SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

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INTRODUCTION: NATIONAL TRENDS AND DEVELOPMENTS

One immediate reaction to last year's terrorist attacks on the United States was an upsurge in religious observance and expression.[1] Issues of religious accommodation and tolerance in the workplace are therefore very much in the public eye. Ironically, it was on September 11, 2000 that the Seventh Circuit heard oral arguments in *Anderson v. U.S.F. Logistics (IMC), Inc.*,[2] the "Have a Blessed Day"[3] case.

The controversy began when a representative of U.S.F.'s largest customer, Microsoft, complained about Elizabeth Anderson's use of this phrase in business communications.[4] Anderson twice ignored her supervisor's instruction not to use the phrase in correspondence to Microsoft.[5] In a meeting called to discuss the situation, Anderson offered to refrain from using the phrase with any individuals who took offense, but her supervisor did not respond to the proposed accommodation.[6]

The next step was a written reprimand and distribution of a company policy to all Indianapolis employees instructing them to refrain from using "additional religious, personal or political statements" to communications with customers.[7] Although the policy also prohibited such communications with co-workers, Anderson was allowed to continue wishing her fellow employees blessed days.[8]

Anderson took the matter public and a local newspaper published an article that quoted a Microsoft spokesperson as saying Microsoft had no objection to the phrase.[9] Based on her reading of the article, Anderson decided she could resume using the phrase. The day after the article appeared, Anderson again used the

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1. *See* Laurie Goodstein, *As Attacks' Impact Recedes, a Return to Religion as Usual*, N.Y. TIMES, Nov. 26, 2001, at A1.
2. 274 F.3d 470 (7th Cir. 2001).
3. *Id.* at 473.
4. *Id.*
5. *See id.*
6. *Id.*
7. *Id.* at 474.
8. *Id.*
9. *Id.*

"Blessed Day" closing in a communiqué to Microsoft.[10] U.S.F. did not push the issue by imposing further discipline but did not retract the previous reprimand.[11]

For several months Anderson refrained from using the "Blessed Day" phrase. She then sent an e-mail to Microsoft with the phrase "HAVE A BLESSED DAY" in capital letters, surrounded by quotation marks. She received another reprimand.[12]

More than six months later, Anderson brought suit under Title VII of the Civil Rights Act of 1964[13] (Title VII), claiming failure to reasonably accommodate her religious practice and seeking injunctive relief.[14] Judge John Daniel Tinder of the Southern District of Indiana denied a preliminary injunction, concluding that it was unlikely Anderson would succeed on the merits.[15] Anderson filed an interlocutory appeal with the Seventh Circuit, which affirmed on December 14, 2001.[16]

Judges Cudahy, Easterbrook and Williams all agreed that because Anderson used the phrase only sporadically and had no religious commitment or requirement to use the phrase all the time, "an accommodation that allows her to use the phrase with some people but not with everyone could be a reasonable accommodation."[17] The court also noted that the employer had not sought "to denigrate" Anderson's belief.[18] In fact, U.S.F. had invited her to open a company-sponsored event by saying a prayer over the loudspeaker and allowed her to use the "Blessed Day" phrase with co-workers, display religious sayings in her work area, and listen to religious radio broadcasts at her work station.[19]

The *Anderson* decision may help employers and employees better understand religious accommodation. An employer's obligation to provide reasonable religious accommodations is measured differently than under the ADA. Employers may legally refuse, as an undue hardship, religious accommodations that would involve more than *de minimis* cost.[20]

An important point, not raised in *Anderson*, is that Title VII's requirement of reasonable religious accommodation applies to any sincerely held religious belief, not merely traditional Judeo-Christian beliefs.[21] On November 19, 2001,

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10. *Id.*

11. *Id.*

12. *See id.*

13. 42 U.S.C. § 2000e (1994).

14. *Anderson*, 274 F.3d at 474.

15. Anderson v. U.S.F. Logistics (IMC), Inc., 2001 U.S. Dist. LEXIS 2807, *45-46. (S.D. Ind. 2001).

16. *Anderson*, 274 F.3d at 470.

17. *Id*. 476.

18. *Id*.

19. *Id*. at 476-77. Note that the court did not say these accommodations were required, but it considered them as evidence of the employer's tolerance toward expressions of faith. *Id*.

20. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.").

21. *See* Bushouse v. Local Union 2209 UAW, 164 F. Supp. 2d 1066, 1072 n.14 (N.D. Ind.

the Equal Employment Opportunity Commission (EEOC) and U.S. Departments of Justice and Labor issued a joint statement reaffirming their commitment to combat workplace discrimination based on religion, ethnicity, national origin or immigration status.[22] The statement urged victims of workplace bias to promptly report incidents to allow timely investigation.[23] The statement specifically refers to acts directed toward individuals who are, or are perceived to be, Arab, Muslim, Middle Eastern, South Asian or Sikh.[24]

The EEOC has therefore put employers on renewed notice that adverse actions or harassment based on religious or national affiliation, physical or cultural traits and clothing, perception and association may violate Title VII.[25] As of December 6, the EEOC had already logged 166 formal workplace discrimination complaints specifically related to the September 11 attacks.[26]

Another tolerance-related issue on the rise is disability harassment.[27] This has become the fourth most frequent form of harassment claim (following racial, sexual, and national origin harassment), with 2,400 complaints logged annually.[28] A New Jersey man with dyslexia and other neurological impairments recently won a six-figure jury award.[29] Other cases have involved allegations of horseplay targeting a mentally retarded restaurant worker, hostility toward and ostracism of an HIV-infected woman, and taunting of a man with bipolar illness

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22. Press Release, U.S. Equal Employment Opportunity Commission, EEOC and Departments of Justice and Labor Issue Joint Statement Against Workplace Bias in Wake of September 11 Attacks, *at* http://eeoc.gov/press/11-19-01.html (last visited Nov. 19, 2001).

23. *Id*.

24. *Id*.

25. *See* U.S. Equal Employment Opportunity Commission, Employment Discrimination Based on Religion, Ethnicity, or Country of Origin, *at* http://eeoc.gov/facts/fs-relig_ethnic.html (last visited Dec. 12, 2001).

26. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Confers with Minority Groups on Combating September 11 Backlash Discrimination, *at* http://eeoc.gov/press/12-12-01.html (last visited Dec. 12, 2001).

27. *See* Reed Abelson, *Employers Increasingly Face Disability-Based Bias Cases*, N.Y. TIMES, Nov. 20, 2001, at C1. Note that the Seventh Circuit has yet to decide in favor of a plaintiff on a disability harassment claim. In each case raising such a claim, the court has therefore assumed without deciding that the claim is cognizable under the Americans with Disabilities Act (ADA). *See, e.g.*, Casper v. Gunite Corp., 2000 U.S. App. LEXIS 16241, *12 (7th Cir. 2000) (unpublished opinion); Silk v. City of Chicago, 194 F.3d 788, 803-04 (7th Cir. 1999). The Seventh Circuit has signaled its receptivity to such claims by noting that a cause of action for disability harassment appears to exist based on ADA language prohibiting discrimination in any "term, condition, or privilege of employment"—language that parallels Title VII. *Casper*, 2000 U.S. App. LEXIS 16241 at *12-13. During the survey period, the Fourth and Fifth Circuits, which are usually considered relatively conservative, recognized claims of hostile environment based on disability. *See* Marcia Coyle, *New Tool for Job Bias Suits*, NAT'L L.J., May 14, 2001 at A1.

28. Abelson, *supra* note 27.

29. *Id*.

as a "psycho" and "freak."[30]

Employees who are appropriately sensitive to issues of race and gender may not be as well educated when it comes to disabilities. These issues become more complicated when an employer is entrusted with medical information about an employee because, for example, the employee has submitted a certification in support of a request for leave under the Family and Medical Leave Act (FMLA). Employers must protect the disabled individual's privacy by strictly limiting disclosure of information regarding the disability to those with a legitimate need to know.[31]

These privacy concerns have been affected by the September 11 attacks. On October 31, 2001, the EEOC issued technical assistance to employers concerned about special needs of disabled employees in the event of an emergency evacuation.[32] According to the EEOC, when an employer knows of an employee disability, it may inquire about special emergency assistance needs. However, the EEOC cautions that employers should not assume that all disabled individuals require special help, but should rather consult the individuals who are best able to assess their own situations. The information also helps employers determine how much medical information they may request, and with whom they may share it.[33]

The remainder of this Article will review some of the survey year's most significant and interesting legal developments affecting Indiana employers and employees. It begins by looking at Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and other federal law developments. It continues with a summary of worker's compensation and other state law developments, followed by a brief update on the force and effect of arbitration agreements. It concludes by mentioning three pending cases worth monitoring.

I. TITLE VII

A. What Qualifies as an Adverse Action?

Under *McDonnell Douglas*' burden-shifting method of proof,[34] a plaintiff establishes a prima facie case of discrimination by showing she was a protected class member who performed satisfactorily but suffered some adverse employment action to which others outside the class were not subjected.[35] Similarly, a party claiming retaliation under Title VII must show that because he

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30. *Id.*

31. *See* 42 U.S.C. § 12112(d)(3)-(4) (1994).

32. U.S. Equal Employment Opportunity Commission, EEOC Provides Technical Assistance to Employers on Requesting Medical Information as Part of Emergency Evacuation Procedures, *at* http://eeoc.gov/press/10-31-01.html (last visited Oct. 31, 2001).

33. *Id.*

34. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

35. Grube v. Lau Indus., 257 F.3d 723, 728 (7th Cir. 2001).

engaged in a protected activity he suffered an adverse employment action.[36]

A key issue in several recent cases has been whether the alleged action was legally adverse (sometimes referred to as a "tangible employment action").[37] In *Stutler v. Illinois Department of Corrections*, the court provided a brief recap of some Seventh Circuit holdings on this point.[38] The court requires a "'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'" that materially alters the terms and conditions of employment.[39] Negative performance evaluations, job title changes, greater travel distance to work and/or loss of a telephone or workstation do not qualify standing alone.[40] Retaliatory harassment by a supervisor or co-workers may qualify but only if it is sufficiently severe.[41] Here, the court held that neither Stutler's lateral transfer with no loss of benefits or responsibilities nor an "unpleasant" working environment qualified as a legally adverse action.[42]

In *Molnar v. Booth*,[43] the court took a more liberal view in a case involving a junior high school principal who allegedly propositioned a teaching intern.[44] On the intern's first day on the job, the principal "ogled her and made appreciative noises," then took her into his office and suggested that he could provide permanent room space and supplies not normally available to junior teachers.[45] In ensuing weeks he did other things that Molnar perceived as advances, such as calling her to his office to discuss personal matters and inviting her out on his boat.[46] Molnar's rejection of these offers led to retraction of the art supplies and the offer of an art room, plus a negative evaluation (later retracted) that could have kept Molnar from receiving her teaching license.[47]

A jury awarded Molnar $500 in actual damages and $25,000 in punitive damages.[48] The Seventh Circuit affirmed, calling the tangible employment action issue close but concluding that confiscation of essential supplies and a negative evaluation were sufficiently adverse.[49] Although the criticism was temporary, it

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36. Stutler v. Ill. Dep't of Corr., 263 F.3d 698, 702 (7th Cir. 2001).

37. *See, e.g.*, Haugerud v. Amery Sch. Dist., 259 F.3d 678, 698 (7th Cir. 2001) (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

38. *Stutler*, 263 F.3d at 703 (citations omitted).

39. *Haugerud*, 259 F.3d at 698 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998); citing Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996)).

40. *Stutler*, 763 F.3d at 703 (citing Hill v. Am. Gen. Fin., Inc., 218 F.3d 639, 645 (7th Cir. 2000); Place v. Abbott Labs., Inc., 215 F.3d 803, 810 (7th Cir. 2000)).

41. *Id.*

42. *Id*. at 702-04.

43. 229 F.3d 593 (7th Cir. 2000).

44. *Id*. at 597.

45. *Id*.

46. *Id*.

47. *Id*. at 597-98.

48. *Id*. at 599.

49. *Id*. at 600.

threatened Molnar's career for a period of time.[50] The court was concerned about allowing supervisors to punish employees and then avoid liability by reversing the action later.[51]

In *Russell v. Board of Trustees*,[52] the court deemed a five-day unpaid suspension materially adverse.[53] Plaintiff Russell claimed a spotless thirty-year employment record.[54] Russell's problem arose when she filled out a time card in advance, anticipating that she would be attending a full day of training.[55] A flat tire caused her to miss the afternoon session of the training, and she failed to correct the entry when she submitted the card the next day.[56] When Russell returned from a two week vacation, her supervisor asked how the seminar went.[57] Russell responded that she only attended the morning session, and immediately acknowledged her error when shown the time card discrepancy.[58]

Russell claimed the resulting five-day suspension was an act of retaliation for her complaints about her supervisor's mistreatment of female employees.[59] The district court held that the suspension was not sufficiently adverse to be actionable.[60] The Seventh Circuit disagreed, finding the entry on a formerly spotless record that Russell committed "theft of services" by "falsif[ying]" a time record even worse than the loss of five days' pay.[61]

Other employees were less successful during the survey period in proving adverse employment actions. In *Haugerud v. Amery School District*,[62] a longtime custodial worker claimed that her employer tried to pressure her into resigning, told male custodians not to help female custodians, gave her additional responsibilities not assigned to males, and intentionally interfered with her work performance.[63] The court concluded that the alleged incidents could collectively constitute a pervasively hostile environment.[64] However, Haugerud was never disciplined, demoted, terminated, denied wage or benefit opportunities or increases, or made to perform more menial tasks.[65] The appeals court therefore affirmed summary judgment for the school district on the sex discrimination

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50. *Id*. at 600-01.

