SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

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INTRODUCTION

Although no seismic shifts occurred in Indiana employment law during the survey period, there were a number of noteworthy developments. Observers generally agree that the Seventh Circuit continues to be more pro-employer than most other Circuits. However, two of the female justices of the Seventh Circuit called for more plaintiff-friendly interpretations of the proof required to justify punitive damages,[1] to establish that an employer perceived the plaintiff as disabled,[2] and to support an affirmative defense in cases of sexual harassment by a supervisor.[3] In *DeClue v. Central Illinois Light Co.*,[4] Judge Ilana Diamond Rovner respectfully but spiritedly took issue with the majority holding that an employer's failure to provide a female lineman with civilized bathroom facilities was not actionable as hostile environment harassment.[5] Judge Rovner's most indignant statement came in *Equal Employment Opportunity Commission v. Indiana Bell Telephone Co.*,[6] where she rejected a defense to punitive damages based on the employer's collective bargaining agreement and concluded her detailed dissent by writing:

> In the series of [the employer's] ineffective responses to [the supervisor's] harassment, one has no difficulty detecting a reckless

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1. *See* Gile v. United Airlines, Inc., 213 F.3d 365, 376 (7th Cir. 2000) (Wood, J., dissenting in part and concurring in part).

2. *See* Wright v. Ill. Dep't of Corr., 204 F.3d 727, 733-36 (7th Cir. 2000) (Rovner, J., dissenting).

3. *See* Hill v. Am. Gen. Fin., Inc., 218 F.3d 639, 645-47 (7th Cir. 2000) (Wood, J., dissenting in part).

4. 223 F.3d 434 (7th Cir. 2000).

5. *See id*. at 437-40 (Rovner, J., dissenting in part). Judge Rovner wrote:

> As my colleagues acknowledge, when an employer provides no restrooms at all to its employees and expects them to relieve themselves outdoors, the burden falls more heavily on women than it does on men. . . . If men are less reluctant to urinate outdoors, it is in significant part because they need only unzip and take aim . . . .
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> . . . [W]hen, in the face of complaints, an employer fails to correct a work condition that it knows or should know has a disparate impact on its female employees—that reasonable women would find intolerable—it is arguably fostering a work environment that is hostile to women, just as surely as it does when it fails to put a stop to the more familiar types of sexual harassment.

Id. at 438 (citations omitted).

6. 214 F.3d 813 (7th Cir. 2000).

> indifference to the plight of the company's female workers. . . . The fact that it took the company nearly twenty years to bring the harassment to an end is telling in and of itself.
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> Twenty years!
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> I respectfully dissent.[7]

Judge Rovner may not be alone in her views because the Seventh Circuit subsequently granted rehearing *en banc* in the case.[8] Circuit-watchers should be alert for signs that these dissenting voices are gaining ground and shifting the Seventh Circuit toward greater receptivity to plaintiffs' arguments.

This Article begins with a broad overview of national trends and highlights which types of plaintiff claims are most prevalent and which are increasing. The Article then offers a brief review of the major national developments and moves on to a statute-by-statute review of significant Seventh Circuit and Indiana employment cases. A brief discussion of the latest decisions concerning the states' Eleventh Amendment immunity from certain federal employment laws follows. After a review of the most noteworthy procedural developments during the survey period, the Article concludes by suggesting several substantive issues that are percolating and bear further monitoring.

I. TRENDS IN CHARGE FILINGS AND RESOLUTIONS—A NATIONAL PERSPECTIVE

Recent national Equal Employment Opportunity Commission (EEOC) charge statistics offer a broad perspective on employment law trends.[9] Surprisingly, EEOC charge activity declined in fiscal year 1999 to 77,444 charges received, but rebounded in fiscal year 2000 to 79, 896 charges, which is the highest volume since 1997.[10] The overall rate of "reasonable cause" findings remains relatively low, but in 2000, the percent of such findings increased to a record high of nearly nine percent, compared to an annual average of less than four percent over the prior eight years.[11]

Streamlined procedures, coupled with a decline in charges filed, have enabled the EEOC to process claims more promptly. For example, in 1995, it took up to eighteen months merely for the EEOC to assign an investigator to a

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7. *Id*. at 836 (Rovner, J., concurring in part and dissenting in part).

8. *See* EEOC v. Ind. Bell Tel. Co., No. 99-1155, 2000 U.S. App. LEXIS 22797, at *1 (7th Cir. Sept. 6, 2000).

9. Title VII, ADA and ADEA plaintiffs must normally file timely EEOC charges prior to commencing suit. *See* Douglas L. Williams & Melinda Rothhaar McAfee, *Handling the EEOC Investigation*, *in* 2 ALI-ABA COURSE OF STUDY MATERIALS—EMPLOYMENT AND LABOR LAW (8th ed. 1997) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)).

10. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ALL STATUTES: FY 1992-FY 2000 (last modified Jan. 18, 2001), *at* http://www.eeoc.gov/stats/all.html.

11. *See id.*

case.[12] In the EEOC's Indianapolis district office, which serves Indiana and Kentucky, claim processing time has improved to a six-month turnaround. Two operational changes have contributed to the improvement.[13] The first is a triage approach, whereby the agency conducts an early evaluation in an effort to quickly dismiss unfounded complaints and to expedite particularly strong charges.[14] The second is a voluntary mediation program established in 1999.[15] During the mediation program's first six months, eighty-three percent of employees agreed to mediation, compared to thirty-five percent of employers.[16] To encourage greater employer participation, the EEOC is publicizing two important facts: (1) over half of its mediation settlements result in no monetary award to the charging party, and (2) on average, mediations are resolved in fewer than ninety days.[17]

Although charge activity is down overall, some charges are becoming more frequent. Harassment charges, which were virtually nonexistent through 1985, accounted for over ten percent of the EEOC's charge activity by fiscal year 1990.[18] In 1999, that figure topped eighteen percent.[19]

Another notable growth trend is the increase in the number of retaliation charges filed under various statutes. In fiscal year 2000, twenty-seven percent of all charges filed included a claim of retaliation, compared to fifteen percent in 1992.[20]

The potential power of a retaliation claim is demonstrated in *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*.[21] Pryor, the plaintiff, cited five incidents of alleged harassment. However, Judge Richard Posner, writing for a unanimous panel, dismissed two incidents as "entirely innocuous," two as "mildly flirtatious," and found only one "possibly suggestive or even offensive."[22] Therefore, the alleged conduct was not so severe that a rational trier of fact could conclude that it changed Pryor's workplace conditions.[23]

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12. *See* Gregory Weaver, *An Agency's Recovery Act: With More Money and Manpower, EEOC Now Handles Discrimination Cases More Quickly*, INDIANAPOLIS STAR, May 29, 2000, at G1.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TRENDS IN HARASSMENT CHARGES FILED WITH THE EEOC DURING THE 1980S AND 1990S (last modified July 11, 2000), *at* http://www.eeoc.gov/stats/harassment.html.

19. *See id.*

20. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS: FY 1992 THROUGH FY 2000 (last modified Jan. 18, 2001), *at* http://www.eeoc.gov/stats/charges.html [hereinafter CHARGE STATISTICS].

21. 212 F.3d 976 (7th Cir. 2000).

22. *Id.* at 977-78.

23. *See id.* at 978.

However, three months after Pryor filed her sexual harassment claim, her law firm employer fired her for gluing an artificial fingernail onto a friend's finger in the ladies' room.[24] The Seventh Circuit reversed summary judgment for the firm on the issue of retaliation based on Pryor's nine-year record of satisfactory written performance reviews, the firm's failure to follow its progressive discipline policy, and the fact that the thirty-second process was not prohibited by any work rule and occurred while Pryor was on break.[25] Given these circumstances, Judge Posner concluded Pryor had a triable retaliation claim, albeit no triable discrimination claim, because a reasonable jury could find that the firm used pretextual evidence of misconduct as a "figleaf" to cover up retaliation for the sexual harassment charge.[26]

II. NATIONAL EMPLOYMENT DISCRIMINATION DEVELOPMENTS

The leading U.S. Supreme Court employment law case during the survey period was *Reeves v. Sanderson Plumbing Products, Inc.*,[27] an age discrimination case. The Court granted certiorari in *Reeves* to resolve a circuit split over whether a plaintiff's prima facie case for discrimination, coupled with sufficient evidence for a trier of fact to reject a nondiscriminatory explanation for the employer's adverse action, is adequate to support a finding of employer liability.[28] The Court, without deciding that the *McDonnell Douglas* burden-shifting framework applies to age discrimination claims, affirmatively answered that question both in general terms and as applied to the case.[29]

Reeves presented a prima facie case for discrimination by showing he was at least forty years old when he was fired from his position as a manufacturing supervisor; he was otherwise qualified for the position; he was discharged; and his three successors in the position were all in their thirties.[30] Sanderson Plumbing met its burden of production by explaining that it terminated Reeves for failing to maintain accurate attendance records.[31] Reeves presented rebuttal evidence that he maintained accurate records and that the true decisionmaker behind the termination had directed disparaging age-based comments at Reeves.[32]

A jury returned a verdict for Reeves, but the Fifth Circuit reversed the decision.[33] The Fifth Circuit acknowledged the likelihood that a reasonable jury could have found Sanderson Plumbing's stated employment decision to be

24. *See id.* at 979.
25. *See id.* at 979-80.
26. *See id.* at 980.
27. 530 U.S. 133 (2000).
28. *See id.* at 2104.
29. *See id.* at 2105, 2108, 2110.
30. *See id.* at 2106.
31. *See id.* at 2103-04.
32. *See id.* at 2107, 2110-11.
33. *See id.* at 2104.

pretextual.[34] Nonetheless, it held that the trial court erred in denying the employer judgment as a matter of law because the plaintiff presented insufficient evidence that he had been discharged because of his age.[35]

Justice O'Connor, writing for a unanimous U.S. Supreme Court, disagreed, stating that "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."[36] Circumstantial proof that the employer's explanation is not believable may be sufficiently persuasive to allow a trier of fact to reasonably infer that the employer is covering up discriminatory intent.[37] Such an inference may be justified if the employer, who is most able to give the actual reason for the action, has offered a reason that lacks credibility.[38] Factors to determine whether a court should grant judgment as a matter of law include the strength of the plaintiff's prima facie case, the probative value of the proof challenging the credibility of the employer's stated justification, and other relevant evidence.[39]

Some Indiana observers viewed *Reeves* as a significant victory for plaintiffs struggling to survive summary judgment.[40] This optimism abated two months later when the Seventh Circuit handed down *Kulumani v. Blue Cross Blue Shield Assoc.*,[41] applying *Reeves* in the context of a national origin discrimination case.[42] Plaintiff Kulumani's manager identified three of Kulumani's co-workers for termination during a company-wide reduction in the workforce, based on seniority and performance.[43] When the company's human resources director overrode the decision and released Kulumani instead of one of the manager's nominees, Kulumani described the action as "suspicious" and therefore pretextual.[44]

However, the Seventh Circuit said that "'pretext for discrimination' means more than an unusual act; it means something worse than a business error; [it]

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34. *See id.*

35. *See id.* The Fifth Circuit found against Reeves for several reasons: the age-based comments did not occur in the direct context of the plaintiff's discharge; there was no evidence that two other persons who recommended Reeves' termination were motivated by age; the two decisionmakers were over fifty years of age; two other supervisors in Reeves' area were also accused of faulty recordkeeping; and the employer filled several open management slots with persons over fifty years of age following Reeves' discharge. *See id*.

36. *Id.* at 2111.

37. *See id.* at 2108.

38. *See id.* at 2108-09.

39. *See id.* at 2109.

40. *See, e.g.*, Tim A. Baker, *Supreme Court Decision Eases Burden for Discrimination Plaintiffs*, IND. LAW., July 19, 2000, at 4.

41. 224 F.3d 681 (7th Cir. 2000).

42. *See, e.g.*, Tim A. Baker, *7th Circuit Revisits Pretext Following Supreme Court Ruling*, IND. LAW., Oct. 11, 2000, at 4.

43. *See Kulumani*, 224 F.3d at 683.

44. *See id.* at 683-84.

means deceit used to cover one's tracks."[45] Kulumani's evidence showed an unusual intervention but fell short of the requirement of *Reeves*, which is "a dishonest explanation, a lie rather than an oddity or error."[46] Therefore, the Seventh Circuit affirmed summary judgment for the employer on the merits,[47] making it clear that Indiana employees claiming employment discrimination under the *McDonnell Douglas* approach still face a substantial evidentiary hurdle in order to earn the right to a jury decision on the merits.

