SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

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INTRODUCTION: NATIONAL TRENDS AND DEVELOPMENTS

This survey period was marked by incremental change—as opposed to major revision—in the area of employment law. Whether primarily representing employees or employers in employment cases, practitioners will find this year's developments a "mixed bag." From the plaintiff-employee perspective, good news came largely in procedural rulings, most notably the United State Supreme Court's generous application of the "continuing violation doctrine" in harassment cases.[1] Employer-defendants, on the other hand, will find comfort in the Court's rejection of Department of Labor regulations relating to notice requirements under the FMLA[2] and decisions further narrowing the scope of "disability" or "reasonable accommodation" under the ADA.[3]

Regardless of one's perspective, this remains an area of the law where it is important to keep abreast of new developments—which seem to occur on an almost weekly basis. In the discussion below, we analyze the most notable new cases handed down during the survey period, including decisions under Title VII, the ADA, ADEA, FMLA, and related state laws. We close with our "watch list": cases pending before the U.S. Supreme Court that may generate significant new rulings during the *next* survey period.

I. TITLE VII

A. Continuing Violation Doctrine

Under Title VII, an Indiana plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC) within 300 days "after the alleged unlawful employment practice occurred."[4] In June 2002, the United States Supreme Court issued an important decision in *National Railroad Passenger Corp. v. Morgan*,[5] addressing whether, and under what circumstances,

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1. Nat'l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002).

2. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002).

3. *E.g.*, Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002); U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

4. 42 U.S.C. § 2000e-5(e)(1) (1994 & Supp. V 1999).

5. 122 S. Ct. 2061 (2002).

a Title VII plaintiff may sue on events that occurred outside the statutory time period.

Plaintiff Abner Morgan filed a charge claiming that, during his employment at Amtrak, he was harassed and disciplined more harshly than other employees based on his race.[6] Some of the acts of which he complained occurred more than 300 days before the date he filed his EEOC charge.[7] Amtrak sought summary judgment on all incidents that fell outside the 300 day filing period.[8]

The U.S. Supreme Court noted that there was a split among the appellate courts on how to handle acts outside of the statutory filing period.[9] Looking to the Title VII wording that "[a] charge under this section *shall be filed* within [300 days] *after the alleged unlawful employment practice occurred*," the Court held that discrete acts, although related, could not be converted into a single unlawful practice for purposes of timely filing.[10]

After analyzing case history, the Court stated several important principles. The first was that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock . . . ."[11] The Court did, however, hold that the statute would not bar an employee from using prior acts as background evidence to support a timely claim.[12] Moreover, the filing time period is subject to the equitable doctrines of tolling and estoppel.[13] The Court reasoned that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"[14]

The Court reached a different conclusion, however, on the issue of hostile environment claims.[15] The Court distinguished these types of claims because, by their nature, they involve repeated conduct.[16] Because a hostile work environment claim is comprised of a series of acts that add up to a single unlawful employment practice, the Court concluded that if one act contributing to the claim occurred within the filing period, the Court could consider the entire time period of the alleged hostile environment in determining liability.[17] Therefore, in order for a charge of hostile environment to be timely, the employee need only file the charge within 300 days of any act that is part of a

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6. *Id.* at 2068.
7. *Id.*
8. *Id.*
9. *Id.* at 2069.
10. *Id.* at 2070-71 (emphasis supplied by the court).
11. *Id.* at 2072.
12. *Id.*
13. *Id.*
14. *Id.* at 2073.
15. *Id.*
16. *Id.*
17. *Id.* at 2074.

hostile work environment.[18]

A court must, therefore, look at alleged acts that make up a hostile environment and consider events preceding the limitations period if they are part of the same actionable hostile work environment practice.[19] Plaintiff Morgan cited incidents involving the same type of employment actions which occurred with relative frequency and were perpetrated by the same managers.[20] The conduct outside the limitations period was not, therefore, time-barred because all the acts making up the claim qualified as part of the same employment practice and at least one act fell within the statutory time period.[21]

The Court left the door open for employers faced with situations where the plaintiff unreasonably delayed in filing a charge.[22] Employers may raise equitable defenses such as laches, which in the Title VII context requires proof of a lack of diligence by the plaintiff and prejudice to the employer.[23]

B. Disparate Treatment Cases

1. "Lost Chance" Theory.—Two cases based on disparate treatment theories gave the Seventh Circuit opportunities to decide issues of first impression. In the first case, the court borrowed from tort law principles and applied a "lost chance" theory in calculating a back pay award.[24] The court noted at the outset that the procedural posture of the case was a bit unusual because it was brought by white male applicants who successfully alleged race and gender discrimination in hiring and promotion by the Illinois State Police (ISP).[25] These men prevailed in their reverse discrimination case by proving that ISP's affirmative action plan was not narrowly tailored to meet a compelling governmental interest.[26] Three of these plaintiffs appealed the calculation of their back pay award.[27]

The district court judge took the novel approach of calculating back pay by evaluating the likelihood that each individual would have received a promotion.[28] He then awarded back pay on a proportional basis.[29] The plaintiffs argued that each should receive the full amount of recovery, and that the burden of proof on the damages issue rested with ISP.[30] In effect, they argued that it was ISP's burden to prove by clear and convincing evidence that each of the plaintiffs

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18. *Id.* at 2075.
19. *Id.* at 2076.
20. *Id.*
21. *Id.* at 2077.
22. *Id.* at 2076.
23. *Id.* at 2077.
24. Bishop v. Gainer, 272 F.3d 1009 (7th Cir. 2001).
25. *Id.* at 1011.
26. *Id.*
27. *Id.* at 1015.
28. *Id.*
29. *Id.*
30. *Id.*

would have failed to receive a promotion absent the reverse discrimination.[31]

The Seventh Circuit said the plaintiffs "ask[ed] too much."[32] The court cited *Doll v. Brown*,[33] where the court discussed the hypothetical situation of multiple candidates for a single promotion.[34] If four out of five applicants for a single job were discriminated against, and all were equally qualified, it would be obviously wrong to award all four back pay, give one the job, and allow the other three front pay as well. Because the issue was novel and had not been briefed in *Doll*, the court did not hold that the lost chance theory was available in employment discrimination cases but "commend[ed] it to the consideration of bench and bar as a possible method of arriving at more just and equitable results in cases such as this."[35]

Here, the district judge evaluated the chances of two of the plaintiffs who had been competing for the same job and who placed third and fourth on the promotion list. He assigned one plaintiff a forty-five percent likelihood of success and the other a thirty percent likelihood.[36] The third plaintiff competed for a promotion with two other white males who occupied positions higher on the promotion list, so the judge assessed his chances at fifteen percent.[37]

The Seventh Circuit noted that this approach "involves more art than science," but observed that this is also true of comparative negligence calculations and, in situations such as this, is the likeliest way to produce a just result.[38] It found "no reason to disturb the thoughtful calculations" of the district court judge.[39]

2. Comparative Qualifications.—The second disparate treatment case offering the Seventh Circuit an issue of first impression was *Millbrook v. IBP, Inc.*[40] The question presented was when evidence of comparative qualifications supports a jury verdict of discrimination. Millbrook was a janitor at a meat processing plant who claimed that he suffered discrimination based on race when he was passed over for promotion to quality control inspector.[41] A jury awarded him $7500 in pain and suffering, $25,000 in lost wages, and $100,000 in punitive damages.[42]

IBP required that its quality control inspectors have strong communication skills because their job duties often brought them into confrontation with

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31. *Id.*
32. *Id.* at 1016.
33. 75 F.3d 1200 (7th Cir. 1996).
34. *Bishop*, 272 F.3d at 1016.
35. *Id.* (quoting *Doll*, 75 F.3d at 1207).
36. *Id.* at 1016.
37. *Id.*
38. *Id.* at 1016-17.
39. *Id.* at 1017.
40. 280 F.3d 1169 (7th Cir. 2002).
41. *Id.* at 1172.
42. *Id.*

production supervisors.[43] Millbrook applied without success for an inspector position eight different times.[44] The jury concluded that another applicant was better qualified on seven of the eight occasions but found discrimination on the eighth claim.[45]

The court began by noting that in evaluating pretext, the question is not whether the employer made a proper evaluation of competing applicants, but whether it used deceit to cover its discriminatory tracks.[46] IBP justified its hiring decision by explaining that the successful candidate had prior experience in quality control, had superior communication skills to Millbrook, and was more confident in his demeanor.[47] Millbrook cited subjective comments from interviews such as "shows no real interest," "no skills experience pertaining to this position," "gave poor and incomplete answers to questions," and "lacks ability to answer questions clearly" as demonstration of racial bias.[48] The court disagreed, finding no evidence that the subjective criteria used in evaluating the candidates was a "mask for discrimination."[49] The quoted comments were negative but racially neutral, and at trial IBP offered specific facts in support of the subjective evaluations.[50] Additionally, similar comments were made about white candidates.[51]

The court then revisited its precedent on the issue of when evidence of comparative qualifications, absent other evidence of discrimination, could be sufficient to support a jury verdict of discrimination.[52] After reviewing holdings in other circuits, the court held that

> where an employer's proffered nondiscriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." In other words, "[i]n effect, the plaintiff's credential would have to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'"[53]

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43. *Id.*
44. *Id.*
45. *Id.* at 1172-73.
46. *Id.* at 1175.
47. *Id.*
48. *Id.* at 1176.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 1179.
53. *Id.* at 1180-81 (quoting Deines v. Tex. Dep't of Protective & Reg. Servs., 164 F.3d 277,

The court reiterated its often-stated position that its role is not to act as a super personnel department second guessing employers' business judgments.[54] Applying this standard, the court held that Millbrook could not prevail without providing some affirmative evidence challenging IBP's credibility.[55] Applying the standard that comparative qualifications do not support a finding of pretext, the court found it "a close question" as to whether Millbrook's qualifications equaled or exceeded those of the successful applicant.[56] At the end of the day, he failed to sufficiently prove intentional discrimination. Thus, the jury verdict could not stand.[57] In summary, the court stated, "Title VII is not a merit selection program."[58]

Not all members of the Seventh Circuit would have reached the same conclusion. Five judges voted to grant *en banc* rehearing of the 2-1 decision.[59]

C. Harassment

Three Seventh Circuit opinions issued during the survey period and dealing with claims of harassment are worth comment. In the first, *Gawley v. Indiana University*,[60] an Indiana University Police Department officer claimed that a senior officer had subjected her to harassment. Among other things, he made offensive comments about her pants being too tight and commented on her breast size when fitting her for a bullet-proof vest.[61] On one occasion, he groped her breast while he was adjusting the vest on her.[62] Gawley eventually complained but did not at that time mention the breast groping incident.[63] The senior officer received a counseling memorandum based on the offensive comments.[64]

The investigation continued after the counseling memorandum's issuance, and the report was eventually watered down to remove many conclusions that criticized the senior officer and the department.[65] Gawley resigned thereafter and claimed constructive discharge.[66] She conceded that after the counseling memorandum, the offensive conduct did not reoccur.[67]

In resolving the case, the Seventh Circuit considered the University's

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279 (5th Cir. 1999) and Byrnie v. Town of Cromwell, 243 F.3d 93, 103 (2d Cir. 2001)).