51. *Id*.

52. 243 F.3d 336 (7th Cir. 2001).

53. *Id*. at 341.

54. *Id*.

55. *Id*. at 339.

56. *Id*. at 339-40.

57. *Id.* at 340.

58. *Id*.

59. *Id*. Among other things, the supervisor allegedly said one female employee "dressed like a whore," called another a bitch, and called Russell "grandma." *Id*. at 339.

60. *Id*. at 341.

61. *Id*.

62. 259 F.3d 678 (7th Cir. 2001).

63. *Id*. at 684-87.

64. *Id*. at 698.

65. *Id*. at 692.

claim, although it reversed on the harassment claim.[66]

In *Grube v. Lau Industries*,[67] the plaintiff's complaint arose from a shift reassignment after more than twenty years working the day shift.[68] The court said, "Title VII simply was never intended to be used as a vehicle for an employee to complain about the hours she is scheduled to work or the effect those hours have upon the time an employee spends with family members."[69] The change in working hours was not, therefore, an adverse employment action.[70]

In *Aviles v. Cornell Forge Co.*,[71] the plaintiff argued that "[c]alling the police on someone is always an adverse act."[72] The Seventh Circuit had considered this case in a previous appeal and remanded.[73] On successive appeal, Aviles mischaracterized the earlier Seventh Circuit opinion, which held that a false report that Aviles was armed and lying in wait outside the plant after threatening his supervisor *could* constitute an adverse action.[74] At the ensuing trial, however, it was established that Aviles was escorted by police from the plant after he refused to leave following a suspension.[75] Aviles then ignored police instructions not to return and parked within two blocks of the plant entrance.[76]

Someone from the plant telephoned the police to report Aviles' presence.[77] In response to an officer's question the caller expressed uncertainty but said Aviles might be armed.[78] The police forcibly removed Aviles from the vicinity of the plant but did not arrest him.[79] The appeals court agreed with the district court that Aviles suffered no adverse action, because Aviles did not prove the report false.[80] Furthermore, any injury Aviles incurred was unforeseeable because the company caller had no reason to expect that Aviles would resist or that the police would overreact in removing Aviles from the area.[81]

B. Standards and Methods of Proof

This survey marks the first full year following the Supreme Court's decision

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66. *Id*. at 700.
67. 257 F.3d 723 (7th Cir. 2001).
68. *Id*. at 728.
69. *Id*. at 729.
70. *Id*. at 729-30.
71. 241 F.3d 589 (7th Cir. 2001).
72. *Id*. at 590, 593.
73. Ariles v. Cornell Forge Co., 183 F.3d 598 (7th Cir. 1999).
74. 241 F.3d at 593.
75. *Id*. at 591.
76. *Id*.
77. *Id*.
78. *Id*.
79. *Id*. at 591-92.
80. *Id*. at 593.
81. *Id*. at 592.

in *Reeves v. Sanderson Plumbing Products, Inc.*,[82] a case many believed would have a significant impact on summary judgment practice in employment discrimination cases.[83] In *Reeves*, the Court resolved a circuit split regarding the standard of proof necessary for a plaintiff to survive a motion for judgment as a matter of law.[84] At issue was whether a trier of fact could infer discrimination from the falsity of the employer's explanation for its action (known as the "pretext" standard) or whether the plaintiff had to present additional evidence of intentional discrimination ("pretext plus").[85] Opting for the lower standard, the Court ruled that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[86]

Reeves was hailed as a major victory for plaintiffs[87] and seemed to signal a sea change in approach to dispositive motions in employment cases. Early predictions were that *Reeves* would make it easier for an employment plaintiff to get to a jury and harder for jury verdicts to be overturned.[88]

Actual experience, however, has proved otherwise. Based on the limited post-*Reeves* data available, several authors have found no significant change in the number of cases being resolved on motion, nor on the fate of summary judgment rulings on appeal.[89]

Seventh Circuit practice seems consistent with this finding. During the survey period, the Seventh Circuit considered appeals of summary judgment rulings in seventy-two employment discrimination cases. The Seventh Circuit affirmed the entry of summary judgment in sixty-two of these cases, affirmed in part in five more, and reversed outright in only five.[90]

An interesting point is that the Seventh Circuit rarely cited the *Reeves* decision in these cases. Only twelve of the summary judgment discrimination

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82. 530 U.S. 133 (2000).

83. *See* Philip M. Berkowitz, *An Early Analysis of the Impact of* Reeves v. Sanderson, N.Y.L.J., Sept. 28, 2000, at 5.

84. *See* Susan W. Kline, *Survey of Employment Law Developments for Indiana Practitioners*, 34 IND. L. REV. 675, 678 (2001).

85. *See* Berkowitz, *supra* note 83.

86. *Reeves*, 530 U.S. at 147.

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

88. *See, e.g.*, Marcia Coyle, *New High Court Bias Ruling May Spark More Jury Trials, Settlements*, NAT'L L.J., June 26, 2000 at B1 ("Employers will likely face more jury trials, increased pressure for settlement and greater caution in making employment-related decisions because of an age bias ruling by the U.S. Supreme Court."); Linda Greenhouse, *The Justices Make It Easier to Win Suits for Job Bias*, N.Y. TIMES, June 13, 2000 at A24; Peter N. Hillman, *Risks of Discrimination Suits Increase for Employers Following Supreme Court Ruling in* Reeves, EMP. LITIG. REP., July 11, 2000 at 3.

89. *See, e.g.*, Tamara Loomis, *Employment Bias; After 'Reeves,' Little Has Changed in the Circuit*, N.Y.L.J., July 5, 2001, at 5.

90. Authors' calculations.

cases decided during the survey period contain any mention of *Reeves*, and most of those cases cite the decision only in passing.[91] The explanation for this omission may be that *Reeves* did not technically change the standards in the Seventh Circuit—which has always been a "pretext" circuit.[92] Thus, pre-*Reeves* case law on summary judgment standards remains viable in this circuit.

One case illustrating the continuity of standards in the Seventh Circuit is *Pugh v. City of Attica*.[93] Pugh, a former city animal control officer, sued the city, alleging discharge due to a perceived disability and retaliation for protesting police harassment.[94] In its motion for summary judgment, the employer presented its explanation for the discharge—that it believed Pugh had misappropriated funds.[95] The trial court granted summary judgment for the city.[96]

On appeal, Pugh attempted to bring the case within the *Reeves* framework by arguing, among other things, that he had not actually committed the misconduct for which he had been fired.[97] In support of this argument, Pugh relied on his own denials and explanation of the incident.[98] Pugh argued that this created a dispute regarding whether the employer's explanation for its decision was "unworthy of credence."[99]

The Seventh Circuit summarily rejected this argument. Relying on pre-*Reeves* case law, the court ruled that the issue on summary judgment was not whether Pugh had actually misappropriated funds, but whether the city had honestly believed that he did so:

> Mr. Pugh's argument is misplaced. By arguing that he did not mishandle funds, he has not cast any doubt on the honesty of the City's belief that he had engaged in such conduct. Mr. Pugh offers no evidence to suggest that the City had additional information or knowledge . . . which would have indicated that the City did not truly believe that Mr. Pugh had misappropriated funds.[100]

Based on the city's evidence explaining its investigation and conclusions, the Seventh Circuit easily found that the city had met this "honest belief" standard.[101]

The plaintiff in *Logan v. Kautex Textron North America*[102] was similarly unable to capitalize on *Reeves*. Plaintiff Logan's six co-workers evaluated her

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91. Authors' calculations.
92. *See, e.g.*, Sheehan v. Donlen Corp., 173 F.3d 1039 (7th Cir. 1999).
93. 259 F.3d 619 (7th Cir. 2001).
94. *Id.* at 621, 624.
95. *Id.* at 624.
96. *Id.*
97. *Id.* at 627.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 629.
102. 259 F.3d 635 (7th Cir. 2001).

performance at the end of her probationary period, and four recommended that she not be offered permanent employment.[103] Logan attributed the decision to retaliation for her complaints about two alleged racial comments and one alleged threat to her job security, all made by one of the voting co-workers.[104] Kautex, according to Logan, attributed its decision to Logan's "bad attitude, sabotaging tanks, performance, and absenteeism."[105] Logan argued that this inconsistency would allow a jury to infer that these proffered reasons were not the actual reasons for her discharge.[106]

The Seventh Circuit disagreed, noting that all the reasons except absenteeism were related and concluding, "no reasonable jury could find that Logan was terminated for any reason other than that she was voted out by her team."[107] The court acknowledged that race discrimination may be camouflaged under the label "attitude," but Logan failed to produce any objective evidence that Kautex was engaging in such a subterfuge.[108]

On the other hand, *Reeves* may have made a difference in a few of the close cases decided during the survey period. For example, in *Bell v. Environmental Protection Agency*,[109] the court showed a willingness to consider the substantive merits of the employment decision in question. There, sixteen candidates applied for four available promotions.[110] All selectees were white, native-born Americans.[111] Two African-American applicants sued claiming racial discrimination, and two other foreign-born applicants sued claiming national origin discrimination.[112]

The selection process included a personal interview and a rating system.[113] Two successful applicants achieved ratings of sixty-nine and two scored a perfect seventy-five.[114] Two plaintiffs achieved perfect scores, one scored sixty-nine, and one scored sixty-three.[115] All four plaintiffs had been employed by the EPA for a longer time than any selectee, and each plaintiff had received more service achievement awards than at least three selectees.[116] The plaintiffs presented statistical data suggesting that the EPA promoted blacks and foreign-born employees less often than non-black and native-born employees, although only

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103. *Id*. at 638.
104. *Id*. at 638, 640.
105. *Id*. at 640.
106. *Id*.
107. *Id.*
108. *Id*. at 640-41.
109. 232 F.3d 546 (7th Cir. 2000).
110. *Id*. at 549.
111. *Id.*
112. *Id*. at 548.
113. *Id*. at 549.
114. *Id.*
115. *Id.*
116. *Id*. at 551.

the data on foreign-born employees qualified as statistically significant.[117] They also presented a memorandum written before the promotion decision was made by one of the interview panelists, expressing the opinion that two plaintiffs were better qualified than two selectees.[118]

The court held that the comparative qualifications evidence and statistics precluded summary judgment on the discrimination claims.[119] It said, "Even if the pieces of evidence were not conclusive by themselves, they sufficiently countered the EPA's assertion that it honestly believed it was promoting the best candidates."[120]

The court was similarly receptive to the plaintiff's arguments in *Gordon v. United Airlines, Inc*.[121] In *Gordon*, a probationary flight attendant on layover in Los Angeles found his hotel room unsatisfactory.[122] The crew desk was closed, so he decided to return home to Chicago to shower and change clothes, then return in time for his next scheduled flight.[123] He checked in at the Chicago crew desk and (by his account) offered to carry out this plan, but was excused from the assignment.[124] United ultimately terminated Gordon for the unauthorized schedule deviation, and he claimed race and age discrimination.[125]

The district court granted summary judgment to United.[126] The Seventh Circuit reversed in a split decision.[127] The majority focused on United's lack of a clear definition of "unauthorized deviation" and noted that it was a rarely-invoked infraction.[128] In addition, it was unclear who decided Gordon should be charged with an unauthorized deviation, and the only other "unauthorized deviation" action on record did not result in the (white female) employee's termination.[129] The court said:

> A reasonable jury could conclude, given United's inconsistent definition of unauthorized deviation, the rarity with which the unauthorized deviation provision was invoked, the disparate ways it was applied when it was invoked in Mr. Gordon's case, and United's inability to identify the management employee responsible for characterizing Mr. Gordon's conduct, that United's stated reason was a pretext for discrimination.[130]

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117. *Id*. at 553-54.
118. *Id*. at 551-52.
119. *Id*. at 554.
120. *Id.*
121. 246 F.3d 878 (7th Cir. 2001).
122. *Id*. at 881.
123. *Id*. at 881-83.
124. *Id*. at 882.
125. *Id*. at 880.
126. *Id*.
127. *Id*. at 893.
128. *Id*. at 890.
129. *Id*. at 891-92.
130. *Id*. at 893.