III. TITLE VII DEVELOPMENTS

A. Harassment: What Conduct Qualifies?

Holman v. State of Indiana[48] presented the rare circumstance of true "equal opportunity harassment," which the Seventh Circuit held does not fall within the ambit of Title VII of the Civil Rights Act of 1964.[49] The Holmans, a married couple working maintenance for the state transportation department, both experienced inappropriate advances from their shop foreman. The foreman touched Karen Holman's body, stood inappropriately close to her, asked her for sex and directed sexist comments at her. He also grabbed Steven Holman's head while requesting sexual favors.[50]

The court noted that "the touchstone of Title VII is . . . discrimination or disparate treatment" based on gender.[51] Quoting *Oncale v. Sundowner Offshore Services, Inc.*,[52] the court identified the critical Title VII issue, for either same- or opposite-sex harassment, as "whether members of one sex are exposed to disadvantageous terms or conditions of employment *to which members of the other sex are not exposed*."[53] The court acknowledged the concern that exempting "equal opportunity harassers" could encourage these miscreants to gain immunity by harassing people of both sexes, even though only one sex was the preferred target.[54] However, the court considered that strategy unlikely, considering other potential penalties such as employer disciplinary action and state tort law liability.[55]

Judge Evans wrote separately to harmonize the holding with *Oncale*,[56] which involved a single-sex workplace. He noted that an equal opportunity harasser

45. *Id.* at 684.
46. *Id.* at 685.
47. *See id.*
48. 211 F.3d 399 (7th Cir.), *cert. denied*, 121 S. Ct. 191 (2000).
49. *See id.* at 401; 42 U.S.C. § 2000e (2000).
50. *See* Holman, 211 F.3d at 401.
51. *Id.* at 402.
52. 523 U.S. 75 (1998).
53. Holman, 233 F.3d at 403 (emphasis added) (quoting *Oncale*, 523 U.S. at 80).
54. *See id.* at 404.
55. *See id.*
56. *See id.* at 407 (Evans, J., concurring).

might engage in such sex-specific and derogatory behavior, as was demonstrated in *Oncale*, that the plaintiff could prove discrimination against one or the other sex.[57]

Another case decided during the survey period reaffirmed that Title VII prohibits discrimination based on sex, but does not prohibit discrimination based purely on sexual orientation. In *Hamner v. St. Vincent Hospital and Health Care Center, Inc.*,[58] Hamner, a homosexual nurse, complained that his supervisor's superior had screamed at him, refused to acknowledge or communicate with him, and harassed him by lisping, making wrist-flipping motions, and joking about homosexuality.[59] The hospital's stated reason for terminating the nurse's employment was his alleged willful falsification of a patient's record. However, Hamner claimed he was terminated in retaliation for filing a grievance concerning this alleged discrimination based on sexual orientation.[60]

The court said that Hamner's claim might have prevailed had he shown that the harasser treated all male nurses as homosexuals, or that he harassed only male and not female homosexual nurses.[61] However, because Hamner did not claim discrimination based on gender, and only claimed discrimination based on his sexual orientation, his case was insufficient as a matter of law.[62]

This stance is consistent with the Seventh Circuit's reputation for being relatively tough on employment discrimination plaintiffs. The 1993 decision in *Saxton v. American Telephone & Telegraph Co.*,[63] which has been a favorite citation of defense counsel, played a critical role establishing that reputation. In *Saxton*, the plaintiff claimed that a co-worker had tried to kiss her, had touched her thigh without permission, and had jumped out of some bushes and attempted to grab her.[64] The Seventh Circuit rejected her argument that this conduct created a hostile environment, reasoning that it was not sufficiently severe.[65]

During the survey period, however, the Seventh Circuit clarified the limits of the *Saxton* holding. In *Hostetler v. Quality Dining, Inc.*,[66] a co-worker at Burger King grabbed Hostetler's face and "stuck his tongue down her throat."[67] The next day, when Hostetler resisted the same co-worker's attempt to kiss her, he started to unfasten her brassiere.[68] That same week, the co-worker told Hostetler in crude terms, while she was working at the counter, how effectively

57. *See id.*
58. 224 F.3d 701 (7th Cir. 2000).
59. *See id.* at 703.
60. *See id.* at 704.
61. *See id.* at 707 n.5.
62. *See id.* at 707.
63. 10 F.3d 526 (7th Cir. 1993).
64. *See id.* at 528-29.
65. *See id.* at 533-34.
66. 218 F.3d 798 (7th Cir. 2000).
67. *Id.* at 801.
68. *See id.*

he could perform oral sex on her.[69]

The district court compared this conduct to that in *Saxton* and concluded that the conduct was not sufficiently severe to create a cause of action.[70] The Seventh Circuit disagreed.[71] Judge Rovner, writing for a unanimous panel, held that "the type of conduct at issue here falls on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive."[72] Two of the actions supporting the claim were "unwelcome, forcible physical contact[s] of a rather intimate nature,"[73] and even the crude remark, which could be considered an unwelcome sexual proposition, was "more than a casual obscenity."[74]

Because only a few acts were alleged, Judge Rovner discussed the types of physical activity that may give rise to an action for harassment. She described such acts as "[a] hand on the shoulder, a brief hug, or a peck on the cheek" as acts that are seldom severe enough to be actionable standing alone.[75] Even more crude or intimate acts such as "a hand on the thigh, a kiss on the lips, a pinch of the buttocks" may not be sufficiently "severe" in isolation.[76] However, the "physical, intimate, and forcible" acts alleged, which Rovner described as "invasive, humiliating, and threatening," albeit few in number, justified summary judgment for the employer.[77]

As a final note on the topic of what conduct constitutes harassment, the Seventh Circuit rejected a novel claim in *DeClue v. Central Illinois Light Co.*,[78] but only because the cause of action was ill-chosen.[79] Audrey DeClue worked as an electric company lineman, and traveled with her male crew members by truck between various job sites each day.[80] She argued that her employer's failure to provide her with restroom facilities created a hostile environment.[81] Her male colleagues customarily relieved themselves in open areas.[82]

Judge Posner, writing for the majority, found no discriminatory intent.[83] However, he acknowledged that DeClue might have had a successful claim under a disparate impact theory.[84] Judge Rovner dissented, noting that the company

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69. *See id.* at 802.
70. *See id.* at 805.
71. *See id.* at 812.
72. *Id.* at 807.
73. *Id.*
74. *Id.* at 808.
75. *Id.*
76. *Id.*
77. *Id.* at 808-09.
78. 223 F.3d 434 (7th Cir. 2000).
79. *See id.* at 437.
80. *See id.* at 435-36.
81. *See id.* at 437.
82. *See id.* at 436.
83. *See id.* at 436-37.
84. *See id.*

had offered DeClue no workable and non-stigmatizing alternatives, that DeClue's co-workers had made harassing comments, and that certain job sites afforded almost no privacy.[85]

The split among panel members, coupled with Judge Posner's observation that DeClue "has waived what may have been a perfectly good claim of sex discrimination" makes clear that employers who fail to make reasonable efforts to provide civilized restroom facilities to female employees should expect litigation and an uphill battle to justify their refusal.[86] Moreover, *DeClue* sounds another note of warning: plaintiffs' counsel must know the pleading alternatives in employment discrimination claims, and craft complaints wisely.

B. Applying the Faragher/Ellerth *Analysis: Did the Plaintiff Act Reasonably?*

In *Burlington Industries, Inc. v. Ellerth*[87] and *Faragher v. City of Boca Raton*,[88] the U.S. Supreme Court established that, under Title VII, employers are vicariously liable for hostile environment sexual harassment committed by the plaintiff's supervisor.[89] If the victim suffered no tangible adverse employment action, however, the employer may assert an affirmative defense requiring proof by a preponderance of two elements: "[1] that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and [2] that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[90] The Seventh Circuit requires an employer to show three things to justify an instruction on the affirmative defense: "(1) the plaintiff endured no tangible employment action; (2) there is some evidence that the employer reasonably attempted to correct and prevent sexual harassment; and (3) there is some evidence that the employee unreasonably failed to utilize the avenues presented to prevent or correct the harassment."[91]

The Seventh Circuit decided three cases during the survey period that clarify the second prong of the *Faragher/Ellerth* test, whether the plaintiff acted reasonably. In *Savino v. C. P. Hall Co.*,[92] the plaintiff argued that this "avoidable consequences" doctrine should allow a defendant who successfully asserts the affirmative defense a reduction in damages owed, but not full absolution from liability.[93] The Seventh Circuit disagreed, noting that regardless of how the avoidable consequences doctrine operates in tort law, the U.S. Supreme Court made clear in *Faragher* that "unreasonable foot-dragging" by the plaintiff will

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85. *See id.* at 439 (Rovner, J., dissenting).
86. *Id.* at 437.
87. 524 U.S. 742 (1998).
88. 524 U.S. 775 (1998).
89. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.
90. *Ellerth*, 524 U.S. at 765, *Faragher*, 524 U.S. at 807.
91. Savino v. C.P. Hall Co., 199 F.3d 925, 932 (7th Cir. 1999).
92. *Id.* at 925.
93. *Id.*

at least reduce damages and may allow the employer to avoid liability altogether.[94] The only adverse action plaintiff Savino could identify after she allegedly suffered sexual advances by her supervisor was an office relocation, which did not represent the type of substantial detriment contemplated in *Faragher* and *Ellerth*.[95] Also, Savino's complaints were incomplete and delayed.[96] Therefore, the court affirmed a jury verdict for the employer.[97]

In *Hill v. American General Finance, Inc.*,[98] the Seventh Circuit affirmed summary judgment for the employer on a sexual and racial harassment claim.[99] One issue raised on appeal was whether the employer had adequately communicated its sexual harassment policy.[100] The company had a general policy of complying with the equal opportunity laws and a policy statement that prohibited sexual harassment.[101] A separate memorandum outlined a complaint procedure. A company official testified that the policies were kept in notebooks in a "public access type place" within each branch office, and plaintiff Hill admitted that she knew the company had a human resource group responsible for policing employee sexual or racial harassment.[102]

The panel majority found this evidence sufficient, but Judge Wood dissented, arguing that the employer had not established its affirmative defense based upon undisputed facts.[103] Judge Wood questioned both the adequacy of the policies and of their distribution, observing that "[e]mployees cannot be expected to go around opening up all sorts of unmarked binders, to see if by any chance they might contain the company's harassment policy."[104] Therefore, Judge Wood did not agree with the other panel members' conclusion that Hill's failure to report the harassment was unreasonable as a matter of law.[105]

In the third case dealing with the *Faragher/Ellerth* affirmative defense, *Johnson v. West*,[106] the Seventh Circuit established who bears the burden of proof regarding a plaintiff's failure to report harassment.[107] Plaintiff Johnson had waited nearly a year to report alleged acts of harassment by her supervisor to any high-level manager qualified to speak for the employer.[108] At her bench trial, she unsuccessfully offered evidence of threats, verbal abuse, and other intimidation

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94. *Id.*
95. *See id.* at 932-33, 933 n.8.
96. *See id.* at 933-34.
97. *See id.* at 929.
98. 218 F.3d 639 (7th Cir. 2000).
99. *See id.* at 645.
100. *See id.* at 643.
101. *See id.* at 643-44.
102. *Id.* at 644.
103. *See id.* at 646 (Wood, J., dissenting in part).
104. *Id.* at 647.
105. *See id.*
106. 218 F.3d 725 (7th Cir. 2000).
107. *See id.* at 731-32.
108. *See id.* at 728, 732.

by her supervisor, and explained that she delayed reporting his sexual advances out of fear that she would lose her job.[109] The court remanded for consideration of whether Johnson had acted reasonably, and placed the burden on the employer to prove that she had not.[110]

C. What Is an "Adverse Employment Action"?

An actionable claim for retaliation or discrimination requires that the plaintiff prove that he or she has suffered some adverse employment action.[111] In *Ribando v. United Airlines, Inc.*,[112] the Seventh Circuit gave examples of material changes that might qualify as adverse actions, including termination or demotion accompanied by a wage or salary cut, a reduction in title, a material benefit loss, significantly lessened job responsibilities, or other "indices that might be unique to a particular situation."[113] Plaintiff Ribando claimed that a letter of concern, placed in her personnel file after a male employee accused her of making a harassing remark, was an adverse action as defined under Title VII,[114] but the court held that her complaint came nowhere close to the severity required to be actionable.[115] Similarly, as mentioned above, the Seventh Circuit held in *Savino v. C. P. Hall Co.*[116] that being moved to another floor of the office is not a tangible employment action in the *Faragher/Ellerth* sense.[117]

The most novel claim of adverse action during the survey period arose in *Cullom v. Brown*.[118] Plaintiff Cullom, a staffing specialist at a Veterans Administration hospital, filed several EEOC discrimination complaints.[119] In an effort to avoid further complaints, hospital management ordered Cullom's supervisor to give Cullom better performance ratings than he deserved. Had Cullom received more accurate (i.e., more critical) appraisals, he would have been eligible for remedial programs which, he claimed, would have earned him a promotion. His claimed adverse action, therefore, was inflated performance ratings. He succeeded in persuading the district court, which awarded him $1500

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109. *See id.* at 727-28, 732.