54. *Id.* at 1181.
55. *Id.* at 1182.
56. *Id.*
57. *Id.* at 1184.
58. *Id.*
59. *Id.* at 1169.
60. 276 F.3d 301 (7th Cir. 2001).
61. *Id.* at 305-06.
62. *Id.* at 306.
63. *Id.*
64. *Id.*
65. *Id.* at 307.
66. *Id.*
67. *Id.* at 311-12.

affirmative defense under *Ellerth*[68] and *Faragher*,[69] that it exercised reasonable care to prevent and correct sexually harassing behavior in a prompt manner, and that Gawley unreasonably failed to take advantage of the corrective opportunities the University provided.[70] The conduct by the senior officer that Gawley characterized as harassment covered a span of about seven months.[71] She waited another seven months before pursuing a formal complaint through the University's procedures.[72] As soon as she availed herself of these procedures, the University took action that stopped the harassment.[73] The Seventh Circuit therefore affirmed summary judgment in favor of the University because Gawley unreasonably failed to take advantage of available corrective procedures.[74]

Approximately a week after the *Gawley* decision, the Seventh Circuit handed down its opinion in *Hall v. Bodine Electric Co.*[75] Hall, a machine operator, complained that some of her coworkers had harassed her when one pulled her sleeveless blouse and t-shirt away from her body, exposing her breasts, and another commented on the size of her nipples.[76] During the investigation of that incident, Hall cited other instances of what she considered inappropriate sexual conduct that she had not previously reported.[77]

The company's human resources manager interviewed eighteen people, including all those identified as potential witnesses and others stationed in the area of the alleged incident.[78] He took handwritten notes during these interviews, and then typed them into his computer and shredded the handwritten notes each day.[79] He concluded that not only had one of Hall's coworkers violated the company rules prohibiting sexual harassment, but also that Hall was guilty of similar violations.[80] The company discharged both employees.[81]

In the ensuing lawsuit, Hall pointed to the human resources manager's failure to preserve his handwritten notes as evidence that the investigation was a "sham" to dummy up a reason to fire her.[82] The court disagreed, noting that employers are not required to keep every scrap of paper and that it is sufficient to retain the actual employment record itself.[83] The investigator's reasons for disposing of the

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68. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
69. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
70. *Cawley*, F.3d at 311.
71. *Id.* at 312.
72. *Id.*
73. *Id.*
74. *Id.*
75. 276 F.3d 345 (7th Cir. 2002).
76. *Id.* at 351.
77. *Id.*
78. *Id.* at 352.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 358.
83. *Id.*

handwritten notes was that they were very rough and duplicative of the typed version, and that he wanted to preserve confidentiality.[84] The court found all those reasons "entirely plausible."[85]

Moreover, the investigator's final report noted that eight of sixteen witnesses interviewed described mutually inappropriate behavior between the two terminated employees.[86] Witnesses said that the two touched each other in a playful, sexual manner on numerous occasions, constantly told sexual jokes, and often made graphic sexual comments to each other.[87] Hall attempted to argue that her conduct might have been inappropriate but fell short of Title VII sexual harassment. The court was unpersuaded, however, and said that "an employee's complaint of harassment does not immunize her from being subsequently disciplined or terminated for inappropriate workplace behavior."[88] In fact, the court went on to say, failure to terminate Hall would probably have constituted a Title VII violation in the form of sex discrimination against the other offender.[89]

Less than a week after the *Hall* decision, the Seventh Circuit handed down *Longstreet v. Illinois Department of Corrections*.[90] Longstreet complained of two incidents within a thirty-day period, the first involving another officer who masturbated in front of her and the second involving a fellow officer who allegedly rubbed his penis against Longstreet's buttocks.[91] The court noted that both incidents, if proven, would be "close to 9's on a scale of 10," but also noted that, because the offenders were coworkers, the employer would only be liable if it negligently failed to take steps to remedy the illegal harassment.[92]

Longstreet attempted to prove negligence by showing that both offenders had harassed others before her. The court found only one prior offense with "any potential legal meat."[93] The alleged masturbator apparently offered another female officer specified amounts of money for sexual acts. When the officer complained, the miscreant was reassigned so that his target did not have to work with him again.[94]

In evaluating whether the Department of Corrections had acted negligently, the Seventh Circuit found that the its response to the earlier incident was "not obviously unreasonable."[95] Moreover, the court declined to find employers strictly liable for every second incident of harassment committed by any

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84. *Id.*
85. *Id.*
86. *Id.* at 359.
87. *Id.*
88. *Id.*
89. *Id.*
90. 276 F.3d 379 (7th Cir. 2002).
91. *Id.* at 381.
92. *Id.*
93. *Id.* at 382.
94. *Id.*
95. *Id.*

employee, particularly when the first incident was much less serious than the second. The court also noted that the case might come out differently had there been other non-hearsay complaints of harassment preceding Longstreet's complaint. However, a rule imposing strict liability on an employer whenever an employee committed a second act of harassment would force employers to discharge first-time offenders in all harassment cases.[96]

Longstreet also claimed that her reassignment to a different duty station was in retaliation for her complaints about harassment. This claim failed because the only evidence she offered of a connection between the complaint and the reassignment was timing.[97] The Court held, "[T]he transfer occurred 4 months after the second complaint. This is insufficient."[98]

D. Retaliation

1. Protected Activity.—In order to establish a prima facie case of retaliation under Title VII, a plaintiff must show that she engaged in statutorily protected expression, that she suffered an adverse employment action, and that there is a causal link between the protected expression and the adverse action.[99] During the survey period, the Seventh Circuit issued two opinions dealing with the definition of what qualifies as statutorily protected expression. In the first, *Worth v. Tyer*, the plaintiff claimed that over a two-day period her supervisor brushed up against her; stared at her breasts; stroked her face, hair, nose, backside, and leg; and put his hand down her dress and placed it on her breast for several seconds.[100] On the following day, Worth reported these actions to the local police department. She received a call the next day terminating her employment arrangement "in light of the recent circumstances."[101] She later filed an EEOC complaint and subsequently brought suit.[102]

The defendants argued that Worth had not shown that she engaged in a protected activity, because she was fired before she complained to the EEOC, and her police report did not qualify as statutorily protected expression.[103] The Seventh Circuit disagreed, quoting Title VII's provision that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ."[104] The Seventh Circuit concluded that Worth's police report fell within this "opposition" clause.[105]

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96. *Id.* at 383.
97. *Id.* at 384.
98. *Id.* (citing Sauzek v. Exxon Coal USA, 202 F.3d 913 (7th Cir. 2000)).
99. Worth v. Tyler, 276 F.3d 249, 265 (7th Cir. 2001).
100. *Id.* at 257.
101. *Id.*
102. *Id.* at 265-56.
103. *Id.* at 265.
104. *Id.* (quoting 42 U.S.C. § 2000e-3(a) (1994 & Supp. V 1999)).
105. *Id.*

The defendants offered evidence that the adverse employment action—i.e., Worth's discharge—was for a legitimate nondiscriminatory reason, but Worth countered that the statement that her firing was "in light of recent circumstances" constituted direct evidence that this reason was pretextual.[106] The supervisor lost credibility by initially denying that he ever touched the plaintiff in any manner, then later admitting that this denial was a lie.[107] The Seventh Circuit concluded that the jury's finding of retaliation was not clearly erroneous, so the district court did not err when it denied the defendant's motion for judgment as a matter of law.[108]

In another retaliation case, *Fine v. Ryan International Airlines*,[109] the airline demoted a female pilot after she failed a mandatory proficiency check.[110] She believed the test was rigged to disadvantage women, and five months later she and three female coworkers wrote a letter to management complaining that the airline treated female pilots inequitably.[111] The following month the airline discharged her after she experienced difficulty scheduling training that she needed to become eligible for promotion back to her previous position.[112]

The district court granted summary judgment to the airline on Fine's claims of sexual harassment and sex discrimination but allowed the claim of retaliation to go to a jury.[113] The jury awarded Fine $6000 in compensatory damages and $3.5 million in punitive damages, which the district court reduced to the statutory cap of $300,000.[114]

On appeal, the airline argued that the court should have been granted judgment as a matter of law in its favor on grounds that Fine did not "reasonably [believe] in good faith that the practice she opposed violated Title VII."[115] The Seventh Circuit paraphrased the airline's position as follows: "How . . . could Fine reasonably have believed she was complaining about discrimination when the district court found that she was not discriminated against as a matter of law?"[116] This argument missed the target, the court held, because it is only permissible to retaliate against someone who claims a Title VII violation if the claim is "completely groundless."[117] To be groundless, a claim must rest on facts that no reasonable person could possibly construe as a case of discrimination. The fact that a claim ultimately proves unsuccessful does not, therefore, mean

106. *Id.* at 265-66.
107. *Id.* at 266.
108. *Id.* at 266-67.
109. 305 F.3d 746 (7th Cir. 2002).
110. *Id.* at 749.
111. *Id.*
112. *Id.*
113. *Id.* at 751.
114. *Id.*
115. *Id.* at 752 (quoting Alexander v. Gerhardt Enters., Inc., 40 F.3d 187, 195 (7th Cir. 1994)).
116. *Id.*
117. *Id.* (quoting McDonnall v. Cisneros, 84 F.3d 256, 259 (7th Cir. 1996)).

that it was not protected activity.[118]

On the record presented, the court could not conclude as a matter of law that Fine had no grounds whatsoever for believing that she had suffered sex discrimination.[119] Among other things, none of her male counterparts experienced similar delays in scheduling training, and two other women who failed proficiency checks also believed that the tests were manipulated in an effort to demote female pilots.[120] Fine was called a "whiner" after she complained of sexual harassment and was treated differently from a male pilot when they asked to see their personnel files.[121] In the end, "[t]here was enough evidence for the jury to find that Fine had a good-faith objectively reasonable belief that Ryan was discriminating against her on the basis of her sex," and the court declined to disturb that finding.[122]

2. Summary Judgment Standard.—In *Stone v. City of Indianapolis Public Utilities Division*,[123] the court affirmed summary judgment against the *pro se* plaintiff without discussion or analysis, but it took the opportunity to clarify the standard for summary judgment when a plaintiff claims that he suffered retaliation based on a complaint of employment discrimination.[124] Plaintiffs in such cases may survive summary judgment using either of two approaches.[125] The more straightforward approach is to present direct evidence that he engaged in protected activity and suffered the adverse employment action as a result.[126] If he makes that showing, and it is uncontradicted, the plaintiff is entitled to summary judgment.[127]

If the defendant contradicts this evidence, the case will go to a jury unless the defendant presents unrefuted evidence that it would have taken the same action against the plaintiff even absent no retaliatory motive.[128] In this latter scenario, the defendant is entitled to summary judgment because the plaintiff was not harmed by any retaliation that may have occurred.[129] There is no bright line rule as to how much evidence the plaintiff must present when using this approach, but "mere temporal proximity" between the time of filing of the charge of discrimination and the allegedly retaliatory adverse employment action will rarely be enough, standing alone, to create a triable issue.[130]

The second approach that a plaintiff may employ to survive summary

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118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 753.
123. 281 F.3d 640 (7th Cir. 2002).
124. *Id.* at 642.
125. *Id.* at 644.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* (citations omitted).

judgment is the adaptation of *McDonnell Douglas*[131] to the retaliation context.[132] In this approach, the plaintiff must show that after filing the charge or engaging other protected activity, he alone, and not any other employee similarly situated who did not file a charge, suffered an adverse employment action despite satisfactory performance.[133] If the defendant presents no rebuttal evidence, the plaintiff is entitled to summary judgment. If the defendant presents unrebutted evidence of a legitimate nondiscriminatory reason for the action, the defendant is entitled to summary judgment. Otherwise, the question goes to a jury.[134]

This case will help practitioners because it clarifies the prima facie case elements and the burdens of proof for retaliation claims in the Seventh Circuit. In particular, it clarifies how causation plays into each of the two alternative approaches to establishing Title VII retaliation.