Judge Easterbrook dissented, saying that the *McDonnell Douglas* approach "has become so encrusted with the barnacles of multi-factor tests and inquiries that it misdirects attention."[131] The proper summary judgment focus, he argued, was whether a reasonable trier of fact could conclude that Gordon was terminated because of his age or race.[132] Unless United's explanation for the discharge was "a fraud on the court—not just an overreaction, but a lie"—summary judgment was proper.[133] Even foolish, trivial or baseless reasons are sufficient, Easterbrook asserted, as long as they are honestly believed and nondiscriminatory.[134] Here, there was no evidence that United tried "to pull the wool over judicial eyes" or "bamboozle the court," and Easterbrook disagreed that "blunders and intra-corporate disarray support an inference of deceit."[135] He characterized the majority view as "'added vigor' in action" and noted that "[s]ummary judgment is a hurdle high enough without 'added vigor'"[136]

The last word on the subject of summary judgment standards during the survey period was *Alexander v. Wisconsin Department of Health & Family Services*.[137] Prompted, most likely, by Judge Easterbrook's dissent in *Gordon*, the Seventh Circuit used the case as a vehicle to address the court's prior use of the phrase "added rigor" in employment cases.[138] In 1992, the court first said it reviewed summary judgment dispositions in such cases with "added rigor" because intent is a central issue, and subjective issues such as good faith and intent are "notoriously inappropriate" questions for summary judgment.[139] Since 1992, the "added rigor" wording has appeared in thirty published Seventh Circuit opinions.[140]

In *Alexander*, the court explained that this phrase merely emphasized that employment discrimination cases usually involve questions of credibility and intent, which are seldom appropriate summary judgment issues.[141] Despite the implication, grants of summary judgment in employment discrimination cases are reviewed under the same standards as all other cases in which summary judgment is granted.[142]

Plaintiff Alexander offered evidence of racially offensive remarks by co-

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131. *Id*.

132. *Id*.

133. *Id*. at 894.

134. *Id*. (quoting Hartley v. Wis. Bell, Inc., 124 F.3d 887, 890 (7th Cir. 1997)).

135. *Id.* at 894-95.

136. *Id*. at 896.

137. 263 F.3d 673 (7th Cir. 2001).

138. *Id*. at 680-81.

139. *Id*. at 681 (quoting McCoy v. WGN Cont'l. Broad. Co., 957 F.2d 368, 370-71 (7th Cir. 1992); Stumph v. Thomas & Skinner, Inc., 770 F.2d 93, 97 (7th Cir. 1985)).

140. *Id.* at 681 n.2.

141. *Id*. at 681.

142. *Id*. (citing Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997)).

workers.[143] He offered no evidence, however, that his five-day suspension for a confrontation with a co-worker, his ten-day suspension for insubordination, and his eventual termination for making a threatening gesture were either motivated by discrimination or in retaliation for his complaints of racial discrimination.[144] The court therefore affirmed summary judgment for the employer.[145]

The case trend indicates that, while *Reeves* may have had some impact in the Seventh Circuit, that effect appears modest and somewhat sporadic. Judge Easterbrook's dissent in *Gordon* makes clear that the court is not united in its view of the required proof for summary judgment**.** This area of law therefore warrants continued monitoring.

Two other cases dealing with standards and methods of proof are worth brief mention, although the Seventh Circuit gave fairly short shrift to the plaintiff's novel burden-of-proof argument in *Price v. City of Chicago*.[146] Price argued that Title VII allows a plaintiff to establish disparate impact liability by showing that the employer refused to adopt an alternative employment practice with a lesser adverse impact.[147] The dispute arose after Price, who is African-American, received the same score on a qualifying examination as another older but equally senior police officer.[148] The older officer got the only promotion available because the city used birth dates to break such ties.[149] Although Price argued that this practice had a disparate impact on African-Americans, the record did not support her assertion.[150] Alternatively, Price argued that her employer should have been required to promote her as well as the older officer as a less discriminatory alternative.[151]

The court made clear that proof of disparate impact is required for the plaintiff's prima facie case.[152] Only after such proof must the employer show that the challenged practice is job-related.[153] If the employer succeeds, the plaintiff may offer evidence that the justification is pretextual because a less discriminatory alternative is available.[154] Price placed the alternatives analysis at the wrong end of the process, and her claim failed.[155]

The final survey period case worth noting dealt with comments as evidence of harassment. In *Mason v. Southern Illinois University*,[156] an African-American

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143. *Id*. at 683.
144. *Id*. at 683-88.
145. *Id*. at 689.
146. 251 F.3d 656 (7th Cir. 2001).
147. *Id*. at 659.
148. *Id*. at 658.
149. *Id*. at 658-59.
150. *Id*. at 659.
151. *Id*. at 660.
152. *Id*.
153. *Id*.
154. *Id*.
155. *Id*. at 661.
156. 233 F.3d 1036 (7th Cir. 2000).

campus police dispatcher's claim of supervisory harassment was based in part on racist comments by co-workers.[157] The Seventh Circuit held that comments neither Mason nor his supervisor ever heard were properly excluded at trial.[158] The trial court did allow evidence of comments made by the supervisor or in the supervisor's presence.[159] The concurring opinion emphasized that, in order to use co-worker comments to prove harassment by a supervisor, the plaintiff must show that the supervisor was or should have been aware that the words or deeds offered as evidence would lead to co-worker misconduct.[160]

C. The Continuing Violation Doctrine

As a general rule, discrimination charges must be based on alleged misconduct that occurred during specified filing timeframes. Plaintiffs sometimes argue, however, that earlier misconduct should be considered under the continuing violation doctrine. This doctrine allows plaintiffs to link otherwise time-barred acts to acts within the limitations period.[161]

During the survey period, the Seventh Circuit issued two noteworthy opinions discussing this doctrine. In *Sharp v. United Airlines, Inc.*,[162] the airline offered to reinstate fourteen flight attendants who sued on grounds of sex, age, and disability discrimination after they were terminated for exceeding weight restrictions.[163] Plaintiff Sharp turned the offer down because she was pregnant, although she could have accepted and immediately taken maternity leave.[164] She later asked United to renew the offer on the same terms, but United declined to do so despite Sharp's ongoing efforts to persuade various United officials.[165]

Two years after United declined to renew the offer, Sharp brought suit.[166] The Seventh Circuit found the continuing violation doctrine inapplicable and said, "[A]n employer's refusal to undo a discriminatory decision is not a fresh act of discrimination."[167]

The plaintiff in *Shanoff v. Illinois Department of Human Services*[168] was similarly unsuccessful in invoking the continuing violation doctrine.[169] Shanoff

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157. *Id*. at 1039-41.

158. *Id*. at 1045.

159. *Id*. at 1047.

160. *Id*. at 1048 (Ripple, J., concurring).

161. Shanoff v. Ill. Dep't of Human Servs., 258 F.3d 696, 703 (7th Cir. 2001).

162. 236 F.3d 368 (7th Cir. 2001).

163. *Id.* at 369.

164. *Id.* at 370.

165. *Id.*

166. *Id*.

167. *Id.* at 373 (quoting Lever v. Northwestern Univ., 979 F.2d 552, 555-56 (7th Cir. 1992)).

168. 258 F.3d 696 (7th Cir. 2001).

169. *Id.* at 703. Plaintiff Shanoff did succeed in convincing the appeals court to reverse summary judgment for the employer, because a reasonable jury could have found that alleged supervisory remarks made during the limitations period that expressed animosity toward Shanoff's

claimed that he suffered a hostile work environment based on actions by his supervisor such as referring to Shanoff as a "haughty Jew" and threatening to "keep [his] white Jewish ass down."[170] Shanoff first complained internally in November 1997, after several hostile remarks, but was told that the employer would take no action to resolve the situation.[171] At that point, the court held, Shanoff was on notice that he had a substantial claim and the filing clock began to run.[172] Shanoff did not sue until October 1998, so the court only considered allegations that fell within the 300 days prior to that filing date.[173]

Different circuits have adopted varying continuing violation standards.[174] The Seventh Circuit holds that plaintiffs may not procrastinate; they must sue "as soon as the harassment becomes sufficiently palpable that a reasonable person would realize [he] had a substantial claim under Title VII" in order to base claims on conduct prior to the limitations period.[175]

The U.S. Supreme Court may soon shed some light on the continuing violation question. The Court has granted certiorari in *Morgan v. National Railroad Passenger Corp.*[176] Plaintiff Morgan claimed race-based harassment that occurred over a four-year period.[177] The Ninth Circuit held that courts can consider time-barred conduct if "the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period."[178] It found the pre-limitations conduct at issue sufficiently related under the totality of the circumstances to invoke the doctrine.[179]

D. Remedies

The U.S. Supreme Court answered an important question in *Pollard v. E.I.*

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race and religion were sufficiently severe to create a hostile work environment. *Id*. at 706.

170. *Id*. at 698, 700.

171. *Id.* at 699-700. *Compare to* Frazier v. Delco Elec. Corp., 263 F.3d 663, 666 (7th Cir. 2001) (allegedly harassing conduct that occurred while the company said it was investigating Frazier's complaints not time-barred; it is "a principle more fundamental than the doctrine of continuing violation" that an employer "cannot plead for time to rectify a situation of harassment . . . but deny the time to the victim of the harassment to learn that the company has failed to rectify it after all").

172. *Shanoff*, 258 F.3d at 703-04.

173. *Id.*

174. *See* Lisa S. Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531 (2000).

175. *Shanoff*, 258 F.3d at 703 (quoting Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1166 (7th Cir. 1996)).

176. 232 F.3d 1008 (9th Cir. 2000), *cert. granted*, 533 U.S. 927 (2001).

177. *Id*. at 1010-13.

178. *Id*. at 1015.

179. *Id*. at 1017-18.

DuPont de Nemours & Co.[180] by holding that front pay is not an element of compensatory damages under the Civil Rights Act of 1991.[181] Pollard sued for co-worker sexual harassment and received $300,000 (the maximum compensatory damages available to her under the Act) plus additional amounts for back pay, benefits and attorney fees.[182] The district court expressed the view that $300,000 was insufficient to compensate Pollard but followed Sixth Circuit precedent holding that front pay was subject to the cap.[183]

The U.S. Supreme Court looked to the original language of the Civil Rights Act of 1964, which was very similar to the National Labor Relations Act (NLRA) and which provided remedies of injunction and/or reinstatement with or without back pay.[184] The NLRA's back pay provision had consistently been interpreted to allow compensation up to the employee's reinstatement date, even if that occurred after judgment.[185]

In Title VII parlance, post-judgment compensation is considered front pay.[186] After the 1964 Act was expanded in 1972 to allow "any other equitable relief," all circuits that addressed the issue allowed front pay, including front pay in lieu of reinstatement when reinstatement was not a viable option.[187]

The Court concluded in *Pollard* that Congress intended to provide *additional* remedies when it passed the 1991 Act.[188] The 1991 Act therefore expands previously available remedies by allowing compensatory and punitive damages in addition to front pay pending or in lieu of reinstatement.[189]

The Seventh Circuit took this rationale a step farther in *Hertzberg v. SRAM Corp.*[190] A jury awarded Hertzberg $20,000 in punitive damages for sexual harassment, but found for the employer on Hertzberg's retaliatory discharge claim. Despite the latter finding, the district court added equitable relief in the form of back and front pay to the award, reasoning that but for the harassment, Hertzberg would not have left the company.[191]

The Seventh Circuit acknowledged *Pollard*'s holding that the 1991 Act left previously available equitable remedies undisturbed, and reasoned that the required showing for those equitable remedies was also unchanged.[192] Therefore, a plaintiff who leaves her job because of discrimination must prove actual or constructive discharge to earn the equitable remedy of reinstatement or back and

180. 532 U.S. 843 (2001).
181. *Id*. at 845.
182. *Id*.
183. *Id.* at 846-47.
184. *Id*. at 848.
185. *Id*. at 849.
186. *Id.*
187. *Id*. at 849-50.
188. *Id.* at 851.
189. *Id.* at 853.
190. 261 F.3d 651 (7th Cir. 2001).
191. *Id*. at 654, 657.
192. *Id.* at 659.

front pay in lieu of reinstatement.[193] Hertzberg failed to do so because the only bases for relief she argued were sexual harassment and retaliatory discharge, and the jury rejected the latter claim.[194] The appeals court therefore reversed the lost pay award.[195]

In reaching this conclusion, the Seventh Circuit distinguished "ordinary" sexual harassment, defined as hostile conduct that an employee is expected to endure while seeking redress, from "aggravated" harassment that makes working conditions so intolerable that the employee is forced to resign (i.e., is constructively discharged).[196] Only in the latter case may an employee who quits his job receive post-resignation back and front pay.[197]

Another remedies issue addressed during the survey period was punitive damages. The Seventh Circuit reheard *EEOC v. Indiana Bell Telephone Co.*[198] en banc to consider whether evidence regarding arbitration and a collective bargaining agreement is admissible on the issues of whether an employer responded reasonably to a sexual harassment complaint and whether the employer's state of mind justified punitive damages.[199] The district court had disallowed the evidence for all purposes.[200]

The original Seventh Circuit panel held the evidence admissible on both points.[201] Judge Ilana Diamond Rovner wrote a spirited dissent in which she deplored a "pattern of inaction in the face of . . . unrelenting misconduct" that spanned twenty years, and concluded that "Ameritech has won . . . the right to invoke the collective bargaining agreement as an excuse for sitting on its hands while [employee Gary] Amos kept on terrorizing his female colleagues."[202]

The rehearing inspired four different decisions, with the majority holding arbitration and collective bargaining agreements inadmissible on the question of liability, but admissible as a defense to punitive damages.[203] Judge Easterbrook wrote:

> An employer is entitled to show that things were not as bad as they appeared . . . . The district court's order enabled the EEOC to ask the jury rhetorically why any conscientious employer would have acted as Ameritech did unless it wanted harm to befall female workers, while

193. *Id.*

194. *Id.* at 661.