110. *See id.* at 731-32. The court also remanded for additional legal analysis on a retaliatory discharge claim. *See id*. at 733.

111. *See* Ribando v. United Airlines, Inc., 200 F.3d 507, 510 (7th Cir. 1999) (citations omitted).

112. *Id.* at 507.

113. *Id*. at 511 (quoting Crady v. Liberty Nat'l Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993)).

114. *See id.* at 509.

115. *See id.* at 509, 511 (citing Smart v. Ball St. Univ., 89 F.3d 437, 441 (7th Cir. 1996) (holding negative performance appraisals, standing alone, are not actionable adverse actions)).

116. 199 F.3d 925 (7th Cir. 1999).

117. *See id.* at 933.

118. 209 F.3d 1035 (7th Cir. 2000).

119. *See id.* at 1037.

damages plus fees and costs.[120]

Although the Seventh Circuit did not condone the hospital's "poor and even dishonest policy,"[121] it disagreed that Cullom suffered actionable retaliation, stating that "while Title VII prevents employers from punishing their employees for complaining about discrimination, it does not prevent an employer from unjustifiably rewarding an employee to avoid a discrimination claim."[122] Overly positive performance ratings and failure to impose probation and remedial training are not adverse.[123] Although failure to promote is an adverse action, the district court erred in concluding that Cullom proved that had he been put on probation, he would have been promoted sooner. Given Cullom's performance history, the Seventh Circuit found no evidence that he would have successfully completed the remedial program.[124] Even if he had, he would only have been qualified to continue in his former position, not to advance to a position requiring greater skills.[125] The court concluded that "[a]s a policy matter, the VA's behavior is indefensible. . . . But, Title VII liability does not turn on ill-advised personnel decisions."[126]

The Seventh Circuit recognized in *Simpson v. Borg-Warner Automotive, Inc.*[127] that constructive demotion, like constructive discharge, may be an adverse action, although the plaintiff's claim did not succeed.[128] Plaintiff Simpson, a manufacturing supervisor, sought and received a downgrade to a production line position.[129] She claimed that her supervisor had made her working environment intolerable because of her sex, which forced her to seek demotion, although the employer pointed out that it had offered her a transfer to a different supervisory position away from the offending supervisor.[130]

The court noted that constructive demotion analysis is similar to constructive discharge analysis: the plaintiff must prove that unlawful discrimination made his or her working conditions so intolerable that a reasonable person would have had no choice but to resign or seek demotion.[131] One difference is that a resignation removes one from the unbearable situation completely, while a demoted employee who remains in proximity to the offensive work conditions might have difficulty characterizing the situation as truly intolerable.[132]

Applying this analysis, the court found only two of Simpson's numerous

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120. *See id.*
121. *Id.*
122. *Id.* at 1041 (citing 42 U.S.C. § 2000e-3(a) (1994)).
123. *See id*.
124. *See id.* at 1043.
125. *See id.* at 1044.
126. *Id.* (citation omitted).
127. 196 F.3d 873 (7th Cir. 1999).
128. *See id.* at 876.
129. *See id*. at 874.
130. *See id.* at 876.
131. *See id.* at 876-77.
132. *See id.* at 876.

complaints persuasive.[133] The first was her supervisor's delay in terminating an employee who threatened Simpson; the second was an order, later rescinded, that Simpson take a basic skills test.[134] Because these claims did not constitute intolerable working conditions, Simpson's demotion was not an adverse employment action.[135] Accordingly, the Seventh Circuit affirmed summary judgment for the employer.[136]

In *Stockett v. Muncie Indiana Transit System*,[137] the court again found an employment action potentially adverse although, as in *Simpson*, the plaintiff failed to prove his case.[138] The Transit System received an anonymous report that Stockett, a bus driver, was seen smoking crack cocaine.[139] A supervisor trained to recognize signs of drug or alcohol influence observed Stockett during a meeting called to investigate a complaint of sexual harassment and noted Stockett's red eyes and uncharacteristically calm demeanor.[140] Management ordered Stockett to undergo drug testing in accordance with company policy and terminated him based on the test's positive result. Stockett claimed racial discrimination, pointing to a white employee who, he alleged, received more favorable treatment.[141]

The court acknowledged that employment conditions designed to harass and humiliate based on race are actionable adverse employment actions.[142] In particular, a drug test can be a "'badge of shame.'"[143] Therefore, if a drug test is not administered in a routine fashion following standard and legitimate employer practices, an order to submit to such a test may be actionable.[144] Here, however, the employer applied its policy evenhandedly.[145] The white employee, cited as receiving more favorable treatment, was observed by a trained supervisor, as was Stockett, but in the white employee's case that supervisor saw no signs of drug use to justify ordering a drug test.[146] Therefore, Stockett failed to make out a prima facie case of racial discrimination.[147]

The requirement of an adverse employment action applies in other statutes as well as Title VII, including the Age Discrimination in Employment Act

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133. *See id.* at 877.
134. *See id.* at 877-78.
135. *See id.* at 878.
136. *See id.*
137. 221 F.3d 997 (7th Cir. 2000).
138. *See id.* at 1002-03.
139. *See id.* at 999.
140. *See id.* at 999-1000.
141. *See id.* at 1000.
142. *See id.* at 1001.
143. *Id.* at 1001 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995)).
144. *See id.* at 1001-02.
145. *See id.* at 1002.
146. *See id.*
147. *See id.* at 1002-03.

(ADEA)[148] and the Americans with Disabilities Act (ADA).[149] In *Hunt v. City of Markham*,[150] the plaintiffs asserted an age discrimination claim under the ADEA and a race discrimination claim under the Civil Rights Act of 1866.[151] The court held that both statutes require proof of an adverse employment action, which in this case was the denial of a pay raise.[152] The Seventh Circuit had previously held that denial of a bonus was not an adverse action, at least not under Title VII.[153] However, the court distinguished raises, which are customary for satisfactory workers, from bonuses, which are entirely discretionary and sporadic.[154] It noted that raises are necessary to enable real wages to keep up with inflation, and concluded that the denial of a raise is more likely than denial of a bonus to reflect impermissible motivation.[155]

D. Standing for Employment Testers

Kyles v. J.K. Guardian Security Services, Inc.[156] is a significant decision establishing that, in the Seventh Circuit, employment "testers" have standing to bring suit under Title VII.[157] The African-American plaintiffs, Kyra Kyles and Lolita Pierce, worked for the Chicago Legal Assistance Foundation and applied for a receptionist position with the defendant.[158] Although each of their white counterparts received a job offer, neither made it past the first interview.[159] They sued under both Title VII and Section 1 of the Civil Rights Act of 1866.[160] The district court entered summary judgment for the employer on both claims, holding that testers lack standing because they have no genuine interest in employment.[161]

The Seventh Circuit looked to housing discrimination law for guidance, recognizing that Title VIII of the Fair Housing Act[162] is functionally equivalent to Title VII and that "the provisions of these two statutes are given like

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148. *See* 29 U.S.C. § 621 (2000).

149. *See* 42 U.S.C. § 12101 (2000).

150. 219 F.3d 649 (7th Cir. 2000).

151. *See id.* at 653.

152. *See id.* at 653-54.

153. *See id.* at 654 (citing Miller v. Am. Fam. Mut. Ins. Co., 203 F.3d 997, 1006 (7th Cir. 2000)).

154. *See id.*

155. *See id.* at 654.

156. 222 F.3d 289 (7th Cir. 2000).

157. *See id.* at 292. As the court explained, a "tester" in the employment context is "an individual who, without the intent to accept an offer of employment, poses as a job applicant in order to gather evidence of discriminatory hiring practices." *Id.*

158. *See id.* at 291-92.

159. *See id.* at 292.

160. *See id.* (citing 42 U.S.C. § 1981 (2000)).

161. *See id.*

162. *See* 42 U.S.C. § 3601 (The Civil Rights Act of 1968).

construction and application."[163] The U.S. Supreme Court has held that regardless of the intent behind a housing availability inquiry, any person given false information has standing to sue.[164] The Seventh Circuit later applied the same logic to a claim of racial steering in housing and held that the testers had standing.[165]

The Seventh Circuit recognized that the statutory language differs between Title VII and the Fair Housing Act.[166] The Fair Housing Act makes it unlawful "[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."[167] Title VII has no comparable provision.[168] However, both statutes are broadly directed toward prohibiting discrimination, both authorize individuals to act as "private attorneys general" to enforce the prohibitions, and both reflect a congressional intent to confer the broadest possible standing under Article III of the U.S. Constitution.[169]

Judge Rovner, writing for a unanimous panel, looked to the Title VII language making it unlawful "to limit, segregate, or classify . . . employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's race . . . ."[170] A job applicant who is turned away based on race has suffered the exact injury described in the statute, even if the only harm suffered is the statutory violation.[171] Also, a strong public interest underlies Title VII's prohibitions, and testers advance that interest by providing convincing evidence that would otherwise be difficult to obtain.[172]

Although the Seventh Circuit found standing for testers in Title VII suits, it reached a different conclusion concerning the Civil Rights Act of 1866, which prohibits discrimination on the basis of race in the making and enforcement of private and public contracts.[173] Because the testers had no intention to enter into a contract of employment, they suffered no injury within the scope of that statute.[174]

The *Kyles* decision gives legal force to a position taken by the EEOC since 1990,[175] and provides organizations that wage war against employment

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163. *Kyles*, 222 F.3d at 295.

164. *See id.* at 296 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982)).

165. *See Kyles*, 222 F.3d at 296-97 (citing Vill. of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990)).

166. *See id.* at 297.

167. 42 U.S.C. § 3604(d) (2000).

168. *See Kyles*, 222 F.3d at 297.

169. *Id.* at 297 (citation omitted).

170. *Id*. at 298 (quoting 42 U.S.C. § 2000e-2(a)(2) (2000)).

171. *See id.*

172. *See id.* at 298-99.

173. *See id.* at 301 (citing Runyon v. McCrary, 427 U.S. 160, 168 (1976)).

174. *See id.* at 302.

175. *See id.* at 299.

discrimination a very powerful tool. By using testers, such groups may collect objective evidence that a decisionmaker's stated reason for rejecting a protected-class applicant is pretextual. Employers would be well-advised to review and standardize their job applicant screening process, document the reasons why those hired are most qualified, and monitor to make sure that decisionmaking criteria are being consistently applied.

E. Collective Bargaining Agreements as State-of-Mind Evidence

On September 6, 2000, the Seventh Circuit granted rehearing en banc in *Equal Employment Opportunity Commission v. Indiana Bell Telephone Co.*[176] This case is worth watching. The EEOC, representing several female employees of defendant Ameritech, charged that employee Gary Amos committed numerous acts of sexual harassment and that Ameritech failed to act promptly to address the harassment.[177] Before the trial began, the district court ruled that Ameritech could not present testimony that Amos' eventual termination was delayed due to concerns about violating the "just cause" provision of Ameritech's collective bargaining agreement.[178] The district court stated in its order that "any concerns by an employer that an arbitrator might undo the discipline it has meted out for misconduct does not excuse taking no, or very little, action when [Title VII] requires them [sic] to act promptly to halt any violations of its provisions."[179] The jury awarded a total of $1,050,000 in punitive damages, which the court reduced to $635,000.[180]

A divided Seventh Circuit panel initially held that the district court erred in refusing to allow the evidence regarding the collective bargaining agreement.[181] The majority noted that a plaintiff seeking punitive damages must prove that the defendant employer acted with malice or reckless indifference to the employee's federally protected rights.[182] Obligations under Title VII do not always trump labor agreement obligations; for example, an employer need not violate a bargained-for seniority system to accommodate religious observance.[183] Therefore, evidence of the union agreement was factually relevant to state of mind, and was not irrelevant as a matter of law.[184] Furthermore, the error was not harmless, because it prevented Ameritech decisionmakers from testifying completely about the reasons for the timing of Amos' termination.[185] The size

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176. 214 F.3d 813 (7th Cir. 2000), *vacated and reh'g en banc granted by* No. 99-1155, 2000 U.S. App. LEXIS 22797 (7th Cir. Sept. 6, 2000).

177. *See id.* at 816.

178. *See id.* at 819.

179. *Id.*

180. *See id.* at 820.

181. *See id.* at 825.

182. *See id.*

183. *See id.* at 823.