II. PROCEDURAL ISSUES

A. United States Supreme Court Holdings

During the survey period, the United States Supreme Court settled three procedural issues in the area of employment law. Perhaps the most significant decision came in *EEOC v. Waffle House, Inc.*[135] The question presented was whether an agreement between an employer and an employee to arbitrate employment-related disputes would serve to bar the EEOC from pursuing such victim-specific judicial relief as back pay, reinstatement, and damages.[136]

Waffle House required all prospective employees to sign an application that provided for mandatory arbitration of any dispute or claim concerning their employment. Employee Eric Baker signed the application, began working as a grill operator, and sixteen days later suffered a seizure at work. Waffle House discharged him soon after the seizure. He never initiated arbitration proceedings, but he did file a timely EEOC charge alleging a violation of the Americans With Disabilities Act (ADA).[137]

The Fourth Circuit Court of Appeals concluded that the agreement did not prevent the EEOC from bringing an enforcement action because the EEOC was not a party to the contract and had independent statutory authority to bring suit.[138] However, the court said that the EEOC was precluded from seeking victim-specific relief, in order to give effect to the policy goals expressed in the Federal Arbitration Act.[139]

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131. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
132. *Stone*, 281 F.3d at 644.
133. *Id.*
134. *Id.*
135. 534 U.S. 279 (2002).
136. *Id.* at 282.
137. *Id.* at 282-83.
138. *Id.* at 284.
139. *Id.*

The U.S. Supreme Court, in a 6-3 decision,[140] resolved a circuit split on this question.[141] The Court reviewed the history of Title VII and the Federal Arbitration Act, and noted that the Federal Arbitration Act directs courts to enforce arbitration agreements as they do other contracts, but it does not require parties who have not agreed to arbitrate to do so.[142] The Court also noted that when the EEOC does pursue victim-specific relief absent any arbitration agreement, it is "in command of the process" because it has exclusive jurisdiction over the claim for a period of time, and the employee may not prosecute the claim until the agency issue a right-to-sue letter.[143] If the EEOC chooses to file suit on its own, the employee has no independent cause of action, although she may intervene in the EEOC suit.[144]

The majority's bottom line was that "a contract cannot bind a nonparty."[145] It concluded that, as to both Title VII and the ADA, the EEOC might be acting in the public interest even when it pursued relief that was entirely victim specific. Because the EEOC's claim was not merely derivative, the employee's arbitration agreement did not stop the agency from bringing an action seeking victim-specific relief.[146]

The Court did note that an employee's conduct could limit the relief the EEOC might actually obtain.[147] For example, if Baker had entered into a settlement agreement or failed to mitigate his damages, those actions would limit the recovery available to the EEOC.[148] Otherwise, the employer would be penalized by a double recovery.[149]

In contrast to the 6-3 split in *Waffle House*, the U.S. Supreme Court Justices were in perfect harmony in the case of *Swierkiewicz v. Sorema*,[150] which dealt with the pleading requirement in employment discrimination cases. Swierkiewics, a fifty-three-year-old native of Hungary, claimed national origin and age discrimination based on his termination.[151] The district court dismissed his complaint because he did not allege circumstances supporting an inference of discrimination and therefore failed to adequately allege a prima facie case.[152] The Second Circuit Court of Appeals affirmed, and the U.S. Supreme Court granted *certiorari* to resolve a circuit split over the proper pleading standard for

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140. *Id.* at 281.
141. *Id.* at 285.
142. *Id.* at 293.
143. *Id.* at 290-91.
144. *Id.* at 291.
145. *Id.* at 294.
146. *Id.* at 296-98.
147. *Id.* at 296.
148. *Id.*
149. *Id.* at 297.
150. 534 U.S. 506 (2002).
151. *Id.* at 508-09.
152. *Id.* at 509.

employment discrimination cases.[153]

The Supreme Court adopted the majority rule that a plaintiff need not plead a prima facie case of discrimination under the *McDonnell Douglas* standard to survive a motion to dismiss.[154] Some circuits had held that a complaint was inadequate unless it contained factual allegations supporting each element of the prima facie case.[155] The Supreme Court noted that the *McDonnell Douglas* prima facie case was an evidentiary standard rather than a pleading requirement.[156] The particular requirements of a prima facie case will vary depending on the context of the claim.[157]

The employer argued that allowing lawsuits based only on conclusory allegations of discrimination to go forward would burden courts and encourage disgruntled employees to bring unsubstantiated claims.[158] In response, the Court pointed out that the plaintiff had alleged that he had been terminated based on national origin and age in violation of Title VII and the ADEA, had detailed events leading to his termination, had provided relevant dates, and had specified the ages and nationalities of at least some persons involved with his termination.[159] This, the Court held, was sufficient to satisfy liberal principles of notice pleading.[160]

The third U.S. Supreme Court decision during the survey period dealing with procedural issues was *Edelman v. Lynchburg College*.[161] That case dealt with a challenge to an EEOC regulation that allowed a charging party who had filed on a timely basis to verify that charge after the filing time expired.[162] The Court looked to the purpose of the verification provision, which was designed to "provide some degree of insurance against catchpenny claims of disgruntled, but not necessarily aggrieved, employees."[163] The Court presumed that Congress did not intend the requirement of an oath or affirmation to change the fundamental nature of Title VII as a remedial scheme in which lay persons, rather than attorneys, initiate the process.[164] Allowing the "relation back" of an oath inadvertently omitted from an original filing would help ensure that uninformed lay complainants would not forfeit their rights.[165] On the other hand, the Court agreed that a verification should be required before an employer will be called

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153. *Id.* at 509-10.

154. *Id.* at 510 n.2.

155. *Id.*

156. *Id.* at 510.

157. *Id.* at 512.

158. *Id.* at 514.

159. *Id.*

160. *Id.*

161. 535 U.S. 106 (2002), *aff'd in part, rev'd in part, remanded by* 300 F.3d 400 (4th Cir. 2002).

162. *Id.* at 109.

163. *Id.* at 115.

164. *Id.*

165. *Id.*

upon to respond to a complaint.[166] The Court held, taking both concerns into account, that the EEOC's relation back regulation was a valid and, indeed, "unassailable" interpretation of the statute.[167]

B. Seventh Circuit Decisions

Before the U.S. Supreme Court decided *Edelman*, the Seventh Circuit had an opportunity early in the survey period to address a case of first impression in the circuit: whether a district court abused its discretion by dismissing a complaint on the basis that it contained repetitious and irrelevant matter.[168] In *Davis v. Ruby Foods, Inc.*, Davis, a former Dunkin Donuts employee, filed a claim of sexual harassment against a female supervisor.[169] His twenty-page complaint was highly repetitious and included material that Judge Richard Posner characterized as "sometimes charming" (citing the plaintiff's statement that "all federal judges should have their pay by law doubled"), but irrelevant and at times "downright weird."[170] The Illinois District Court dismissed the complaint without prejudice, and Davis did not refile.[171] The Seventh Circuit did not fault him for this failure because he was acting *pro se*, noting that the district court did not explain the deficiency that led to the dismissal or how it could be corrected.[172]

The court recognized that Rule 8 of the Federal Rules of Civil Procedure requires a "short and plain statement" with each averment stated in simple, concise, and direct fashion and noted that this complaint failed that test.[173] Nonetheless, it performed the essential function of a complaint—it put the defendant on notice of the claim.[174] Indeed, the court noted, it gave the employer far more information than the civil rules require, and appeared to state a claim under Federal Rule of Civil Procedure 12(B)(6).[175] The court, therefore, sided with the plaintiff.

The court noted that dismissal of a complaint as unintelligible would be a different matter.[176] It also noted that there were limits on its holding that extraneous matter would not warrant dismissal of a complaint under Rule 8.[177] It cited as an example a Third Circuit dismissal of a complaint that ran 240

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166. *Id.*

167. *Id.* at 118.

168. Davis v. Ruby Foods, Inc., 269 F.3d 818, 820 (7th Cir. 2001), *on remand, summary judgment entered by* No. 00 C 5578, 2002 U.S. Dist. Lexis 10480 (N.D. Ill. June 11, 2002).

169. *Id.* at 819.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 820.

175. *Id.*

176. *Id.* (citing Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988)).

177. *Id.* at 821.

pages.[178] Judge Posner added one final bit of guidance, advising defense counsel not to move to strike extraneous matter in a complaint unless its presence created some prejudice to the defense.[179]

The case of *McCaskill v. SCI Management Corp.*[180] is similarly noteworthy because it offers a remarkable debate over what constitutes a judicial admission. The case involved a provision in an arbitration agreement stating that each party would pay its own costs and attorney's fees, regardless of the outcome of the arbitration. Plaintiff McCaskill argued that this provision improperly limited her ability to vindicate her rights under Title VII.

During oral argument, SCI's attorney conceded that the agreement would be unenforceable if construed to limit the plaintiff's ability to recover attorney's fees under Title VII if she prevailed. Judge Bauer found no need to proceed any further in examining whether Title VII's fee shifting provisions override arbitration agreements because in his view, that verbal admission constituted a binding judicial admission "the same as any other formal concession made during the course of proceedings."[181] He therefore concluded that the arbitration clause was unenforceable.[182]

Judge Rovner concurred in the judgment but sharply disagreed with the "unprecedented expansion of the doctrine of judicial admissions."[183] She described Judge Bauer's opinion that a single comment during oral argument qualified as an assessment of the merits of the client's case as "simply stunning."[184] She noted that this comment occurred in the context of the SCI attorney making an alternative argument, which was that the agreement should not be read as barring an attorneys fee award.[185] The attorney acknowledged at one point, in response to a question, that if the language was read to completely bar attorney's fees, that would be "inconsistent with Title VII."[186]

In Judge Rovner's view, this accurate assessment of the weakness of SCI's position was not a concession concerning a fact in issue, but a candid statement of legal opinion.[187] She did not find the comment to be "the sort of deliberate, clear, and unambiguous statement evincing an intentional waiver that has been held sufficient to constitute a judicial admission. She cited *Moose Lodge No. 107 v. Irvis*, where the U.S. Supreme Court said, "We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument."[188] Judge Rovner

178. *Id.* (citing *In re* Westinghouse Secs. Litig., 90 F.3d 696, 703 (3d Cir. 1996)).
179. *Id.*
180. 298 F.3d 677 (7th Cir. 2002).
181. *Id.*
182. *Id.*
183. *Id.* at 681.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 682 (quoting 407 U.S. 163, 170 (1972)) (other citations omitted).

concurred with Judge Bauer's conclusion, based on her own interpretation of the contract language and its legal implications.[189]

The Seventh Circuit dealt more directly with the enforceability of an arbitration contract in *Penn v. Ryan's Family Steak Houses, Inc.*[190] Rather than directly requiring employees to agree to arbitration agreements when they were hired, Ryan's required new hires to execute contracts directly with the arbitration service. The agreement specified that the employer was a third-party beneficiary of the contract. The agreement lacked specifics, and the only responsibility it assigned the arbitration service was that of providing an arbitration forum. Employees who executed the agreements received a copy of rules providing for very restrictive discovery and complete discretion by the arbitrator over the location and time of arbitration proceedings.

The Seventh Circuit declined to evaluate the merits of this system, however, because the employee never entered into an enforceable contract.[191] Applying Indiana contract law, the court examined the arrangement for mutuality of obligation.[192] Indiana contracts are unenforceable if they are too vague and indefinite for material provisions to be ascertained, and also if the arrangement fails to obligate one party to do anything.[193]

The court found that the arbitration service did not make enough of a commitment to create mutuality of obligation. Because it was required only to provide an arbitration forum but did not specify the forum or the standards, it could have fulfilled its promise with a coin toss.[194] The arbitration service's contract with the employer might have saved the arbitration provision had it done more to limit the arbitration service's ability to change procedures, but it contained no such provisions. The provision allowing either the employer or the arbitration service to cancel the agreement on ten days' notice was not a sufficient limitation.[195]

The court went on to look for mutuality in the employment application itself.[196] Again, it found nothing in Indiana law to support the proposition that a benefit received from a third party (i.e., the offer of employment by the employer) created mutuality.[197] Therefore, the court found the arbitration agreement between the employee and the arbitration service unenforceable without considering the plaintiff's additional argument that he had not knowingly and voluntarily entered into the agreement.[198]

An additional survey period Seventh Circuit opinion dealing with procedural

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189. *Id.* at 685.
190. 269 F.3d 753 (7th Cir. 2001).
191. *Id.* at 758.
192. *Id.* at 759.
193. *Id.* (citations omitted).
194. *Id.*
195. *Id.* at 760.
196. *Id.*
197. *Id.*
198. *Id.* at 761.

issues is worthy of mention. In *Beckel v. Wal-Mart Associates, Inc.*,[199] the plaintiff filed an untimely charge of sexual harassment against her former employer. She invoked the doctrine of equitable estoppel in an effort to overcome her delinquency, explaining that when she complained to higher-ups at Wal-Mart about harassment by her supervisor, she was told to discuss her allegations with no one outside top management. She said she took this to mean that she could not retain a lawyer or complain to the EEOC without risking her job.