195. *Id.*

196. *Id.* at 658.

197. *Id.*

198. 256 F.3d 516 (7th Cir. 2001) (en banc).

199. *Id*. at 519.

200. *Id.*

201. 214 F.3d 813, 825 (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).

202. *Id.* at 826, 836 (Rovner, J., concurring in part and dissenting in part).

203. *Ind. Bell Tel. Co.*, 256 F.3d at 519, 528-29, 531, 537.

disabling Ameritech from giving what may have been its best answer.[204]

Employers will no doubt take issue with some of the court's reasons for disallowing this evidence on the liability issue. A majority of the court agreed that collective bargaining agreements and arbitration systems are not imposed upon employers by forces beyond their control, and called employers "wrong to suppose that an arbitrator is some outside force even ex post its agreement to a given arbitration clause," because the contract defines the arbitrator's authority.[205] Here, if Ameritech feared that Amos' discharge would be overturned by an arbitrator, the majority suggested that it could have "transfer[ed] Amos to an empty room and give[n] him make-work tasks" because "[f]eatherbedding ensues from some collective bargaining agreements, and the lateral arabesque solves many a personnel problem."[206]

Two additional Seventh Circuit survey period cases dealt with punitive damages. In both, the court discussed and applied *Kolstad v. American Dental Association*,[207] a 1999 U.S. Supreme Court case that clarified when punitive damages are available in Title VII cases. To justify punitives under *Kolstad*, an employer must act "in the face of a perceived risk that its actions will violate federal law," but need not be specifically aware that it is engaging in discrimination.[208] The plaintiff must show that the discriminatory actor was a managerial agent acting within the scope of her employment.[209] The employer may avoid punitive damages by proving that it made a good faith effort to implement an antidiscrimination policy.[210]

In *Bruso v. United Airlines, Inc.*,[211] an airline supervisor claimed he was demoted in retaliation for reporting sexual harassment of female employees by a fellow supervisor.[212] The district court granted summary judgment to the airline on the issue of punitives without applying the *Kolstad* framework.[213] The Seventh Circuit reversed, noting that the managerial agents who demoted Bruso were aware of Title VII's antidiscrimination principles and United's zero-tolerance antidiscrimination policy.[214] Bruso presented evidence that the investigation of the alleged harasser's conduct was merely a sham to discredit Bruso and to cover for management's failure to address the harassment sooner.[215] The appeals court therefore found a triable issue on the question of punitive

204. *Id*. at 528.
205. *Id*. at 521-22.
206. *Id.* at 524.
207. 527 U.S. 526 (1999).
208. *Id.* at 536.
209. *Id.* at 543.
210. *Id.* at 545.
211. 239 F.3d 848 (7th Cir. 2001).
212. *Id.* at 852-53.
213. *Id.* at 859.
214. *Id*. at 859-60.
215. *Id.* at 860-61.

damages.[216]

The court was less receptive to the plaintiff's argument in *Cooke v. Stefani Management Services, Inc.*[217] Plaintiff Cooke, a gay bartender, was fired the day after he rejected his male supervisor's advances.[218] A jury awarded Cooke $7500 in back pay and lost benefits and $10,000 punitive damages.[219]

The employer appealed the punitive damage award,[220] citing *Kolstad*'s good faith effort defense. Stefani had sexual harassment policies, conducted management training, and displayed an anti-harassment poster.[221] Although the reporting policy for harassment lacked a provision allowing the complainant to bypass his or her manager if that manager was the harasser, the court said that Cooke should have exercised common sense and talked to someone higher in the chain of command.[222]

Because the manager committed "rogue acts motivated by a desire to amuse himself, not benefit his employer," the court refused to impute the manager's knowledge of harassment to the company.[223] The court therefore reversed the punitive damages award based on the employer's good faith efforts defense.[224]

Though it does not involve a substantive employment law issue, *Kenseth v. Commission of Internal Revenue*[225] involves taxation of attorneys' fee awards, an issue that can significantly affect remedies available for employment discrimination. In that case, the plaintiff settled an age discrimination suit with his former employer.[226] Pursuant to a contingent fee agreement, the attorney deducted forty percent of the settlement proceeds for his fee, and paid the remainder of the settlement to the plaintiff, who did not report as taxable income the $91,800 deducted by the law firm. [227]

The tax court ruled that the entire amount was taxable as income, and the Seventh Circuit acknowledged a circuit split but found the tax court resolution of the issue "clearly correct."[228] The court reasoned that the attorneys' fees were simply part of the "cost of generating income" and thus part of gross income like other business expenses.[229]

That attorneys' fees are part of gross income does not mean, of course, that they are actually taxed in all cases. As the Seventh Circuit pointed out in

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216. *Id.* at 861.
217. 250 F.3d 564 (7th Cir. 2001).
218. *Id.* at 565.
219. *Id.* at 566.
220. *Id.* at 568.
221. *Id.*
222. *Id.* at 569.
223. *Id.*
224. *Id.* at 570.
225. 259 F.3d 881 (7th Cir. 2001).
226. *Id.* at 882.
227. *Id.*
228. *Id.* at 883, 885.
229. *Id.* at 883-84.

Kenseth, a taxpayer may deduct those fees as a miscellaneous itemized deduction.[230] However, due to limitations on this and other deductions, it is unlikely that the taxpayer will be able to deduct the full amount paid to his or her attorneys. Further, attorneys' fees are not deductible for purposes of the alternative minimum tax.[231]

The practical effect of *Kenseth* may be that it will become more expensive for an employer to settle an employment discrimination case because the employee will seek additional compensation to defray the "tax effect" of the ruling. In Kenseth's situation, the Seventh Circuit's ruling cost the employee an additional $26,992.[232] Ironically, *Kenseth* may have its greatest impact on "nuisance value" settlements, because the tax impact of the settlement may dwarf its value to the plaintiff.

Practitioners may also wish to take note of *United States v. Cleveland Indians Baseball Co.*,[233] a U.S. Supreme Court case dealing with payroll taxes on settlements. The question there was whether Social Security and unemployment taxes are assessed in the year a back pay award is actually paid, or the year the wages should have been paid.[234] The answer made a $100,000 difference in that case because in 1994 a group of former Indians players collected settlements totaling over $2 million for violations of free agency rights that occurred in 1986 and 1987.[235] These players all exceeded the taxable wage ceilings in 1986 and 1987, but they were no longer team employees in 1994.[236] The Court sided with the Internal Revenue Service and held that the tax is assessed when the wages are actually paid.[237]

II. AMERICANS WITH DISABILITIES ACT

A. Substantial Limitation in a Major Life Activity

To qualify for the employment-related protections of the Americans with Disabilities Act, a person must prove an impairment that substantially limits one or more of his major life activities.[238] Regulations define a substantial limitation as the inability to perform a major life function or a significant restriction in the duration, manner or condition under which the plaintiff can carry out the activity

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230. *Id*. at 882.

231. *Id*.

232. Kenseth owed $17,000 in alternative minimum tax. In addition, his deduction was reduced by two percent ($5298) due to the floor on miscellaneous itemized deductions and by $4694 due to the overall limitation on itemized deductions. *Id*. at 882.

233. 532 U.S. 200 (2001).

234. *Id*. at 204.

235. *Id*. at 204, 207.

236. *Id*. at 207.

237. *Id*. at 207-08.

238. 42 U.S.C. § 12102(2) (1994). Alternatively, a plaintiff may show a record of such an impairment or that he was regarded as having such an impairment. *Id.*

compared to the general populace.[239] Some examples of major life activities are walking, seeing, hearing, speaking, breathing, learning, and—according to EEOC regulations—working.[240] A limitation on working must significantly restrict a plaintiff's ability to perform a class of jobs or a broad range of jobs in various classes.[241]

The U.S. Supreme Court recently handed down *Toyota Motor Manufacturing, Inc. v. Williams*,[242] addressing whether a substantial limitation in performing manual tasks due to carpal tunnel syndrome qualifies an employee for reasonable accommodation under the ADA.[243] Williams, an assembly line worker, developed problems gripping tools and working with her arms elevated and outstretched.[244] A reassignment to quality control temporarily resolved the situation, but this solution broke down when additional duties were assigned to quality control workers.[245] Toyota refused to relieve Williams of these additional duties and she sued, asserting that Toyota should have accommodated her carpal tunnel syndrome.[246]

The Sixth Circuit held that Williams was substantially limited in the major life activity of performing manual tasks, and awarded her partial summary judgment on the issue of whether she was disabled under the ADA.[247] Justice O'Connor, writing for a unanimous Court, disagreed, saying "[T]he Court of Appeals did not apply the proper standard . . . it analyzed only a limited class of manual tasks and failed to ask whether respondent's impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives."[248]

In proving a substantial limitation in a major life activity—here, the activity of performing manual tasks—the Court said a plaintiff must offer more than medical diagnosis of impairment.[249] The evidence must show a substantial limitation in the context of the plaintiff's own experience, which requires individualized assessment.[250] This is especially true when dealing with a condition such as carpal tunnel syndrome, which has widely varying symptoms.[251]

In this assessment, the "central inquiry" is how well the plaintiff can perform

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239. *See* 29 C.F.R. § 1630.2(j) (2002).

240. 29 C.F.R. § 1630.2(i) (2002).

241. Webb v. Clyde L. Choate Mental Health & Dev. Ctr., 230 F.3d 991, 998 (7th Cir. 2000).

242. 534 U.S. 184 (2002).

243. Linda Greenhouse, *Justices Try to Determine the Meaning of Disability*, N.Y. TIMES, Nov. 8, 2001, at A18.

244. *Williams*, 534 U.S. at 686.

245. *Id.* at 686-87.

246. *Id.* at 687.

247. *Id.* at 686.

248. *Id.* at 690.

249. *Id.* at 691-92.

250. *Id.* at 692.

251. *Id.* at 693.

tasks that are centrally important to daily life, not just to the plaintiff's particular job.[252] Here, Williams' ability to do personal hygiene tasks and household chores was relevant.[253] Her difficulty with repetitive work requiring elevation of her arms and hands to shoulder level for long periods of time was not.[254] Williams could still brush her teeth, wash her face, bathe, tend a flower garden, prepare breakfast, do laundry, and tidy up her house.[255] She avoided sweeping, occasionally needed help getting dressed, and was less frequently able to play with her children, garden, and drive long distances, but "these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual-task disability as a matter of law."[256] The Court therefore reversed the partial summary judgment Williams won in the Sixth Circuit.[257]

The Court left two significant questions unanswered. First, it expressed no opinion on whether working should be considered a major life activity.[258] Second, the Court noted that the ADA does not authorize any agency to interpret the term "disability," but did not decide whether the EEOC regulations are entitled to any deference because Toyota did not attack the reasonableness of those regulations.[259]

During the survey period, the Seventh Circuit dealt with three other notable cases where substantial limitation in a major life activity was a central issue. In *Contreras v. Suncast Corp.*,[260] the plaintiff's back injury allegedly made him unable to lift more than forty-five pounds for a long period of time, do strenuous work, or drive a forklift more than four hours daily.[261] The court "fail[ed] to see how such inabilities constitute a significant restriction on one's capacity to work, as the term is understood within the ADA" because they would not preclude the plaintiff from performing any broad class of jobs.[262] Other circuits have said that a restriction on lifting as little as twenty-five pounds is not significant under the ADA definition.[263]

Contreras went on to make the novel claim that he was disabled in the major life activities of sexual reproduction and engaging in sexual relations because his

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252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 694.
257. *Id.*
258. *Id.* at 689.
259. *Id.* at 689-90.
260. 237 F.3d 756 (7th Cir. 2001).
261. *Id.* at 763.
262. *Id.*
263. *Id.* (citing, inter alia, Wooten v. Farmland Foods, 58 F.3d 382, 384, 386 (8th Cir. 1995) (holding that plaintiff was not substantially limited in major life activity of working where plaintiff was restricted to light duty with no working in cold environment and no lifting items weighing more than twenty pounds).

ability to engage in intercourse dropped from a rate of twenty times per month before his injury to two times per month after.[264] He pointed out that in *Bragdon v. Abbott*,[265] the U.S. Supreme Court recognized that reproduction is a major life activity and implied that engaging in sexual relations may be as well.[266] However, *Bragdon* dealt with the impact of HIV on reproductive ability.[267] The Seventh Circuit declined to extend that holding and rejected Contreras' argument that his decreased capacity for sex due to his bad back qualified as an impairment substantially limiting a major life activity.[268]

The court found the plaintiff's situation in *Lawson v. CSX Transportation, Inc*.[269] more persuasive. Lawson's diabetes required him to administer insulin injections three times a day, to test his blood sugar four to six times a day, exercise, and to carefully monitor his diet.[270] The court readily determined that this condition was a physical impairment, because it affected Lawson's joints, eyes, and metabolic, vascular, urinary and reproductive systems. The court also accepted that eating is a major life activity under the ADA, because it is central to life.