184. *See id.* at 824.

185. *See id.* at 824-25.

of the punitive damages award, which vastly exceeded the $15,000 jury award for compensatory damages, further underscored the importance of any potential evidence on the central issue of the defendant's state of mind.[186]

Judge Rovner, in dissent, agreed with District Court Judge McKinney that an employer's duty to protect workers from harassment under Title VII should take precedence over any conflicting collective bargaining provision.[187] After reviewing the "pattern of inaction in the face of Amos' unrelenting misconduct," Judge Rovner acerbically observed that "Ameritech has won . . . the right to invoke the collective bargaining agreement as an excuse for sitting on its hands while Amos kept on terrorizing his female colleagues."[188]

The Seventh Circuit's ultimate determination will interest employers who are caught between the rock of a collective bargaining agreement and the hard place of potential liability for sexual harassment under Title VII. Regardless of the outcome, it should create an increased sense of urgency for employers faced with sexual harassment complaints. When Ameritech finally decided that Amos should be punished for one of his harassing episodes, the thirty-day disciplinary action period specified in the union agreement had expired. Ameritech therefore deferred any discipline out of concern that any action against Amos would be grieved by the union and eventually be reversed by an arbitrator.[189] Even if Ameritech ultimately succeeds in getting the punitive damage award reversed, the delay that created the dilemma between statutory and contractual obligations has undoubtedly generated substantial business costs in the form of litigation fees and expenses and lost managerial time.

IV. THE AMERICANS WITH DISABILITIES ACT

In 1992, the EEOC began enforcing the Americans With Disabilities Act (ADA).[190] Within one year, disability charges accounted for seventeen percent of all EEOC charges processed. By fiscal year 2000, that figure rose to twenty percent.[191] The voluminous claim activity gave the Seventh Circuit the opportunity to address a variety of ADA issues during the survey period.

A. Hostile Environment Claims and the ADA

One notable, although unsurprising, development was in *Silk v. City of Chicago*.[192] In *Silk*, the Seventh Circuit edged closer to acknowledging the viability of hostile environment claims under the ADA. However, the plaintiff's evidence was insufficient to survive summary judgment, and the court stopped short of affirmatively recognizing the cause of action and instead assumed

186. *See id.* at 825.

187. *See id.* at 826 (Rovner, J., concurring in part and dissenting in part).

188. *Id*.

189. *See id.* at 825.

190. *See* CHARGE STATISTICS, *supra* note 20.

191. *See id.*

192. 194 F.3d 788 (7th Cir. 1999).

without deciding that such a claim is cognizable.[193]

In *Silk*, a Chicago police officer developed sleep apnea, which the police department accommodated by allowing Silk to work only the day shift.[194] Following a Title VII-type approach, the Seventh Circuit required Silk to "demonstrate that a rational trier of fact could find that his workplace is permeated with discriminatory conduct—intimidation, ridicule, insult—that is sufficiently severe or pervasive to alter the conditions of his employment."[195] That degree of abusiveness is assessed from both an objective and subjective viewpoint.[196]

Silk failed to show that the examples of harassment he cited (such as an order to go home to get regulation footwear for an inspection, unreported but public taunts that Silk was a "medical abuser" and a "limited duty phony," and an unreported threat made by a known joker to bomb Silk's car)[197] rose to the level of a hostile environment.[198] Also, the only adverse employment action Silk proved was an order that he stop teaching an evening college class, pursuant to a departmental rule prohibiting officers on limited duty from working any second job inconsistent with the restrictions requiring limited duty.[199] The court found that this action was neither harassment nor retaliation based upon Silk's disability, and affirmed summary judgment for the department.[200]

Although the Seventh Circuit still has not formally recognized a cause of action for hostile environment harassment under the ADA, it edged toward doing so in *Silk* by delineating the above standards for analyzing such claims. Indiana employers should therefore expect to see more ADA hostile environment claims asserted. Employers must make sure that their staff members treat disabled workers with respect, or risk liability. Attorneys working with disabled plaintiffs should consider whether their clients suffered harassment and, if so, should proceed in the same manner as when dealing with a charge of harassment based on race or sex.

B. Perceived Disabilities

In last year's survey issue, the most significant employment development reported was the U.S. Supreme Court's ruling that, in determining whether a person has a disability under the ADA, mitigating measures must be considered.[201] The Court held that a person who is not substantially limited in

193. *See id.* at 803-04.

194. *See id.* at 795.

195. *Id*. at 804.

196. *See id.* at 805.

197. *Id*. at 796.

198. *See id.* at 807.

199. *See id.* at 806 n.17.

200. *See id.* at 794, 806, 808.

201. *See* Murphy v. United Parcel Serv., 527 U.S. 516, 521 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999).

any major life activity when using a mitigating measure such as medication, corrective lenses, a prosthesis, or a hearing aid is not generally entitled to ADA protection.[202] For example, a nearsighted person who can see normally when using eyeglasses or contact lenses has no cause of action under the ADA merely because he or she is terminated because of the nearsightedness.[203] These decisions went against the EEOC's statutory interpretation and greatly reduced the number of viable ADA claimants.

The ADA is not, however, limited to people with actual disabilities. It also covers those with a record of a qualified impairment, or who are regarded by their employers as having a qualified impairment.[204] Persons who can no longer directly claim a covered disability may therefore argue that, although they did not have a condition that (as mitigated) limited them in a major life activity, their employers regarded them as having such a limiting disability. If successful, such plaintiffs qualify as disabled under the ADA.[205] The Seventh Circuit dealt with several such claims during the survey period, with summary judgment for the employer on the ADA claim affirmed in each case discussed below.[206]

In *Gorbitz v. Corvilla, Inc.*,[207] the plaintiff, an accounting manager at a not-for-profit agency, suffered head and neck injuries in an automobile accident.[208] This resulted in frequent absences from her job to visit doctors and physical therapists.[209] Her employer's initial tolerance eventually wore thin, and she was asked to schedule appointments after 3:30 p.m. and to provide a weekly list of her medical appointments to the agency executive director.[210] After the agency terminated her for attitude problems, she filed an ADA claim, arguing that because agency management knew about the numerous medical appointments, she was regarded as disabled.[211]

The Seventh Circuit disagreed, stating that "it is well known that medical appointments, in and of themselves, do not signal the existence of a disability; doctors frequently prescribe physical therapy for those without any substantial limitations in a major life activity that rise to the level of a disability."[212] Gorbitz offered only speculation that agency management regarded her as disabled, which was not enough to raise a genuine issue of fact.[213]

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202. *See Sutton*, 527 U.S. at 488.

203. *See id.* at 488-89.

204. *See* 42 U.S.C. § 12102(2) (2000).

205. *See Sutton*, 527 U.S. at 489.

206. *See* Moore v. J.B. Hunt Transp., Inc., 221 F.3d 944, 947 (7th Cir. 2000); Wright v. Ill. Dep't of Corr., 204 F.3d 727, 728 (7th Cir. 2000); Krocka v. City of Chicago, 203 F.3d 507, 510 (7th Cir. 2000); Gorbitz v. Corvilla, Inc., 196 F.3d 879, 880 (7th Cir. 1999).

207. 196 F.3d at 879.

208. *See id.* at 880.

209. *See id.*

210. *See id.* at 880-81.

211. *See id.* at 881.

212. *Id.* at 882.

213. *See id.*

In *Krocka v. City of Chicago*,[214] a police department learned that Krocka, a veteran officer, was taking Prozac to alleviate depression.[215] The department ordered a physical and psychological evaluation to assess Krocka's continued fitness for duty, which revealed that Krocka exhibited neither symptoms of psychological illness nor side effects of the medication. Krocka returned to his regular duties subject to participation in the department's "Personnel Concerns Program" that included ongoing monitoring and, on one occasion, a test to measure the Prozac level in Krocka's blood.[216]

The district court concluded that, although Krocka suffered the impairment of severe depression, he was not substantially limited in any major life activity in his medicated state and was therefore not disabled under the ADA.[217] In its "regarded as" analysis, the Seventh Circuit distinguished between two types of claims.[218] An employer may erroneously believe that the employee has a substantially limiting impairment when the employee possesses no such impairment.[219] This was not Krocka's case, because he did in fact suffer from severe depression.[220] Or, as in Krocka's case, an employer may erroneously believe that an impairment is substantially limiting, when it is not.[221]

In support of his "regarded as" claim, Krocka argued that the medical evaluation and ongoing monitoring violated the ADA. The Seventh Circuit accepted that the monitoring was an adverse action, but focused on the fact that the department allowed Krocka to carry on his responsibilities without weapon-carrying or any other restrictions. Because Krocka performed all his regular duties, the court concluded, the department could not have regarded Krocka as substantially limited, despite his medicated state.[222] Furthermore, the medical evaluation and monitoring requirement was reasonable, especially given the significant safety concerns of police work, because it allowed the department to avoid uninformed assumptions regarding Krocka's fitness for duty.[223]

Plaintiff Wright, in *Wright v. Illinois Department of Corrections*,[224] was equally unsuccessful in asserting a "regarded as" claim.[225] Wright disclosed on his application for a prison guard position that he was a veteran with a service-related disability (an ankle injury that occurred during a volleyball game while he was serving in the Marine Corps).[226] Although Wright told his interviewer

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214. 203 F.3d 507 (7th Cir. 2000).
215. *See id.* at 511.
216. *Id.*
217. *See id.* at 513.
218. *Id.* at 513-14.
219. *See id.*
220. *See id.* at 514.
221. *See id.*
222. *See id.*
223. *See id.* at 515.
224. 204 F.3d 727 (7th Cir. 2000).
225. *See id.* at 732-33.
226. *See id.* at 728 & n.1.

that he could not run long distances, he passed a physical agility test and received a job offer. After he was hired, Wright learned in an orientation meeting that the correction officers' training academy included marching exercises. He announced that he could not participate, and the department withdrew his job offer.[227] After his state representative intervened, the department agreed to have a physician evaluate Wright's physical ability to do the job. However, when Wright arrived late for his appointment, it was canceled and never rescheduled.[228]

Although the department answered affirmatively to an interrogatory asking "whether Defendant considered Plaintiff to be disabled," a divided Seventh Circuit panel looked to the underlying circumstances.[229] The majority found that the department considered Wright qualified until Wright himself raised a doubt by indicating that he could not perform a required training exercise. The department first accepted Wright's word that he could not complete the task but then agreed to get a medical opinion after Wright asserted that he was physically qualified for the job itself. The court characterized the department's actions as a permissible effort to ascertain Wright's physical limitations rather than as regarding Wright as substantially impaired in a major life activity such as walking or caring for himself. Although the employer admittedly (and correctly) perceived Wright as unable to run long distances or to march, it did not regard him as substantially limited in ways contemplated by the ADA.[230]

The Seventh Circuit reached a similar conclusion in *Moore v. J.B. Hunt Transport, Inc*.[231] Moore suffered from rheumatoid arthritis, which caused him to move more slowly than most people. He obtained employment as a truck driver training instructor, and was assigned to ride along with students on public roadways and to stand outside trucks in an outdoor training area and direct student maneuvers such as backing and turning. Both the jolts and vibrations from riding with inexperienced drivers and cold, damp weather conditions aggravated Moore's condition. He requested reassignment as a classroom instructor but was denied that position because he was not the most qualified candidate. Moore lost his position and later found work elsewhere as a charter coach bus driver. [232]

Neither Moore's sensitivity to cold and damp weather nor the possibility of disabling but infrequent arthritis flare-ups foreclosed him from a wide range of positions for which he was qualified. Therefore, the Seventh Circuit concluded that Moore did not qualify as disabled under the ADA. Moore also could not prove that his employer regarded him as unqualified for a wide range of jobs; only that it regarded him as unqualified for two specific types of driver instruction.[233]

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227. *See id.*
228. *See id.*
229. *Id*. at 731.
230. *See id.* at 732-33.
231. 221 F.3d 944 (7th Cir. 2000).
232. *See id.* at 948-49.
233. *See id.* at 952-53.