Judge Posner stated, "If the employer merely orders the employee not to talk to anyone except the employer's managers about her allegation of sexual harassment, and she misunderstands this to mean that talking to a lawyer or filing an administrative complaint or a lawsuit would be considered employee misconduct and jeopardize her job, there is no basis for finding equitable estoppel unless the employer phrases the order in a way calculated to mislead a reasonable person."[200] Employers are entitled to take measures to prevent employees from spreading "what may be groundless rumors concerning improper conduct by another employee."[201]

Based upon her deposition testimony, the court found the plaintiff's claim that the general manager told her she would be discharged if she disclosed the incident to anyone besides management not credible.[202] Judge Posner observed that affidavits offered to contradict a deposition "are so lacking in credibility as to be entitled to zero weight in summary judgment proceedings unless the affiant gives a plausible explanation for the discrepancy."[203] An error by counsel during the deposition is not a sufficiently plausible explanation.[204]

Moreover, the court noted that even if things had occurred as the plaintiff described, equitable estoppel still would not apply, because such a threat would be grounds for a Title VII retaliation claim.[205] Therefore, a reasonable person would be encouraged to bring a claim in this scenario, not deterred.[206] Allowing a claim of retaliation to be used to extend the statute of limitations would misapply the equitable estoppel doctrine and circumvent limitations Title VII imposes on retaliation claims.[207] In short, the court held that "a threat to retaliate is not a basis for equitable estoppel."[208]

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199. 301 F.3d 621 (7th Cir. 2002).
200. *Id.* at 623.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 624.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*

III. AMERICANS WITH DISABILITIES ACT

A. U.S. Supreme Court Developments

The United States Supreme Court's most contentious survey period decision involving the ADA came in *U.S. Airways, Inc. v. Barnett*.[209] In *Barnett*, the Court grappled with the potential conflict when a disabled worker seeks assignment to a particular position as a "reasonable accommodation," in conflict with the interests of other workers who have superior rights to bid for the job under a seniority system.[210] A narrow five-justice majority held that "the seniority system will prevail in the run of cases" because a requested accommodation that conflicts with a seniority system's rules would not ordinarily be "reasonable."[211] To survive summary judgment on the question, a plaintiff would have to show special circumstances that make a seniority rule exception reasonable in that particular case.[212]

Cargo-handler Barnett injured his back and invoked seniority rights to transfer to a mailroom position. U.S. Airways' seniority system allowed others to periodically bid on that position based on seniority. When Barnett learned that at least two employees with greater seniority intended to bid on the job, he asked to remain in the position as a reasonable accommodation for his disability-related limitations. U.S. Airways turned down his request, and Barnett lost the job.

The district court granted summary judgment in U.S. Airways' favor, but the Ninth Circuit reversed in an *en banc* decision. The Ninth Circuit considered a seniority system merely one factor in the undue hardship analysis. When the case reached the Supreme Court, U.S. Airways argued, and Justices Scalia and Thomas agreed, that the requested accommodation was automatically unreasonable because it would have allowed Barnett to violate a rule that others must obey.[213] The Court's majority, however, focused on the definition of the term "reasonable," plus the fact that the plaintiff bears the burden of demonstrating that any given accommodation would be "reasonable."[214] The Court cited several considerations in support of its conclusion that an exception to a seniority system would not be reasonable in the run of cases.[215] Such systems, even if not collectively bargained, are important to employee-management relations because they contribute to employee expectations of fair and uniform treatment.[216] The resulting sense of job security and opportunity for steady, predictable advancement based on objective criteria helps encourage

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209. 535 U.S. 391 (2002).
210. *Id.* at 393.
211. *Id.* at 394.
212. *Id.*
213. *Id.* at 397-98.
214. *Id.* at 400-02.
215. *Id.* at 403-06.
216. *Id.* at 404.

employees to stay with the employer.[217]

The Court went on to give examples of situations where an exception to a seniority system might be a reasonable accommodation.[218] If the employer retains the right to change the seniority system unilaterally and does so fairly frequently, one more exception might not make much difference in employee expectations.[219] Also, the system itself might contain so many exceptions that one more would have little effect.[220]

The Court found it easier to reach consensus in the case of *Chevron U.S.A., Inc. v. Echazabal*.[221] This case involved a challenge to an EEOC regulation that allowed employers to refuse to hire an individual if his performance on the job would endanger his own health, due to a disability. All nine justices agreed that the ADA permitted the regulation.

Plaintiff Echazabal, who suffered from Hepatitis C, applied for a job at a Chevron oil refinery. He received an offer contingent on passage of a physical examination, but Chevron's doctors concluded that his condition would be aggravated by continued exposure to toxins at the refinery and the company withdrew the offer of employment.

The Ninth Circuit concluded that the EEOC's regulation creating a threat-to-self defense for employers exceeded the scope of permissible rulemaking under the ADA. The text of the ADA explicitly allows employers not to employ those whose disability would place others in the workplace at risk, but says nothing about threats to the disabled employee herself.[222]

The U.S. Supreme Court again ruled against the Ninth Circuit, thereby resolving a circuit split.[223] The Court examined the language of the statute and noted, among other things, that an interpretation limited to a threat to others in the workplace could mean that an employer could not refuse to hire a worker whose disability would threaten others outside the workplace.[224] For example, it would make little sense if a typhoid carrier could successfully sue for being denied a job as a meat packer.[225] The Court also noted that the EEOC's interpretation allowing a threat-to-self defense would avoid conflicts with OSHA regulations.[226]

A third survey period U.S. Supreme Court decision dealt with the ADA and the ongoing development of the law on what constitutes a disability under the Act. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[227] a unanimous

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217. *Id.*
218. *Id.* at 405.
219. *Id.*
220. *Id.*
221. 536 U.S. 73 (2002).
222. *Id.*
223. *Id.* at 78.
224. *Id.* at 83-84.
225. *Id.* at 84.
226. *Id.* at 84-85.
227. 534 U.S. 184 (2002).

Court concluded that the plaintiff's carpal tunnel syndrome did not constitute a disability under the Act.[228]

Plaintiff Williams worked with pneumatic tools in an automobile manufacturing plant in Kentucky. Her physician placed her on permanent work restrictions after diagnosing her with carpal tunnel syndrome and tendinitis in both arms. After two years of modified duty jobs and a workers compensation leave, Toyota assigned Williams to a quality control inspection position. This arrangement worked for a while, until Toyota implemented a process change requiring all the quality control inspectors to rotate through all of the tasks in the inspection process. One of those tasks was to wipe cars with oil, which involved working with hands and arms at shoulder height for several hours at a time.

Williams requested the accommodation of working no more than two jobs within the quality control process. When the parties could not come to an agreement, Williams filed an ADA claim arguing that her physical impairment substantially limited her in manual tasks, housework, gardening, playing with her children, lifting, and working.

The Sixth Circuit Court of Appeals focused on the "manual tasks" claim and found that Williams was disabled because her condition "prevented her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time."[229] The Sixth Circuit disregarded evidence that Williams was able to tend to her personal hygiene and perform personal and household chores.[230]

In analyzing whether Williams' conditions amounted to a disability, the Supreme Court observed that the dictionary definition of "substantially," as used in the phrase "substantially limits," excludes impairments that interfere with the performance of manual tasks in only a minor way.[231] Moreover, the word "major" in the phrase "major life activities" requires that those activities be important -- in fact, of "central importance to daily life."[232] The impact of the impairment must also be permanent or long-term.[233]

The Court noted the special necessity of an individualized assessment of an impairment's effect when the impairment is such that symptoms vary widely among individuals.[234] Carpal tunnel syndrome, the Court noted, is that type of condition.[235] The Court cited studies that one quarter of carpal tunnel cases resolve in a month without surgical treatment, although in twenty-two percent of

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228. *Id.* at 187, 202.

229. *Id.* at 192 (quoting 224 F.3d 840, 843 (6th Cir. 2000)).

230. *Id.*

231. *Id.* at 196-97.

232. *Id.* at 197.

233. *Id.* at 198.

234. *Id.* at 199.

235. *Id.*

cases the symptoms linger for as long as eight years or more.[236]

The Court also clarified its holding in *Sutton v. United Air Lines, Inc.*,[237] where the Court held that the major life activity of working is substantially limited only if the plaintiff is unable to work on a broad class of jobs.[238] *Sutton* was not intended, the Court said, to suggest that other major life activities besides working were also subject to a class-based analysis.[239]

The Court explained that the ADA does not require the analysis of whether an impairment constitutes a disability to focus entirely on the effect of the impairment in the work place.[240] It should instead focus on whether the individual has a disabling impairment in the context of carrying out the normal tasks of her daily life, rather than tasks that are unique to any particular job.[241] In this case, "repetitive work with hands and arms extended at or above shoulder levels for extended periods of time" would not be an important part of daily living for most people.[242] The court of appeals therefore erred in disregarding evidence that the respondent was able to maintain her personal hygiene and perform personal and household chores.[243] The evidence showed that she could "brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house."[244] Her condition did require her to avoid sweeping, give up dancing, require occasional help dressing, and reduce the frequency with which she played with her children, gardened, and drove long distances.[245] However, the Court concluded that these changes "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."[246]

B. Seventh Circuit Rulings on What Constitutes a Disability

During the survey period, the Seventh Circuit also added to the body of law on what constitutes a disability under the ADA. In *Furnish v. SVI Systems, Inc.*,[247] a plaintiff, Furnish, who suffered from cirrhosis caused by chronic Hepatitis B was terminated for unsatisfactory performance.[248] His position at

236. *Id.*
237. 527 U.S. 471 (1999).
238. *Toyota Motor Mfg., Inc.*, 534 U.S. at 200.
239. *Id.*
240. *Id.* at 201.
241. *Id.*
242. *Id.* (quoting 224 F.3d 840, 841 (6th Cir. 2000)).
243. *Id.* at 201-02.
244. *Id.* at 202.
245. *Id.*
246. *Id.*
247. 270 F.3d 445 (7th Cir. 2001).
248. *Id.* at 446.

SVI involved video system installation work at hotels.[249] His Hepatitis B limited his ability to travel and to keep up with his employer's installation schedule.[250]

The Seventh Circuit concluded that Furnish's ADA claim failed because the major life activity he cited as the basis for his claim—liver function—does not qualify as a major life activity under the Act.[251] Although Hepatitis B is both serious and chronic, the court did not deem liver function something "integral to one's daily existence" in the same sense as functions such as eating and working.[252] Furnish failed to assert that his condition substantially limited him in working or in any other activity. Moreover, even if liver function served as a major life activity under the ADA, the plaintiff failed to prove that his disease substantially limited his liver function, because doctors' reports characterized his liver function as "adequate" and "normal."[253] In its treated condition, the plaintiff's liver disease became dormant, and because courts examine conditions taking into account corrective or mitigating measures, he could not show any substantial limitation in liver function.

