42 U.S.C. § § 2000e-2(e)(2), a similar “qualification” exception exists for schools, colleges, and other educational institutions as it relates to religion.

E. What theories are used to prove Title VII discrimination?

There are four basic theories used to prove Title VII discrimination: 1) disparate treatment; 2) policies or practices that presently perpetuate the past effects of discrimination; 3) disparate impact; and 4) failure to make a religious accommodation.⁹ The two most common theories are discussed here.

F. What is disparate treatment and how do you prove it in an individual case?

Disparate treatment is the different (and typically less favorable) treatment of an individual because of his/her protected class. Teamsters v. U.S., 431 U.S. 324, 335 n.1

⁹ See Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law Second Edition and Updates, Third Edition*, Ch. 1, p. 4 (BNA 1997).

(citation omitted) (1977). The key issue is whether the employer's actions were motivated by discrimination. The plaintiff employee may prove the employer's discriminatory intent by direct evidence or by circumstantial evidence.

Direct evidence is evidence that directly proves discrimination. For example, a statement by the decision maker in the decisional process that he/she is terminating the employee because of the employee's religion would be direct evidence of discrimination. "[S]tray remarks[.]" which are "statements by nondecisionmakers" and "statements by decision makers unrelated to the decisional process itself," do not constitute direct evidence. Hopkins v. Price Waterhouse, 490 U.S. 228, 277 (1989). See, e.g., Morgan v. A.G. Edwards & Sons, Inc., 486 F.3d 1034, 1043 (8th Cir. 2007) (finding that direct evidence does not include "stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process"); Mitchell v. City of Wichita, 140 Fed. Appx. 767, 778 (10th Cir. 2005) ("Evidence demonstrating discriminatory animus in the decisional process needs to be distinguished from stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process.").

Stray remarks may nonetheless constitute circumstantial evidence of discrimination. Stray remarks by decisionmakers or remarks by nondecisionmakers may be used as circumstantial evidence of discrimination. See, e.g., Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 355 (6th Cir. 1998) ("remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff" are relevant Similarly, the discriminatory remarks of those who may have influenced the decision not to reassign the plaintiff to other positions in the company may be relevant when the plaintiff challenges the motive behind that decision."); Ross v. Rhodes Furniture, 146 F.3d 1286, 1291 (11th Cir. 1998) (stray remarks may be relied upon as circumstantial evidence of discrimination); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 521 (3d Cir. 1997) (finding that "stray remarks by nondecisionmakers may be properly used by litigants as circumstantial evidence of discrimination"); Abrams v. Lightolier Inc., 50 F.3d 1204, 1214 (3d Cir. 1995) ("discriminatory comments by nondecisionmakers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination"); Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 333 (3d Cir. 1995) ("[A] supervisor's statement about the employer's employment practices or managerial policy is relevant to show the corporate culture in which a company makes its employment decision, and may be used to build a circumstantial case of discrimination.")

Circumstantial evidence is evidence that, although not direct, would permit the factfinder to "infer" that discrimination has occurred. An example of circumstantial evidence would be proof that qualified African Americans have applied, but that no qualified African Americans have been hired.

Although there is no rigid test for proving discrimination (see St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993) (citation omitted) ("The McDonnell Douglas methodology

was ‘never intended to be rigid, mechanized, or ritualistic.’’’)), the McDonnell Douglas framework is the generally-accepted approach to evaluate circumstantial evidence. In a discriminatory discharge case, that framework first requires an employee to prove a *prima facie* case by showing that he or she was:

- a) a member of a protected class;
- b) qualified for the position;
- c) discharged from the position; and
- d) replaced by a non-member of a protected class.

Id. at 506. If the employee meets this burden, then the employer has a burden of producing evidence of a legitimate nondiscriminatory business reason for its decision. Id. at 506-07. Once the employer proffers such a reason, the presumption of discrimination “simply drops out of the picture,” and the employee must then show that the employer’s proffered reason is a pretext for discrimination. Id. at 511 & 515. As the Hicks Court has indicated, “a reason cannot be proved to be a ‘pretext for discrimination’ unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.” Id. at 516 (emphasis in original). Further, depending on the strength of the evidence, “rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.” Id. at 511 (emphasis in original).

In a mixed-motive case, the burden of proof shifts to the employer to show that it would have made the same adverse employment decision even absent discrimination. In such cases the plaintiff need not show that the defendant’s proffered explanations are pretextual for discrimination, rather, she can allow that while the defendant’s explanations may be true, the defendant also acted out of a discriminatory motive. Desert Palace v. Costa, 539 U.S. 90 (2003). See, e.g., Burton v. Town of Littleton, 426 F.3d 9, 19 -20 (1st Cir. 2005); Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 317 (4th Cir. 2005); Richardson v. Monitronics Int’l, Inc., 434 F.3d 327, 334 (5th Cir. 2005) (“a plaintiff in a Title VII action need only provide circumstantial evidence of discrimination to be entitled to proceed under the mixed-motive framework”); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Mereish v. Walker, 359 F.3d 330 339 -340 (4th Cir. 2004); Bell v. Kaiser Found. Hosp., 122 Fed. Appx. 880, 882 (9th Cir. 2004).

The Court in Desert Palace held that neither direct evidence nor any other heightened evidentiary showing was required to trigger a mixed-motive analysis. Id.

G. What is disparate impact and how do you prove it?

To prove disparate impact (sometimes referred to as “adverse impact”), an employee must show that a facially-neutral policy or practice has a significant adverse impact on a protected class. For disparate impact, the employee need not show discriminatory intent. Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971).

As a result of the Civil Rights Act of 1991's amendment to Title VII, an employee seeking to prove disparate impact must articulate a *prima facie* case of disparate impact by showing that the challenged practices have a disproportionate impact on a protected group. If the employee makes this showing, the burden of persuasion shifts to the employer to show that the challenged practices are "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2k(1)(A). This standard was codified into Title VII but originated from Griggs v. Duke Power Co., which rejected two job requirements because "neither . . . is shown to bear a *demonstrable relationship to successful performance* of the jobs for which it was used. Both were adopted . . . without *meaningful study of their relationship to job-performance ability*."¹⁰ The Court later fleshed out this requirement in Albemarle Paper Co. v. Moody: "Job relatedness cannot be proved through vague and unsubstantiated hearsay," but instead must be shown by a study "validating" the use of the job requirement as a criterion for the specific job in question.¹¹ In Albemarle, the employer's study purported to validate the test for only three of the eight jobs for which it was used, which was insufficient because "[a] test may be used in jobs other than those for which it has been professionally validated only if there are 'no significant differences' between the studied and unstudied jobs."¹² To meet this burden of persuasion, the employer can use any of the three validation techniques included in the EEOC's Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. § 1607.

The high level of validation that disparate impact law requires of job requirements is illustrated well by Lanning v. SEPTA, a case that is especially instructive because the Third Circuit issued two successive opinions – the first one rejecting the employer's effort at validating the test, but the second one accepting the proof the employer had offered on remand.¹³

The first Lanning opinion rejected, for its disparate impact on women, a requirement that transit police officers have a certain aerobic capacity and be able to run 1.5 miles in 12 minutes. The defendant set its requirement only after its expert proved a correlation between aerobic capacity and officer performance (*e.g.*, numbers of arrests and commendations), but "to show the business necessity of a discriminatory cutoff score[,] an employer must demonstrate that its cutoff *measures the minimum qualifications necessary for successful performance of the job in question*."¹⁴ Even if running is important, the chosen cutoff was a judgment call, and "[a] business necessity standard that wholly defers to an employer's judgment as to what is desirable . . . is completely inadequate."¹⁵ The court expressly rejected the idea of deference to any "'readily justifiable'" chosen cutoff:

¹⁰ 401 U.S. at 431 (emphases added).

¹¹ 422 U.S. 405, 428 (1975).

¹² 422 U.S. 405, 428 (1975).

¹³ Lanning v. SEPTA, 181 F.3d 478 (3d Cir. 1999) (reversing judgment for employer), *later op.*, 306 F.3d 286 (3d Cir. 2002) (upholding judgment for employer after second trial).

¹⁴ 181 F.3d at 489 (emphasis added).

¹⁵ 181 F.3d at 490.

The general import of [defendant's validation] studies that the higher an officer's aerobic capacity, the better the officer is able to perform the job. . . . [T]his conclusion alone does not validate . . . [defendant's] cutoff under the Act's business necessity standard. At best, these studies show that aerobic capacity is related to the job. . . . *A study showing that "more is better," however, has no bearing on the appropriate cutoff* to reflect the minimal qualifications necessary to perform successfully the job in question.¹⁶

The second *Lanning* opinion upheld a defense judgment because highly *job-specific* "studies indicated that individuals who fail the test will be much less likely to successfully execute critical policing tasks. . . . [Those] who passed the run test had a [job] success rate . . . from 70% to 90%. The success rate of the individuals who failed . . . ranged from 5% to 20%."¹⁷ Thus, "experts set the . . . cutoff at 12 minutes for objective reasons, with the studies showing that the *projected rate of success* of job applicants *dropped off markedly*" for those who failed.¹⁸

In *Gregory v. Litton Systems, Inc.*, the Ninth Circuit found that a questionnaire used in hiring by a sheet-metal company disparately impacted African-American job seekers by requiring applicants to reveal arrest records. Inquiries into arrest records (not convictions) could not be shown by employer Litton to have any "reasonable business purpose."¹⁹ Then in *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit ruled that the railroad's policy refusing employment to anyone with a conviction other than a minor traffic violation disparately impacted minorities without showing business necessity. The Eighth Circuit's wrote: "We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden."²⁰

Accordingly, employers may consider an individual's criminal record only if the employer can justify its policy under the business necessity exception. Earlier this year, in *El v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, the Third Circuit offered the most in-depth court analysis to date of the legality of making hiring decisions based on an applicant's criminal record.²¹ The Third Circuit upheld an employer's policy barring plaintiff from employment because of his criminal record. This case is distinguishable from other cases disallowing criminal record checks because it was a unique job situation involving care for the disabled.

¹⁶ 181 F.3d at 492-93 (emphasis added).

¹⁷ 306 F.3d at 291.

¹⁸ 306 F.3d at 291 (emphasis added).

¹⁹ LCCR Memo citing *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

²⁰ Ellen Medlin citing *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975).

²¹ 479 F.3d 232 (3rd Cir. 2007).

The plaintiff, Douglas El, worked for a subcontractor of SEPTA, Philadelphia's mass transit operator, as a paratransit driver shuttling physically and mentally disabled passengers. Pursuant to the subcontract, SEPTA disallowed hiring anyone with a violent criminal conviction. Within the first few weeks of El's employment, his direct employer discovered that El had a 40-year old conviction for second-degree murder for a crime that occurred when he was 15 years old. Based solely on this conviction, El was fired. El sued on a disparate impact theory under Title VII. He argued that SEPTA's policy adversely affected minority applicants; he lost on summary judgment.

SEPTA's policy required its drivers have:

No record of driving under the influence of alcohol or drugs and no record of any felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person(s); and

No record of any conviction within the last seven years for any other felony or any other misdemeanor in any category referenced below, and not be on probation or parole for any such crime, no matter how long ago the conviction for such crime may be.²²

The court held, *inter alia*, that SEPTA's expert reports concluding (a) that individuals with violent convictions are more likely to commit violent acts than individuals who have never been convicted and (b) that mentally and physically disabled people are more likely to be victims of abuse sufficiently proved that its policy was justified by business necessity and that El had not offered an alternative policy that accomplished SEPTA's legitimate goal of public safety.²³

The decision briefly discusses the EEOC guidelines. Under the EEOC's current guidelines, employers may avoid Title VII liability only if they demonstrate a business necessity by showing that they considered the following three factors: (1) the nature and gravity of the offense;²⁴ (2) the time elapsed since the conviction or completion of the sentence; and (3) the nature of the job sought.