C. Substantial Limitation

As explained above, an ADA claimant must prove that her disability substantially limits her in some major life activity.[234] During the survey period, the Seventh Circuit rejected claims of substantial limitation in two cases. In *Schneiker v. Fortis Insurance Co.*,[235] the plaintiff suffered from depression and alcoholism, which were exacerbated when she worked under a particular supervisor. During a temporary reassignment under another supervisor, Schneiker's performance and ability to cope with her work situation improved. Fortis, Schneiker's employer, gave the plaintiff opportunities to interview for permanent positions in other departments, with special concessions such as exempting her from a restriction against pursuing more than one transfer opportunity at a time. Fortis also offered her a transfer to a position with lower pay but strong growth potential, which she refused.[236]

Schneiker claimed disability discrimination after she was terminated.[237] The Seventh Circuit, reaffirming prior holdings,[238] found that the record showed only that Schneiker's conditions impaired her ability to work with one particular supervisor.[239] However, such personality conflicts, even those serious enough to trigger depression, do not establish disability if the employee could perform the job under alternative supervision. Therefore, the court affirmed summary judgment for Fortis.[240]

In *Sinkler v. Midwest Property Management Ltd. Partnership*,[241] a regional sales manager suffered panic attacks when she drove a car anywhere beyond her home city of Kenosha, Wisconsin.[242] She claimed that she was fired because of her phobia, which substantially limited her ability to work, and that her employer failed to offer her a reasonable accommodation, such as approval to travel by air or train to out-of-town work assignments.[243] The Seventh Circuit agreed with the district court's ruling that despite Sinkler's phobia, she was still able to hold a broad range of other jobs.[244] The circuit court reasoned that although sales

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234. Alternatively, the claimant may show that she was regarded as having an impairment that substantially limited a major life activity, or that she had a record of an impairment that substantially limited a major life activity. *See* 42 U.S.C. § 12102(2) (2000).

235. 200 F.3d 1055 (7th Cir. 2000).

236. *See id.* at 1058.

237. *See id.* at 1059.

238. *See* Weiler v. Household Fin. Corp., 101 F.3d 519 (7th Cir. 1996); *see also* Palmer v. Circuit Court of Cook County, 117 F.3d 351 (7th Cir. 1997).

239. *See Schneiker*, 200 F.3d at 1061.

240. *See id.* at 1062.

241. 209 F.3d 678 (7th Cir. 2000).

242. *See id.* at 681.

243. *See id.* at 682, 685.

244. *See id.* at 685. In fact, Sinkler was employed in the Kenosha area for thirty years before she began work at Midwest. She found work at Sears after her termination from Midwest. *See id.*

positions often require out-of-town travel, many such jobs required driving only in the Kenosha area. Moreover, other positions accessible by public transit or car-pool were available in the Chicago and Milwaukee metropolitan areas.[245] Therefore, the Seventh Circuit again affirmed summary judgment for the employer.[246]

D. Failure to Accommodate

Once an ADA plaintiff gets over the hurdle of proving a disability that substantially limits her in a major life activity, one form of claim she may bring is that her employer failed to reasonably accommodate that disability. The plaintiff in *Vollmert v. Wisconsin Department of Transportation*[247] asserted such a claim. Vollmert, who suffered from a learning disability and dyslexia, had been employed for twenty-one years by the Wisconsin Department of Transportation, where she processed applications for special license plates. When the department implemented a new computer system, Vollmert had difficulty becoming proficient with the system, although she received classroom and some individual instruction. She repeatedly asked basic questions, which trainers discouraged by telling her to refer to her notes. Subsequently, she fell behind in productivity.[248] Vollmert filed suit under the ADA after the department laterally transferred her to a position that limited her promotional opportunities.[249]

The district court dismissed the suit, holding that Vollmert failed to show that she could perform the essential job functions, even with accommodation.[250] The Seventh Circuit disagreed, giving greater credence to a rehabilitation expert report that Vollmert offered.[251] This report concluded that Vollmert could have become proficient in the processing position had she been given training appropriate for her disability.[252] The expert had based his opinion on Vollmert's narrative account, education, prior work experience, and aptitude tests. His report stated the facts supporting his conclusions.[253] He opined that Vollmert's learning was hindered by a variety of factors, including: the fact that she was still working under the old system while trying to learn the new one; her one-on-one training only totaled about four hours; the complex written training manual was not well-suited to her learning disabilities; and she needed the opportunity

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at 685-86.

245. *See id.* at 686.

246. *See id.* at 687.

247. 197 F.3d 293 (7th Cir. 1999).

248. *See id.* at 296.

249. *See id.* at 295-96.

250. *See id.* at 297-98.

251. *See id.* at 298-300.

252. *See id.* at 299.

253. *See id.* at 300. In other comparable cases, the Seventh Circuit has rejected reports that state only "naked conclusions." *Id.* at 298 (citations omitted).

to ask repetitive questions to successfully assimilate the information.[254]

Because the expert report created a genuine issue of fact as to whether Vollmert could learn the new system with proper training, Vollmert's transfer to a position with lesser advancement potential was not a reasonable accommodation as a matter of law. Moreover, Vollmert had requested a special tutor, and although one was likely available through another agency at no charge, the department failed to provide training geared toward Vollmert's disability. Based upon these findings court remanded the case for trial. [255]

The plaintiff in *Rehling v. City of Chicago*[256] was less successful. EEOC regulations recommend, although the ADA statute does not require, that employers engage in an "interactive process" with disabled persons to agree upon a reasonable accommodation.[257] Police Officer Rehling lost part of a leg as a result of an automobile accident and, after extended medical leave, asked to return to work on limited duty status in his former district. However, that district had no desk jobs available. The police department offered Rehling a reassignment to another unit, which Rehling declined because of transportation concerns, although he did not challenge the suitability of that position in his response to the employer's summary judgment motion.[258] The Seventh Circuit affirmed partial summary judgment for the employer because Rehling failed to show that any desk position was available in his old district, and because "a plaintiff cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process."[259]

E. Other ADA Issues

Two survey period cases offer guidance on the issue of damages. In the first, *Gile v. United Airlines, Inc.*,[260] the Seventh Circuit reversed an award of punitive damages in a failure-to-accommodate claim.[261] Gile, whose psychological disability was exacerbated by working nights, asked repeatedly but unsuccessfully for a shift change.[262] A jury awarded her $200,000 in compensatory damages and $500,000 in punitive damages, which the court reduced to $300,000 as required under 42 U.S.C. § 1981a(b)(3).[263] Under the ADA, punitive damages require a "discriminatory practice . . . with malice or reckless indifference to the federally protected rights of an aggrieved

254. *See id.* at 301.
255. *See id.* at 302.
256. 207 F.3d 1009 (7th Cir. 2000).
257. *Id*. at 1015 (citing 29 C.F.R. § 1630.2(O)(3) (2001)).
258. *See id.* at 1012-13, 1016-17.
259. *Id.* at 1016.
260. 213 F.3d 365 (7th Cir. 2000).
261. *See id.* at 376.
262. *See id.* at 369-70.
263. *See id.* at 371.

individual."[264] The U.S. Supreme Court held in 1999 that "malice or reckless indifference" depends on the "employer's knowledge that it may be acting in violation of federal law," rather than the egregiousness of the employer's misconduct.[265] Here, United refused to accommodate Gile because it mistakenly believed, based on a medical director's assessment, that Gile suffered no disability.[266] Such refusal was negligent but not, according to the panel majority, a sufficiently reckless state of mind to justify punitive damages.[267]

Pals v. Schepel Buick & GMC Truck, Inc.[268] presents a cautionary tale for defense counsel. A used-car manager with muscular dystrophy sued for disability discrimination, requesting back wages, future wages, and mental distress.[269] He won a lump-sum compensatory damages jury award of $1,050,000.[270] On appeal, the employer argued that 42 U.S.C. 1981a(b)(3), which limits ADA damages to $300,000 for the largest employers, limited Schepel's exposure to $100,000 based on its staff size.[271] However, the Seventh Circuit determined that the ADA damage cap does not apply to back pay or front pay.[272] Because the jury used a general verdict form, and the employer's attorneys failed to ask for a breakdown of damages, the court could not ascertain whether the award included more than $100,000 for Pals' mental distress.[273] Furthermore, the court held that front and back pay are equitable remedies to be decided by the judge under both Title VII and the ADA, and because neither party objected, both impliedly consented to the jury determination.[274] In the end, Pals retained the entire jury award.[275] The important lesson of this case is that defense counsel must insist on an itemization of Title VII or ADA jury awards, or risk losing the benefit of the cap on certain types of damages.

Another issue that the Seventh Circuit clarified was the interplay between the ADA and claims for Social Security disability benefits. In *Cleveland v. Policy Management Systems Corp.*,[276] the U.S. Supreme Court held that application for or receipt of Social Security Disability Insurance (SSDI) benefits does not automatically estop a recipient from pursuing an ADA claim, as long as the plaintiff adequately explains the apparent inconsistency.[277]

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264. *Id*. at 375 (citing 42 U.S.C. § 1981a(b)(1) (2000)).

265. *Id.*

266. *See id.* at 375-76.

267. *See id.* at 376.

268. 220 F.3d 495 (7th Cir. 2000).

269. *See id.* at 497, 499.

270. *See id.* at 499.

271. *See id.*; 42 U.S.C. § 1981a(b)(3) (2000).

272. *See Pals*, 220 F.3d at 499.

273. *See id.* at 500.

274. *See id.* at 500-01.

275. *See id.* at 501.

276. 526 U.S. 795 (1999).

277. *See id.* at 797-98. The ADA requires the plaintiff to prove that he or she can perform the essential functions of the position at issue, with or without a reasonable accommodation, which is

In *Feldman v. American Memorial Life Insurance Co.*,[278] the plaintiff incurred a work-related injury and filed for SSDI benefits, stating that she was "completely and totally disabled and [could not] perform any substantial gainful employment."[279] The Seventh Circuit reviewed various possible justifications for treating SSDI representations and ADA claims differently, such as a lapse of time between the SSDI application and ADA claim, during which the disability abated.[280] Here, however, none of these justifications applied. Therefore, the Seventh Circuit affirmed summary judgment for the employer, finding that Feldman had made contradictory and unreconciled assertions and that it would not "permit litigants to adopt an alternate story each time it advantages them to change the facts."[281] Because Feldman offered no direct explanation for the seeming contradiction, the court refused to assume that it could be resolved.[282]

A final holding came in *Equal Employment Opportunity Commission v. Humiston-Keeling, Inc.*,[283] in which the Seventh Circuit rejected an EEOC argument and affirmed summary judgment for the employer.[284] The plaintiff, a warehouse "picker," developed tennis elbow and could no longer do the lifting required in her job. She applied for several vacant internal clerical positions for which she was minimally qualified, but in each case was passed over for a more qualified applicant.[285] The EEOC argued that "reasonable accommodation" under the ADA required the employer to advance the plaintiff over a more qualified nondisabled person unless doing so presented provable "undue hardship."[286]

Judge Posner, writing for a unanimous panel, disagreed, noting that such a requirement could have perverse results, such as forcing an employer to give one disabled candidate preference over a more seriously disabled candidate, or to give preference to a white male disabled candidate over a more qualified female minority candidate.[287] The ADA, Judge Posner stated, does not require such "affirmative action with a vengeance."[288] While the Act does not allow an employer to reject the best-qualified applicant based on disability, it similarly does not require the hiring of a qualified but inferior candidate based on

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at apparent odds with the incapacity claim required for Social Security disability benefits. *See id.* at 802; Albertson's, Inc. v. Kirkinburg, 527 U.S. 555, 578-79 (1999) (quoting 42 U.S.C. § 12111(8)).

278. 196 F.3d 783 (7th Cir. 1999).

279. *Id*. at 786-88.

280. *See id.* at 790-91.

281. *Id*. at 791.

282. *See id.* at 792.

283. 227 F.3d 1024 (7th Cir. 2000).

284. *See id.* at 1025, 1029.

285. *See id.* at 1026-27.

286. *Id*. at 1027.