The more difficult question was whether Lawson's diabetes substantially limited him in the activity of eating, because the U.S. Supreme Court held in *Sutton v. United Airlines, Inc*.[271] that corrective or mitigating measures must be taken into account in this evaluation.[272] This did not require, as the district court concluded, that Lawson's actual physical ability to ingest food be restricted; rather, the analysis considers the difficulties that the treatment regimen caused and the consequences of noncompliance.[273]

Even with the insulin, Lawson's "perpetual, multi-faceted and demanding treatment regime" required constant vigilance.[274] Any breakdown in that regime would have "dire and immediate" consequences including dizziness, weakness, loss of concentration and impairment of bodily functions.[275] Lawson's situation went well beyond mere dietary restrictions; in fact, the treatment itself could cause hypoglycemia and trigger these life-threatening symptoms.[276]

The court acknowledged language in *Sutton* saying "[a] diabetic whose illness does not impair his or her daily activities" would not qualify as disabled

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264. *Id*. at 763-64.
265. 524 U.S. 624 (1998).
266. *Contreras*, 237 F.3d at 763-64.
267. *Id.* at 764.
268. *Id*.
269. 245 F.3d 916 (7th Cir. 2001).
270. *Id*. at 918.
271. 527 U.S. 471 (1999).
272. *Id.* at 482.
273. 245 F.3d at 924.
274. *Id.*
275. *Id.*
276. *Id*. at 924-25.

under the ADA.[277] It noted, however, that *Sutton* requires an individualized inquiry and did not say that diabetes could never qualify as a disability.[278] Not only were Lawson's daily activities impaired even after taking insulin treatment into account, but the life-long duration and severity of the condition further convinced the court that Lawson was entitled to ADA protection.[279] The court therefore remanded for further proceedings.[280]

A final case, *EEOC v. Rockwell International Corp.*,[281] provides insight regarding the evidence required to establish that a condition constitutes a "substantial limitation" on the major life activity of working. Rockwell Corporation required applicants for positions in its plant to undergo "nerve conduction tests."[282] The tests were designed to confirm the presence of neuropathy—a condition characterized by sensory loss and muscle weakness.[283] Rockwell believed that individuals with abnormal test results were more likely to develop repetitive stress injuries, such as carpal tunnel syndrome.[284] The entry-level positions for which Rockwell was hiring—trimmer, finisher, final finisher and assembler—all involved repetitive motion.[285] Therefore, Rockwell refused to hire any nonskilled applicant who scored outside the normal range on the nerve conduction test.[286]

The EEOC brought suit on behalf of seventy-two job applicants rejected on the bases of the test results.[287] Notably, Rockwell stipulated that all of the applicants were otherwise qualified for the positions they sought.[288] In addition, none of the applicants suffered from any impairments at the time that they were turned away by Rockwell.[289] Instead, the EEOC argued that Rockwell had perceived the applicants as disabled—in this case, as unable to perform jobs requiring frequent repetition or the use of vibrating power tools.[290]

Although the case was based on a "regarded as" theory, this did not prove significant to court's analysis. Instead, the court considered whether Rockwell regarded the applicants as suffering from a condition that would, if true, constitute a bona fide disability.[291] Thus, the court's decision turned on whether

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277. *Id.* at 926.

278. *Id.*

279. *Id.*

280. *Id.* at 932.

281. 243 F.3d 1012 (7th Cir. 2001).

282. *Id.* at 1014. *See also infra* Part II.G (discussing EEOC action against employer that conducted genetic testing of employees for susceptibility to carpal tunnel syndrome).

283. *Rockwell Int'l Corp.*, 243 F.3d at 1012.

284. *See id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 1015.

289. *Id.*

290. *Id.* at 1016.

291. *Id.* at 1017.

the inability to perform repetitive motion jobs, such as the jobs at issue, constituted a substantial limitation on the major life activity of working.[292]

In resolving this issue, the Seventh Circuit considered the type of evidence required to meet this definition of disability. Rockwell argued that the EEOC could sustain its burden of proof only by presenting quantitative vocational data regarding the jobs available in the relevant market.[293] The EEOC, on the other hand, suggested that it could prove that Rockwell regarded the applicants as disabled based solely on the Rockwell's admitted perception that the applicants could not perform four specific jobs in its plant.[294]

The Seventh Circuit struck a middle ground between the two approaches. The court stopped short of holding that a plaintiff "cannot prevail without quantitative evidence of the precise characteristics of the local job market."[295] On the other hand, the court suggested that such evidence would almost always be necessary. In affirming the entry of summary judgment for Rockwell,[296] the court held that "this is not one of the *rare cases* in which the claimants' impairments are so severe that their substantial foreclosure from the job market is obvious."[297]

This conclusion seems reasonably consistent with the result of *Toyota v. Williams*. The Seventh Circuit's resolution of *Rockwell* shows that ADA plaintiffs seeking relief based on actual or perceived repetitive stress injuries, particularly carpal tunnel syndrome, face an uphill evidentiary battle.

B. Attendance as a Job Requirement

During the survey period, the Seventh Circuit twice reiterated its stance that most jobs require regular attendance. In *Amadio v. Ford Motor Co.*,[298] an assembly line worker took seventy weeks of sick leave in the three years prior to his termination.[299] The district court rejected his bid for ADA protection in part because his inability to work on a regular basis made him unable to perform all essential job functions.[300] The Seventh Circuit agreed, citing previous holdings that work attendance is an essential employment requirement for clerical workers, teachers, account representatives, production employees, and plant equipment repairmen.[301] The Seventh Circuit stopped short of saying that every

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292. *Id*.

293. *Id.* Due to the district court's rulings regarding expert reports, the EEOC was unable to present evidence from a vocational expert. *Id.* at 1016.

294. *Id*. at 1016-17.

295. *Id.* at 1017.

296. *Id.* at 1018.

297. *Id*. 1017 (emphasis added).

298. 238 F.3d 919 (7th Cir. 2001).

299. *Id.* at 921.

300. *Id*. at 924.

301. *Id*. at 927 (citing Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894 (7th Cir. 2000); Waggoner v. Olin Corp., 169 F.3d 481 (7th Cir. 1999); Corder v. Lucent Tech.,

job requires attendance, but easily concluded that Amadio's position should be on that list because factory maintenance and production require employees to be on the premises.[302]

In *EEOC v. Yellow Freight System, Inc.*,[303] a forklift driver with AIDS-related cancer also had a "woeful" attendance record.[304] As in *Amadio*, the Seventh Circuit emphasized, "[L]et us be clear that our court, and every circuit that has addressed this issue, has held that in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability."[305] The plaintiff's job, like Amadio's, required his presence at the employer's work site.[306] Because he was not fulfilling the essential job function of regular attendance, his ADA claim failed.[307]

C. Reasonable Accommodation and Seniority Systems

One difficult area for employers is the interplay between reasonable accommodation and seniority systems. The U.S. Supreme Court has granted certiorari in *US Airways, Inc. v. Barnett*[308] to address this question. In that case, an injured cargo handler was transferred to a mailroom position that did not require heavy lifting.[309] He was then bumped from that job by a more senior employee under the airline's non-union bidding system.[310]

A Ninth Circuit panel originally agreed with the district court that the airline did not violate the law by following its legitimate seniority system.[311] The court later granted rehearing en banc and reversed on this issue, holding that "a seniority system is not a per se bar to reassignment" although it is a factor in evaluating undue hardship on the employer.[312]

D. Direct Evidence of Discrimination in Training

In *Hoffman v. Caterpillar, Inc.*,[313] the Seventh Circuit considered an interesting aspect of the ADA: the prohibition against discrimination in "regard to job application procedures, the hiring, advancement, or discharge of

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Inc., 162 F.3d 924 (7th Cir. 1998); Nowak v. St. Rita High Sch., 142 F.3d 999 (7th Cir. 1998); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538 (7th Cir. 1995)).

302. *Id*. (citing *Jovanovic*, 201 F.3d at 900).

303. 253 F.3d 943 (7th Cir. 2001).

304. *Id.* at 945-46, 949-50.

305. *Id.* at 948.

306. *Id*. at 949.

307. *Id.* at 948-50.

308. 228 F.3d 1105 (9th Cir. 2000), *cert. granted*, 532 U.S. 970 (2001).

309. *Id*. at 1108.

310. *Id*. at 1109, 1119-20.

311. Barnett v. U.S. Air., Inc., 196 F.3d 979 (9th Cir. 1998), *vacated and rehearing en banc granted*, 201 F.3d 1256 (9th Cir. 2000).

312. 228 F.3d at 1120.

313. 256 F.3d 568 (7th Cir. 2001).

employees, employee compensation, *job training*, and other terms, conditions and privileges of employment."[314] Hoffman, who is missing her lower left arm, indexed documents in Caterpillar's optical services department.[315] She was able to perform all essential functions of that job with accommodations such as a typing stand.[316] She requested training on a high-speed scanner upon which the department's productivity relied.[317] Her supervisor denied the request because he thought that clearing paper jams and straightening documents as they came out of the machine required the use of two hands.[318]

Hoffman lost at the district court level because she failed to show that the supervisor's refusal to train her affected her compensation, benefits, hours, title or promotion potential.[319] She therefore had not shown an adverse employment action, which (as discussed above) is generally required in employment discrimination cases following the *McDonnell Douglas* framework.[320]

The Seventh Circuit questioned the assumption that denial of training must materially affect a disabled individual's employment to be actionable, noting that Hoffman's was the rare case involving direct evidence of discriminatory intent.[321] The court took into account the fact that plaintiffs alleging discrimination in hiring, termination or other statutorily listed actions are not required to separately prove that the action was materially adverse, and concluded, "[W]ith respect to employment actions specifically enumerated in the statute, a materially adverse employment action is not a separate substantive requirement."[322] It remanded the case to allow Hoffman to prove her physical capability to operate the scanner.[323]

E. Direct Threats to Health or Safety

Another interesting ADA provision deals with employees who pose "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[324] In *Emerson v. Northern States Power Co.*,[325] Emerson, a customer service representative, handled mostly routine customer calls, but also spent up to ten percent of her time fielding calls about gas and electrical emergencies.[326] After she fell and hit her head while rollerblading, she experienced occasional panic attacks that required her to take breaks of

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314. *Id*. at 575 (citing 42 U.S.C. § 12112(a) (1994)) (emphasis added).
315. *Id*. at 570.
316. *Id.*
317. *Id.*
318. *Id*. at 571.
319. *See id*. at 574.
320. *Id*. at 574.
321. *Id*. at 576.
322. *Id*. at 575-76.
323. *Id*. at 576-77.
324. 42 U.S.C. § 12111(3) (1994).
325. 256 F.3d 506 (7th Cir. 2001).
326. *Id*. at 508.

indeterminate duration.[327] Northern States Power Co. (NSP) rejected Emerson's request that someone else handle safety-sensitive calls during these episodes because it could not ensure that a co-worker or supervisor would always be available when needed.[328] It eventually terminated her employment after no other mutually agreeable assignment could be found.[329]

NSP defended its action on the basis that Emerson posed a direct threat under the ADA definition.[330] The Seventh Circuit agreed, looking to duration of the risk and the nature, severity, likelihood, and imminence of potential harm.[331] It noted that Emerson had already suffered two panic attacks on the job and agreed that the attacks amounted to a direct threat in a job that required prompt and accurate response to power emergencies.[332] NSP could not sufficiently reduce that risk by any reasonable accommodation.[333]

F. Contingent Workers

The EEOC issued guidance during the survey period on the ADA's applicability to workers provided by staffing firms such as temporary agencies.[334] The agency's position is that these workers frequently qualify as employees of both the agency and the client, so both must offer ADA protections. The guidelines cover several important questions. Disability-related questions and medical examinations are not permissible, according to the agency, until the individual has been offered an assignment with a particular client. Merely adding the individual to an agency roster of available staffers is not enough. The staffing firm bears responsibility for reasonable accommodations in the applications process, but both the firm and client may be responsible for on-the-job accommodations. The guidelines also talk about how undue hardship is measured if both entities provide accommodations.[335]

G. Genetic Testing

Another issue on the EEOC's agenda during the survey period was its first lawsuit challenging genetic testing under the ADA.[336] Burlington Northern Santa

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327. *Id.* at 508-09.

328. *Id*. at 509-10.

329. *Id*. at 510.

330. *Id*. at 513-14.

331. *Id*. at 514.

332. *Id*.

333. *Id*. at 514-15.

334. Press Release, U.S. Equal Employment Opportunity Commission, EEOC, Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms (Dec. 22, 2000), *at* http://www.eeoc.gov/docs/guidance-contingent.html.

335. *Id.*

336. Press Release, U.S. Equal Employment Opportunity Commission, EEOC, EEOC Petitions Court to Ban Genetic Testing of Railroad Workers in First EEOC Case Challenging Genetic Testing Under Americans with Disabilities Act (Feb. 9, 2001), *at* http://www.eeoc.gov/press/2-9-01-c.html.