The court noted, "The EEOC's Guidelines...do not speak to whether an employer can take these factors into account when crafting a bright-line policy, nor do they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a lifetime ban."²⁵ Further, the court determined that the guidelines were entitled to deference "in accordance with the thoroughness of its research and the persuasiveness of its reasoning." Yet here, the court found the EEOC guidelines lacking because they failed to "substantively analyze the statute," thus the court did not adopt the EEOC's three part test.²⁶

²² *Id.* at 237.

²³ *Id.* at 248-49.

²⁴ Guidelines originally appear at Equal Employment Opportunity Commission ("EEOC") Compliance Manual § 605 App.

²⁵ 479 F.3d at 243.

²⁶ *Id.* at 244.

Instead, the court established a broader standard that requires an employer's policy to "accurately distinguish between applicants that pose an acceptable level of risk and those that do not."²⁷ The court went on to say, "[w]e would expect that someone at SEPTA would be able to explain how it decided which crimes to place into each category, how the 7-year number was selected, and why SEPTA thought a lifetime ban was appropriate for a crime like simple assault."²⁸ The court expressed skepticism that SEPTA derived its policy from rigorous analysis and research, yet without any rebuttal evidence from EI, the court had little choice but to uphold the trial court's ruling.²⁹

H. Under the statute, what are the damages for Title VII discrimination?

Title VII remedies include back pay, reasonable attorney fees, interest, and appropriate equitable relief for violations of Title VII. 42 U.S.C. § 2000e-5(g)(k). Compensatory damages include "future pecuniary losses [*i.e.*, front pay], emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a; EEOC Enforcement Guidance N-915.002 (EEOC Compliance Manual Section 603 App'x).

Where an employee shows intentional discrimination (*i.e.*, disparate treatment), the employee can recover compensatory and punitive damages up to a specified, capped amount. 42 U.S.C. § 1981a. Title VII caps the sum of compensatory and punitive damages on a sliding scale based on the maximum number of employees the employer had in each of 20 or more calendar weeks in the current or preceding calendar year: for employers with 15 to 100 employees, the maximum combined amount of compensatory and punitive damages is \$50,000; for employers with 101 to 200 employees, the cap is \$ 100,000; 201 to 500 employees, \$ 200,000; over 500 employees, \$ 300,000.³⁰

Punitive damages require "malice" or "reckless indifference to the federally protected rights" of the employee,³¹ *id.*, and may only be awarded where there is conscious wrongdoing. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 537 (1999). Punitive damages awards must adhere to certain constitutional and statutory limitations. For punitive damage awards to be constitutional, a defendant must have received fair notice that both "certain conduct will subject him to punishment," and of "the possible severity of the punishment that may be imposed." Deters v. Equifax Credit Info. Servs., 202 F.3d 1262, 1271 (10th Cir. 2000) (citing Continental Trend Resources Inc. v. OXY USA Inc., 101 F.3d 634, 636 (10th Cir. 1996)). Courts assess whether a defendant received fair notice by examining three "guideposts": "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable

²⁷ *Id.* at 245.

²⁸ *Id.* at 248.

²⁹ *Id.* at 247.

³⁰ 42 U.S.C. § 1981a(b)(3).

³¹ Punitive damages are not available against the government. 42 U.S.C. § 1981a(b)(1).

cases.”³² State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003); see also BMW of North America v. Gore, 517 U.S. 559, 575 (1996)). Courts also consider the deterrent effect of a punitive damage award. BMW at 569.

³² See, e.g., Motorola Credit Corp. v. Uzan, 388 F.3d 39, 63 (2d Cir. 2004) (directing district court to reconsider punitive damages award in light of the constitutional “guideposts”); Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 66 Fed. Appx. 398, 400 (3d Cir. 2003) (same).

**SECTION 1981,
42 U.S.C §§ 1981-1988**

A. Who is protected under Section 1981?

- 1) All persons within the jurisdiction of the United States have the same right in every state and territory to make and enforce contracts, to sue, be parties, and give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and are subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

All jurisdictions that have addressed the employment-at-will issue have held that the employment-at-will relationship is a contract for Section 1981 purposes. The following discussion is limited to situations in which an employer has violated Section 1981 in his/her relations with an employee.

- 2) Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987): Racial discrimination prohibited by Section 1981 is any discrimination against identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.
- 3) Hostile environment-racial harassment claims and race-based constructive discharge also may be brought under Section 1981
- 4) Retaliation claims premised on assertion of rights are also protected by Section 1981
- 5) A Section 1981 claim CANNOT be based on allegations of national origin, religious discrimination, citizenship status, gender discrimination, disability or age discrimination

B. Who may be liable?

- 1) Private Sector Employers
 - a) There is no restriction as to employer size, which is found in other anti-discrimination statutes.
 - b) The employer may be liable under certain circumstances for acts of intentional discrimination by employees even when the employees are not supervisors.
 - c) Under certain circumstances, the parent corporation may be liable for discriminatory acts of its subsidiary.
 - d) Supervisors may be individually liable if they make or recommend employment decisions.

- e) There is no liability for a corporate official when he/she did not participate in discrimination.
- 2) Public Sector Employers
- a) Section 1981 does not waive sovereign immunity in suits against the United States. Federal officials may be personally liable for *ultra vires* acts/unauthorized acts or acts beyond the scope of their power.
 - b) Local government employers
 - c) State government employers
 - (1) State governmental entities and officers sued in official capacity enjoy sovereign immunity.
 - (2) State officials, in their individual capacity, may be sued for injunctive relief and damages.

C. What is prohibited?

- 1) Section 1981 guarantees freedom from racial discrimination in the making, enforcement performance, modification, and termination of contracts.
- 2) Section 1981 also guarantees enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship

D. What are the required elements of a Section 1981 claim?

- 1) General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982):

To state a claim:

- a) The plaintiff must allege deprivation of rights caused by racial discrimination (*i.e.*, that the person was deprived of a right which, under similar circumstances, would have been accorded to a person of a different race);
 - b) The plaintiff must present sufficient evidence to allow the jury to conclude that the defendant's action was motivated by racial considerations.
 - c) Proof of disparate impact alone is insufficient.
 - d) The plaintiff must establish a purposeful intent to discriminate.
- 2) Patterson v. McLean Credit Union, 491 U.S. 164 (1989):

Section 1981 prohibits not only racially motivated refusals to contract, but it also prohibits offers to enter into contracts only upon discriminatory terms.

E. What is the burden of proof?

- 1) Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981):

The plaintiff maintains the ultimate burden of proving intentional racial discrimination under Section 1981.

- 2) The plaintiff's burden includes establishing a *prima facie* case of intentional discrimination by a preponderance of the evidence.
- 3) Under the burden shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and reiterated in Burdine, 450 U.S. 248 (1981), the plaintiff may prove intentional discrimination either by direct evidence of racial discrimination or by an inference of racial discrimination.
- 4) When the plaintiff has no direct evidence of racial discrimination, the plaintiff's claims must be analyzed under the framework established by the Supreme Court in McDonnell Douglas. Under this framework, the Plaintiff must prove that:
 - (a) she is a member of a protected class;
 - (b) an adverse employment action occurred;
 - (c) similarly situated persons outside her protected class were treated differently.

McDonnell Douglas, 411 U.S. 792; Burdine, 450 U.S. 248.

F. There Can Be No Section 1981 Cause of Action Based On Disparate Impact:

- 1) General Building Contractors Assn. v. Pennsylvania United Engineers and Constructors, Inc., 458 U.S. 375, 388-91 (1982):

Section 1981 only prohibits purposeful discrimination. It does not prohibit disparate impact discrimination.

G. Who may sue under Section 1981?

- 1) An individual may bring suit.
- 2) Section 1981 suits MAY NOT be pursued by organizations whose injuries derive only from the violation of others' civil rights.

H. What damages are allowed under a Section 1981 claim?

The following relief may be obtained:

- 1) Unlimited monetary damages;
- 2) Compensatory damages;
- 3) Future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses;
- 4) Punitive damages when the employer (except municipalities) discriminated with malice or with reckless indifference to the federally protected rights of an aggrieved individual; and
- 5) Injunctive relief.

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)
29 U.S.C. §§ 621-634
and
OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA)³³
29 U.S.C. § 626(f)(1)

A. Who is covered under the ADEA?

- 1) The ADEA Applies to:
 - a) Private Sector Employees

Any employee or job applicant age 40 or older working for or applying to work for an employer that is engaged in interstate commerce and employs more than 20 workers.
 - b) Public Sector Employees Employed By:
 - (i) Federal government;
 - (ii) State and local governments and state agencies;
 - (iii) State colleges and public school districts;
 - (iv) Employment agencies; and
 - (v) Labor organizations.
 - c) U.S. citizens employed overseas by a U.S. corporation or a subsidiary
 - d) Recipients of federal funds, such as Head Start, recipients of block grants such as health entities, and low income energy assistance
 - e) Presidential appointees and employees of elected state and local officials
 - f) Federal government contractors and subcontractors: Executive Order 11141

See 29 U.S.C. § 630(b) (employer); 29 U.S.C. § 630(f) (employee); and 29 U.S.C. § 631(a) (age requirement).
- 2) The ADEA Does Not Apply to
 - a) An employee working for an employer who is a foreign person not controlled by a U.S. employer

³³ The OWBPA amended the ADEA.

- b) Uniformed personnel in active or reserve armed forces, see Spain v. Ball, 928 F.2d 61, 63 (2nd Cir. 1991); and Kawitt v. U.S., 842 F.2d 951, 953-54 (7th Cir. 1988).
 - c) Independent contractors:
 - (1) Test for distinguishing independent contractor from employee
 - (a) “right to control test”
 - (b) “economic realities test”
 - d) Partners in a partnership, See e.g., Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440, 441 n.1 and 449-50 (2003) (Although an ADA case, the Supreme Court adopted a 6 factor test to determine whether a shareholder was an employee for purposes of statutory coverage. The opinion implies it would apply equally to the ADEA and Title VII).
 - e) Indian tribes, see EEOC v. Cherokee Nation, 871 F. 2d 937 (10th Cir. 1989); EEOC v. Fond du Lac Heavy Equipment and Construction Co., 986 F. 2d 246 (8th Cir. 1993).
- 3) Other:
- a) Religious institutions are not given a blanket exemption under the ADEA. Courts apply the test set out in NLRB v. Catholic Bishop, 440 U.S. 490 (1979) on a case by case basis.