287. *See id.*

288. *Id*. at 1029.

disability.[289] Furthermore, Judge Posner noted that in most cases a transfer from a warehouse job to a less physically strenuous office job is usually a promotion, and even the EEOC acknowledges that the ADA does not require promotion as a reasonable accommodation.[290]

V. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

When an employer lays employees off in a workforce reduction ("RIF," for Reduction In Force), age discrimination actions often arise. During the survey period the Seventh Circuit addressed several RIF cases. In *Cullen v. Olin Corp.*[291] the Seventh Circuit reversed a jury award totaling $850,000 and remanded for a new trial because the trial court abused its discretion in allowing evidence that an employee who assumed part of a RIF victim's job responsibilities failed to perform those duties satisfactorily thereafter.[292] The circuit court held that this evidence was irrelevant because it had no bearing on management's state of mind at the time it decided to terminate Cullen.[293]

The facts and holding of *Michas v. Health Cost Controls of Illinois, Inc.*[294] are unremarkable, but the court's review of the proof required in age discrimination claims involving RIFs is worth noting. A true RIF involves permanent elimination of certain positions.[295] The basic *McDonnell Douglas* approach to establishing a claim of intentional discrimination requires the plaintiff to prove that she belongs to a protected class, that she met reasonable performance expectations, that she suffered adverse employment action such as termination, and that her position remained open or was filled by someone not a member of the protected class.[296] In a RIF, a discrimination victim may be unable to prove the last element. Therefore, in the alternative, she must prove that similarly situated non-protected-class members received more favorable treatment. In making an age discrimination claim, she must show that she was similarly situated to younger employees who were retained.[297]

When a single employee is discharged and her responsibilities are absorbed by other employees so that the position is not filled, the Seventh Circuit has dubbed the action a "mini-RIF."[298] An employee with a unique position could not prevail under the basic RIF test, because she could not point to any other similarly situated employee who received better treatment. Therefore, the plaintiff must only show that employees who were not members of the protected

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289. *See id.* at 1028-29.
290. *See id.* at 1029.
291. 195 F.3d 317 (7th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).
292. *See id.* at 319, 325.
293. *See id.* at 324.
294. 209 F.3d 687 (7th Cir. 2000).
295. *See id.* at 693.
296. *See id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
297. *See id.*
298. *Id.*

class absorbed her duties.[299] This returns one to the basic *McDonnell Douglas* analysis, because in both the RIF and mini-RIF scenarios the claimant's duties were absorbed by at least one other employee who was either specifically hired or previously employed, so that the plaintiff can show that a person or persons outside the protected class assumed her duties.[300] Therefore, in ascertaining whether to apply the basic *McDonnell Douglas* analysis or the alternative RIF analysis, counsel should focus on whether the plaintiff's responsibilities were absorbed by others, or whether they were eliminated entirely.[301]

The distinction described in *Michas* may not, however, be as clear-cut in the application as it sounds in theory. In *Michas*, the court described a mini-RIF as involving the discharge of only a single employee. However, in the earlier *Cullen* case, the court applied the mini-RIF analysis when it focused on whether and to whom any substantial portion of the claimant's responsibilities were reassigned, even in the context of a seventy-four-person layoff.[302] Because *Michas* indicates no intent to overrule *Cullen*, one could reasonably assume that the mini-RIF analysis, which parallels the basic *McDonnell Douglas* analysis, applies regardless of the overall extent of the workforce reduction when the plaintiff can identify an employee or employees who assumed her former job responsibilities.

Two post-survey period developments, both of which also involve RIFs, bear further monitoring. In *Adams v. Ameritech Services Inc.*,[303] a central issue is the admissibility of statistical evidence to show intentional age discrimination.[304] The plaintiffs, who were RIF victims, proffered expert reports that examined correlations between employees' ages and termination rates.[305] The district court refused to admit the reports for several reasons, including unreliability of the underlying information, lack of analysis of causation, lack of control for other variables, and likelihood of confusing the jury.[306] The Seventh Circuit remanded the case for reconsideration, pursuant to the *Daubert* standard, of whether the reports were "prepared in a reliable and statistically sound way, such that they contained relevant evidence."[307] The court held that regression analysis is not a requirement for admissibility, and a report may, if bolstered by other evidence, meet the *Daubert* standard even if it merely eliminates the possibility that it was pure chance that a RIF adversely affected employees protected under the ADEA more than others.[308]

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299. *See id.*

300. *See id.* at 693-94.

301. *See id.* at 694.

302. *See* Cullen v. Olin Corp., 195 F.3d 317, 320 (7th Cir. 1999).

303. 231 F.3d 414 (7th Cir. 2000).

304. *See id.* at 422. The court noted that the Seventh Circuit does not recognize age discrimination claims based on disparate impact. *See id.*

305. *See id.* at 425.

306. *See id.* at 427.

307. *Id.* at 425.

308. *See id.* at 425, 427-28.

On December 11, 2000, the EEOC issued a final regulation[309] on the ADEA "tender back" rule, addressing the U.S. Supreme Court's 1998 decision in *Oubre v. Entergy Operations, Inc.*[310] The Older Workers Benefits Protection Act of 1990 (OWBPA) [311] amended the ADEA and, among other things, permitted employees to waive their ADEA rights in return for consideration such as increased severance or early retirement benefits. Such waivers are, however, governed by specific OWBPA requirements, such as a requirement that the waiver be written in understandable language.[312]

Prior to the EEOC's recent regulation, an employee who entered into a waiver agreement but thereafter sought to bring suit under the ADEA faced two obstacles from traditional contract law. First, the "tender back" rule required an individual who wished to challenge a waiver to first repay the consideration received for the waiver. Second, the "ratification" principle provided that an individual who failed to return the payment was deemed to have approved the waiver.[313] The final EEOC rule states that neither of these principles applies to ADEA waivers.[314] Therefore, employees who wish to challenge the validity of their ADEA waivers may do so without first repaying the amount received for signing the waiver. If the employee prevails in overturning the waiver, however, and then proves age discrimination and obtains a monetary award, the employer may be able to deduct the amount paid for the waiver in calculating the amount owed.[315]

VI. OTHER FEDERAL STATUTES

A. Family and Medical Leave Act

The most significant Seventh Circuit Family and Medical Leave Act (FMLA) decision during the survey period was *Dormeyer v. Comerica Bank-Illinois*,[316] which overruled an EEOC regulation. Plaintiff Dormeyer was excessively absent from her bank teller job, and after her twentieth unexcused absence in less than a year, the bank terminated her. Some of Dormeyer's absences occurred after she became pregnant and requested FMLA leave, for which she was ineligible because she had worked fewer than 1250 hours in the prior twelve months. The bank ignored Dormeyer's request for FMLA, and Dormeyer sued under an EEOC

309. 29 C.F.R. § 1625.23 (2001).

310. 522 U.S. 422 (1998).

311. 29 U.S.C. § 626(f) (2000).

312. *See id.* § 626(f)(1)(A)-(G).

313. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS: FINAL REGULATION ON "TENDER BACK" AND RELATED ISSUES CONCERNING ADEA WAIVERS, *at* http://www.eeoc.gov/regs/tenderback-qanda.html (last modified Dec. 11, 2000) [hereinafter QUESTIONS AND ANSWERS].

314. *See* 29 C.F.R. § 1625.23(a) (2001).

315. *See id.* § 1625.23(c); *see also* QUESTIONS AND ANSWERS, *supra* note 313.

316. 223 F.3d 579 (7th Cir. 2000).

regulation stating that if an employer fails to advise an employee who requests FMLA leave of her eligibility for the leave, the employee is deemed eligible for leave even if she would not otherwise have qualified.[317]

Judge Posner, writing for a unanimous panel, held that the EEOC cannot enact a rule that effectively cancels the FMLA's statutory eligibility conditions.[318] Furthermore, Judge Posner found the rule unreasonable in granting benefits to those who were never intended to receive them.[319] The court also rejected Dormeyer's claim of pregnancy discrimination, noting that although some of her absences were related to her pregnancy, she failed to show that the absences of nonpregnant employees were overlooked.[320]

Rice v. Sunrise Express, Inc.,[321] another significant Seventh Circuit survey period FMLA decision, examines the question of who bears the burden of proof to show a legitimate business reason for a termination that occurs during an FMLA leave. The district court instructed the jury that it was the defendant's burden to show that the plaintiff would have been terminated even if she had not been on leave.[322] Finding that the defendant had not satisfied this burden, the jury returned a verdict for plaintiff Rice.[323]

The Seventh Circuit, scrutinizing the statutory language of the FMLA, noted that a plaintiff's substantive rights under the act do not include entitlement to any right or benefit to which the employee would not have been entitled, had he not taken FMLA leave.[324] The panel majority held that the employee "always bears the ultimate burden of establishing the right to the benefit."[325] Rejecting the Department of Labor's interpretation as to the allocation of the burdens, the majority held that an employer wishing to claim that a benefit (such as reappointment to a position held prior to a leave) would have been unavailable regardless of the leave, bears only the burden of production. Once the employer has submitted evidence supporting the assertion, the employee bears the burden of proving, by a preponderance of the evidence, that she would have received the

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317. *See id.* at 581-82.

318. *See id.* The court left open the possibility that the regulation might be upheld if the plaintiff asserted detrimental reliance based on the employer's silence, and sought to estop the employer from denying leave based on reasonable reliance and resulting harm. *See id.*

319. *See id.* at 582-83.

320. *See id.* at 583. In dicta, Judge Posner went on to say that although disparate impact is a permissible liability theory under the Pregnancy Discrimination Act, Dormeyer could not prevail on that theory either. Disparate impact applies where the employer has imposed an eligibility requirement that is not really necessary for the job and that weighs more heavily on a protected class such as pregnant employees. Here, attendance was a legitimate job requirement from which the law did not require that pregnant women be excused. *See id.* at 583-84.

321. 209 F.3d 1008 (7th Cir.), *reh'g en banc denied by* 217 F.3d 492 (7th Cir.), *and cert. denied*, 121 S. Ct. 567 (2000).

322. *See id.* at 1016.

323. *See id.* at 1010.

324. *See id.* at 1018.

325. *Id*.

benefit absent the leave. Because the evidence in the case was close, the court remanded for a new trial.[326] Judge Evans, dissenting, pointed out the practical difficulties this burden allocation creates for plaintiffs, given that employers control most of the evidence needed to prove the point.[327]

B. Equal Pay Act

Two survey period cases reiterating established doctrine deserve brief mention. In *Snider v. Belvidere Township*,[328] a female deputy assessor with six years of seniority received a forty-cent-per-hour raise that put her at the same hourly rate as a newly hired male deputy assessor.[329] Her claim of pay discrimination failed because she did not show that any similarly situated male, who was doing the same work, was paid a higher wage.[330]

In *Lang v. Kohl's Food Stores, Inc.*,[331] a group of unionized and mostly female grocery store bakery and deli employees complained that jobs in the produce department paid more, and that most produce workers were male.[332] Because the Equal Pay Act does not require intent to discriminate, the plaintiffs could prevail by showing unequal pay for substantially equal work.[333] The employer successfully argued, however, that the produce positions required more skill, responsibility, and effort. Produce workers are called upon to arrange wares for display, decide what produce to discard or mark down, and lift heavier merchandise. The plaintiff's Title VII claim failed as well for lack of evidence that the employer steered women into the lower-paying positions.[334]

C. Employee Polygraph Protection Act

Early in the survey period, the Seventh Circuit took an expansive view of the Employee Polygraph Protection Act (EPPA),[335] and in *Veazey v. Communications & Cable of Chicago, Inc.*,[336] ruled that an audiotape recording of an employee's voice may violate the EPPA's general prohibition against lie detection tests if used in conjunction with another lie detection devise. Plaintiff Veazey was the key suspect when one of his co-workers received an anonymous and threatening

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326. *See id.*

327. *See id.* at 1019 (Evans, J., dissenting); *see also* Rice v. Sunrise Express, Inc., 217 F.3d 492, 493 (7th Cir. 2000) (denying petition for rehearing en banc) (Wood, J., Rovner, J. and Williams, J., dissenting with opinion).

328. 216 F.3d 616 (7th Cir. 2000).

329. *See id.* at 614, 617.

330. *See id.* at 619.

331. 217 F.3d 919 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 771 (2001).

332. *See id.* at 922.

333. *See id.* at 922-23.

334. *See id.* at 923.

335. 29 U.S.C. §§ 2001-09 (1999).