Fe Railroad allegedly tested blood samples of employees who filed work-related injury claims based on carpal tunnel syndrome, without the employees' knowledge or consent.[337] The EEOC took the position that the ADA forbids genetic testing as a prerequisite of employment, and that tests intended to predict future disabilities are irrelevant to the employee's present job performance capabilities.[338] On April 17, 2001, the railroad agreed to stop the testing program, but stipulated to preserve related evidence pending resolution of discrimination charges that were filed.[339]

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Statistical Evidence

In October 2000, in *Adams v. Ameritech Services, Inc.*,[340] the Seventh Circuit issued an important decision on the role of statistical evidence in age discrimination cases. The plaintiffs, who had been terminated during a company-wide reduction in force (RIF), proffered expert reports that examined correlations between employee ages and termination rates.[341] The district court ruled that the reports were not admissible for several reasons, including unreliability of the underlying information, lack of causation analysis, lack of control for other variables, and the likelihood of jury confusion.[342] It then granted summary judgment to the defendants on all significant issues in the case.[343]

The Seventh Circuit remanded for reconsideration, pursuant to the *Daubert* standard, of whether the expert reports were "prepared in a reliable and statistically sound way, such that they contained relevant evidence."[344] The court held that regression analysis is not a prerequisite to admissibility and that, if bolstered by other evidence, a report may meet the *Daubert* standard even if it merely eliminates the possibility that a RIF's disproportionately adverse effect on Age Discrimination Employment Act (ADEA) protected employees was due to mere chance.[345]

The Seventh Circuit handed down two other decisions during the survey period that dealt with statistical evidence and the ADEA. In *Kadas v. MCI Systemhouse Corp.*,[346] Judge Posner took the opportunity, in affirming summary

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337. *Id*.

338. *Id*.

339. *See, e.g.*, *Settlement with EEOC Requires Employer to Stop Genetic Testing*, EMP. LITIG. REP., May 15, 2001, at 4.

340. 231 F.3d 414 (7th Cir. 2000). The Seventh Circuit does not recognize disparate impact claims of age discrimination. *Id.* at 422.

341. *Id*. at 425.

342. *Id*. at 427.

343. *Id*. at 417.

344. *Id.* at 425.

345. *Id*. at 425, 427-28.

346. 255 F.3d 359 (7th Cir. 2001).

judgment for the employer, to clarify three statistical evidence issues in discrimination cases.[347] First, he addressed dicta that has appeared in opinions from five different circuits suggesting that if the supervisor who "riffed" the plaintiff was older than the plaintiff, that fact would weigh heavily against a finding of age discrimination.[348] Judge Posner offered "counterdictum" that "the relative ages of the terminating and terminated employee are relatively unimportant" for several reasons.[349] He noted that older people often do not feel old and in fact prefer to work with younger people, and might wish to protect themselves against potential age discrimination by proactively winnowing out other older workers.[350] He also noted that people are often oblivious to their own prejudices.[351] In this case, the plaintiff was terminated within months of his hiring, and arguably a discriminatory employer would be much more likely to decline to hire older workers than to invite lawsuits by hiring and then promptly firing them.[352]

Judge Posner's second point dealt with a circuit split on whether statistical evidence is only admissible in proving discrimination if it reaches a five percent significance level, that is, two standard deviations.[353] He described the five percent benchmark as an arbitrary measure adopted by scholarly publishers, and said, "Litigation generally is not fussy about evidence."[354] Under the *Daubert* standard the judge must determine whether the significance level is worthy of the fact-finder's consideration in the context of the case and the particular study.[355]

Finally, Judge Posner discussed another circuit split, on whether statistical evidence alone can establish a prima facie case of intentional discrimination if it is deemed sufficiently significant.[356] He concluded, "Although it is unlikely that a pure correlation, say between age and terminations, would be enough . . . it would be precipitate to hold that it could never do so."[357] He offered the example of a RIF of 100 out of 1000 employees, where all 100 were age forty or

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347. *Id*. at 361-63.

348. *See id*. at 361 (citations omitted).

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 361-62.

353. *Id*. at 362.

354. *Id.*

355. *Id.* at 362-63.

356. *Id*. at 363.

357. *Id*. *See also* Bell v. Envtl. Prot. Agency, 232 F.3d 546 (7th Cir. 2000). The plaintiffs alleged disparate treatment in promotions based on race and national origin discrimination in violation of Title VII. *Id*. at 548. Their statistical evidence was too broad to establish a prima facie case of systemic disparate treatment, but was admissible as probative evidence of pretext. *Id*. at 553. The national origin data was statistically significant and "suggest[ed] a general pattern of discrimination toward the foreign born." *Id*. at 553-54. The data examining differences based on race was not statistically significant but was nonetheless admissible as circumstantial evidence of possible discrimination. *Id.* at 554.

older and all those retained were under forty, as a case where the statistics alone might justify shifting the burden to the employer to explain.[358]

B. Disparate Impact Claims

The disparate impact theory is widely accepted as a means of establishing employer liability under Title VII, and Congress codified this theory when it amended Title VII in 1991.[359] The ADEA contains no comparable language. In *Adams v. Ameritech Services, Inc.*,[360] the Seventh Circuit acknowledged a circuit split on the cognizability of disparate impact claims under the ADEA and reiterated its stance that "disparate impact is not a theory available to age discrimination plaintiffs in this circuit."[361]

The U.S. Supreme Court has granted certiorari to resolve this issue in *Adams v. Florida Power Corp.*,[362] a case brought by 117 former employees of a Florida utility company.[363] More than seventy percent of the workers terminated in a corporate reorganization were at least forty years old, and therefore protected under the ADEA.[364] They claimed that the corporate environment was "pervaded by ageism" and "subtle systemic bias."[365] With *Adams v. Florida Power Corp.*, the U.S. Supreme Court will decide whether older workers may sue claiming that company layoffs targeted them more heavily than younger workers. This decision could have widespread implications for employers, particularly if troubled economic times, including layoffs, continue.

Indiana employment practitioners should watch for the decision in this case to see if it alters the Seventh Circuit's stance by interpreting the ADEA to prohibit policies that appear neutral but that affect older workers more harshly.

C. Tender Back Rule

On December 11, 2000, the EEOC issued a final regulation[366] on the ADEA "tender back" rule, addressing the U.S. Supreme Court's 1998 decision in *Oubre v. Entergy Operations, Inc.*[367] The Older Workers Benefits Protection Act of 1990 (OWBPA)[368] amended the ADEA and, among other things, permitted

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358. *Kadas*, 255 F.3d at 363.

359. *See* 42 U.S.C. § 12112(b)(3)(A) (1994).

360. 231 F.3d 414 (7th Cir. 2000).

361. *Id.* at 422 (citing Blackwell v. Cole Taylor Bank, 152 F.3d 666, 672 (7th cir. 1998) (citing cases on both sides of issue from various circuits); Maier v. Lucent Techs, Inc., 120 F.3d 730, 735 & n.4 (7th Cir. 1997); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077-78 (7th Cir. 1994)).

362. 255 F.3d 1322 (11th Cir. 2001), *cert. granted*, 122 S. Ct. 643 (2001).

363. Linda Greenhouse, *Judicial Candidates' Speech to Be Reviewed by Justices*, N.Y. TIMES, Dec. 4, 2001, at A16.

364. *Id*.

365. *Id*.

366. 29 C.F.R. § 1625.23 (2000).

367. 522 U.S. 422 (1998).

368. 29 U.S.C. § 626(f) (1998).

employees to waive their ADEA rights in return for consideration such as increased severance or early retirement benefits.[369] Such waivers are, however, governed by specific OWBPA requirements, such as a requirement that the waiver be written in understandable language.[370]

Prior to the regulation, an employee who entered into a waiver agreement but thereafter sought to bring suit under the ADEA faced two obstacles arising out of 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.[371] Second, the "ratification" principle provided that an individual who failed to return the payment was deemed to have approved the waiver.[372]

The final EEOC rule directs that neither of these principles applies to ADEA waivers.[373] The new rule provides that any condition precedent or penalty to challenge an ADEA waiver is invalid, including tender-back requirements and provisions that an employer may recover attorney's fees or damages because of the filing of an ADEA suit.[374] 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 and then proves age discrimination and obtains a monetary award, the employer may, however, be able to deduct the amount paid for the waiver in calculating the amount owed.[375]

IV. OTHER FEDERAL LAW DEVELOPMENTS

A. Family and Medical Leave Act

The U.S. Supreme Court has granted certiorari in its first case involving the Family and Medical Leave Act (FMLA). In *Ragsdale v. Wolverine Worldwide, Inc.*,[376] the plaintiff was entitled to up to seven months of medical leave under the employer's policy.[377] She took time off for cancer treatment, and the company failed to tell her that the time would count toward her FMLA entitlement.[378] When she was unable to return to work at the end of the seven months, the employer terminated her for exhausting all available leave, including FMLA

369. *Id.*

370. 29 U.S.C. § 626 (f)(1)(A)-(G) (1998).

371. *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 [hereinafter Questions and Answers] (last visited Dec. 15, 2000).

372. *Id.*

373. 29 C.F.R. § 1625.23(a) (2000).

374. 29 C.F.R. § 1625.23(b).

375. 29 C.F.R. § 1625.23(c); *see also* Questions and Answers, *supra* note 371.

376. 218 F.3d 933 (8th Cir. 2000), *cert. granted*, 533 U.S. 928 (2001).

377. *Id*. at 935.

378. *Id*.

time.[379]

Department of Labor regulations make it "the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee."[380] Employees retain their rights to twelve weeks of FMLA leave if their employers fail to notify them that leave will count under the FMLA.[381]

The Eighth Circuit concluded that this latter regulation creates rights not conferred by statute, and invalidated it.[382] The Sixth Circuit reached the opposite conclusion in *Plant v. Morton International, Inc*.[383] The pending Supreme Court decision should resolve this circuit split.

Two Seventh Circuit cases during the survey period provide a helpful reminder that the proper focus in FMLA cases is whether the employer acted against an employee because he took leave to which he was entitled. In *Gilliam v. United Parcel Service, Inc.*,[384] the plaintiff told his supervisor that he wanted a "few" or a "couple" of days to join his fiancée, who had just given birth to their child.[385] The supervisor allowed him to take Friday off, waiving the collective bargaining agreement's ten-day notice requirement.[386]

Gilliam did not contact the employer again until the following Thursday, when he heard his supervisor was trying to locate him.[387] The union contract required a call by the start of the shift on the third working day of leave, that is, the Tuesday after the Friday he first took leave.[388] UPS terminated Gilliam for abandoning his job.[389] Gilliam argued that he was entitled to leave of up to 120 days under the FMLA without informing UPS of his expected date of return.[390]

The Seventh Circuit affirmed summary judgment for UPS saying, "[T]he FMLA does not provide for leave on short notice when longer notice readily could have been given. Nor . . . does it authorize employees on leave to keep their employers in the dark about when they will return."[391] Because Gilliam did not give the thirty days notice that Department of Labor regulations require for foreseeable leaves, UPS could have insisted that he wait that long to take leave.[392] Furthermore, he was not fired for taking leave, but for failing to let his employer

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379. *Id.*
380. *Id.* at 937 (quoting 29 C.F.R. § 825.208(a) (2001)).
381. *Id.* (quoting 29 C.F.R. §§ 825.208(c), 825.700(a) (2001)).
382. *Id.* at 939.
383. 212 F.3d 929 (6th Cir. 2000).
384. 233 F.3d 969 (7th Cir. 2000).
385. *Id*. at 970.
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id*. at 971.
392. *Id.*

know on a timely basis when he expected to return to work.[393]

The plaintiff in *Kohls v. Beverly Enterprises Wisconsin, Inc.*[394] was unsuccessful for a similar reason.[395] Kohls, an activities director at a nursing home, took maternity leave.[396] Shortly before the leave began, she admitted to errors in checking account records she maintained for a resident's trust fund.[397] During her absence, her temporary replacement outshone her in several respects.[398] Kohls was terminated the day she returned from leave based on alleged misappropriation of funds and unsatisfactory job performance.[399]

The Seventh Circuit affirmed summary judgment for the employer, saying that although an employee may not be terminated for taking FMLA leave, she may be terminated for poor performance if the same action would have been taken absent the leave.[400] This is true even if the problems for which the employee is terminated come to light as a result of the employee's absence during the leave.[401] Kohls argued that the reasons given for her firing were pretextual, and that the real reason was that the employer liked the temporary replacement better.[402] The court countered by saying, "Nothing in the record indicates that [the employer] preferred [the temporary replacement] for any reason related to Kohls' taking of leave."[403]

B. State Immunity

On February 21, 2001, the U.S. Supreme Court held in *Board of Trustees of the University of Alabama v. Garrett*[404] that the Eleventh Amendment bars suit in federal court by state employees to recover money damages for the state's failure to comply with title I of the ADA.[405] In the aftermath of *Garrett*, the Seventh Circuit revisited its conclusion in *Varner v. Illinois State University*[406]

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393. *Id.*

394. 259 F.3d 799 (7th Cir. 2001).

395. *Id*. at 801.

396. *Id*.

397. *Id*. at 802. While she was on leave, the employer determined that Kohls did not always record dates and check numbers for transactions; threw away bank statements without reconciling the account; did not record what checks written to "cash" were for; and could not account for a $30.93 check. *Id.*

398. *See id.* The replacement responded to several programming complaints by substantially revamping Kohls' programs. *Id*. Numerous residents, their family members, and co-workers wanted the temporary staff member to stay on permanently in the activities position. *Id*. at 806.