B. What is prohibited?

- 1) The ADEA prohibits discrimination against an employee 40 years old or older on the basis of age with respect to any term, condition, or privilege of employment, including, but not limited to hiring, firing, promotion, layoff and recall, transfer, testing, use of company facilities, compensation, benefits, job assignments, classifications of employees, recruitment, fringe benefits, retirement plans, disability leave, training, apprenticeship programs. See 29 U.S.C. § 623(a).
- 2) “Adverse employment action”
 - (i) To constitute an adverse employment action, the action must significantly alter the terms and conditions of the job.
 - (ii) An important question is, “Would the employment action which has occurred be viewed as material by a reasonable person?”
 - (iii) Actions, other than discharge, have been held to violate the ADEA, including:

- (a) Transfer/Reassignment, compare Tadlock v. Powell, 291 F.3d 541, 546-47 (8th Cir. 2002); Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 919-20 (8th Cir. 2000); and Maddow v. Proctor & Gamble Co., 107 F.3d 846, 852 (11th Cir. 1997), with Currier v. Postmaster General, 304 F.3d 87, 88-89 (D.C. Cir. 2002) and Policastro v. Northwest Airlines, Inc., 297 F.3d 535, 539-40 (6th Cir. 2002).
 - (b) Age-based harassment, see e.g., Terry v. Ashcroft, 336 F.3d 128, 148 (2nd Cir. 2003); Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294 (4th Cir. 1999); Piette v. CSX Transport [check name], 1999 WL 486413, at *2 (6th Cir. July 2, 1999).
 - (iv) Not all actions have been held to be a violation, generally including the following:
 - (a) Adverse employment actions taken for reasons other than age or any other unlawful discrimination motive;
 - (b) Mere threats to downgrade or to fire;
 - (c) Lateral transfer; and
 - (d) Reassignment to specific geographic area
- 2) Evaluation of employees
- a) Employers are to evaluate older employees on their individual merits and not on their particular age.
 - b) Employers cannot rely on age as a proxy for an employee's other characteristics, such as productivity, stamina, mental acuity but rather must address each of those factors on an individual basis. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)
- 3) Job notices and advertisements may not include age preferences, limitations, or specifications, except in rare circumstances in which age is a bona fide occupational qualification reasonably necessary to the normal operation of the business. See 29 C.F.R. § 1625.4(a).
- 4) Pre-employment inquires may include age or date of birth, but such inquiries are closely scrutinized to make sure the inquiry is made for a lawful purpose. See 29 C.F.R. § 1625.4(b).
- 5) The disparate treatment theory of employment discrimination is also applicable under the ADEA. Hazen, 507 U.S. 604.

- 6) Employer may not discriminate between two employees over the age of 40 by favoring one on the basis of age. See e.g., O'Connor v. Consolidated Coin Caterers, 517 U.S. 308 (replacement by someone within the protected age group but substantially younger may be evidence of age discrimination).
- 7) Mandatory retirement is not lawful, except in limited cases:
 - a) Bona fide executive
 - b) High policymaking employee, 29 U.S.C. § 631(c).
- 8) Reverse age discrimination is not prohibited, see General Dynamics Land Systems Inc. v. Cline, 540U.S. 581 (2004).

C. How does a plaintiff establish a *prima facie* case of age discrimination in employment?

- 1) A plaintiff must ordinarily show he/she was:
 - a) Within the protected age group;
 - b) Adversely affected by the defendant's employment decision;
 - c) Qualified for the position at issue; and
 - d) Replaced by a person outside the protected group or someone within the protected class who is substantially younger.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-42 (2000) (“[W]e shall assume, *arguendo*, that the McDonnell Douglas framework is fully applicable here.”).

D. What is the burden of proof?

- 1) A plaintiff may proceed by either of two general methods to carry the burden of making his/her case:
 - a) A plaintiff may attempt to meet burden directly, by presenting direct or circumstantial evidence that age was a determining factor resulting in an adverse employment action.
 - b) A plaintiff may rely on the proof scheme for a *prima facie* case” McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981))
 - c) Most often, a plaintiff will choose the “burden shifting analysis” set forth in McDonnell Douglas
 - (i) The plaintiff must establish *prima facie* case;

- (ii) The defendant must then come forward with a legitimate, nondiscriminatory reason for the adverse action; and
 - (iii) The plaintiff must demonstrate that the defendant's reason is pre-textual.
- d) Mixed-motive analysis, see Price Waterhouse v. Hopkins, 290 U.S. 228 (1989) and Desert Palace v. Costa, 539 U.S. 90 (2003).

E. Who May Be Held Liable Under ADEA?

- 1) The employer
- 2) The employer's agents, 29 U.S.C. § 630(b).
- 3) An overwhelming majority of cases have held that an individual employee, such as a manager or supervisor, cannot not be held liable under the ADEA.

F. What is required for posting notices?

- 1) A notice is posted to advise employees of all rights under the ADEA.
- 2) The notice should be conspicuous.
- 3) The notice should be accessible to employees with visual or other disabilities that affect reading. See C. Geoffrey Weirich, Employment Discrimination Law, at 615 and n. 93 (4th Ed. 2007).

See 29 U.S.C. § 627; 29 C.F.R. § 1627.10.

G. What are the standard defenses to an ADEA Claim?

- 1) Action, otherwise prohibited, in which age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business.
 - a) Narrowly construed on case by case basis, See Western AirLines, Inc. v. Criswell, 472 U.S. 400 (1985); 29 C.F.R. § 1625.6.
 - b) Used to defend maximum hiring or mandatory retirement ages for jobs involving public safety, such as federal air traffic controller, Park Police officer and other law enforcement officers, nuclear materials courier, Armed Service reserve and active personnel

- (1) Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985): Airline to provide same transfer privileges to 60 year old captains as afforded to captains disqualified for reasons other than age.
 - (2) Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985): Flight engineers mandatory retirement at 60 held unlawful.
 - (3) Johnson v. Mayor & City Council of Baltimore, 462 U.S. 353 (1985): Mandatory retirement age of 55 for firefighters must be applied on an individual basis.
- c) Acts or omissions taken in a good faith effort to conform with or in reliance upon any administrative regulation, order, ruling, or interpretation issued by the EEOC.
- 2) Action, otherwise prohibited, is taken based upon reasonable factors other than age, including:
 - a) Deteriorating job performance
 - b) Age-neutral staff reduction
 - c) Safety concerns
 - d) Employee's pension status or seniority
 - 3) Action, otherwise prohibited, in which involve an employee working in foreign country and ADEA compliance would violate foreign country's law.
 - 4) Action, otherwise prohibited, in compliance with a bona fide seniority system.
 - 5) Action, otherwise prohibited, in compliance with a bona fide employee benefit plan.
 - 6) Action taken to discharge or discipline employee for good cause.

H. What is required to obtain a waiver of ADEA rights governed by the OWBPA?

- 1) Permissible to request waiver of any ADEA right or claim:
 - a) In a settlement of an administrative or court claim, 29 U.S.C. § 626(F)(2);
 - b) In connection with an exit incentive program, 29 U.S.C. § 626(F)(1)(F)(ii) and (1)(H); and
 - c) Employment termination. 29 U.S.C. § 626 (F)(1).
- 2) Valid waiver must knowing and voluntary and:

- a) Be in writing and be understandable;
- b) Specifically refer to ADEA rights or claims;
- c) Not waive rights or claims that may arise in the future;
- d) Be in exchange for valid consideration in addition to any benefits or other amounts to which the employee is already entitled;
- e) Advise the employee in writing to consult an attorney before signing waiver; and
- f) Provide the employee at least 21 days to consider the agreement and at least 7 days to revoke the agreement after signing.

See 29 U.S.C. § 626 (F)(1)(A) – (G).

- g) There are additional requirements if waiver involves termination or severance program offered to a group of employees. 29 U.S.C. § 626(F)(1)(F)(ii) and (1)(H).
- 3) No waiver or agreement may affect the EEOC's enforcement responsibilities or interfere with and employee's right to file a charge or participate in EEOC investigation.

I. How is the ADEA enforced?

- 1) Equal Employment Opportunity Commission
- 2) Individual suit
- 3) Representative/Class actions

J. What Relief is Available Under the ADEA?

- 1) Back pay
- 2) Front pay
- 3) Liquidated damages for willful violations
- 4) Reinstatement or promotion
- 5) Injunctive relief
- 6) No punitive damages or recovery for emotional distress
- 7) Prejudgment interest discretionary
- 8) Attorneys fees and costs

AMERICANS WITH DISABILITIES ACT OF 1990 (“ADA”)
42 U.S.C. §§ 12101 et. seq.
and
THE REHABILITATION ACT OF 1973
29 U.S.C. §§ 705, 791-794

A. Who is covered?

- 1) The ADA applies to the following employers:
 - a) Private employers “affecting” interstate commerce, employing more than 15 workers each working day is each of 20 weeks in the current or preceding calendar year. 42 U.S.C. § 12111(5)(A) (1990).
 - b) Public Sector Employers:
 - (i) State and local governments, state agencies. Id. §12131(1)(A).
 - (ii) State colleges and public school districts. Id. § 12131(1)(B).
 - c) Employment agencies. Id. § 12111(2).
 - d) Labor organizations. Id. § 12111(2).
 - e) Joint labor-management committees. Id. § 12111(2).
 - f) Covered entities in foreign countries. Id. § 12112(c)(1)
- 2) The ADA does not apply to the following employers
 - a) *Bona fide* membership clubs. Id. § 12111(5)(B)(ii).
 - b) Indian tribes. Id. § 12111(5)(B)(i).
 - c) The federal government, corporations owned by the United States recipients of federal financial assistance, and federal contractors, which are all covered by the Rehabilitation Act of 1973. Id. § 12111(5)(B)(i).
- 3) A qualified individual with a disability is protected under the ADA. Id. § 12112(a). See also id. § 12111(8).
 - a) Employer and employee status is determined by the common-law “control test.” Clakamas Gastroenterology Assocs., P.C. v. Wells, 538 440 (2003).
 - b) “Disability” is “(A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual, (B) having a record of such an impairment, (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2), see also 29 CFR § 1630.2(g) (1998).

Compare Bragdon v. Abbott, 524 U.S. 624 (1998) (holding HIV infection is an impairment from the moment of infection); Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) (obesity not a physical impairment unless it relates to a psychological disorder); Morisky v. Broward County, 80 F.3d 445 (11th Cir. 1996) (functional illiteracy is not physical impairment under the ADA); Santiago v. City of Vineland, 107 F. Supp. 2d 512, 550 (D.N.J. 2000) (psychological disorders of aggression and emotional violence were not psychological or mental impairments under the ADA); Doe v. United States Postal Serv., 37 FEP 1867, 1869 (D.D.C. 1985) (“transsexualism is a covered disability”).

- c) Excluded from the definition of “disability” is the current use of illegal drugs or the use of alcohol at the workplace. Id. § 12114(a). But former drug users who have completed a supervised drug rehabilitation program are protected. Id. § 12114(b)(1). Also excluded from “disability” are homosexuality, bisexuality, transvestitism, pedophilia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, psychiatric substance abuse disorders. 42 U.S.C. § 12211(b)(1), (2); see also 29 U.S.C. § 705(20(E)-(F) (2000).
- d) A “major life activity” is a function such as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Mental and emotional processes such as thinking, concentrating, and interacting with others are major life activities. 29 C.F.R. § 1630(2)(i) (1999).

Tovota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002): United States Supreme Court asserted “major life activities” are those of central importance to daily life, which are permanent and long term. Examples may include walking, seeing, hearing, manual tasks involved in personal hygiene, like tooth brushing and bathing, as well as personal or household chores. See e.g., Peters v. Baldwin Union Free Sch. Dist., 320 F.3d 164, 168 (2d Cir. 2003) (ability to care for oneself is a major life activity, as it “encompasses normal activities of daily living”); Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144, 151 (2d Cir. 1999) (cooking, bathing, dressing are basic activities of caring for oneself); Fiscus v. Wal-Mart Stores, 385 F.3d 378, 384 (3d Cir. 2004) (eliminating body waste major life activity under ADA); Head v. Glacier Nw., Inc., 413 F.3d 1053, 1060 (9th Cir. 2005) (sleeping is major life activity); Barnes v. Goodyear Tire & Rubber Co., 48 S.W. 3d 698, 706 (Tenn. 2000) (speaking is a major life activity); Fraser v. Goodale, 342 F.3 1032, 1038 (9th Cir. 2003) (working is a major life activity).