336. 194 F.3d 850 (7th Cir. 2000).

voicemail message.[337] As part of its investigation, the employer asked Veazey to read a copy of the threatening message into a tape recorder in order to obtain a voice exemplar. Veazey refused because he did not know how the tape might be used and because he found the message offensive. While Veazey offered to record a different message, he was nonetheless terminated for insubordination.[338]

After a fairly extensive review of the history of the lie detector,[339] the Seventh Circuit looked to the statutory definition of "lie detector," which covers any device used to render "a diagnostic opinion regarding the honesty or dishonesty of an individual."[340] Although simply comparing two voice samples without the aid of stress analyzing equipment is not a lie detector test, the court concluded that Veazey was entitled to try to show that the employer intended to use the recording in conjunction with some other device to directly assess whether Veazey was speaking truthfully in denying responsibility for the threatening message.[341]

VII. UNEMPLOYMENT COMPENSATION

Two survey period appeals, both involving the same employer, help to illustrate when violation of a work rule is just cause for termination for unemployment compensation purposes. In *Stanrail Corp. v. Unemployment Insurance Review Board*,[342] the benefit claimant missed work on two consecutive days and failed to report the absences in the manner required by company policy.[343] The employer had a "demerit point" system that assessed points for various infractions such as safety violations (fifty points), horseplay (fifty points), and tardiness (ten points for up to six minutes, twenty points for seven to twelve minutes, etc.).[344] Once an employee accumulated more than 500 demerit points, he or she could be immediately dismissed from work.[345]

In *Stanrail Corp.*, the claimant accumulated 300 points each for his two unreported absences and was fired.[346] The Unemployment Insurance Review Board found that the claimant had knowingly violated a reasonable and uniformly enforced rule concerning absenteeism. It nevertheless reversed the administrative law judge's finding of just cause for the termination, by broadening its inquiry and reviewing work rules other than the rule upon which the termination was based.[347] The court of appeals reversed the review board on

337. *See id.* at 853.
338. *See id.*
339. *See id.* at 854-58.
340. *Id*. at 858 (quoting 29 U.S.C. § 2001(3) (1999)).
341. *See id.*
342. 734 N.E.2d 1102 (Ind. Ct. App. 2000).
343. *See id.* at 1104.
344. *See id.* at 1103.
345. *See id.* at 1104.
346. *See id.*
347. *See id.* at 1105.

the grounds that it had impermissibly looked beyond the work rule cited as justifying the discharge.[348]

Stanrail was less successful in *Stanrail Corp. v. Review Board of the Department of Workforce Development*.[349] Stanrail changed its policy that allowed employees who submitted proper medical documentation to take unlimited unpaid sick leave in periods of three or more days at a time, to a policy allowing only three such leaves per year. Additional sick leave earned "demerit points" under the above-described system.[350]

The claimant took two of these unpaid sick leaves and received a written notice that he had only one remaining. He took another, and received a notice that his next such leave would earn demerit points. He then took a fourth leave to be treated for contact dermatitis and, upon his return, was assessed demerit points that resulted in his termination.[351]

The Indiana Court of Appeals looked to testimony of Stanrail's human resource manager, who stated that he had personal discretion whether or not to enforce the policy. He also said that an employee who was pregnant, had a heart attack or cancer, or was hospitalized for a serious illness would likely not be assessed demerit points, but that an employee ordered by a physician to remain in bed for a serious illness would probably accrue points.[352] The court agreed with the review board that Stanrail was not uniformly enforcing the relevant work rule, and also that the claimant did not "knowingly" violate the rule because of the rule's unwritten exceptions.[353] It therefore upheld the review board's ruling granting unemployment benefits to the claimant.[354]

One additional survey period case that clarifies notice requirements is worth noting. *Scott v. Review Board of the Indiana Department of Workforce Development*[355] involved an unemployment benefits claimant who was out of the state attending a funeral when her hearing notice arrived.[356] The notice was mailed the requisite ten days prior to the hearing, but had not yet been delivered five days later when Scott left town. When she returned, Scott found in her mail both the hearing notice and the administrative law judge's decision reversing the initial approval of benefits. The review board affirmed the decision, but the Indiana Court of Appeals reversed.[357]

The court interpreted the statute to require "actual, timely notice" of a hearing.[358] Mailing of such a notice via regular mail raises a presumption of

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348. *See id.* at 1106.
349. 735 N.E.2d 1197 (Ind. Ct. App. 2000).
350. *See id.* at 1200-01.
351. *See id.* at 1201.
352. *See id.* at 1204.
353. *Id.* at 1205.
354. *See id.* at 1206.
355. 725 N.E.2d 993 (Ind. Ct. App. 2000).
356. *See id.* at 995.
357. *See id.*
358. *Id.* at 996.

notice, but this presumption is rebuttable.[359] The agency did not dispute that Scott did not receive actual notice prior to the hearing, so the court concluded that Scott was denied her right to a reasonable opportunity for a fair hearing of her case's merits.[360]

VIII. STATE IMMUNITY

During the last survey period, a narrow U.S. Supreme Court majority held in *Alden v. Maine*[361] that under the Eleventh Amendment, Congress lacked the power to subject the states to suit under the Fair Labor Standards Act (FLSA) in either federal or state courts.[362] Several survey period decisions followed up on this holding by addressing whether the states are subject to certain other federal employment laws. In *Kimel v. Florida Board of Regents*,[363] the U.S. Supreme Court held that the Age Discrimination in Employment Act (ADEA), like the FLSA, did not abrogate the states' Eleventh Amendment immunity.[364] Although the ADEA, unlike the FLSA, contains a clear statement of Congress' intent to abrogate state immunity, the Court held that Congress exceeded its constitutional authority under the Fourteenth Amendment in attempting to subject the states to the ADEA's provisions.[365]

On February 21, 2001, the Court similarly, in *University of Alabama at Birmingham Board of Trustees v. Garrett*,[366] held that the Eleventh Amendment bars suits in federal court by state employees to recover money damages for failure to comply with Title I of the ADA.[367]

The Seventh Circuit denied an Eleventh Amendment defense in *Varner v. Illinois State University*,[368] which involved an Equal Pay Act (EPA) claim. A class of tenured and tenure track female faculty members sued the University, claiming pay discrimination. When the Seventh Circuit originally considered the case in 1998, it held that "Congress clearly intended to abrogate the States' Eleventh Amendment immunity through its passage of the Equal Pay Act, and that this abrogation was a valid exercise of congressional authority under § 5 of the Fourteenth Amendment."[369] The U.S. Supreme Court, on writ of certiorari, vacated and remanded the decision for further consideration in light of *Kimel*.[370]

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359. *See id.*

360. *See id.*

361. 527 U.S. 706 (1999).

362. *See id*. at 712.

363. 528 U.S. 62 (2000).

364. *See id.* at 67.

365. *See id.* at 66-67.

366. 121 S. Ct. 955 (2001).

367. *See id.* at 960.

368. 226 F.3d 927 (7th Cir. 2000).

369. *Id*. at 929 (citing Varner v. Ill. St. Univ., 150 F.3d 706, 717 (7th Cir. 1998), *vacated*, 120 S. Ct. 928 (2000)).

370. *See* Ill. State Univ. v. Varner, 528 U.S. 1110 (2000).

On remand, the Seventh Circuit reached the same conclusion, contrasting the EPA, which prohibits discrimination in wages based on gender, from statues aimed at discrimination based on age and disability. The latter forms of discrimination receive only rational basis review under the Constitution, whereas gender-based classifications receive heightened scrutiny.[371] Because the EPA qualifies as "remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment," the Seventh Circuit again rejected the University's Eleventh Amendment defense.[372]

IX. PROCEDURAL ISSUES

A. Sufficiency of the EEOC Charge

The Seventh Circuit clarified several significant procedural questions during the survey period. One issue of critical importance to practitioners is the sufficiency of the EEOC charging document. Three cases on this topic are notable. The first is *Novitsky v. American Consulting Engineers, L.L.C.*,[373] in which the plaintiff complained that her employer discharged her based on age and religion, and allowed other employees to make anti-Semitic remarks in the workplace.[374] The plaintiff also sought damages for emotional distress because her employer failed to accommodate her religious beliefs by denying her time off on Yom Kippur. The court first observed that such damages could not be more than a day's pay because after her request was denied, the plaintiff worked on Yom Kippur.[375] The plaintiff's duty to mitigate damages obligated her to choose between working or not working based upon whichever caused the lesser injury, so the maximum loss would be the day's pay lost by not working.[376] In any event, however, the plaintiff had waived the failure-to-accommodate claim by excluding it from her charge.[377] Lack of notice to the employer of its alleged failure "frustrated the conciliation process" that is the purpose of the EEOC charging procedure.[378] The plaintiff unsuccessfully attempted to blame the EEOC, because her intake questionnaire did list the Yom Kippur episode. By statute, however, it is the charge and not the questionnaire that governs the action because the employer receives only the charge.[379] The plaintiff freely signed the

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371. *See Varner*, 226 F.3d at 934.

372. *Id*. at 936 (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627, 639 (1999)).

373. 196 F.3d 699 (7th Cir. 1999).

374. *See id.* at 701.

375. *See id.*

376. *See id.* The court acknowledged that the calculation would be more complicated if the plaintiff offered any evidence that refusal to work could have jeopardized her job. *See id.*

377. *See id.* at 703.

378. *Id*. at 702.

379. *See id.* (citing 42 U.S.C. § 2000e-5(b)).

charge, and therefore was bound whether she read it or not.[380]

A similar issue arose in *Vela v. Village of Sauk Village*.[381] Plaintiff Vela circled "harassment" as a type of discrimination alleged on her intake form, but this item was subsequently crossed out on the form.[382] On her actual charge form, Vela checked "sex" and "national origin" as bases of discrimination and listed three specific incidents in which she claimed she was treated differently from non-Mexican male employees. The district court granted the employer's summary judgment motion, in part because of Vela's failure to include a sexual harassment claim in her EEOC charge. [383]

Vela unsuccessfully argued on appeal that because sexual harassment is a form of sexual discrimination, her charge was sufficient because she checked "sex" as one basis of discrimination against her. The Seventh Circuit disagreed, citing precedent that there must be "a reasonable relationship between the allegations in the charge and the claims in the complaint," and that it must appear that "the claim in the complaint can reasonably be expected to grow out of an EEOC investigation of the allegations in the charge."[384]

Vela also argued that she had orally communicated the facts related to her sexual harassment claim to an agency intake officer, who misled her when he told her to cross out the sexual harassment reference on the intake form and who omitted the claim of harassment when he typed the charge. The Seventh Circuit remained unpersuaded, citing *Novitsky* and stating that "an oral charge, if made as [Vela] testified, not reflected in nor reasonably related to the charge actually filed, is not a sufficient predicate for a claim of sexual harassment in her civil action."[385] These two cases make clear that an oral statement to an EEOC representative is no substitute for written documentation in the formal charge of all types of discrimination alleged.

The final case covering sufficiency of the EEOC charging document is *Scott v. City of Chicago*.[386] The plaintiff charged the employer with taking actions to "lessen [her] job responsibilities" based on race and age.[387] The city sought

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380. *See id.* Judge Rovner, concurring, focused on the fact that here, the plaintiff's counsel was present when the plaintiff reviewed and signed the charge that the EEOC drafted. *See id.* at 703 (Rovner, J., concurring). The panel majority opinion noted that the charge did not offer the employer adequate notice "whether or not the complainant had a lawyer, whether or not she sought or listened to counsel, indeed, whether or not she read or understood the charge." *Id*. at 702-03. Judge Rovner wrote that "[c]ontrary to the opinion's implications, we do not now decide whether an illiterate person or *pro se* person who signs a charge prepared by the EEOC, which leaves out critical information provided by the claimant to the EEOC in the intake questionnaire, would be similarly bound by the charge." *Id*. at 703 (Rovner, J., concurring).

381. 218 F.3d 661 (7th Cir. 2000).

382. *See id.* at 663.

383. *See id.*

384. *Id*. at 664 (quoting Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994)).

385. *Id*. at 665.

386. 195 F.3d 950 (7th Cir. 1999).

387. *Id*. at 951.

dismissal, citing several cases in which the complaint failed to include notice of an item that was essential to the plaintiff's claim.[388] The Seventh Circuit held on appeal that the district court wrongly granted the employer's motion to dismiss. The reason for the dismissal was that the complainant failed to specify what adverse employment actions the employer took against her.[389] However, the Seventh Circuit focused on the fact that the plaintiff held a distinctive job position, as Assistant Commissioner of Systemwide Services at the City of Chicago Public Library. In light of her unique job responsibilities, the court held that the complaint adequately communicated the gravamen of her claims.[390]

B. Title VII Class Notice Requirements

Another important procedural issue involves Title VII class certification. In *Jefferson v. Ingersoll International Inc.*,[391] the plaintiffs as a class filed a pattern-or-practice suit asserting that the defendant employers committed race discrimination in considering employment applications. They sought both equitable relief and monetary damages.[392] Prior to the Civil Rights Act of 1991, the normal basis of class certification in pattern-or-practice cases was Federal Rule of Civil Procedure 23(b)(2), because only equitable relief was available.[393] This rule, unlike Rule 23(b)(3), which applies when the plaintiffs seek money damages, does not require notice to each class member, and does not allow class members to opt out of the action.[394] The district judge in *Jefferson* ruled that the plaintiffs could proceed under Rule 23(b)(2), and the defendants brought an interlocutory appeal.[395]

The Seventh Circuit held that when a plaintiff class seeks compensatory or punitive damages, Rule 23(b)(2) applies only if the monetary relief sought "is incidental to the equitable remedy."[396] The court remanded the case for resolution of whether the damages sought were more than incidental.[397] If so, the

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388. *See id.* at 952 (citing Kyle v. Morton High Sch., 144 F.3d 448, 454 (7th Cir. 1998); *see also* Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 792 (7th Cir. 1996); Perkins v. Silverstein, 939 F.2d 463, 467-68 (7th Cir. 1991)).

389. *See id.* at 951.

390. *See id.* at 952.

391. 195 F.3d 894 (7th Cir. 1999).

392. *See id.* at 896.

393. *See id.* Before the Civil Rights Act of 1991 became effective, class members could receive a monetary award for back pay, but the back pay was deemed equitable relief. *See id.*

394. *See id.*

395. *See id.* at 897.