The Seventh Circuit next addressed whether diabetes was a disability under the ADA in *Nawrot v. CPC International*.[254] Nawrot's type I diabetes required him to inject himself with insulin three times daily and to test his blood sugar at least ten times daily.[255] Even with these measures, he still experienced episodes of both high and low blood sugar that affected his health, personality, and behavior. In the two years leading up to his termination, he had three diabetic episodes at work.[256]

In February 1997, when introduced to a new employee, Nawrot said "I would shake your hand but I just went to the bathroom and did not wash my hands."[257] He later blamed this strange behavior on disorientation due to hypoglycemia. He took a three-month leave of absence to attend to his health but, when he returned, he and his employer could not agree on appropriate accommodations, and Nawrot was eventually fired.[258]

Nawrot brought suit, arguing that his diabetes substantially limited the major life activities of working, thinking, and caring for himself. The Seventh Circuit agreed that Nawrot's diabetes substantially limited his ability to think and care for himself, and focused on those two major life activities.[259]

The court then went on to consider Nawrot's condition in light of mitigating

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249. *Id.*
250. *Id.* at 447.
251. *Id.* at 449.
252. *Id.* at 449-50.
253. *Id.* at 450-51.
254. 277 F.3d 896 (7th Cir. 2002).
255. *Id.* at 901.
256. *Id.*
257. *Id.*
258. *Id.* at 901-02.
259. *Id.*

measures.[260] The court noted that despite his medical regimen, Nawrot could not completely control his blood sugar level.[261] He would on occasion lose consciousness and fall and experience difficulty expressing coherent thoughts.[262] Physically, he had incurred kidney damage and nerve damage in his feet.[263]

Although the Seventh Circuit determined that Nawrot was disabled under the ADA definition, his suit failed because he was unable to show that his employer's proffered legitimate, nondiscriminatory reason for discharging him was a pretext for disability discrimination.[264] After "numerous documented occasions of inappropriate behavior," Nawrot's employer demanded that he "straighten up and fly right," but "instead he crashed and burned" when he harassed a coworker by contacting her outside of work hours in violation of the employer's explicit directive.[265] The court found that the fact that the harassment did not occur at the workplace was of no moment and held for the employer because Nawrot's discharge was unrelated to his disability status.[266]

The next opinion the Seventh Circuit issued during the survey period addressing what constitutes a disability came in *Stein v. Ashcroft*,[267] a case involving myofacial pain syndrome, which is a muscle problem that results in soreness and tenderness from repetitive muscular motion.[268] Plaintiff Stein worked for the Immigration and Naturalization Service (INS) in Chicago. She worked mostly at the INS office, but at times she would travel outside the office to perform "outreach" assignments. These excursions required moderate physical activity such as long periods of standing, carrying boxes of files and office supplies, and setting up chairs and folding tables.[269]

After Stein's diagnosis with myofacial pain syndrome, she was limited in her ability to perform heavy lifting.[270] Her supervisor eliminated her "outreach" duties, because it was not feasible to provide an assistant to do the lifting and carrying of boxes, and the INS did not want the risk of further injury to Stein. Stein filed suit under the Rehabilitation Act of 1973,[271] claiming that the elimination of her outreach duties caused her to lose opportunities for overtime pay, points necessary for promotion, and opportunities to socialize and exchange ideas.[272]

Stein argued that she was substantially limited in the major life activity of

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260. *Id.* at 904.
261. *Id.* at 905.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 907.
266. *Id.*
267. 284 F.3d 721 (7th Cir. 2002).
268. *Id.* at 723-24.
269. *Id.*
270. *Id.*
271. 29 U.S.C. § 794 (1994).
272. *Stein*, 284 F.3d at 724-25.

working and other major life activities.[273] The Seventh Circuit looked to the ADA for guidance because its definition of disability was carried over nearly verbatim from the Rehabilitation Act. The court rejected Stein's claim that she was substantially limited in the major life activity of working, because lifting and carrying heavy items on outreach assignments was only a single aspect of Stein's duties.[274] The inability to perform a single, narrow job for one employer does not establish that one is precluded from working in a broad class of jobs, as is required for protection under the ADA.[275]

The court went on to consider Stein's other alleged substantial limitations in major life activities.[276] She claimed that her condition had caused her "loss of sleep, impaired sexual relations, inability to participate in sports, inability to cut her food and inability to brush her hair."[277] The court quickly disposed of these claims, because the only evidence Stein offered was her own affidavit in which she referred to these alleged problems only in the past tense.[278] The court also cited the recent decision in *Toyota Motor Manufacturing, Inc. v. Williams*[279] for the proposition that a plaintiff claiming an impairment that substantially limits the major life activity of "performing manual tasks" must show that the limitation is long term or permanent and substantial in effect.[280]

A final survey period Seventh Circuit case involving the perimeters of disability came in *Szmaj v. American Telephone & Telegraph Co*.[281] Plaintiff Szmaj suffered from congenital nystagmus, which caused him difficulty focusing his eyes and prevented him from holding any job that required more than fifty percent of his time to be spent reading.[282] Szmaj, a long time AT&T employee, had applied for a job that required reading a computer screen for eighty percent or more of the work day. The Seventh Circuit affirmed summary judgment for AT&T, stating "we can imagine, though with some difficulty, a society of bookworms in which a person unable to read more than fifty percent of the time would be deemed unable to engage in a major activity of life. That is not our society. To be unable to read all day long is a misfortune for someone who loves to read or who wants to hold a job (a judgeship for example!) that requires continuous reading, but the ability to read all day long is not a major life activity."[283] The court sympathized with the fact that the plaintiff could not read at all without some discomfort, but noted that "discomfort and disability are not

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273. *Id.* at 725-26.
274. *Id.* at 726.
275. *Id.* at 725-26.
276. *Id.* at 726.
277. *Id.*
278. *Id.*
279. 534 U.S. 184 (2002).
280. *Stein*, 284 F.3d at 726 (citing *Toyota Motor Mfg., Inc.*, 534 U.S. 184).
281. 291 F.3d 955 (7th Cir. 2002).
282. *Id.* at 956.
283. *Id.*

synonyms."[284]

C. Temporary Light Duty Positions

One more notable Seventh Circuit ADA case during the survey period involved an employer who set aside a pool of light duty positions for employees who were recovering from various physical difficulties.[285] Plaintiff Tamara Watson, an assembly line worker, suffered a shoulder injury that restricted her ability to perform repetitive motions.[286] Her employer normally required all assembly line workers to rotate through all positions (in an effort to avoid repetitive stress injuries) but allowed Watson to perform only a limited series of tasks during her recovery. When Watson's physician imposed a permanent restriction against any tasks that required repetitive motion of her upper right arm, her employment was terminated. She sued on the grounds that the light duty position should have been assigned indefinitely as a reasonable accommodation.[287]

The Seventh Circuit held that assuming Watson was disabled (which the court deemed doubtful under *Toyota v. Williams*), it would not be reasonable to require her employer to create a new job tailored to Watson's individual abilities. Here, Watson acknowledged that job rotation was both the normal procedure and a sensible business practice, rather than a scheme to avoid ADA obligations.[288] The court considered the practice of creating a pool of light duty positions that keep experienced workers available for reassignment after a recovery period, and concluded that this procedure is exactly what the ADA encourages. Watson sought to turn this practice against the employer by claiming entitlement to occupy such a light duty (or limited task) position indefinitely.[289] The Seventh Circuit declined to punish a good deed, holding that a person is "otherwise qualified" within the meaning of the ADA only if he or she can perform a regular position with or without accommodation.[290] Watson could not do so and, instead, wanted the employer to create a different job by carving out a subset of the various assembly line tasks.[291] The court affirmed summary judgment for the employer, holding that "the ADA does not require employers to create new positions."[292]

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284. *Id.*
285. Watson v. Lithonia Lighting, 304 F.3d 749 (7th Cir. 2002).
286. *Id.* at 750.
287. *Id.* at 750-51.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*

IV. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Disparate Impact

The debate continues on whether disparate impact claims are viable under the Age Discrimination in Employment Act (ADEA). In March 2002, the U.S. Supreme Court heard oral arguments in *Adams v. Florida Power Corp.*[293] That case was brought by 117 employees who were displaced during a series of reorganizations and workforce reductions. The plalintiffs were among the seventy percent of affected Florida Power workers who were over forty years of age.[294] These employees claimed that their employer's action had a disparate impact on workers over forty, because a seemingly neutral policy fell more harshly on that group and, they argued, there was no valid business reason for the disparity.[295] The district court initially allowed the case to proceed as a class action, but later reversed its position and held that the ADEA required proof of intentional discrimination. The Eleventh Circuit Court of Appeals agreed.[296]

During oral arguments, Justice Ruth Bader Ginsberg pointed out that the core definition of discrimination in the ADEA exactly tracks Title VII language, yet Florida Power was asking that those identical words be interpreted differently.[297] Justice Sandra Day O'Connor, however, observed that the disparate impact test might be more appropriate for race discrimination than for age discrimination because of a long societal history of racial bias.[298]

Court watchers awaiting resolution of the issue were disappointed when, on April Fool's Day, the Supreme Court backed away from the issue by dismissing its writ of certiorari as improvidently granted.[299] Some commentators viewed this as a victory for older workers generally, although a defeat for these particular plaintiffs, because it appeared that the court conservatives would probably have had the votes to affirm the Eleventh Circuit ruling, had certiorari not been dismissed.[300]

The Seventh Circuit has taken a position similar to that of the Eleventh Circuit. In *Miller v. City of Indianapolis*,[301] the court declined to decide whether disparate impact claims could be prosecuted under the Uniform Services Employment and Reemployment Rights Act[302] (USERRA), because the case

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293. Linda Greenhouse, *Supreme Court Hears Arguments on Major Issues in Age Bias Law*, N.Y. TIMES, Mar. 21, 2002, at A33.

294. *Id.*

295. *Id*.

296. *Id*.

297. *Id*.

298. *Id*.

299. 535 U.S. 228 (2002).

300. Gina Holland, *Court Will Not Rule in Age Case*, ASSOCIATED PRESS, Apr. 1, 2002.

301. 281 F.3d 648 (7th Cir. 2002).

302. 38 U.S.C. § 4301 (1994 & Supp. V. 1999).

failed on the facts.[303] The court took the opportunity to reiterate that, "[a]t some future time it may become necessary for us to decide whether a disparate impact claim can be prosecuted under USERRA. We do not always allow such claims. For instance, we do not recognize disparate impact claims in this circuit under the Age Discrimination in Employment Act."[304]

B. Pretext and Independently Sufficient Reasons

In *Lesch v. Crown Cork & Seal Co.*,[305] a sixty-one-year-old comptroller with nearly forty years of service was forced into early retirement during a corporate reorganization, and a fifty-year-old was appointed head of the new accounting group.[306] The Seventh Circuit bypassed an analysis of Lesch's prima facie case, stating, "It is not always necessary to march through this entire process if a single issue proves to be dispositive. Here, as is often true, that issue is pretext or the lack thereof."[307]

Crown offered several justifications for its decision to discharge Lesch. The principal reason was that the comptroller position was eliminated during a phase-out of a Crown division.[308] The executive in charge of deciding who would head up the new accounting group believed the younger candidate the most obvious choice because he was most familiar with certain accounting projects, had been doing a satisfactory job for her, and was competent as an accountant to lead the group. Also, the successful candidate had a superior understanding of computers and proficiency with accounting software.[309]

On appeal, Lesch challenged some of these reasons for the retention decision, but the court noted that "he has said nothing about others. This alone dooms his effort to establish pretext. Where an employer offers multiple independently sufficient justifications for an adverse employment action, the plaintiff-employee must cast doubt on each of them"[310] The Court therefore affirmed summary judgment for the defendant.[311]

C. No State Immunity Against EEOC Suits

In *EEOC v. Board of Regents*,[312] the EEOC brought a public enforcement action on behalf of four former employees of the University of Wisconsin Press who claimed they were terminated on the basis of their age. The University of Wisconsin argued on appeal that the suit should have been barred under Eleventh

303. *Miller*, 281 F.3d at 651.
304. *Id.*
305. 282 F.3d 467 (7th Cir. 2002).
306. *Id.* at 469.
307. *Id.* at 472-73.
308. *Id.*
309. *Id.* at 474.
310. *Id.* at 473.
311. *Id.* at 474.
312. 288 F.3d 296 (7th Cir. 2002).