- e) Determining if an individual is “substantially limited” in a major life activity turns on the nature, severity and duration of the impairment. The individual must be significantly restricted in a class or broad range of jobs.

Courts must consider whether the individual can correct or “mitigate” the disability. 42 U.S.C. § 1630(2)(j).

Sutton v. United Air Lines, Inc., 527 U.S. 491 (1999)— Supreme Court held plaintiff’s vision disorder treated with corrective lenses was not a disability under the ADA, and did not substantially limit one or more major life activity. Specifically, the term “limits” was interpreted to mean a “present limitation,” not one that might limit a major life activity without corrective measures. See e.g., Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) (high blood pressure corrected with medication was not a substantial limitation); Albertson’s v. Kirkingburg, 527 U.S. 555 (1999) (where plaintiff’s brain had corrected monocular vision he was not substantially limited in a major life activity).

- f) A disabled individual is “qualified” where she can, “with or without a reasonable accommodation” “perform the essential functions of the job.” 42 U.S.C § 12111(8).

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)—United States Supreme Court held individualized inquiry and findings of fact are necessary to determine whether a disabled individual is “qualified” under the Act; Someone with a contagious disease can have a qualifying disability. See e.g., Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 27-28 (1st Cir. 2002) (holding plaintiff with one arm could be qualified under the Act because evidence did not support a one-handed EMT could not, under any circumstances, perform the essential functions of the job); Calef v. Gillette Co., 322 F.3d 75, 86-87 (1st Cir. 2003) (plaintiff’s ADHD rendered him not a qualified individual because he could not perform the essential functions of the job that included handling stressful situations).

- g) The “essential functions” of the job are the fundamental duties actually performed by incumbents. 29 C.F.R. § 1630(2)(n).

Milton v. Scrivener, Inc., 53 F.3d 1118, 1124 (10th Cir. 2003)—“The initial inquiry into whether a job requisite is essential is whether an employer actually requires all employees in the particular position to perform the allegedly essential function.” See e.g., Kiphart v. Saturn, 251 F.3d 573, 585 (6th Cir. 2001) (rotation of employees was not an essential function even though job description indicated it was, because very few teams, if any, fully rotated tasks); Skerski v. Time Warner Cable Co., 257 F.3d 273, 281 (3d Cir. 2001) (questions existed regarding whether climbing was an essential function of cable installer’s job where he performed nearly all duties underground).

B. What is prohibited?

- 1) Discrimination prohibited under the ADA includes:

- a) Limiting, segregating, or classifying an applicant or employee in a way that adversely affects their opportunities or status because of disability; 42 U.S.C. § 12112(b)(1).
 - b) Participating in a contractual or other arrangement or relationship that subjects a qualified applicant or employee to disability discrimination; Id. § 12112(b)(2).
 - c) Utilizing standards, criteria, or methods of administration that perpetuate or have the effect of discrimination on the basis of disability; Id. § 12112(b)(3)(A), (B).
 - d) Denying equal jobs or benefits to a qualified individual because an individual who has a relationship to or association with a qualified individual has a known disability; Id. § 12112(b)(4).
 - e) Not making reasonable accommodations for a qualified applicant or employee the known physical or mental disability, unless the accommodation would impose an undue hardship on the operation of the business of such covered entity; Id. § 12112(b)(5)(A), (B).
 - f) Using tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless job-related and consistent with business necessity; Id. § 12112(b)(6) and
 - g) Failing to select and administer employment tests in the most effective manner to so that the test results accurately reflect the skills, aptitude, or whatever is being tested for, and not an employee or applicant's impaired sensory, manual, or speaking skills. Id. § 12112(b)(7).
- 2) A “reasonable accommodation” can include measures such as making existing facilities readily accessible to and usable by individuals with disabilities; and restructuring a job or work schedules, reassigning the employee to a vacant position, acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials or policies, providing qualified readers or interpreters. Id. § 12111(9).

United Airways v. Barnett, 535 U.S. 391 (2002)—United States Supreme Court determined “reasonable accommodation” was not a synonym for “effective accommodation,” but that a particular accommodation may be reasonable by showing that it is “reasonable on its face, *i.e.*, ordinarily or in the run of cases.” Requiring an employer to abandon a seniority system to accommodate a disabled individual was not “reasonable.” See e.g., Tesh v. United States Postal Serv., 349 F.3d 1270, 1275 (10th Cir. 2003) (providing a specialized chair to employee was reasonable accommodation); Higgins v. New Balance Athletic Shoe, Inc.,

194 F.3d 252, 264-65 (1st Cir. 1999) (relocation of loudspeaker for hearing-impaired employee was a reasonable accommodation); but see Burnett v. Western Res. Inc., 929 F. Supp. 1349, 1359 (D. Kan. 1996) (accommodations which would be personal in nature are not required, such as prosthetic limbs, eyeglasses, hearing aids, wheelchairs, or similar devices). See C. GEOFFREY WEIRICH, EMPLOYMENT DISCRIMINATION LAW, at 886-920 (4th Ed. 2007).

- 3) Pre-employment inquiries and medical exams are permitted in certain circumstances:
 - a) Employers are permitted to ask an applicant whether he/she is able to perform job-related activities with or without a reasonable accommodation. Id. § 12112(d)(2)(B). An employer cannot ask whether the applicant is disabled or has any physical or mental impairment that may prevent the applicant from performing the job; about the nature of severity of the applicant's disability; how often the applicant will require leave because of the disability or for treatment; or about the applicant's workers' compensation history. Id. § 12112, 29 C.F.R. § 1630.14(b)(1).
 - b) Pre-employment medical exams, other than drug tests, are generally not permitted. Offers of employment contingent on confidential medical exams, so long as they are required of all incoming employees, are permitted provided that, if the exams screen out persons with disabilities, the criteria used are job-related, the criteria used are consistent with medical necessity, and there is no reasonable accommodation that would allow the individual to perform the job. Id. § 12112(d)(3).
 - c) Medical exams and inquiries of current employees are permitted only where they are job-related and consistent with business necessity, or where they are necessary to making a reasonable accommodation. Id. § 12112(d)(A).

C. What are the key defenses?

- 1) The individual poses a "direct threat" to the health and safety of others. Factors to be considered are the duration of the risk posed, the nature and severity of the proposed harm, and the imminence and likelihood of the harm. Id. § 12113(b); 29 C.F.R. § 1630.2(r).

Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002)—The Supreme Court established the four factors discussed above which should be evaluated to determine if an individual poses a direct threat, or a significant risk to health or safety that cannot be eliminated by reasonable accommodations. See e.g., McGeshick v. Principi, 357 F.3d 1146, 1151 (10th Cir. 2004) (holding applicant with Meniere's disease proposed direct threat); Donahue v. Conrail, 224 F.3d 230 (3d Cir. 2000) (employee who suffered from disease which caused unexpected loss of consciousness posed direct threat); Onishea v. Hopper, 171 F.3d 1289,

1297 (11th Cir. 1999) (contraction of a fatal disease posed significant risk and was thus direct threat); but see Chalk v. United States Dist. Court Cent. Dist., 840 F.2d 701, 709 (9th Cir. 1998) (mere theoretical possibility of transmission of HIV from teacher to students was not a direct threat).

- 2) The employer was not made aware of the need for accommodation. In many instances, almost any request by an employee related to a medical condition is sufficient, provided that it is sufficiently specific. 42 U.S.C. § 12112(b)(5)(A).

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000)—9th Circuit held the interactive process is “triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation.” See e.g., Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 952 (8th Cir. 1999) (“when the disabled individual requests accommodation, it becomes necessary to initiate the interactive process”); Taylor v. Phoenixville School Dist., 184 F.3d 296, 315 (3d Cir. 1999) (employer's duty to engage in the interactive process begins “[o]nce the employer knows of the disability and the employee's desire for accommodations” and that the employer must “ ‘meet the employee half-way’ ” by requesting additional information) (quoting Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996));

- 3) The requested accommodation poses an “undue hardship” on an employer in that it is significantly difficult or expensive, considering factors such as the nature and cost of the accommodation, the nature of the employer’s facility and operations, and the employer’s resources. Id. § 12111(10); 28 C.F.R. 42.511(c) (1998).

Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995)—holding the undue hardship factors are relational; that is, they evaluate the “desirability of a particular accommodation according to the consequences that the accommodation will produce.” See Bennett v. Henderson, 15 F. Supp. 2d 1097 (D. Kan. 1998) (limits exist where suggested accommodations may exceed the bounds of reasonableness when costs exceed benefits to be derived, especially where an employee would be unable to perform all essential job functions even with a requested accommodation).

- 4) A reasonable accommodation was offered and refused.

Smith v. Midland Brake, 180 F.3d 1154, 1177 (10th Cir. 1999) – An employer who proposes a reassignment that is rejected by an employee is under no obligation to continue offering reassignments; employer’s duties have been discharged. See also e.g., Webster v. Methodist Occupational Health Ctrs., Inc., 141 F.3d 1236, 1238 (7th Cir. 1998) (employee cannot later argue a different accommodation should have been provided after refusing an initial offer of reasonable accommodation); Miller v. Illinois Dep’t of Corr., 107 F.3d 483, 485

(7th Cir. 1997) (plaintiff's refusal to accept offered transfer when she insisted on an unavailable position warranted dismissal of her accommodation claim).

D. What is required for posting notices?

Notices describing rights under the ADA must be conspicuous and accessible to employees and applicants. 42 U.S.C. § 12115.

E. How is the ADA enforced?

- 1) Equal Employment Opportunity Commission. Id. § 1211(a).
- 2) Individual suit. Id. § 12133.
- 3) Representative/Class actions. Id. § 12188.

F. What relief is available under the ADA?

- 1) Back pay
- 2) Front pay
- 3) Reinstatement, promotion, hiring
- 4) Compensatory damages
- 5) Punitive damages
- 6) Injunctive relief
- 7) Attorneys fees and costs

See id. § 12188(2).

THE EQUAL PAY ACT OF 1963 (“EPA”)
29 U.S.C. § 206(d)

A. Who is covered?

- 1) “Employers” as defined broadly in the Fair Labor Standards Act to include anyone who suffers or permits another to work, but subject to certain exemptions, including:
 - a) Private employers
 - b) Labor organizations
 - c) State and federal employees
 - d) Certain industries and classes of employers are excluded, such as certain agricultural and domestic workers, some not-for-profits, elected officials, and military personnel

B. What is prohibited?

- 1) Payment of unequal wages between men and women
- 2) On the basis of sex
- 3) For “equal work,” which is work
 - a) Requiring equal skill, effort, and responsibility
 - b) Performed under similar working conditions
- 4) A labor organization may not cause or attempt to cause an employer to discriminate in wages on the basis of sex

C. What are the key defenses?

- 1) The plaintiff must make out a *prima facie* case that she is performing equal work but receiving less pay than a male employee in the same establishment.
- 2) An employer may show that difference in pay is attributable to sex-neutral systems:
 - a) Seniority system
 - b) Merit system

- c) A system that measures earnings by quality or quantity of work
 - d) A premium for completing a *bona fide* training program
- 3) An employer may show the difference in pay is based on any other factor other than sex.