399. *Id.* at 803.

400. *Id*. at 805, 807.

401. *Id*. at 806.

402. *Id.*

403. *Id.*

404. 531 U.S. 356 (2001).

405. *Id.*

406. 226 F.3d 927 (7th Cir. 2000).

("*Varner II*") that the Equal Pay Act (EPA) qualifies as "remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment," so that state immunity is inapplicable.[407] In *Varner II*, which was decided before *Garrett*, the court contrasted the EPA with statutes aimed at age and disability discrimination.[408] The former focuses on gender-based classifications that receive heightened constitutional scrutiny, while the latter types of claims receive only rational basis review.[409]

In *Garrett*, the Supreme Court considered whether Congress had identified "a history and pattern of unconstitutional employment discrimination by the States against the disabled," and concluded that it had not.[410] In *Cherry v. University of Wisconsin System Board of Regents*,[411] an EPA case, the defendant tried to convince the Seventh Circuit that "no abrogation of States' immunity against federal statutory claims is valid without express findings in the statute itself, grounded in sufficient legislative record evidence, that States had engaged in a pattern and practice of committing unconstitutional conduct of the type being prohibited by that statute."[412] The Seventh Circuit disagreed, finding no indication in *Garrett* of a bright-line rule requiring such specific findings, and reaffirmed the holding of *Varner II* that state immunity does not preclude EPA suits.[413]

C. The Fair Labor Standards Act "Window of Correction" for Improper Deductions from Exempt Employees

The Fair Labor Standards Act requires that executive, administrative, and professional employees be paid on a salary basis in order to be classified as exempt from overtime pay.[414] These employees must receive a predetermined compensation amount each pay period that is not subject to reduction based on the quality or quantity of work.[415] Department of Labor regulations offer a "window of correction" for employers to remedy improper deductions.[416] The Seventh Circuit reversed its position regarding when this window of correction is available in *Whetsel v. Network Property Services, LLC*.[417]

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

408. *Id*. at 934.

409. *Id*.

410. 531 U.S. at 368.

411. 265 F.3d 541 (7th Cir. 2001).

412. *Id*. at 552.

413. *Id*. at 553.

414. *See* Auer v. Robbins, 519 U.S. 452, 454-55 (1997) (citing Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified as amended in sections of 29 U.S.C.), 29 C.F.R. §§ 541.1-541.3 (1996)).

415. *Id*. at 455 (citing 29 C.F.R. § 541.118(a) (1996)).

416. *See* 29 C.F.R. § 541.118(a)(6) (2001).

417. 246 F.3d 897 (7th Cir. 2001).

Plaintiff Whetsel was one of sixteen employees treated as exempt.[418] She filed suit after leaving the company, claiming that she should have been paid for overtime because the employer had an unwritten policy that subjected her and other exempt employees to possible pay deductions for partial-day absences.[419] She cited four salaried employees allegedly subjected to partial-day deductions on eight occasions.[420] The employer had circulated a memo to all employees acknowledging that partial-day deductions from exempt employee salaries occurred on "isolated occasions," but further saying that past and current policy was not to deduct for partial day absences of salaried employees, even if they had insufficient benefit time available to cover the missed time.[421] It also repaid the four affected salaried employees.[422]

The secretary of the Department of Labor interprets the regulation to deny curative opportunities to employers with policies of deducting pay from exempt employees as a disciplinary measure.[423] In a prior case, the Seventh Circuit had concluded differently, although arguably in dicta.[424] In *Whetsel*, the court overruled this conclusion and adopted the Department of Labor position, "[W]hen an employer has a practice or policy of improper deductions as defined . . . the window of correction provided in 29 C.F.R. § 541.118(a)(6) is not available."[425] It remanded the case to resolve the issue of whether this employer's actions did constitute such a practice or policy.[426]

V. WORKER'S COMPENSATION

A. Employer-Employee Relationship

In *GKN Co. v. Magness*,[427] the Indiana Supreme Court clarified the analysis for determining whether an employer-employee relationship exists for worker's compensation purposes.[428] Magness, a truck driver hired by a subcontractor, suffered injuries while working on a highway construction project and sued GKN, the general contractor.[429] GKN argued that Magness was its employee as well as the subcontractor's employee, so his exclusive remedy was worker's compensation.[430]

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418. *Id*. at 899.
419. *Id*.
420. *Id.*
421. *Id*.
422. *Id*. at 899-900.
423. *Id*. at 900-01.
424. *Id*. at 903 (citing DiGiore v. Ryan, 172 F.3d 454, 465 (7th Cir. 1999)).
425. *Id.* at 904.
426. *Id*. at 904-05.
427. 744 N.E.2d 397 (Ind. 2001).
428. *Id*. at 402-03.
429. *Id.* at 399-400.
430. *Id.* at 400.

The supreme court applied the seven-factor analysis of *Hale v. Kemp*,[431] but emphasized that the factors must be weighed in a balancing test and not tallied in a majority-wins approach.[432] Furthermore, the right to exercise control weighs most heavily, rather than intent of the parties, as previous cases had indicated.[433] After applying this revised approach, the court concluded that Magness was not a GKN employee.[434]

The court also clarified the burden of proof in jurisdictional challenges where the employer argues that the trial court lacks jurisdiction because worker's compensation is the plaintiff's exclusive remedy.[435] The employer carries the burden of proving that the complaint falls under worker's compensation unless the complaint itself demonstrates that an employment relationship exists.[436] In the latter case, the burden shifts to the employee to show why worker's compensation would not apply.[437] The court therefore disapproved language in prior cases indicating that if an employer raises the issue of preclusion under the worker's compensation statute, the employee automatically assumes the burden.[438]

The degree of judgment involved in this seven-factor test was illustrated in *Degussa Corp. v. Mullens*.[439] There, the court applied the analysis and split two-to-two on the conclusion.[440] Reasonable minds will often differ when applying the factors to a particular set of facts.

B. Purely Emotional Injury

The Indiana Court of Appeals held in two cases that worker's compensation does not apply to purely emotional injuries. In *Branham v. Celadon Trucking Services, Inc*.,[441] Judge Kirsch prefaced his analysis by quoting, "The law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable."[442]

Plaintiff Branham fell asleep during a work break, and a co-worker dropped

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431. 579 N.E.2d 63, 67 (Ind. 1991) (listing the most important factors as right to discharge, mode of payment, supplying tools or equipment, belief of the parties in the existence of employer-employee relationship, control over means used in results achieved, length of employment, and establishment of work boundaries).

432. 744 N.E.2d at 402.

433. *Id.* at 402-03 (citing Rensing v. Ind. State Univ. Bd. of Tr., 444 N.E.2d 1170 (Ind. 1983)).

434. *Id.* at 407.

435. *Id.* at 403-04.

436. *Id.* at 404.

437. *Id.*

438. *Id.*

439. 744 N.E.2d 407 (Ind. 2001).

440. *Id.* at 414. Justice Rucker did not participate. *Id*. at 415.

441. 744 N.E.2d 514 (Ind. Ct. App. 2001).

442. *Id.* at 518 (quoting Kelley v. Post Publ'g Co., 98 N.E.2d 286, 287 (Mass. 1951)).

his own pants so another prankster could photograph the two men in a suggestive pose.[443] Management found out what had happened after the picture circulated among other co-workers.[444] Both perpetrators received a week's unpaid suspension, and the photographer was demoted.[445] Branham was so humiliated by the incident that he left the company.[446]

The court of appeals observed that Indiana's worker's compensation statute covers on-the-job injuries, defined as including disabilities resulting in an injured employee's inability to work and impairments in the form of loss of physical function.[447] Branham's injury was not physical, and he remained fully fit for employment.[448] Therefore, the worker's compensation statute did not preclude Branham's tort claims, although those claims failed on the merits.[449]

A similar result was obtained in *Dietz v. Finlay Fine Jewelry Corp*.[450] Dietz, a sales clerk, sold fine jewelry for a company that leased space in L.S. Ayres retail stores.[451] She gave an unauthorized discount to a customer who had become irritated because Dietz had to seek help in processing her transaction, and the assistance was slow in coming.[452] The store security manager called Dietz in for an hour-long interview during which he allegedly insisted that she stay in the room and accused her of stealing jewelry to support a substance abuse problem.[453] As in *Branham*, the court of appeals held that worker's compensation did not preclude Dietz's tort claims because Dietz alleged no physical injury or loss of physical function.[454] It remanded for consideration of her false imprisonment and defamation charges.[455]

C. When Is Expert Testimony Required?

Two survey period cases provide guidance on the role of expert testimony in worker's compensation cases. The first is *Muncie Indiana Transit Authority v. Smith*,[456] where the issue was whether Smith's carpal tunnel syndrome arose out of his employment as a bus driver.[457] None of the medical records Smith offered

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443. *Id.* at 518-19.

444. *Id.* at 519.

445. *Id.*

446. *Id.*

447. *Id*. at 520 (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1288-89 (Ind. 1994)).

448. *Id.*

449. *Id.* at 520-25.

450. 754 N.E.2d 958 (Ind. Ct. App. 2001).

451. *Id*. at 963.

452. *Id.*

453. *Id*. at 963-64.

454. *Id*. at 965.

455. *Id*. at 971.

456. 743 N.E.2d 1214 (Ind. Ct. App. 2001).

457. *Id.* at 1215.

as evidence contained any opinion as to the cause of this condition, and Smith was the sole witness at the worker's compensation hearing.[458] The court considered guidance from other states regarding what qualifies as competent evidence of causation in worker's compensation cases and concluded that both lay and expert evidence are admissible if "the injury was not caused by a sudden and unexpected external event."[459] If, however, "the cause of the injury is not one which is apparent to a lay person and multiple factors may have contributed to causation, expert evidence on the subject is required."[460] Smith offered no expert evidence, so his claim failed.[461]

In *Schultz Timber v. Morrison*,[462] a truck driver suffered broken bones and a punctured lung when a load shifted, causing his truck to overturn.[463] Thereafter, he experienced severe headaches that were exacerbated by physical activity.[464] Schultz argued that only the testimony of a vocational expert could satisfy Morrison's burden of proof that he could not obtain or perform reasonable types of employment.[465] Schultz's vocational expert testified that Morrison could work an eight-hour day of light or "light plus" duty.[466] Morrison offered only testimony by his two treating physicians, who said that Schultz's expert failed to consider Morrison's level of pain and ability to function with that pain.[467]

The court held, "Although vocational experts are utilized in many workmen's compensation cases, they are not a prerequisite to obtaining total permanent disability payments."[468] Here, Morrison's doctors testified that Morrison could not stand, walk, or read for extended periods of time, could not make repetitive motions with his shoulders and arms, and required pain medication that interfered with cognitive functions.[469] The appeals court upheld the Worker's Compensation Board's four-to-three decision granting Morrison total and permanent disability.[470]

D. Acquiescence

The issue in *Wimmer Temporaries, Inc. v. Massoff*[471] was whether the employer acquiesced in the claimant's violation of a conspicuously posted safety

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458. *Id.* at 1216.
459. *Id*. at 1217.
460. *Id.*
461. *Id*. at 1218.
462. 751 N.E.2d 834 (Ind. Ct. App. 2001).
463. *Id*. at 836.
464. *Id.*
465. *Id*.
466. *Id*. at 837.
467. *Id.* at 836-37.
468. *Id.* at 837.
469. *Id.*
470. *Id.* at 836.
471. 740 N.E.2d 886 (Ind. Ct. App. 2000).

rule.[472] Massoff, a caster working on a temporary basis at a foundry, failed to shut down a piece of equipment before cleaning a spout.[473] This was common practice, although a posted safety notice threatened disciplinary action against anyone found inside the safety enclosure while the equipment was running.[474]

The employer emphasized that no one specifically told Massoff to violate the written rule.[475] The statute denies compensation if an employee knowingly fails to obey a conspicuously posted, reasonable rule of the employer.[476] The court, however, focused on the fact that before the safety rule was posted Massoff was trained to clean with the table in operation, and other employees continued to follow this practice after the rule's posting.[477] Any shutdown slowed production and increased scrap.[478] Six hours before Massoff's accident, a co-worker and a team leader saw Massoff violating the rule and, although both had disciplinary authority, said nothing.[479] The court affirmed the award of benefits to Massoff, finding that the employer acquiesced in the safety violation.[480]

VI. STATE LAW DEVELOPMENTS

A. Indiana's Wage Payment Statute

The Indiana Supreme Court has granted transfer in *St. Vincent Hospital & Health Care Center, Inc. v. Steele*[481] to decide whether the liquidated damages provisions of Indiana's Wage Payment Statute[482] govern the amount of pay as well as the frequency.[483] St. Vincent owed Dr. Steele bi-weekly compensation under an employment agreement.[484] In years three and four of the agreement, St. Vincent began to exclude payment for certain services because it believed the payments were impermissible under proposed Health Care Financing Administration regulations.[485] Steele sued, and the trial court granted him summary judgment. Under the Indiana Wage Payment Statute's treble damages provision, the court awarded Steele $277,812.92 in unpaid wages and

472. *Id*. at 887.
473. *Id.* at 887-88.
474. *Id.* at 888.
475. *Id*. at 889.
476. *Id*. (citing IND. CODE § 22-3-2-8 (1998)).
477. *Id.* at 892.
478. *Id*.
479. *Id.*
480. *Id.* at 892-93.
481. 742 N.E.2d 1029 (Ind. Ct. App. 2001), *trans. granted and opinion vacated*, 761 N.E.2d 413 (Ind. 2001).
482. IND. CODE § 22-2-5-2 (1998).
483. *St. Vincent Hosp.*, 742 N.E.2d at 1032.
484. *Id*. at 1030.
485. *Id*. at 1031.