396. *Id*. at 898. The court noted the U.S. Supreme Court's holding in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), that "proper interpretation of Rule 23, principles of sound judicial management, and constitutional considerations (due process and jury trial), all lead to the conclusion that in actions for money damages class members are entitled to personal notice and an opportunity to opt out." *Jefferson*, 195 F.3d at 897.

397. *See id.* at 899.

court directed, the district court could either certify the class under Rule 23(b)(3) for all purposes, or it could bifurcate the proceedings by certifying a class under Rule 23(b)(3) for money damages and under Rule 23(b)(2) for equitable relief.[398]

Later during the survey period, the Seventh Circuit reaffirmed both this holding and the acceptable alternative approaches in *Lemon v. International Union of Operating Engineers*.[399] In *Lemon*, the court observed that the more abbreviated procedure of Rule 23(b)(2) is based on the presumption that the class members have "cohesive and homogeneous" interests in redressing a common injury by an injunctive or declaratory remedy.[400] In contrast, monetary damage claims typically "require judicial inquiry into the particularized merits of each individual plaintiff's claim."[401]

C. Other Developments

Another noteworthy Seventh Circuit case in the procedural arena is *Pohl v. United Airlines, Inc.*[402] In *Pohl*, an aircraft inspector sued his employer for discrimination based on military status. His attorney discussed the case with opposing counsel and the attorneys for both sides informed the court that they had agreed to a settlement. The plaintiff then refused to sign the settlement agreement, claiming that his attorney had not been authorized to settle. District Judge Barker entered an order enforcing the agreement on the grounds that the attorney had actual authority to settle, and the Seventh Circuit affirmed, applying Indiana law.[403]

Pohl had participated in a series of telephone conversations with his attorney during settlement negotiations, which correlated with his attorney's calls to opposing counsel. Pohl did not object when he received his attorney's letter informing him that his case had been settled. The attorney testified to having communicated each aspect of the settlement to Pohl. Pohl pointed to his handwritten caveat "with my authorization," which he had added to the section of his retainer agreement granting a power of attorney to execute all documents, including settlement agreements. The court, however, refused to interpret this addendum as requiring written authorization, referring to the plaintiff's "misplaced belief that he could back out of the settlement at any time prior to signing it."[404] In light of the court's stance, diligent attorneys will make clear to their clients that a litigant may be bound by a settlement agreement if he

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398. *See id.* The Seventh Circuit also addressed the contention that the EEOC's intervention on the plaintiffs' behalf rendered the class certification issue moot. The court rejected this argument because the EEOC might not seek or receive the same relief that the plaintiffs were seeking in their class suit. *See id.*

399. 216 F.3d 577 (7th Cir. 2000).

400. *Id*. at 580.

401. *Id*.

402. 213 F.3d 336 (7th Cir. 2000).

403. *See id.* at 337-38, 340.

404. *Id*. at 340.

acquiesces in his attorney's representations during negotiations, even prior to formally signing any settlement documentation.

Moving on to administrative developments, the National Labor Relation Board (NLRB) made news by ruling that nonunion workers must be allowed to bring a witness to any workplace meeting that might lead to disciplinary action.[405] The NLRB had extended these "*Weingarten* rights"[406] to nonunion employees in 1982, but reversed its position in 1985.[407] The most recent, three-to-two decision restores those rights retroactively, and may help plaintiffs survive summary judgment by allowing a witness to verify their version of events.[408]

The NLRB majority looked to section 7 of the National Labor Relations Act, which protects the right of employees to engage in "'concerted activities for the purpose of mutual aid or protection.'"[409] Extending *Weingarten* rights, it held, would further this purpose by discouraging unjust punishment of employees.[410]

The two dissenting NLRB members raised a number of concerns, in addition to the uncertainty that such departures from precedent create.[411] One was that a nonunion employee-witness might well lack the knowledge and experience of a union-trained observer and would not represent the interests of all unit employees.[412] Another was the likelihood of increased litigation due to a lack of employer awareness, which would lead to frequent violations.[413] Finally, the presence of an employee-witness could impair the effectiveness of the interview from the employer's perspective, particularly if the assistant is someone personally involved in the matter under investigation.[414]

In addition to raising these concerns, the NLRB's opinion leaves a number of questions unanswered. One is whether employers must pay employee-witnesses or grant them time off to attend investigatory interviews.[415] The NLRB also did not address whether employers must give employees advance warning that a meeting might lead to discipline, nor did it define exactly what type of meetings are covered, such as negative performance appraisals. There is also some debate whether employers are obligated to follow a policy of notifying nonunion employees of their *Weingarten* rights.[416]

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405. *See* Epilepsy Found. of Northeast Ohio, 331 NLRB No. 92 (2000), 2000 WL 967066 (NLRB).

406. *See* NLRB v. Weingarten, 420 U.S. 251 (1975).

407. *See Epilepsy Found*., 331 NLRB No. 92, 2000 WL 967066, at 3.

408. *See id.* at 4.

409. *See id.*

410. *See id.*

411. *See id.* at 12.

412. *See id.* at 13, 29.

413. *See id.* at 14 ("The workplace has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds.").

414. *Id*. at 43, 100.

415. *See* Susan J. McGolrick, *Employee Rights: Attorneys Disagree About Wisdom of NLRB Extending Weingarten Rights*, DAILY LAB. REP., Aug. 7, 2000.

416. *See id.*

This ruling helps level the playing field for employees who are unfairly disciplined or discharged and should encourage plaintiffs' attorneys. The ruling, however, requires close monitoring. An appeal seems likely, and the fact that the NLRB members split their votes along party lines (with the three Democrats in the majority and the two Republicans dissenting[417]) makes it possible that a change in the NLRB's composition could lead to yet another reversal.

X. THE "WATCH LIST"

A. The Enforceability of Arbitration Agreements

One hot topic in employment law is how far employers can go in requiring employees to agree to binding arbitration. In an effort to control legal costs, employers have increasingly turned to this kind of agreement, and until recently the enforceability of such agreements seemed fairly clearcut.[418] The Seventh Circuit, along with most other circuits, had taken the position that the Act authorizes federal courts to enforce binding arbitration provisions in all employment contracts.[419] But then the Ninth Circuit took a contrary position that caused great consternation among employers, and the U.S. Supreme Court stepped in to resolve the circuit split.

On March 21, 2001 employers applauded the U.S. Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*,[420] which left the Seventh Circuit precedent undisturbed. Plaintiff Adams signed a form as part of his application when Circuit City hired him in 1995, agreeing to submit all employment disputes to binding arbitration.[421] Two years later, Adams brought suit in state court alleging harassment based on sexual orientation under California law.[422] The Ninth Circuit interpreted language in the Federal Arbitration Act exempting "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" as excluding all employment contracts from the Act's coverage.[423] It reversed the federal district court's order compelling arbitration.[424]

The U.S. Supreme Court reversed the Ninth Circuit in a 5-4 decision based upon the text of the statute, rather than its legislative history.[425] The majority

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417. *See id.*

418. The Federal Arbitration Act, 9 U.S.C. § 1 (2000), makes predispute arbitration valid and enforceable. *See* Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 364 (7th Cir.), *cert. denied*, 528 U.S. 811 (1999).

419. *See* Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361 (7th Cir. 1999).

420. No. 99-1379, 2001 U.S. LEXIS 2459 (Mar. 21, 2001).

421. *See id.* at *8-9.

422. *Id*. at *9; Marcia Coyle, *Three High Court Rulings Give Business Upper Hand in ADRs*, NAT'L. L.J., Apr. 2, 2001 at B1.

423. *Circuit City*, 2001 U.S. LEXIS 2459 at *7-8,

424. *See* Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999).

425. *See Circuit City*, 2001 U.S. LEXIS 2459 at *7, *25-26, *33.

interpreted the Act's exemption narrowly as excluding only transportation worker employment contracts from the Act's coverage.[426] Justice Anthony M. Kennedy, writing for the majority, noted "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation."[427] The Court was not persuaded by the attorneys general of twenty-two states, who argued as *amici* that the Federal Arbitration Act should not be read to pre-empt state laws that protected employees by prohibiting them from signing away their rights to pursue state-law discrimination actions in court.[428]

While the decision clarified the overall scope of the Federal Arbitration Act, it left many questions unanswered. The Court reiterated a prior holding that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[429] It remains to be seen whether workers who agree to arbitration retain their rights to collect punitive damages and attorney fees, and to pursue class actions. Another unresolved question is how broadly "transportation workers" will be defined.

The role of agencies such as the EEOC in cases involving arbitration agreements is another open issue. The Court has granted certiorari in its first case dealing with this question. Next term, it will take up the case of *E.E.O.C. v. Waffle House, Inc.*,[430] in which the EEOC is arguing that it should not be precluded from seeking relief such as back pay, damages or reinstatement on behalf of workers who signed arbitration agreements because it was not a party to the agreement.[431] Employment law attorneys should watch for this decision and others clarifying the power of employment arbitration agreements.

B. Electronic Monitoring of Employee Activities

A second area worth watching falls under the general heading of workplace privacy. During the summer of 2000, sponsors introduced the Notice of Electronic Monitoring Act in both the U.S. Senate and the House of Representatives.[432] The proposed bill would prohibit secret surveillance of employee communications, by requiring employers notify employees before monitoring telephones, e-mail or Internet use and/or tracking computer keystrokes. The proposed notice requirement includes the frequency of employer monitoring activities.

Although the bill stalled in the committee process, workplace privacy issues

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426. *See id*. at *25.

427. *Id*. at *32.

428. *See id*. at *29-30.

429. *Id*. at *33 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

430. 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 69 U.S.L.W. 3628 (U.S. Mar. 26, 2001) (No. 99-1823).

431. *See id*. at 806-07.

432. *See* H.R. 4908, 106th Cong. (2d Sess. 2000); *see also* S. 2898, 106th Cong. (2000).

continue to receive significant press. Evolving technology that offers employer ever cheaper and more comprehensive monitoring tools may increase employers' monitoring practices.[433] Those interested should watch for further legislative activity.

C. Carpal Tunnel Syndrome as a Disability; Job Transfer Rights of the Disabled

On April 16, 2001, the U.S. Supreme Court granted certiorari in two ADA cases for the 2001 term.[434] In the first, *Williams v. Toyota Motor Manufacturing, Ky., Inc.*,[435] the Sixth Circuit held that a woman with carpal tunnel syndrome qualified for protection under the ADA because she was substantially limited in performing manual tasks.[436] Toyota argues that the plaintiff can do other work and engage in a many everyday activities, which makes her only partially impaired and ineligible for ADA protection.[437] It is asking the Court to interpret the ADA to require an impairment that significantly restricts, and does not merely affect, a major life activity.[438]

The second case, *Barnett v. U.S. Air*,[439] involves a disabled employee's right to reassignment into a position that she could not otherwise claim due to a unilaterally imposed seniority system.[440] The Ninth Circuit looked for guidance to the EEOC's compliance manual, which says, "Reassignment means that the employment gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended."[441] It held that "reassignment is a reasonable accommodation and . . . a seniority system is not a per se bar to reassignment," although "a seniority system is a factor in the undue hardship analysis" that is conducted on a case-by-case basis.[442]

Employment law attorneys who work with disability claims will look forward with interest to the U.S. Supreme Court's take on these issues.

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433. *See* Greg Miller, *High-Tech Snooping All in Day's Work; Security: Some Firms Are Now Using Computer Investigators to Uncover Employee Wrongdoing*, L.A. TIMES, Oct. 29, 2000, at A1; *see also* Joe Salkowski, *Rising Workplace Hazard: Snooping*, CHI. TRIB., July 31, 2000, at C5.

434. *See* Linda Greenhouse, *Justices Accept 2 Cases to Clarify Protection for Disabled*, N.Y. TIMES, April 17, 2001 at A13.

435. 224 F.3d 840 (6th Cir. 2000).

436. *See id.* at 843.

437. *See* Greenhouse, *supra* note 434.

438. *See id.*

439. 228 F.3d 1105 (9th Cir. 2000).

440. *See id.* at 1118.

441. *Id*. (quoting EEOC ENFORCEMENT GUIDANCE, EEOC COMPLIANCE MANUAL 5452).

442. *Id*. at 1120.

CONCLUSION

The survey period developments covered the entire employment spectrum. Many issues remain evolutionary, and the volume and variety of these developments may frustrate practitioners who are struggling to keep current.

On a more positive note, it is this diversity of claim types, issues, and factual scenarios that makes employment law such a vital area of practice. The ever-shifting landscape creates potential pitfalls for the uninformed, but it assures that employment attorneys will remain challenged.