D. How is the EPA enforced?

- 1) Statute of limitations is two years, three years if the violation is “willful”
- 2) No administrative filing requirement
- 3) EEOC
- 4) Private lawsuits:
 - a) Individual action
 - b) Collective action with “opt in” provision

E. What are the remedies?

- 1) Back wages
- 2) Liquidated damages or prejudgment interest
- 3) Injunctive relief for EEOC
- 4) No punitive damages, except perhaps in retaliation cases
- 5) No compensatory damages
- 6) Attorneys fees and costs

RETALIATION

A. Overview of Protection From Retaliation under Title VII, Section 704(a):

Section 704(a) of Title VII protects an employee or applicant for employment (and in some circuits a former employee) from adverse action. Likewise, most federal employment and discrimination statutes similarly include a prohibition on retaliation. Retaliation claims generally are analyzed the same, regardless of the authority under which filed, for the following reasons:

Employees are protected from retaliation on both the bases of participation and opposition. They are read liberally to protect persons who file administrative charges of discrimination or otherwise aid Equal Employment Opportunity Commission (“EEOC”) enforcement functions.³⁴ Broadly speaking, participation clause protection is narrower (covering fewer activities) but deeper (more categorically protected), while opposition clause protection is broader but shallower.³⁵

1. Participation:

Where an employee has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under the relevant statute.

³⁴ E.g., Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997) (finding that definition of “employees” in Title VII anti-retaliation provision is ambiguous, and therefore, consistent with broader context and purpose of Title VII, is to be construed to include former employees); Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001) (holding that causal link element in prima facie case of retaliation is construed broadly and employee need prove only that protected activity and adverse employment action were “not completely unrelated”); Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) (stating that actionability of Title VII anti-retaliation claim not affected by type of discrimination or level of severity); Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994) (finding directive that, as remedial legislation, Title VII be construed broadly, applies to reasonableness of plaintiff’s belief that violation occurred for purposes of retaliation claim under opposition clause); E.E.O.C. v. Ohio Edison Co., 7 F.3d 541, 545-46 (6th Cir. 1993) (Title VII opposition clause should be broadly construed to protect employee, or her representative, against retaliation); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989) (upholding finding that employer impermissibly retaliated against employee who testified in another employee’s EEOC proceeding against employer); Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988) (noting that participation and opposition clauses of Title VII are to be “broadly construed to protect employees who utilize the tools provided by Congress to protect their rights”).

³⁵ E.g., Glover v. S.C. Law Enforcement Div., 170 F.3d 411 (4th Cir. 1999).

By contrast, courts are divided on the question of whether the Fair Labor Standards Act (which includes the Equal Pay Act as a component) protects only formal participation from retaliation. Compare Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999) (en banc) (employees who complain to their employer about alleged violation of the FLSA are protected by the statute’s anti-retaliation provisions), cert. denied, 528 U.S. 1116 (2000) with Harrison v. Admin. Review Bd., 390 F.3d 752, 757 (2d Cir. 2004) (citing Lambert v. Genesee Hosp., 10 F.3d 46 (2d Cir. 1993) (female employees’ oral complaints to their supervisor, about not receiving an equal salary and an equal opportunity to apply for a promotion as male employees, did not meet the threshold for a prima facie case for retaliation under the Equal Pay Act), cert. denied, 511 U.S. 1052 (1994)).

Under the retaliation provision of the FLSA, participating employees are required to have a good faith belief that the employer is covered. Even an employer who is not otherwise covered by the FLSA may be subject to the statute’s anti-retaliation provisions if the employee reasonably believes that the employer is covered. See, e.g., Sapperstein v. Hager, 188 F.3d 852 (7th Cir. 1999) (For a participating employee to be protected under the FLSA’s anti-retaliation provision, “[t]here is no requirement that those laws must actually be violated. It is sufficient that the plaintiff had a good-faith belief that they might be violated.”).

Court's broadly construe the participation clauses and extend derivative protection where an employer mistakenly believes an employee has engaged in protected conduct and where an employee is related to or allied with someone who engaged in protected activity.

The participation clause protects individuals who participate in activity related to a formal discrimination proceeding. Good faith belief in the underlying discrimination claim is generally not required by the participant, as protection is afforded regardless of whether the underlying discrimination allegations have merit.³⁶ All individuals participating in the activity are covered, as former employees are afforded the same protections as current employees.³⁷

2. Opposition:

Where an employee has opposed any practice made an unlawful employment practice under the relevant statute.

Under the opposition clause the courts are not unanimous on what constitutes protected activity and consideration must be given to (1) whether the practice opposed must be in fact and in law a violation of the relevant statute; (2) under what circumstances broad or ambiguous complaints will be interpreted as opposition; and (3) under what circumstances the form of the opposition, such as unlawful or disruptive conduct, will withdraw statutory protection that otherwise might exist.

Protected "opposition" to discrimination can include a variety of practices having little or nothing to do with any administrative or judicial proceedings, such as public protests and letters to officials with no responsibility for acting on discrimination charges.³⁸ The basic limitation is the requirement of reasonable conduct and good-faith belief that the opposed conduct was discriminatory.³⁹

³⁶ EEOC GUIDELINES, Vol. 2, Sec. 8-II.C.2 (protected participation includes activities made in conjunction with a proceeding or investigation initiated under Title VII, ADEA, EPA or ADA, without regard to whether the allegations are valid or reasonable); see, e.g., Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 175 (2d Cir. 2005); Deravin v. Kerik, 335 F.3d 195, 203-205 (2d Cir. 2003); Buettner v. Arch Coal Sales Co., Inc., 216 F.3d 707, 714 (8th Cir. 2000); Merritt v. Dillard Paper Co., 120 F.3d 1181, 1188-89 (11th Cir. 1997); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996) (a complainant need not contain a successful discrimination claim, and need only show a "good faith, reasonable belief" that a violation occurred); Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994) (Title VII's participation clause does not require that a charge of discrimination be valid or even reasonable); Balazs v. Liebenthal, 32 F.3d 151, 158-59 (4th Cir. 1994) (charge of discrimination need not be true). But see Amos v. Hous. Auth. Of Birmingham Dist., 927 F.Supp. 416, 421-22 (N.D.Ala. 1996); Fiscus v. Triumph Group Operations, Inc., 24 F.Supp.2d 1229, 1241 (D. Kan. 1998) ("reasonable good faith belief that employer discriminated" required).

³⁷ Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (Title VII); accord Flannery Recording Indus. Ass'n of Am., 354 F.3d 632, 642 & n.2 (7th Cir. 2004) (ADA and ADEA); Bullock v. Equitable Life Assur. Soc. of United States, 259 F.3d 395, 400 (5th Cir. 2001) (ERISA).

³⁸ See E.E.O.C. v. Crown Zellerbach Corp., 720 F.2d 1008 (9th Cir. 1983).

³⁹ E.g., Peters v. Jenney, 327 F.3d 307, 320-21 (4th Cir. 2003); Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2d Cir. 1999); Trent v. Valley Elec. Ass'n, Inc., 41 F.3d 524, 526 (9th Cir. 1994); Bigge v. Albertsons

A good-faith belief standard applies; the opposition remains protected so long as the employee reasonably and in good faith believed that unlawful discrimination was occurring.⁴⁰ Protection will be denied only if the employee's professed belief that discrimination occurred is so far from the mark that "[n]o reasonable person could have believed that the [conduct] ... violated Title VII's standard."⁴¹

In Hochstadt v. Worcester Foundation for Experimental Biology,⁴² a seminal case on the limits of protected opposition, the employer's particularly strong interest in a harmonious environment for cooperative laboratory research justified discharging the plaintiff as "disloyal." Although the plaintiff's constant complaints about salary and poor evaluations "were associated with a protected objective," she also engaged in actions "of an excessive nature" that included circulating negative rumors, disclosing confidential employee information, and other tactics that damaged employee relationships and interfered with work objectives, justifying her termination.⁴³ The First Circuit held that the manner in which an employee expresses opposition to an allegedly discriminatory practice must be reasonable to qualify as protected conduct-- a standard that has been followed by other circuit courts.⁴⁴ Illegal tactics, such as an employee "stall-in" that violates state law on obstructing traffic, also do not qualify as protected activities.⁴⁵

It is permissible for the plaintiff's accusations to have a negative effect on the employer, however; otherwise, virtually all protected activity would be deemed disloyal. The test is whether plaintiffs go so far as to subvert the workplace and their own performance. Equal Employment Opportunity Commission v. Crown Zellerbach Corporation,⁴⁶ an early case on the limits of Hochstadt, held that the opposition clause protected not only plaintiffs who complained of discrimination to the EEOC, but also those who engaged in a wide-ranging array of complaints, protests, and pressure tactics. These protected activities included sending letters to the employer's corporate parent requesting meetings and to local officials demanding investigation, picketing the mayor's office, filing an administrative

Inc., 894 F.2d 1497 (11th Cir. 1990).

⁴⁰ For discussion of rationale behind good-faith belief standard, see generally, Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1137-41 (5th Cir. 1981) (discussing inter alia Sias v. City Demonstration Agency, 588 F.2d 692, 694-95 (9th Cir. 1978) and Hearth v. Metro. Transit Comm'n, 436 F. Supp. 685, 688-89 (D. Minn. 1977)).

⁴¹ Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001). For further discussion of the outer limits of the good-faith reasonable belief standard, see infra Part III(A)(2)(b)(ii).

⁴² 545 F.2d 222 (1st Cir. 1976).

⁴³ Id. at 234; see also Rollins v. Fla. Dep't of Law Enforcement, 868 F.2d 397 (11th Cir. 1989) (finding that employer had legitimate basis for taking adverse action against plaintiff whose behavior fell beyond protected conduct; plaintiff filed overwhelming number of complaints, bypassed complaint chain of command, and damaged morale with unsupported accusations).

⁴⁴ E.g., Rollins, 868 F.2d at 401. Whether the opposition is reasonable is determined "on a case by case basis by balancing the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment." Id. Accord Hertz v. Luzenac Am., Inc., 370 F.3d 1014, 1021 (10th Cir. 2004); Matima v. Celli, 228 F.3d 68, 79-80 (2d Cir. 2000); Jennings v. Tinley Park Comty. Consol. Sch. Dist. No. 146, 864 F.2d 1368, 1374 (7th Cir. 1988).

⁴⁵ See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

⁴⁶ 720 F.2d 1008 (9th Cir. 1983).

complaint with the Office of Federal Contract Compliance, and sending a letter to a school district discouraging it from giving the employer an award for providing underprivileged students career guidance because of the employer's "bigoted position of racism."⁴⁷ In sum, as long as employees opposing discrimination do not disrupt the workplace and continue to satisfy the requirements of their jobs, their conduct is unlikely to be deemed so unreasonable as to lose opposition clause protection.

"Opposition" clause protection extends to employees who were incorrect in their belief that discrimination had occurred only if they reasonably and in good faith believed that discrimination had occurred. Under that rule, the question is how incorrect an employee's belief can be and remain protected. In Clark County School District v. Breeden, a female employee claimed she was unlawfully retaliated against when she complained that a supervisor and co-worker laughed at one sexually offensive joke that a job applicant made about another woman.⁴⁸ Applying the Ninth Circuit's elaboration of the "reasonable belief" standard, the Supreme Court held that "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard."⁴⁹

B. What are the elements of a retaliation claim?

1. That the employee engaged in statutorily protected conduct, i.e., either participation or opposition;
2. That the employee suffered adverse treatment; and
3. That a causal connection exists between the protected conduct and the adverse treatment. This nexus normally is established for purposes of a prima facie case by proof that the protected conduct preceded the adverse treatment and proof of the employer's knowledge of the employee's protected activity prior to taking the adverse action.