Amendment concepts of sovereign immunity.[313]

The Seventh Circuit noted that, "[i]f this case was to be prosecuted in federal court, the EEOC had to do it. The individual charging parties were barred by the Eleventh Amendment from suing the state."[314] The court went on to note, however, that it is well established that just because states retain sovereign immunity for private lawsuits does not mean that they have similar immunity from suit by the federal government.[315] In *Alden v. Maine*,[316] the U.S. Supreme Court held that even though private suits against states were barred under the ADA, ADA standards could be enforced "by the United States in actions for money damages."[317]

The University of Wisconsin argued that the nature of this case made it different because the EEOC was not seeking to remedy a pattern of intentional discrimination, but was rather "simply standing in the shoes of the [four] individuals and acting in privity with them as their representative. In other words, it is just a private suit dressed in fancy clothes."[318] The court was unpersuaded, noting that "[w]hatever wind might originally have been in the sails of this argument has been knocked out by *EEOC v. Waffle House, Inc.*"[319] In *Waffle House*, the U.S. Supreme Court upheld the EEOC's right to bring an enforcement action under the ADA on behalf of a former employee who signed a valid binding arbitration agreement.[320] The Seventh Circuit acknowledged the University of Wisconsin's argument that sovereign immunity was different and more important than the Federal Arbitration Act or arbitration agreements, but concluded that "[i]f ultimately *Waffle House* is to be distinguished from a case such as this one, that distinction should be drawn not by us, but rather by the Supreme Court."[321] The court therefore affirmed a jury verdict in favor of the EEOC.[322]

The court also addressed the University's argument that the EEOC had not established a prima facie case because it did not show that the charging parties were replaced with persons at least ten years younger.[323] The EEOC argued that prima facie case analysis was no longer relevant at that stage of the proceedings.

The Court noted authority on both sides of this issue, but went on to "look briefly" at the University's argument.[324] The University cited *O'Connor v. Consolidated Coin Caterers Corp.*, where the U.S. Supreme Court stated that a

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313. *Id.* at 299.
314. *Id.*
315. *Id.*
316. 527 U.S. 706 (1999).
317. *Id.* (citing Board of Trustees v. Garrett, 531 U.S. 356 (2001)).
318. *Bd. of Regents*, 288 F.3d. at 299-300.
319. *Id.* at 300.
320. *Id.*
321. *Bd. of Regents*, 288 F.3d at 300 (citing Agostini v. Felton, 521 U.S. 203 (1997)).
322. *Id.* at 305.
323. *Id.* at 302.
324. *Id.*

prima facie case of age discrimination required replacement of the claimant with someone "substantially younger."[325] The Seventh Circuit has defined "substantially younger" as a ten-year differential.[326] The court has also held, however, that the ten-year line is not indelible.[327]

The court, therefore, looked at other evidence offered.[328] Aside from the fact that the four oldest employees were the only ones terminated, other facts supported an inference that the choice was based on age.[329] For example, justifications for the layoff proposal were developed only after the termination decisions had been made.[330] The two decision makers acknowledged during cross examination that they were seeking a "new vision" for the Press, that bringing younger individuals into the Press was part of that vision, and that the ADEA was viewed as a "legal hurdle" to hiring replacements who would fit that new vision.[331] One decision maker expressed the opinion that the Press had not "had the vision to be agile enough" and that by terminating the charging parties, the Press would "improve that agility."[332]

The court concluded that the jury could reasonably have inferred that in this decision maker's mind, youth and agility were linked.[333] After reviewing the evidence, the Seventh Circuit concluded that the jury verdict for the EEOC was supported by the evidence, despite the fact that some of the charging parties' replacements were less than ten years younger.[334]

V. FAMILY AND MEDICAL LEAVE ACT

A. Advance Designation of Leave Not Required

In a 5-4 decision, the U.S. Supreme Court struck down a Labor Department regulation requiring employers to inform employees in advance that leave would be designated as Family and Medical Leave Act (FMLA) leave in order for that leave to count toward FMLA entitlement. In *Ragsdale v. Wolverine World Wide, Inc.*,[335] plaintiff Ragsdale was diagnosed with Hodgkin's disease in 1996.[336] She became unable to work and exhausted the seven months of unpaid sick leave she was allowed under the company's policy. During this time, the company held her position open and maintained her health benefits. When Ragsdale sought an

325. *Id.*
326. *Id.* (citing Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672 (7th Cir. 1997)).
327. *Id.* (citing Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 893 (7th Cir. 1997)).
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at 303.
332. *Id.*
333. *Id.*
334. *Id.* at 299, 301, 304.
335. 535 U.S. 81 (2002).
336. *Id.* at 84-85.

additional thirty days of leave after missing thirty consecutive weeks of work, the company advised her that she had exhausted her available leave. Ragsdale contended that she was still entitled to twelve weeks of leave under the FMLA because she had never received specific notice that any part of her absence would count as FMLA leave.[337]

Labor Department regulations require employers to inform their workers about the FMLA and how it relates to the company's leave plan.[338] Employers must give written notice that leave has been designated as FMLA leave within a reasonable time after the employee provides notice of the need for leave under the regulations, with a reasonable time defined as "one or two business days if feasible."[339]

The majority of the Court held that the categorical penalty of denying an employer any credit for leave granted prior to notice of the designation of the leave was contrary to the remedial design of the FMLA.[340] The penalty lacked any connection to whatever prejudice the employee might have suffered.[341] In Ragsdale's case, she had not shown that she would have taken less time off, or taken time on an intermittent basis, had she received timely notice.[342]

The government argued that a categorical penalty was easier to administer than a fact-specific inquiry, but the Court was unpersuaded, pointing out that the FMLA requires a retrospective, case-by-case analysis.[343] The Court also noted that the Labor Department regulation could have a backlash effect because employers seeking to avoid the problem that Wolverine experienced might simply discontinue voluntary programs providing leave in addition to the FMLA's minimum requirement.[344] They would then simply designate all leave as FMLA leave, and employees would end up worse off.[345]

B. Calling in Sick Is Insufficient FMLA Notice

In *Collins v. NTN-Bower Corp.*,[346] the plaintiff had accumulated twelve informal and four formal warnings for attendance problems before she called in sick for two days and was discharged. Collins argued that in situations where advance notice by the employee of the need for leave is impossible, the employee is never required to advise the employer that the leave request falls within the FMLA.[347]

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337. *Id.*
338. *Id.* at 86-87.
339. *Id.* at 87 (quoting 29 C.F.R § 825.301(c))
340. *Id.* at 88.
341. *Id.*
342. *Id.* at 90.
343. *Id.* at 91.
344. *Id.* at 94-96.
345. *Id.*
346. 272 F.3d 1006 (7th Cir. 2001).
347. *Id.* at 1008.

The Seventh Circuit disagreed, holding that in such situations notice may be delayed, but it is not entirely excused.[348] In other words, "notice is essential even for emergencies," although it may occur after the fact.[349] The court repeated its previous position that the ADA protects only persons who are capable of working full time over the long run, and noted that courts have been similarly "reluctant to read the FMLA as allowing unscheduled and unpredictable, but cumulatively substantial, absences."[350]

Collins' argument suffered from two flaws. First, she notified her employer simply that she was "sick," which does not imply any serious health condition.[351] Second, her deposition testimony that she was incapacitated by depression between ten percent and twenty percent of the time placed her squarely on the horns of a dilemma. Had she truly been incapacitated to that extent, in an unpredictable manner, she would not have qualified for protection under either the ADA or the FMLA. Her actual attendance record showed, however, that she had not missed even ten percent of scheduled work days prior to her discharge, which tended to show that her depression was not as severe as this testimony would indicate.[352] Moreover, the Court noted that "depression did not come on [Collins] overnight."[353] When Collins became aware of her condition, she could have given her employer timely notice of her need for time off to allow the employer to evaluate whether she qualified for FMLA leave.[354]

C. "No Call No Show" Policy Upheld in FMLA Context

In *Lewis v. Holsum of Ft. Wayne, Inc.*,[355] an asthma sufferer who worked at a bakery was put under medical restrictions to avoid flour dust.[356] On December 17, 1997, she suffered an asthma attack at work and checked into a medical center for four days. Her husband delivered an "off work slip," dated December 18, 1997, which stated that Lewis was currently hospitalized but did not state when Lewis would return to work. Lewis did not work as scheduled on December 19, 1997, and the company counted that time as FMLA leave.[357]

Lewis took scheduled vacation time from December 21, 1997, through December 28, 1997. Her next three scheduled work days were December 29, December 31, and January 2, 1998. Lewis did not report to work on any of those days, nor did she call to explain her absence.[358] On January 2, 1998, Holsum

348. *Id.*
349. *Id.*
350. *Id.* at 1007.
351. *Id.* at 1008.
352. *Id.* at 1007-08.
353. *Id.* at 1008.
354. *Id.*
355. 278 F.3d 706 (7th Cir. 2002).
356. *Id.* at 708.
357. *Id.*
358. *Id.*

terminated Lewis' employment in accordance with its company rule, contained in a collective bargaining agreement that supported discharge for a three consecutive days of no call, no show.[359]

Lewis eventually obtained an off work slip verifying her need for time off from December 17, 1997, through January 8, 1998. Her husband delivered the slip to the company on January 2, 1998. This was insufficient under the company policy, however, which required a call in advance of the absence.[360]

The court repeated its prior holding that the FMLA does not "authorize employees on leave to keep their employers in the dark about when they will return."[361] Lewis admitted that she had access to a telephone during her absence, and also that her husband, who also worked at Holsum, could have notified the company of his wife's reason for absence. The company was therefore within its rights to enforce its policy of discharge for a three day no call, no show.[362]

VI. WORKER'S COMPENSATION

A. Determination of Independent Contractor Status

In 2001, the Indiana Supreme Court established two different tests for evaluating employment status. In *GKN Co. v. Magness*,[363] the court adopted a seven-factor test for determining whether an individual was an employee of two different employers. The court listed the following factors: "(1) right to discharge; (2) mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries."[364] The court stated further that "the right to control the manner and means by which the work is to be accomplished is the single most important factor in determining the existence of an employer-employee relationship."[365]

Later in the year, the court addressed the question of employee versus independent contractor status in *Moberly v. Day*.[366] The ten factors Indiana courts will consider are as follows:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation with reference to whether in the locality the work is usually done under the direction of the employer or by a specialist without

359. *Id.* at 709.

360. *Id.* at 710.

361. *Id.* (citing Gilliam v. UPS, Inc., 233 F.3d 969, 971 (7th Cir. 2000)).

362. *Id.*

363. 744 N.E.2d 397 (Ind. 2001).

364. *Id.* at 402 (citing Hale v. Kemp, 579 N.E.2d 63, 67 (Ind. 1991)).

365. *Id.* at 403.

366. 757 N.E.2d 1007 (Ind. 2001).

> supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for person doing the work; (f) the length of time for which the person is employed; (g) the method of payment whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.[367]

In *Expressway Dodge, Inc. v. McFarland*,[368] the Indiana Court of Appeals had occasion to decide which (if either) of these tests to use in determining whether an individual was an independent contractor for purposes of the worker's compensation statute. McFarland was a retiree who drove vehicles to and from auctions and other sites for an automobile dealership. He was free to accept or reject assignments, but when he did accept he typically began and ended his day at the dealership and wore clothing bearing the Expressway logo. Expressway neither designated routes nor directed the speed and manner of McFarland's driving. Mileage reimbursement was based on the most direct route, and Expressway provided insurance, dealer plates, gasoline, meals, and occasionally lodging. On December 15, 1998, when McFarland was seriously injured in a one-car accident while driving to an auction on Expressway's behalf, the question arose whether McFarland was an employee subject to the Worker's Compensation provisions, or an independent contractor.[369]

The court of appeals held that the ten-factor restatement test followed in *Moberly v. Day* was most appropriate in the worker's compensation context and, in a 2-1 opinion, proceeded to apply the ten factors.[370] The majority determined that Expressway did not control the work details. However, this was not dispositive because the type of work did not require significant supervision, especially given McFarland's experience.[371] Although the work was intermittent, it had been going on for years, McFarland had no particular skill or separate business. The work was part of the dealership's regular business and the company provided all instrumentalities needed. McFarland was paid by the job without tax withholdings, although the parties had treated the arrangement as an employment relationship. The majority concluded, all things considered, that McFarland was acting as an employee when he was injured.[372]

Judge Friedlander dissented, agreeing generally with the discussion of applicable law but disagreeing over the conclusion to be drawn from applying the ten-factor test.[373] He identified control as the single most important factor based

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367. *Id.* at 1110 (quoting RESTATEMENT (SECOND) OF AGENCY, § 220(2) (1958)).

368. 766 N.E.2d 26 (Ind. Ct. App. 2002).

369. *Id.* at 28.

370. *Id.* at 30.

371. *Id.*

372. *Id.* at 32.

373. *Id.* at 33.

on *GKN Co. v. Magness*, and noted that McFarland was always free to decline any trip without adverse consequences. If he chose to accept, his instructions were limited to destination and did not cover manner of driving, route, or even departure time. Because of this "largely unfettered discretion," in Judge Friedlander's view McFarland was not an employee of Expressway.[374]

This case is helpful because it identifies the relevant factors for consideration in distinguishing between employees and independent contractors for purposes of Indiana worker's compensation. It is also instructive by illustrating the judgment involved when applying those factors. The panel evaluated a fairly complete set of facts, with one judge arriving at a conclusion exactly opposite that reached by the other two. Indiana employers will welcome the clarification as to what test will apply, but must keep in mind that, because the analysis is extremely fact specific, the conclusion will often be difficult to predict.

B. Coverage During Arrivals and Departures

During the survey period, the Indiana Court of Appeals dealt with two cases involving worker's compensation coverage for employees arriving at or departing from the employer's premises. In *Milledge v. The Oaks*,[375] a decision subsequently vacated when the Indiana Supreme Court granted transfer,[376] a diabetic housekeeper at a living center twisted her ankle in the parking lot as she arrived for her shift. The injury gradually grew worse until she developed gangrene that required the amputation of her leg below the knee. The Worker's Compensation Board found as fact that the asphalt surface of the parking lot was clean, dry, level, and free of debris, and denied coverage on the basis that Milledge's injury did not arise out of and in the course of her employment because there was no causal connection between the sprained ankle and her work duties.[377]

On appeal, the focus was whether the injury occurred "in the course of" and also "arose out of" employment, because both elements must be present for the injury to be compensable.[378] The court agreed that an injury "arises out of" employment when a causal nexus exists between the injury and the duties or services that the injured employee performed.[379] The court also noted that risks are incidental to employment if they are not risks to which the public at large is subjected.[380]

In this case, the evidence showed that the clear, level, and dry parking lot did

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374. *Id.*

375. 764 N.E.2d 230 (Ind. Ct. App. 2002). This decision has since been overruled by Indiana Supreme Court, 784 N.E.2d 926 (Ind. 2003).

376. 774 N.E.2d 518 (2002).

377. *Milledge*, 764 N.E.2d at 232-33.

378. *Id.* at 234.

379. *Id.*

380. *Id.* at 235 (citing Smith v. Bob Evans Farms, Inc., 754 N.E.2d 18, 25 (Ind. Ct. App. 2001)).

not pose any risk to Milledge or, indeed, to anyone else.[381] Although the injury arose in the course of Milledge's employment, nothing about the work premises or the nature of her work caused or contributed to the injury, so the injury did not "arise out of" employment.[382] The Indiana Court of Appeals held that the Worker's Compensation Board did not err when it denied Milledge's application for benefits.[383]

Seven months later, the court of appeals addressed an injury that occurred during an employee's departure. In *Price v. R&A Sales*,[384] a controversy arose when an employee was injured while leaving the building right after he had been terminated. Price had reported to work the morning of August 17, 1998, and within ten minutes his supervisor advised him of his immediate discharge. He left the office and started to walk down a flight of steps to leave the premises, but slipped and fell backwards, allegedly sustaining injuries. R&A argued that the injuries still fell under the worker's compensation statute, despite Price's discharge prior to the injury. The company successfully filed a motion to dismiss in the trial court.[385]

The Indiana Court of Appeals looked for guidance to the U.S. Supreme Court in *Bountiful Brick Co. v. Giles* where the U.S. Supreme Court said, "[e]mployment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done."[386] The court of appeals also looked to its 1994 decision in *Burke v. Wilfong*,[387] where it deemed worker's compensation was the exclusive remedy of an employee who was injured on the employer's property ten minutes before his shift was scheduled to begin.[388] The court also observed that several other jurisdictions have held that discharge does not altogether dissolve an employer-employee relationship for worker's compensation purposes if the employee is injured within a reasonable time after termination while leaving the premises.[389]

The court of appeals concluded that, for purposes of worker's compensation, the employment relationship does not immediately terminate when the discharge takes effect. Here, Price's injuries "clearly arose out of and in the course of his employment with R&A."[390] Worker's compensation was his exclusive remedy.[391]

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381. *Id.* at 236.
382. *Id.*
383. *Id.*
384. 773 N.E.2d 873 (Ind. Ct. App. 2002).
385. *Id.* at 784.
386. *Id*. at 876 (quoting Bountiful Brick Co. v. Giles, 276 U.S. 154, 158 (1928)).
387. 638 N.E.2d 865, 868-69 (Ind. Ct. App. 1994).
388. *Price*, 773 N.E.2d at 875-76.
389. *Id.* at 876.
390. *Id.* at 877.
391. *Id.*

C. Frampton Claims by Union Workers

An additional notable survey period worker's compensation decision is *Goetzke v. Ferro Corp.*[392] Goetzke, an employee who sustained a back injury, was discharged for allegedly defrauding the company regarding the nature and extent of his injuries. The key issue that the Seventh Circuit addressed was the company's claim that former employees who were covered by collective bargaining agreements when they were discharged could not assert "Frampton claims" alleging retaliatory discharge for exercise of workers compensation rights.[393] The Seventh Circuit had previously held that Frampton claims were unavailable to such workers, but the Indiana Court of Appeals had subsequently held otherwise.[394] Because the Indiana Supreme Court had not addressed the question, the court of appeals decision was authoritative absent compelling reason for doubt, thus the Seventh Circuit reversed its position.[395]

The Seventh Circuit went on to assess the merits of Goetzke's claim that his discharge was retaliatory. The company presented evidence that within three months after back surgery, while Goetzke was still on medical leave, he was videotaped engaging a variety of activities including carrying and loading groceries into his vehicle.[396] The day before he participated in a functional capacity evaluation("FCE"), he was caught on tape working on his car, which involved leaning under the hood and pressing the hood down with both hands to close it.[397] The tape also showed him stretching across the front seat of a truck with his feet dangling awkwardly out of the vehicle.[398] Moreover, the person who performed the FCE believed that Goetzke "did magnify his symptoms and his ability may be greater than what the data on the test indicates."[399]

Although Goetzke presented various evidence in rebuttal that he was indeed severely injured, the court focused on the fairly substantial time period between Goetzke's worker's compensation claim and his termination a year later.[400] The court acknowledged that the company had evidence that Goetzke was malingering, and noted that although company officials may have been negligent by not reading the entire FCE report, or in relying only on the portions they considered unequivocal, "Indiana law does not render a company liable for retaliatory discharge because it used poor judgment."[401] The court concluded that Goetzke could bring a Frampton claim even though he was covered under a

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392. 280 F.3d 766 (7th Cir. 2002).

393. *Id.* at 772-73.

394. *Id.* at 773 (citing Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511, 517 (7th Cir. 1985); Bentz Metal Prod. Co. v. Stephans, 657 N.E.2d 1245 (Ind. Ct. App. 1995)).

395. *Id.*

396. *Id.* at 770.

397. *Id*.

398. *Id* at 770-71.

399. *Id.*

400. *Id.* at 775.

401. *Id.* at 776.

collective bargaining agreement, but that his claim failed because he did not show that the company's asserted reason for his discharge, i.e., fraud, was pretextual.[402] In arriving at this conclusion, the court looked to Title VII case law where "the question is not whether [the evaluation was] *right* but whether the employer's description . . . is *honest*."[403]

VII. OTHER STATE LAW DEVELOPMENTS

A. Amount of Payments Under the Wage Payment Statute

The most significant employment law decision by the Indiana Supreme Court during the survey period was an interpretation of Indiana's Wage Payment Statute, which provides treble damages as the penalty for failure to pay amounts due on a timely basis.[404] Dr. Robert Steele had an employment agreement with the Hospital. In the third year of that agreement, the Hospital became concerned that certain payments under the agreement ran afoul of proposed regulations issued by the Federal Healthcare Financing Administration. When the Hospital began withholding these amounts, Steele filed suit alleging breach of contract. The Hospital responded that the Wage Payment Statute, on which Steele's claim was based, governed only the frequency and not the amount that employers must pay employees. Because the Hospital had paid at the appropriate intervals, it argued that it could not be liable for the treble damages.[405]

The court looked to the language of the statute, which provides that an employer "shall pay each employee at least semi-monthly or bi-weekly, if requested, the *amount due* the employee."[406] The statute goes on to say, "payment shall be made for *all wages* earned to a date not more than ten (10) days prior to the date of payment."[407] The court took the view that the phrases "all wages" and "amount due" established, by their plain, ordinary and usual meaning, that the legislature intended this statute to govern both frequency and amount of payment.[408]

The court went on to note that this interpretation avoided an absurd result. If the statute governed only frequency of payment, employers could easily avoid liability by paying a nominal amount such as one dollar either bi-weekly or semi-monthly, without regard to the true amount owed.[409] The court also noted that the Wage Payment Statute was the appropriate vehicle for Steele's claim, because it covers current employees and those who have voluntarily left employment

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402. *Id.* at 776-77.

403. *Id.* (quoting Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992)).

404. St. Vincent Hospital & HealthCare Center, Inc. v. Steele, 766 N.E.2d 699 (Ind. 2002).

405. *Id.* at 701.

406. *Id.* at 702 (citing IND. CODE § 22-2-5-1(a) (1998) (emphasis added)).

407. *Id.* (emphasis added).

408. *Id.* at 703-04.