$555,625.84 in liquidated damages, plus attorney fees.[486]

St. Vincent appealed, arguing that the statute covers only the frequency, not the amount, of payment.[487] The statute reads, in relevant part:

> Sec. 1. (a) Every person, firm, corporation, limited liability company, or association, their trustees, lessees, or receivers appointed by any court, doing business in Indiana, shall pay each employee at least semimonthly or biweekly, if requested, the amount due the employee . . . .
> (b) Payment shall be made for all wages earned to a date not more than ten (10) days prior to the date of payment . . . .[488]

Alternatively, St. Vincent argued that it had a good faith basis for withholding a portion of Steele's wages.[489]

The court of appeals noted conflicting authority, and was persuaded by Steele's argument that if the statute only deals with frequency of payment, an employer could avoid any penalty by paying a *de minimis* amount at least biweekly, regardless of the amount of salary actually due.[490] It also noted the statutory language "the amount due," and affirmed the trial court's award.[491] It rejected St. Vincent's argument for a good faith exception, because no such exception appears in the statute.[492]

The Indiana Supreme Court granted transfer,[493] thereby vacating this holding, and heard oral argument on September 19, 2001. A decision will be forthcoming in due course.

The court of appeals dealt with another aspect of the Wage Payment Statute during the survey period in *Wank v. St. Francis College*.[494] This time the question was whether severance pay offered in connection with a reduction in force is covered by the statute.[495] Plaintiff Wank's position was eliminated as a result of a merger, and the college offered him a severance package in recognition of his years of service.[496]

Almost immediately thereafter, the college separately advised Wank that the severance bonus package was contingent upon Wank's execution of an agreement releasing the college from liability.[497] When Wank declined to sign the release, the college paid him only wages due, including accrued vacation

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486. *Id*. at 1031-32.
487. *Id*. at 1032.
488. *Id*. (citing IND. CODE § 22-2-5-1 (1998)).
489. *Id*. at 1035.
490. *Id*. at 1033-35.
491. *Id*. at 1035.
492. *Id*.
493. St. Vincent Hosp. & Health Care Ctr., Inc. v. Steel, 761 N.E.2d 413 (Ind. 2001).
494. 740 N.E.2d 908 (Ind. Ct. App. 2000).
495. *Id*. at 909-10.
496. *Id*. at 909.
497. *Id*. at 910.

pay.[498] Wank sued, but the trial court held that Wank had no employment contract and that the severance pay was not a wage under the Wage Payment Statute.[499]

Wank argued on appeal that he earned the severance pay through his years of service, making the amount in effect deferred compensation.[500] The court of appeals disagreed, although it reiterated that merely calling a payment a bonus does not automatically exempt it from the statute.[501] Compensation that accrues during an employee's tenure is a wage, even when payment is deferred, if it relates to work performed.[502]

Here, however, the court concluded that although the severance pay was based on years of service, it was not connected to work performed.[503] Also, the college had no severance pay policy, so the offered amount was an optional bonus in recognition of Wank's past service rather than compensation accrued during employment.[504] Because the package was not a term of Wank's employment, the court concluded, "absent a policy creating an entitlement to severance pay, such compensation is not a wage for purposes of the Wage Payment Statute. The severance package at issue . . . was a discretionary, gratuitous benefit offered to employees as an act of benevolence."[505]

B. Enforceability of Vacation Pay Accrual Policies

Another survey period case applying Indiana law is worth noting. *Damon Corp. v. Estes*[506] dealt with vacation pay liability upon termination.[507] Damon's employee handbook read: "Employees will receive their vacation pay, when eligible, on the regular payday, the week following their anniversary date. An employee does not earn vacation pay each year until his/her anniversary date."[508] Estes, upon termination, claimed entitlement to vacation pay calculated from his most recent anniversary date (August 27, 1999) to his termination date (May 1, 2000).[509] The trial court awarded him $121.14 plus costs.[510]

The court of appeals reversed, accepting Damon's argument that its company

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498. *Id*.

499. *Id*. at 910. The trial court found genuine issues of material fact on St. Francis' promissory estoppel claim, and denied summary judgment on that question. *Id.*

500. *Id*. at 911.

501. *Id*. at 912-13.

502. *See id.* at 913.

503. *Id*.

504. *Id.*

505. *Id*. at 913-14.

506. 750 N.E.2d 891 (Ind. Ct. App. 2001).

507. *See id.* at 892.

508. *Id*.

509. *Id*.

510. *Id.*

policy precluded "accrued" vacation time.[511] The court cited *Die & Mold, Inc. v. Western*,[512] where it characterized vacation pay as "additional wages, earned weekly" but went on to say, "where only the time of payment is deferred . . . *absent an agreement to the contrary*, the employee would be entitled to a pro rata share of it to the time of termination."[513] The court in *Die & Mold, Inc*. went on to say that any agreement or published policy to the contrary would be enforceable.[514] Here, a policy Estes had acknowledged in writing clearly stated that an employee earned no vacation pay until his anniversary date.[515] The court therefore reversed and upheld the policy as written.[516]

VII. THE FORCE AND EFFECT OF ARBITRATION AGREEMENTS

An important and ongoing issue is how far employers may go in requiring employees to agree to arbitrate employment disputes. On March 21, 2001, the U.S. Supreme Court resolved a circuit split by upholding an arbitration agreement in *Circuit City Stores, Inc. v. Adams*.[517] Plaintiff Adams signed a form as part of his application process when Circuit City hired him in 1995, agreeing to submit all employment disputes to binding arbitration.[518] Two years later, he brought suit in state court alleging employment discrimination under California law.[519] 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 virtually all employment contracts from the Act's coverage.[520] It reversed the federal district order compelling arbitration.[521]

The U.S. Supreme Court reversed the court of appeals in a five-to-four decision based upon the text of the statute rather than its legislative history.[522] The majority interpreted the Act's exemption narrowly as excluding only transportation worker employment contracts from coverage.[523] 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

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511. *Id*. at 893.

512. 448 N.E.2d 44 (Ind. Ct. App. 1983).

513. *Damon Corp.*, 750 N.E.2d at 893 (quoting *Die & Mold, Inc.*, 448 N.E.2d at 48) (emphasis supplied).

514. *Id*. (quoting *Die & Mold, Inc.*, 448 N.E.2d at 47-48).

515. *See id*.

516. *Id*.

517. 532 U.S. 105 (2001).

518. *Id.* at 109-10.

519. *Id.* at 110.

520. *Id*. at 109 (referring to 9 U.S.C. § 1 (2000)).

521. *Id*. at 124.

522. *Id*. at 119, 124.

523. *Id*. at 119.

importance in employment litigation."[524] 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 employment laws that protected employees by prohibiting them from signing away their rights to pursue state-law discrimination actions in court.[525]

The decision clarified the overall scope of the Federal Arbitration Act but 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."[526] 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 open question is how broadly the classes of transportation workers specifically referenced in the statute will be defined.

On June 20, 2001, five Democratic members of the U.S. House of Representatives introduced legislation to amend the Federal Arbitration Act and overturn the holding of *Circuit City*.[527] Sponsor Dennis Kucinich attacked mandatory employment dispute arbitration agreements as depriving employees, who have inferior bargaining power, of their rights to due process, trial by jury, discovery and appeal.[528]

In another recent development, the U.S. Supreme Court has held that an agreement between an employer and an employee to arbitrate employment disputes does not bar the EEOC from pursuing such victim-specific relief as back pay, reinstatement, and damages.[529] The case arose when Eric Baker, who signed a mandatory arbitration agreement as a condition of employment at a Waffle House restaurant, suffered a seizure sixteen days after he began working as a grill operator.[530] He filed a charge with the EEOC after he was discharged, and the EEOC filed an enforcement action.[531]

Justice John Paul Stevens, writing for the six-justice majority, said that Title VII "clearly makes the EEOC the master of its own case" and that the Federal Arbitration Act "does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum."[532] Although the EEOC does not file many lawsuits (fewer than 300 in 2000, compared to

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524. *Id*. at 123.

525. *Id*. at 121-22.

526. *Id*. at 123 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

527. Susan J. McGolrick, *House Democrats Introduce Legislation to Overturn High Court's Circuit City Ruling*, DAILY LAB. REP., June 21, 2001, at A-3.

528. *Id.*

529. EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002).

530. *Id.* at 758.

531. *Id.*

532. *Id.* at 762-63.

nearly 80,000 discrimination complaints received),[533] the Court's conclusion is important because employees with arbitration agreements will likely continue to file discrimination complaints with the EEOC, hoping that the agency will pursue damages on their behalf.

CONCLUSION: THE WATCH LIST

Three noteworthy employment law cases, not discussed above, are pending before the U.S. Supreme Court. In *Edelman v. Lynchburg College*,[534] the Court will consider the validity of the EEOC's regulation permitting individuals to "verify" their charges by signing to affirm that the assertions are true after the filing deadline has passed.[535] The EEOC mailed a draft charge to plaintiff Edelman on March 18, 1998, but he did not file the charge until April 15, which was thirteen days past the filing deadline.[536] Edelman pointed to a signed letter he sent the EEOC the previous November 14, and an EEOC regulation saying "[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments . . . will relate back to the date the charge was first received."[537]

The Fourth Circuit concluded that this regulation contravened statutory language limiting the EEOC's authority and establishing certain prerequisites: charges "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires."[538] It acknowledged contrary authority from the Fifth, Seventh, Eighth, Ninth and Tenth Circuits but affirmed dismissal of Edelman's charge as untimely filed.[539]

Another case worth watching is *Swierkiewicz v. Sorema*,[540] which deals with Rule 12(b)(6) motions. Plaintiff Swierkiewicz's national origin complaint stated only that he is Hungarian, others employed by Sorema were French, and his termination was motivated by national origin discrimination. He supported his claim of age discrimination only by asserting that the company president said he wanted to "energize" Swierkiewicz's department.[541]

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533. *Id.* at 762 n.7.

534. 228 F.3d 503 (4th Cir. 2000), *cert. granted*, 533 U.S. 928 (2001).

535. Susan McGolrick, *New Term to Begin with Bumper Crop of Employment-Related Cases to Be Heard*, DAILY LAB. REP., Sept. 28, 2001, at B-1.

536. *Edelman*, 228 F.3d at 506.

537. *Id.* at 507 (quoting 29 C.F.R. § 1601.12(b) (2001)).

538. *Id*. at 508 (quoting 42 U.S.C. § 2000e-5(b) (1994)).

539. *Id.* at 510-11 (citing Lawrence v. Cooper Cmtys., Inc., 132 F.3d 447 (8th Cir. 1998); Philbin v. Gen. Elec. Capital Auto Lease, Inc., 929 F.2d 321 (7th Cir. 1991); Peterson v. City of Wichita, 888 F.2d 1307, 1308 (10th Cir. 1989); Casavantes v. Cal. State Univ., 732 F.2d 1441, 1442-43 (9th Cir. 1984); Price v. S.W. Bell Tel. Co., 687 F.2d 74 (5th Cir. 1982)).

540. 2001 U.S. App. LEXIS 3837 (2nd Cir. 2001) (unpublished opinion), *cert. granted*, 533 U.S. 976 (2001).

541. *Id.*

The Second Circuit affirmed the district court ruling granting Sorema's motion to dismiss for failure to state a claim.[542] The U.S. Supreme Court's decision should provide guidance on the subject of what a plaintiff must plead to withstand such a motion to dismiss.

The third case, *Echazabal v. Chevron USA, Inc.*,[543] presents an interesting issue of statutory interpretation under the ADA. The ADA prohibits discrimination against "otherwise qualified" individuals, including "using qualification standards . . . that screen out or tend to screen out an individual with a disability."[544] However, the ADA provides an affirmative defense that allows employers to adopt as a "qualification standard" the requirement that the individual not pose "a direct threat to the health or safety of other individuals in the workplace."[545] At issue in *Echazabal* is whether the employer may also adopt qualification standards to protect the disabled employee from threats to his or her *own* health.[546] The Ninth Circuit ruled that the employer may not adopt such standards, creating a conflict with a prior ruling from the Eleventh Circuit.[547] The Supreme Court has agreed to hear the case.[548]

542. *Id*. (citing FED. R. CIV. P. 12(b)(6) (1994)).

543. 226 F.3d 1063 (9th Cir. 2000), *cert. granted*, 122 S. Ct. 456 (2001).

544. 42 U.S.C. § 12112(b)(6).

545. *Id.* § 12113.

546. *Echazabal*, 226 F.3d at 1064.

547. *Id.* at 1072, 1075; Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996).

548. 122 S. Ct. 456 (2001).