C. What is cognizable adverse treatment?

Courts have considered the following types of treatment adverse: transfer, reassignment, termination, suspension with pay, failure to promote, exclusion from necessary information, refusal to process a grievance, deviation from established in-house procedures, harassment, disciplinary demotion, unjustified evaluations and reports, loss of normal work assignments, etc. Accordingly, adverse treatment may include actions that are not economically detrimental to the employee. However, courts consistently have held that personality conflicts and snubbing that may make an employee's position more difficult do not constitute retaliation.

In what has been widely understood as an employee-friendly decision, the Supreme Court in Burlington Northern & Santa Fe Railway Co. v. White recently resolved a circuit split

⁴⁷ Id. at 1010-11.

⁴⁸ 532 U.S. 268 (2001).

⁴⁹ Id. at 271.

concerning the proper burden of proof in retaliation claims under Title VII.⁵⁰ In White, the Court examined the differences between the statutory construction of Title VII discrimination, which bars unlawful bias in “terms and conditions” of employment, and Title VII retaliation, which does not include this limiting principle. The Court concluded that the plain language of the statute evinces a Congressional intent that protection against retaliation be broader in scope than protection against discrimination.⁵¹

In White, the Supreme Court provided the following example: a “schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.”⁵² To be actionable, however, such a change, must be “material,” not the “petty slights or minor annoyances that often take place at work that all employees experience.”⁵³ The Court left it to the lower courts to determine, on a case-by-case basis, the parameters of unlawful, non-economic actions by employers.⁵⁴

⁵⁰ Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).

⁵¹ Id.

⁵² White, 126 S. Ct. at 2415.

⁵³ Id.

⁵⁴ In light of White, courts have revisited what constitutes a “materially adverse action”: Hare v. Potter, 220 Fed. Appx. 120, 128-129 (3d Cir. 2007) (non-selection for Career Management Program designed “to train and fast-track employees with leadership skills into management-level positions”); Burks v. Wis. Dep’t of Transp., 464 F.3d 744 (7th Cir. 2006) (negative performance reviews and termination); Phelan v. Cook County, 463 F.3d 773 (7th Cir. 2006) (four month termination, despite subsequent reinstatement and award of back-pay); Gregson v. Leavitt, 465 F.3d 87 (2d Cir. 2006) (relief from job duties and a substantial reduction in duties and responsibilities); Taylor v. Roche, 196 Fed. Appx. 799 (11th Cir. 2006) (repeated refusal to transfer employee to night shift); Cassimy v. Bd. of Educ. of Rockford Pub. Schs., Dist. # 205, 461 F.3d 932, 938 (7th Cir. 2006) (reclassification of administrator to teacher); Mickelson v. New York Life Ins. Co., 460 F.3d 1304, 1316-17 (10th Cir. 2006) (denial of employee’s request to return to work part-time); Randolph v. Ohio Dep’t of Youth Servs., 453 F.3d 724, 736-37 (6th Cir. 2006) (placement on administrative leave and subsequent termination, despite eventual reinstatement with 75% back-pay); Kessler v. Westchester County Dep’t of Soc. Servs., 461 F.3d 199, 207-08 (2d Cir. 2006) (transfer); Pryor v. Wolfe, 2006 WL 2460778, at *2 (5th Cir. Aug. 22, 2006) (withholding of employee’s paycheck for hours worked after he filed an EEOC complaint); Minor v. Centocor, Inc., 457 F.3d 632, 634 (7th Cir. 2006) (assignment of extra work); Jordan v. City of Cleveland, 464 F.3d 584 (6th Cir. 2006) (unfair transfers and significant loss of job responsibility); Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1202 (10th Cir. 2006) (termination) (citing White, 126 S. Ct. at 2414-15); McDonough v. City of Quincy, 452 F.3d 8, 18 (1st Cir. 2006) (transfer to daytime shift); Black v. Indep. Sch. Dist. No. 316, 476 F. Supp. 2d 1115, 1124 (D. Minn. 2007) (employee suffered three materially adverse employment actions: “(1) [employer]’s threat that Black was not to speak with the press “or else,” (2) Black’s lack of overtime opportunities, and (3) Black’s reassignment to a position with lower pay and fewer hours”); Glinski v. RadioShack, 2006 WL 2827870, at *15 (W.D.N.Y. Sept. 29, 2006) (negative employment reviews, reductions in pay and termination); Amodio v. Wild Oats Mkts., Inc., 2006 WL 2800903, at *6 (D.Conn. Sept. 28, 2006) (transfer from marketing position to Natural Living Clerk position); Edwards v. Metro-N. Commuter R. Co., 2006 WL 2790402, at *9 (D.Conn. Sept. 27, 2006) (termination, failure to requalify, and failure to provide with protective gear); Perez v. Consolidated Edison Corp. of New York, 2006 WL 2707316, at *13 (S.D.N.Y. Sept. 20, 2006) (“loss of shift differential and overtime pay, the change of work schedule and the change of office location.”); Wright v. Stern, 450 F.Supp.2d 335 (S.D.N.Y. Sept. 15, 2006) (reassignment, negative performance evaluation, downgraded performance evaluation, and assignment to work in basement); Carmellino v. Dist. 20 of New York City Dep’t of Educ., 2006 WL 2583019, at *3 (S.D.N.Y. Sept. 6, 2006) (decision not to promote to open and available position for employee applied); Singh v. United States Sec. Assocs., 2006 WL 2460642, at *5 (S.D.N.Y. Aug. 10, 2006) (security guard’s transfer to different building, which required him to re-qualify for position, amounted to loss of rank); Thomas v. iStar Fin., Inc., 438 F. Supp. 2d 348, 365 (S.D.N.Y. 2006) (providing negative references or refusing to give positive references).

In further evidence that the retaliation protections are broadly defined, the Supreme Court also held that Title VII's anti-retaliation provisions extend beyond workplace-related or employment-related retaliatory acts and harms.⁵⁵ For anti-discrimination statutes, the Court noted that the objective of these laws was to end workplace discrimination, which necessarily focused on the acts inside the workplace. To prevent harm by retaliation, however, the anti-retaliation provisions cannot be limited to the confines of the workplace because employers can effectively retaliate against an employee by taking actions not directly related to employment or by causing harm outside the workplace.⁵⁶

D. False Motive: The McDonnell Douglas Corp. v. Green Burden Shifting Analysis?

Where an employee establishes a prima facie case of retaliation, courts analyze the claim under the McDonnell Douglas Corp. v. Green, 411 U.S. 791 (1973), framework.⁵⁷ The employer has the burden of producing evidence that it had a nonretaliatory, legitimate reason for its actions, i.e., insubordination, poor performance, lack of qualifications, reorganization. If the employer presents proof of a legitimate, nonretaliatory reason for its action, the employee has an opportunity to prove pretext, or that the employer is not being truthful. This effort frequently includes evidence that the employer treated the employee differently than similarly situated employees. The employee will seek to present evidence that creates disbelief of the employer's proffered reason. Of uppermost importance is the temporal relationship between the protected conduct and the adverse action. Actions closer in time enhance an employee's case, and vice versa.

E. Mixed Motive: The Price Waterhouse v. Hopkins Analysis:

The employee need not show that a retaliatory motive was the sole motive for the adverse treatment. If an employee demonstrates that the employer was motivated at least in part by the plaintiff's protected conduct, then under Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), the employee may prevail without necessitating the McDonnell Douglas burden shifting analysis. Where the employer can show it would have made the same decision it did even without the presence of a retaliatory motive, the employee would still be entitled to declaratory relief, injunctive relief (not including hiring, reinstatement or promotion), attorneys fees and costs.

Courts have also found that, consistent with the purpose behind various federal antidiscrimination and whistleblower statutes, an employer's perception, even if mistaken, that an employee engaged in some sort of protected activity, is sufficient to support a retaliation claim, assuming other required elements are also met.⁵⁸

⁵⁵ White, 126 S. Ct. at 2411-12.

⁵⁶ Id.

⁵⁷ Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)); DiCarlo v. Potter, 358 F.3d 408, 420 (6th Cir. 2004); Sanchez v. Henderson, 188 F.3d 740, 745-46 (7th Cir. 1999); Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 38 (1st Cir. 2003); Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000); Cones v. Shalala, 199 F.3d 512, 516 (D.C. Cir. 2000) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Richardson v. N.Y. State Dep't of Corr. Servs., 180 F.3d 426, 444 (2d Cir. 1999)).

⁵⁸ See, e.g., Fogelman v. Mercy Hosp., Inc., 283 F.3d 561, 571 (3d Cir. 2002) (stating that because ADA and ADEA "focus on the employer's subjective reasons for taking adverse action against an employee, ... it matters not whether

F. Retaliation Under Other Statutes

1. Age Discrimination in Employment Act (“ADEA”)

The Age Discrimination in Employment Act (“ADEA”) provides that it is unlawful for an employer to terminate or otherwise discriminate against an employee or job applicant because he has opposed any unlawful discriminatory practice under the Act or has made a charge, testified, or otherwise participated in an investigation or other proceeding related to a charge under the Act.⁵⁹

Because the ADEA’s retaliation provision is nearly identical to Title VII’s retaliation provision, an employee bringing an ADEA retaliation claim is required to establish that: (1) he engaged in a protected employee activity; (2) he was subject to adverse employment action by the employer either subsequent to or contemporaneous with the protected activity; and (3) there is a causal connection between the protected activity and the adverse employment action.⁶⁰

2. Americans With Disabilities Act (“ADA”)

The Americans with Disabilities Act (“ADA”) declares it unlawful to coerce, intimidate, or interfere with any individual in his or her exercise or enjoyment of any right protected under the ADA or to retaliate against an individual who has exercised any protected right or has aided or encouraged another individual in the exercise of any such right.⁶¹ The ADA also establishes whistleblower protection for employees of companies or other organizations that have other ADA compliance obligations because the ADA retaliation and interference prohibitions protect rights under all ADA provisions – not only employment, but also public accommodations and services.⁶²

The ADA’s retaliation provisions are codified at 42 U.S.C. § 12203. While § 12203(a) contains opposition and participation clauses that track those of Title VII, § 12203(b) further prohibits efforts to “coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his having exercised or enjoyed, ... any right granted or protected by this subchapter.”

the reasons behind the employer’s discriminatory animus are actually correct as a factual matter”); Saffels v. Rice, 40 F.3d 1546, 1549-50 (8th Cir. 1994) (concluding that language of and intent behind Fair Labor Standards Act “protects employees who are discharged based on their employer’s mistaken belief that they reported violations or otherwise engaged in protected activity”); Grosso v. City Univ., 2005 WL 627644, at *3-*4 (S.D.N.Y. Mar. 16, 2005) (finding “perception theory” valid basis for Title VII retaliation claim).

⁵⁹ 29 U.S.C. § 623.

⁶⁰ See, e.g., Fasold v. Justice, 409 F.3d 178, 188 (3d Cir. 2005); Franzoni v. Hartmarx Corp., 300 F.3d 767, 772 (7th Cir. 2002); Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94 (2d Cir. 2001).

⁶¹ 42 U.S.C. § 12203(b); 29 C.F.R. § 1630.12(b).

⁶² 42 U.S.C. § 12203(c) (proscribing retaliation as to entirety of Chapter 126, “Equal Opportunity for Individuals with Disabilities,” not just as to employment subchapter).

a. Unclear Basis for Accommodation Request Retaliation Claims

From the face of this statutory language, it would appear that retaliation against an individual who requests accommodation would violate § 12203(b) as an attempt to “coerce, intimidate, threaten, or interfere” motivated by the individual’s efforts to exercise ADA rights. At least one court, however, has held that a claim of retaliation for requesting an accommodation is a Section 12203(a) claim,⁶³ while another court did not specify the statutory basis for such a claim.⁶⁴

b. Possibility of Individual Liability

While most courts have found that individuals cannot be held liable under Title VII,⁶⁵ the ADA’s anti-retaliation provision directing that “No person shall” retaliate⁶⁶ may open the door to individual liability for ADA retaliation claims. A minority view adopts this standard, despite basic ADA discrimination claims allowing for no individual liability.⁶⁷ Other courts have rejected individual liability for ADA retaliation.⁶⁸

c. Availability of Compensatory and Punitive Damages

A few courts have opined that compensatory and punitive damages are not available for ADA retaliation claims because the Civil Rights Act of 1991, which first made such damages available to Title VII and ADA plaintiffs, does not explicitly list the ADA’s retaliation section as one of those covered by the new damages provisions.⁶⁹

⁶³ Garza v. Abbott Labs., 940 F. Supp. 1227, 1244-45 (N.D. Ill. 1996) (denying defendant summary judgment because plaintiff “has produced evidence that she engaged in statutorily protected expression by requesting accommodation.... [T]he adverse actions that Garza alleges followed on the heels of her requests for accommodation”).

⁶⁴ Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1328 (11th Cir. 1998) (ADA plaintiff claimed retaliation after his reasonable accommodation request, and court held that “it would be sufficient for him to show that he had a good faith, objectively reasonable belief that he was entitled to those accommodations under the ADA,” but finding no such reasonable belief).

⁶⁵ E.g., Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) (holding that no individual liability is appropriate under Title VII), abrogated on other grounds by Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). But see Iacampo v. Hasbro, Inc., 929 F. Supp. 562 (D.R.I. 1996) (holding that individual liability is appropriate under Title VII).

⁶⁶ 42 U.S.C. § 12203(a) (emphasis added).

⁶⁷ See Ostrach v. Regents of Univ. of Cal., 957 F. Supp. 196, 200 (E.D. Cal. 1997); *EEOC Policy Guidance on Investigating, Analyzing Retaliation Claims*, BNA Corporate Practice Series No. 40-3 W 6 (2006) (“A charging party can bring an ADA retaliation claim against an individual supervisor, as well as an employer. This is because Section 503(a) of the ADA makes it unlawful for a ‘person’ to retaliate against an individual for engaging in protected activity.”). Cf. Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (finding individual liability but addressing only claim under Title II (public services) rather than Title I (employment) of ADA).

⁶⁸ E.g., Baird v. Rose, 192 F.3d 462, 471-72 (4th Cir. 1999); McInerney v. Moyer Lumber & Hardware, Inc., 244 F. Supp. 2d 393, 397-98 (E.D. Pa. 2002); Van Hulle v. Pac. Telesis Corp., 124 F. Supp. 2d 642, 644-46 (N.D. Cal. 2000); Santiago v. City of Vineland, 107 F. Supp. 2d 512, 551-52 (D.N.J. 2000); Kautio v. Zurich Ins. Co., No. 97-2411-JWL, 1998 WL 164623, at *1-*2 (D. Kan. Mar. 18, 1998); Stern v. Cal. State Archives, 982 F. Supp. 690, 692-94 (E.D. Cal. 1997); Cable v. Dep’t of Dev. Servs., 973 F. Supp. 937, 943 (C.D. Cal. 1997).

⁶⁹ Compare Boe v. AlliedSignal, Inc., 131 F. Supp. 2d 1197, 1202-03 (D. Kan. 2001) (finding that Civil Rights Act of 1991 does not authorize compensatory or punitive damages for ADA retaliation claim) and Brown v. City of Lee’s Summit, No. 98-0438-CV-W-2, 1999 WL 827768 (W.D. Mo. June 1, 1999) (same) with Ostrach v. Regents of Univ. of Cal., 957 F. Supp. 196, 200-01 (E.D. Cal. 1997) (finding that Civil Rights Act of 1991 does authorize

d. Unresolved Retaliation Issues Under the ADA

The ADA retaliation provisions present several issues similar to the issue of whether the Civil Rights Act of 1991 mixed-motive provisions apply to Title VII retaliation claims. The issues are similar in that they share a common source: Congress's penchant for placing anti-retaliation provisions in different statutory sections than antidiscrimination provisions. This placement leads to dueling statutory interpretations that, depending on the viewpoint, may reflect over-interpretation of textual minutiae or may reflect meaningful differences between the legal rules for discrimination and retaliation cases.

compensatory or punitive damages for ADA retaliation claim). Cf. Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (allowing compensatory damages for ADA retaliation claim but addressing only under Title II (public services) rather than Title I (employment) of ADA); Rhoads v. F.D.I.C., No. CCB-94-1548, 2002 WL 31755427 (D. Md. Nov. 7, 2002) (holding that compensatory damages are available for ADA retaliation claims, but punitive damages not available because defendant was governmental agency).

HARASSMENT

A. Overview of Harassment:

The term “harassment” is not mentioned in Title VII, the ADA or ADEA. However, in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the U.S. Supreme Court first recognized a claim of sexual harassment. Subsequent to Meritor, the Supreme Court indicated in Harris v. Forklift Systems, 510 U.S. 17 (1993) that harassment claims may be pursued for Fall protected classes under Title VII. The following cases are illustrative:

1. Age, see, e.g., Burns v. AAF-McQuay, Inc., 166 F.3d 292 (4th Cir. 1999);
2. Race, National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) (race);
3. Disability, see, e.g., Flowers v. Southern Reg'l Physician Servs., Inc., 247 F.3d 229 (5th Cir. 2001);
4. Religion, see, e.g., Daron v. Premdor Entry Sys., 172 F.3d 48, 1998 U.S. App. LEXIS 31017 (6th Cir. Dec. 3, 1998);
5. Same-Sex, see e.g. Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998);
6. Religion and national origin, see e.g. EEOC v. WC&M Enterprises, 101 FEP Cases 332 (5th Cir. 2007); and

Unfortunately, allegations of inappropriate comments or conduct are not uncommon in today’s marketplace. In fact, with the prevalence of electronic media in the modern workplace, the casual distribution of potentially offensive emails, text messages, and video is a growing concern. Couple these issues with an increasingly diverse workforce (sexually, racially, and culturally), and harassment, or at least allegations of it, are a routine occurrence at work. Although the reporting and investigation of harassment allegations has always been important, the Supreme Court’s decisions in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), now place an increased premium on an employee’s reporting of alleged misconduct and on an employer’s response to those reports.

In Faragher/Ellerth, the Court abandoned the quid pro quo framework in supervisory harassment cases and introduced an analysis based on whether a (a) “tangible employment action” occurred or (b) the harassment is environmental.

1. Tangible Employment Action. The Court defined tangible employment action as a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Ellerth, 524 U.S. at 761. Normally, a tangible employment action requires action of a supervisor or management employee. Direct economic harm is an important indicator, but courts have found tangible action in its absence. See e.g., Green v. Administrators of the Tulane

Educational Fund, 284 F.3d 642, 654-55 (5th Cir. 2002); Durham Life Insurance Co. v. Evans, 166 F.3d 1139 (3rd Cir. 1999).

2. Environmental Harassment: The Court did not redefine environmental harassment, but reaffirmed environmental harassment to be offensive conduct (both objectively and subjectively) based on sex (or any other protected class; fication) so severe or pervasive as to alter the conditions of the employee's employment and create an abusive working environment. See Ellerth, 524 U.S. at 754, citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1993) and Harris v. Forklift Systems, Inc., 510 U.S. 17 (1995).

Since Faragher and Ellerth, the *quid pro quo* and hostile environment distinctions have been essentially abandoned in supervisory harassment cases and replaced with analysis of tangible employment action versus purely hostile environment harassment.

B. The Elements Where There Is Tangible Employment Action:

The elements of a sex harassment claim where there is a tangible employment action are:

1. Membership in a protected group: established by a statement of gender. The complaining employee may be of the same gender as the alleged harasser(s);
2. Sex based: the conduct need not be sexual in nature, but must be "because of sex;"
3. A tangible employment action: (see above);
4. The supervisor placed sexual demands on employee: evidence of direct or express sexual demands is not required, but rather, courts have permitted a "broad array" of evidence to satisfy this element; and
5. A nexus between tangible action and the employee's acceptance or rejection of alleged harassment: evidence relevant to a determination of the nexus includes the temporal relationship of the sexual demand and acceptance or rejection and the employment action, comparative evidence of how employees of the opposite gender were treated and evidence of the alleged harasser's involvement in the adverse employment decision.

Following Faragher and Ellerth, when an employee can prove these elements, the employer is vicariously liable per se and is not entitled to an affirmative defense.

C. The Elements of A Hostile Environment Claim:

The elements of a sex based environmental claim are:

1. Membership in a protected group: established by a statement of gender. The complaining employee may be of the same gender as the alleged harasser(s);

2. Sex based: the conduct need not be sexual in nature, but must be “because of sex;”
3. Unwelcome: normally requires proof that the employee complained of the conduct or that the employer knew of the offensive conduct; and
4. Severe or pervasive: the conduct must, both objectively and subjectively, alter the conditions of employment and create an abusing working environment:

The Supreme Court in Faragher and Ellerth set forth a two-pronged affirmative defense that, if satisfied, in some instances permits an employer to avoid liability even if an employee establishes a *prima facie* case of environmental harassment. The affirmative defense does not apply where there was a tangible employment action.

Prong 1 The employer exercised reasonable care to prevent and correct promptly any harassment: Generally satisfaction of this prong requires that the employer have and disseminate a formal policy prohibiting harassment that includes a complaint procedure that allows an employee to bypass the offending supervisor. Courts will consider the policy, the employee’s complaint, if any, and the employer’s response. Analysis of this prong includes the promptness and effectiveness of the employer’s response (where a complaint was made) and the employer’s compliance with its policy prohibiting harassment.

Prong 2 The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise: Generally, if an employee fails to come forward with a complaint, the courts typically find the employee unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer. Fear of retaliation is not an excuse.

D. Variance in Potential Employer Liability Based on Position of “Harasser”:

1. Harassment by high level manager. Faragher and Ellerth suggest that harassment by an individual “indisputably within that class of an employer organization’s officials who may be treated as the organizations proxy” results in automatic liability. Courts have provided little guidance on this “proxy” component.
2. Harassment by a “supervisor.” Where there has been no tangible employment action, the employer is presumptively liable, subject to the Faragher and Ellerth affirmative defense. Generally, supervisors are those whose authority includes the power to hire, fire, demote, promote, transfer or discipline. Absent authority such as this, an employee does not qualify as a “supervisor” for imputing liability to the employer.
3. Harassment by a co-worker. Following Faragher and Ellerth, the courts have continued to apply a negligence standard to cases where the alleged harasser is a co-worker. The employee must prove the employer knew or should have known” of the alleged harassment and failed to take prompt remedial action. See e.g.,

Bailey v. Runyon, 167 F.3d 466, 468 (8th Cir. 1999) (citations omitted); Bernier v. Morningstar, Inc., 495 F.3d 369, 373 (7th Cir. 2007).

4. Harassment by nonemployees. Courts apply the negligence standard reasoning that the employer ultimately controls the conditions of the work environment. In this instance, “appropriate corrective action” includes consideration of the authority and control the employer has over the nonemployee.

EEOC PROCEDURES

A. What are the charge filing requirements?

- 1) Except for the Equal Pay Act (29 U.S.C. § 206 (d)), the substantive statutes administered by the EEOC require that a person claiming discrimination file a charge of discrimination with the EEOC. See 42 U.S.C. § 2000e – 5(b) (Title VII); 29 U.S.C. § 626 (d) (ADEA); 42 U.S.C. § 12117 (a) (ADA).
- 2) Charges must be in writing and under oath. See id.; see also 29 C.F.R. § 1601.9.
- 3) If an unsworn charge is filed, a charging party may verify the charge while it is still pending before the Commission and the verification will relate back to the original filing date. See Edelman v. Lynchburg College, 535 U.S. 106 (2002); 29 C.F.R. § 1601.12(b).
- 4) The charge, at a minimum, must be “a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.” 29 C.F.R. § 1601.12(b).
- 5) A charge may be filed in person or by mail at any EEOC field office, Commission headquarters in Washington, D.C., or with any designated representative of the Commission. See 29 C.F.R. §1601.8.
- 6) The charge filing process also may be started by calling the Commission’s National Contact Center at 1-800-669-4000, but an actual charge must be filed with a district office to constitute a charge.

B. What are the procedures after a charge is filed?

- 7) The EEOC must serve the charge on the respondent within 10 days of the filing of the charge. See 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117 (a); 29 C.F.R. § 1601.14 (a).
- 8) The Commission is authorized to investigate the allegations of the charge, including requiring the Charging Party to provide a statement identifying when and how they believe they were discriminated against, and the facts which lead the person to believe that they were discriminated against. See 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626(d); 29 C.F.R. § 1601.15.
- 9) The Respondent typically is asked to provide a Statement of Position responding to the allegations of the charge, and the EEOC can request documents and interview witnesses.
- 10) The Commission has the authority to issue administrative subpoenas compelling the production of witnesses and documents. See 29 C.F.R. § 1601.16 (a).

- 11) Upon completion of its investigation, the EEOC has no authority to issue a binding determination against any Respondent other than a Federal agency.
- 12) If the Commission determines that there is reasonable cause to believe that a violation has occurred, the Commission will invite the parties to attempt to resolve the allegedly unlawful practice through conciliation. See 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626 (d); 29 C.F.R. § 1601.21 (reasonable cause) and § 1601.24 (conciliation).
- 13) If conciliation fails, the EEOC will notify the parties of that fact (29 C.F.R. § 1601.25).
- 14) At this stage, the EEOC may file suit on behalf of the charging party or issue a Notice of Right to Sue (a/k/a Dismissal and Notice of Rights). See 29 C.F.R. § 1601.27 and § 1601.28 (b).
- 15) A charging party also may request the issuance of a Notice of Right to Sue from the EEOC where the charge has been pending for at least 180 days or the Commission determines that it is unlikely to complete its investigation within 180 days. See 29 C.F.R. § 1601.28 (a)(1) and (2). There is a split among the Circuits as to the validity of early Notices of Right to Sue, and the Supreme Court has not yet addressed the issue. Compare Martini v. Federal National Mortgage Association, 175 F.3d 1336 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000) (holding that the Notice and the authorizing EEOC regulation are void, vacating the jury verdict after five years of litigation, and sending the case back to the EEOC) with Brown v. Puget Sound Electrical Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984), cert. denied, 469 U.S. 1108 (1985) (upholding the same EEOC regulation) and Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1061-63 (11th Cir. 1994) (same). Some courts invalidating the regulation have simply required the action to be held in abeyance while the case is re-submitted to the EEOC for the number of days necessary to make the full 180 days. E.g., Spencer v. Banco Relá, S.A., 87 F.R.D. 739,741-48 (S.D. N.Y. 1980). The Supreme Court has referred to the “early notice” regulation in passing, but without ruling on its validity. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 n.6 (1981). Most lower-court decisions do not mention this reference.
- 16) Although the Commission has the authority to issue substantive “No Cause” determinations, the Commission currently does not do so and instead issues determinations that it is unable to conclude that there was reasonable cause.
- 17) In every instance where the Commission elects not to file suit, the charging party is entitled to a notice of right to sue. See 29 C.F.R. § 1601.28 (b).
- 18) The notice of right to sue should contain the Commission's determination on the charge and the date of service of the notice. See e.g., 29 C.F.R. § 1601.28 (e).

- 19) The charging party has 90 days from receipt of the notice of right to sue to file suit. See 42 U.S.C. § 2000e-5(f); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626 (e).

C. What is administrative exhaustion?

- 20) The charge filing requirement is not jurisdictional and is subject to waiver and estoppel. See Zipes v. TWA, Inc., 455 U.S. 385, 395 (1982).
- 21) Commissioner's charges are subject to greater requirements of specificity than individual charges. See EEOC v. Shell Oil Co., 466 U.S. 54, 73 (1989).
- 22) The ADEA and EPA do not provide for Commissioner's charges, and the EEOC uses directed investigations, sometimes followed by suit by the EEOC, to serve the same role of initiating investigations and enforcement in the absence of a charge by a person aggrieved.
- 23) When one charge of discrimination has been filed by a named plaintiff, in some circumstances other named plaintiffs or interveners may sue as to the same practice without having to file their own EEOC charges. Because of the importance of notice to the EEOC and the defendant, the success of such "piggy backing" efforts may depend on whether the charge on which the others seek to "piggy back" put the EEOC and the defendant on notice of large-scale or class-type liability, or instead that the number of the persons seeking "piggy backing" is small. See e.g., Howlett v. Holiday Inns, Inc., 49 F.3d 189, 194 (6th Cir. 1995) (ADEA; only one piggy backer); Tolliver v. Xerox Corp., 918 F.2d 1052, 1057-58 (2nd Cir. 1990) (Title VII), cert. denied, 499 U.S. 983 (1991)); Anderson v. Montgomery Ward & Co., Inc., 852 F.2d 1008 (7th Cir. 1988) (ADEA); Levy v. U.S. General Accounting Office, 175 F.3d 254, 255 (2nd Cir.) (per curiam), cert. denied, 528 U.S. 876 (1999) (rule did not apply where the additional plaintiffs had filed their own charges and let their notices of right to sue expire); Whalen v. W.R. Grace & Co., 56 F.3d 504, 507 (3rd Cir. 1995) (recognizing conflicting authority but holding that "single filing" rule does not allow amendment of an individual ADEA complaint, not alleging a class or representative action, to add new plaintiffs who have not filed charges with the EEOC, and holding that new individuals may not "opt in" to the individual action); Forehand v. Florida State Hospital at Chattahoochee, 89 F.3d 1562, 1565 n. 8 (11th Cir. 1996) (dictum).
- 24) Although EEOC charges are intended to put the Commission and the respondent on notice of the alleged acts of discrimination, EEOC charges are not construed with "literary exactitude," and the classic test is that "it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Sanchez v. Standard Brands, 431 F.2d 455, 465-66 (5th Cir. 1970).
- 25) The courts have generally held that plaintiffs may include post-charge retaliation claims in their judicial complaints without having filed a retaliation charge with

the EEOC. See, e.g., Clockedile v. New Hampshire Department of Corrections, 245 F.3d 1, 4-5 (1st Cir. 2001); Anderson v. Reno, 190 F.3d 930, 938 (9th Cir. 1999).

- 26) Even though the statutes provide that a civil action may be brought against a respondent named in the charge, courts have taken different views on what it means to be “named” in the charge, and tend to focus on the reasonable scope of the EEOC investigation, actual notice to the unnamed party, and identity of interest between the named and unnamed parties.
- 27) A plaintiff is required to have exhausted claims, not the evidence on which the plaintiff relies to establish the claim. See, e.g., Rutherford v. Harris County, 197 F.3d 173, 186 (5th Cir. 1999); Kline v. City of Kansas City Fire Department, 175 F.3d 660, 668 (8th Cir. 1999), cert. denied, 528 U.S. 1155 (2000).

D. What are the timing filing requirements?

- 1) In non-deferral jurisdictions, a charging party must file their charge within 180 days of the allegedly discriminatory act or practice. See 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626 (d)(1).
- 2) In deferral jurisdictions, a charging party has up to 300 days to file a charge with the commission. See 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117 (a); 29 U.S.C. § 626 (d)(2) and §633(b).
- 3) A deferral jurisdiction is a state with “a comprehensive law and an investigatory agency with enforcement powers that has applied for deferral status.” Fair Employment Practices Manual, § 451.2 (BNA). A list of approved deferral agencies can be found at 29 C.F.R. § 1601.74.
- 4) Neither the deadline for filing a charge, nor the 90 day deadline for filing suit after receipt of the notice of right to sue are jurisdictional. They are subject to waiver, estoppel, and equitable tolling. See Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990); Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); Zipes v. TWA, 455 U.S. 385 (1982).
- 5) The time to file a charge, or to file a lawsuit where there is no administrative exhaustion requirement (ex., 42 U.S.C. §1981), starts to run when the individual is notified of the final adverse employment action, not when the action is put into effect, even if there is a process for reconsideration still available to the plaintiff. See Delaware State College v. Ricks, 449 U.S. 250, 257-58 (1980).
- 6) In pay discrimination cases under Title VII, the time period for filing a charge of discrimination depends on whether the Charging Party contends that they are they victim of an ongoing discriminatory pay system or that their current pay is less than a similarly situated comparator because of discrete acts of intentional

discrimination occurring within the applicable charge filing period. Compare *Bazemore v. Friday*, 478 U.S. 386, 395-96 (1986).

- 7) Discrete retaliatory or discriminatory acts such as hiring, firing, demotion, and the like, occur for purposes of computing filing deadlines on the day the event happens. See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110-15 (2002).
- 8) Unlike discrete events, Morgan held that a claim of hostile work environment is one practice even though it is ordinarily composed of a number of separate actions, some of which may fall outside the period of limitations. “Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by the court for purposes of determining liability.” Morgan, 536 U.S. at 117.
- 9) Morgan expressly provides employers a laches defense in hostile environment claims, and indicates that other equitable defenses may be available as well. Morgan, 536 U.S. at 121-22.
- 10) The laches defense “requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” Morgan, 536 U.S. at 121-22 (citations omitted).
- 11) Morgan does not address when an act or practice occurs in the context of a pattern or practice case. Morgan, 536 U.S. at 1115 n. 9.
- 12) The time to file suit under 42 U.S.C. §1981 is not tolled during the pendency of an EEOC charge. See Johnson v. Railway Express, 421 U.S. 454 (1975).
- 13) The time to file suit or a charge is not tolled pending the exhaustion of an internal review procedure as to a decision that is otherwise final. See Delaware State College v. Ricks, 449 U.S. 250 (1980).
- 14) The time to file suit or a charge is not tolled during a collectively bargained grievance procedure. See International Union of Electrical, Radio and Machine Workers, AFL CIO, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976).

E. What is mediation?

- 1) The Commission has implemented a mediation program, and its Alternative Dispute Resolution Policy Statement is available at www.eeoc.gov.
- 2) Each District Office has a designated staff member who is responsible for coordinating mediation activities within that Office’s geographical jurisdiction. The EEOC’s mediation contact list is also available on the Commission’s website.

- 3) The EEOC screens all charges to determine if they are appropriate for mediation.
- 4) Both parties must consent to participate.
- 5) If the EEOC does not initially offer mediation, the parties may request that the charge be referred to mediation.
- 6) The mediation process is confidential, and no information divulged during the mediation is disclosed to EEOC investigators.
- 7) If a charge is resolved at mediation, the Commission will take no further action on the charge.
- 8) If a charge does not settle, the file will be referred to the EEOC's investigative unit and will be processed through the normal investigative procedure..