409. *Id.* at 704.

temporarily or permanently.[410] The Wage Claim Statute, which the Hospital invoked and which requires that claims be submitted to the Indiana Department of Labor as a prerequisite to filing a complaint in court, applies to employees who have been separated from work by their employer and those whose work has been suspended as the result of an industrial dispute.[411]

The court did leave one question unanswered. The Hospital had argued at the court of appeals that it should not be subject to treble damages because it had a good faith basis for withholding the amount of wages at issue.[412] The court of appeals rejected the notion of any good faith exception to the Wage Payment Statute. Upon transfer, the Hospital did not challenge the court of appeals' decision on that point, and the Indiana Supreme Court specifically expressed no opinion on that issue.[413]

B. Interviewing Adverse Former Employees

The day after the Indiana Supreme Court decision in *Steele*, the Indiana Court of Appeals handed down a notable decision in *P.T. Barnum's Night Club v. Duhamell*.[414] In this case, a bachelorette party guest suffered injury when a male entertainer fell while trying to lift her. In the ensuing litigation, her attorney sought to interview a former employee who had been acting as general manager of the club on the night of the accident. The attorney asked the former employee whether he was represented by the club's counsel. The employee said he was not and eventually signed an affidavit, which the club later moved to strike.[415]

The club looked to Indiana Rule of Professional Conduct 4.2, which states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[416] The court of appeals considered the American Bar Association's position on this rule as applied to former employees, and went on to survey various other jurisdictions' approaches.[417] After discussing these various points of view, the court joined the majority of jurisdictions in holding that Rule 4.2 does not prohibit an attorney from contacting a former employee of an adverse party.[418]

The court did acknowledge the risks that such contacts create, particularly the possibility that such *ex parte* interviews could result in disclosure of

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410. *Id.* at 705 (citing IND. CODE § 22-2-5-1(b)).
411. *Id.* (citing IND. CODE § 22-2-9-2(a) (b)).
412. *Id.* at 702 n.2.
413. *Id.*
414. 766 N.E.2d 729 (Ind. Ct. App. 2002).
415. *Id.* at 731.
416. *Id.* at 732.
417. *Id.* at 733-36.
418. *Id.* at 737.

information covered by an attorney-client privilege.[419] It invited the Indiana Supreme Court to use its rulemaking authority to consider the question, but held that "Rule 4.2 contains no limitations on the contacts an attorney may make with the former employee of an adverse party."[420]

Within a month, this holding was being applied in federal court.[421] The EEOC filed a motion for leave to conduct an *ex parte* interview with one of Dana Corporation's former employees in a racial harassment suit.[422] The district court noted that the question of who may be contacted under Rule 4.2 is frequently litigated and reviewed both Seventh Circuit district court case law and the recent court of appeals determination.[423] Dana Corporation argued that because the former employee had managerial responsibilities, *ex parte* contacts should be barred. The court noted that Dana did not, however, contend that any information the employee might provide would be either imputed to Dana or binding upon Dana.[424] Moreover, Dana did not argue that the *ex parte* communication could result in disclosure of confidential, classified, or privileged information.[425]

The court concluded that absent any specific reason for prohibiting *ex parte* contact with the former employee, particularly privileged communication, the EEOC's motion for leave to interview should be granted.[426]

C. Wrongful Termination and Refusal to Incur Personal Liability

In August 2002, the court of appeals took on the timely topic of corporate officer responsibility. In *McGarrity v. Berlin Metals, Inc.*,[427] the plaintiff was hired as CFO of a corporation and, he claimed, soon discovered that his new employer was falsifying its property tax returns to understate tax liability.[428] McGarrity refused to go along, and the company owner responded by outsourcing preparation of the returns and refusing to provide McGarrity with a copy. McGarrity obtained the information from the local taxing authority, calculated the tax liability as understated by at least $66,000, and lost his job shortly thereafter.[429]

The Indiana Court of Appeals reviewed some common law exceptions to

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419. *Id.*

420. *Id.*

421. EEOC v. Dana Corp., 202 F. Supp. 2d 827 (N.D. Ind. 2002).

422. *Id.* at 828.

423. *Id.* at 829-30.

424. *Id.* at 830 (citing *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996) and *Brown v. St. Joseph County*, 184 F.R.D. 246 (N.D. Ind. 1993) for the proposition that "former employees cannot bind the corporation").

425. *Id.*

426. *Id.*

427. 774 N.E.2d 71 (Ind. Ct. App. 2002).

428. *Id.* at 74.

429. *Id.* at 75.

Indiana's baseline employment-at-will rule.[430] The relevant exception in this case was that an employee who claims that he or she was discharged for refusing to commit an unlawful act that would result in personal liability may sue for wrongful discharge.[431] McGarrity could have committed a Class C felony by certifying the company's financial statements as accurate to company lenders if he knew that the tax liability was significantly understated.[432] He could also have been liable for tax evasion and conspiracy.[433]

The court distinguished McGarrity's situation from that of an employee who refuses an order to violate public policy without incurring personal liability.[434] It had previously held in *Campbell v. Eli Lilly & Company* that no employment-at-will exception covers those situations.[435] Here, however, the court of appeals sent the wrongful termination claim back for jury trial.[436]

The court also reconsidered a jury verdict in favor of the employer on McGarrity's breach of contract claim.[437] This claim was based on assurances the employer allegedly provided when recruiting McGarrity that company employees left only of their own accord.[438] McGarrity and his wife testified that they both told the company owner that they were interested in the relocation and job change only if the new employment would be permanent, and were assured that it would be.[439] Indiana also recognizes an exception to the employment-at-will doctrine if the employer knows the employee had a former job with assured permanency and accepted a new position only upon receiving assurances that the new employer would guarantee similar permanency.[440] Then, the employee may be fired only for good cause.[441]

The trial court instructed the jury that the company could not terminate McGarrity, assuming he proved a promise of permanent employment, as long as McGarrity was "performing the job as he was sought out to do. There must [have been] some good reason to have him fired apart from whim."[442] The court of appeals agreed with McGarrity that this instruction did not define the term "good cause" with sufficient particularity, and sent the question back for retrial.[443]

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430. *Id*. at 76-77.
431. *Id.* at 76.
432. *Id*. at 78.
433. *Id*. at 77-78.
434. *Id*. at 78.
435. *Id.* (citing 413 N.E.2d 1054 (Ind. Ct. App. 1980)).
436. *Id*. at 79.
437. *Id*. at 75, 80.
438. *Id.* at 79.
439. *Id.* at 77-78.
440. *Id.* at 81.
441. *Id.*
442. *Id.* at 82.
443. *Id.*

VIII. OTHER NOTABLE CASES

In *Muick v. Glenayre Electronics*,[444] the Seventh Circuit provided employers some reassurance against claims of invasion of privacy. Muick was employed by Glenayre at the time he was arrested on charges of receiving and possessing child pornography. Federal law enforcement authorities asked Glenayre for a laptop computer it furnished Muick for use at work.[445] Glenayre retrieved the computer from Muick's work area, but refused to hand it over to the federal authorities until they produced a warrant, because it contained confidential corporate information.

The Seventh Circuit gave short shrift to Muick's claim that Glenayre had invaded his privacy.[446] Judge Posner acknowledged that there could in some circumstances be a right of privacy in employer-owned equipment furnished to an employee for use in the place of employment.[447] For example, Judge Posner said, an employer might equip an employee's office with a safe or file cabinet or other receptacle in which to keep his private papers, so that the employee could reasonably assume that the contents of the safe were private.[448] Here, however, Glenayre had announced that it could inspect the laptops furnished for employees, which destroyed any reasonable expectation of privacy.[449] The bottom line for Judge Posner was that "the laptops were Glenayre's property and it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions . . . ."[450]

CONCLUSION: THE WATCH LIST

The United States Supreme Court continues to show a high level of interest in employment law and has accepted five cases for review during the 2003-2004 term. These cases involve issues ranging from the burden of proof in a "mixed motive" case to the substantive elements of a claim under the ADEA. The Court's rulings on these and other issues could further alter the legal landscape for practitioners in this evolving area of the law.

The issues before the U.S. Supreme Court in its upcoming term include:

Does the ADEA prohibit "reverse age discrimination"?[451]

Dennis Cline brought a claim under the ADEA on behalf of himself and other similarly situated employees after his employer, General Dynamics Corporation, and the labor union, the United Auto Workers, entered into a new collective bargaining agreement that eliminated certain retirement benefits for workers

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444. 280 F.3d 741 (7th Cir. 2002).

445. *Id.* at 742.

446. *Id.* at 743.

447. *Id.*

448. *Id.* (citations omitted).

449. *Id.*

450. *Id.*

451. Cline v. General Dynamics Land Systems, 296 F.3d 466 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 1786 (2003).

under 50 years old.[452] Cline argued that provision of benefits solely to those over the age of 50 constituted illegal discrimination based on age.[453] Creating a circuit split, the Sixth Circuit ruled that the ADEA creates a cause of action for so-called "reverse age discrimination"[454]—invalidating policies that favor older workers over their younger (but also over 40) counterparts.[455] If upheld, the decision could render illegal early retirement programs and other seniority-based programs that advantage older employees.[456]

Can a defendant remove a FLSA claim to federal court?[457]

Breuer sued in state court claiming unpaid wages and other damages under the FLSA and his employer removed the lawsuit to federal court pursuant to 28 U.S.C. 1441 and 1446.[458] Breuer moved to remand the case, arguing that the FLSA falls within an exception to the removal statute[459] because the act provides that a FLSA action "may be maintained" in state court.[460] The Eleventh Circuit rejected this argument and held that removal was proper.[461] In doing so, however, the Eleventh Circuit noted the discord in the federal courts over this issue. The Eleventh Circuit actively encouraged the Supreme Court to grant review over its decision, commenting that, "it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard."[462]

What is the proper standard of review for a denial of benefits under an ERISA plan when the Plan Administrator also serves as the funding source?[463]

Kenneth Nord sued the Black & Decker disability plan, claiming that a denial of disability benefits violated ERISA.[464] Although the Plan granted absolute discretion to the Plan Administrator to resolve claims for benefits, Black & Decker served as both the Plan Administrator and the funding source for the Plan.[465] The Ninth Circuit ruled that this dual role created an apparent "conflict

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452. *Id*. at 467-68.

453. *Id*. at 468.

454. The Sixth Circuit expressly rejected the label "reverse discrimination," but acknowledged that it was a "commonly held belief" that the term could describe the theory presented in the case. *Id*. at 471.

455. *Id*. at 469-70.

456. *See id*. at 466 (Williams, J., dissenting).

457. Breuer v. Jim's Concrete of Brevard, 292 F.3d 1308 (11th Cir.), *cert. granted*, 123 S. Ct. 816 (2003).

458. *Id*. at 1308.

459. 28 U.S.C. 1441(a) allows removal "except as otherwise expressly provided by Act of Congress."

460. *Id*. at 1308.

461. *Id*. at 1309.

462. *Id*. at 1310.

463. Nord v. Black & Decker Disability Plan, 296 F.3d 823 (9th Cir. 2002), *cert. granted*, 123 S.Ct. 817 (2003).

464. *Id*. at 827.

465. *Id*. at 828.

of interest." The court further concluded that the apparent conflict, coupled other evidence of inconsistencies and irregularities in the administration of the claim, invalidated the Plan language granting discretion to the Plan Administrator and mandated application of a "de novo" standard of review.[466] Applying this new standard, the Ninth Circuit reversed the entry of summary judgment for the Plan Administrator and directed the entry of summary judgment for the employee.[467] As this decision illustrates, the standard of review in a denial of benefits case can be outcome-determinative. If upheld, the Ninth Circuit's ruling could make it significantly easier for claimants to prevail in certain types of benefits litigation.

Does the decision not to rehire a recovered addict who previously quit in lieu of discharge violate the ADA?[468]

Hernandez, a former employee of Hughes Missile Systems (Raytheon),[469] tested positive for cocaine use and then resigned his employment "in lieu of discharge."[470] Later, after successfully completing a rehabilitation program, Hernandez applied for reemployment.[471] Raytheon rejected his application pursuant to a company policy that employees who quit in lieu of discharge are not available for rehire.[472] The Ninth Circuit ruled that this policy effectively discriminated against employees regarded as disabled or with a record of disability (recovered addicts).[473] The Supreme Court's ruling in this case could shed light on the issue of whether neutral policies may be invalidated because they have unintended consequences that, if intended, could violate the ADA.

When is it proper to give a "mixed motive" instruction in an employment discrimination case?[474]

In the third Ninth Circuit decision to be accepted for review next term, the Ninth Circuit ruled that it would not distinguish between "direct evidence" and "indirect evidence" for purposes of deciding whether it was proper for the district court to give a "mixed motive" instruction in a discrimination case.[475] The Ninth Circuit's survey of decisions from other jurisdictions on this point revealed extensive disagreement and confusion on this subject, which the court described as "a quagmire that defies characterization."[476] The Ninth Circuit ultimately ruled, in a divided en banc decision, that "Congress did not impose a special or

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466. *Id*. at 830-31.

467. *Id*. at 832.

468. Hernandez v. Hughes Missile Sys., 292 F. 3d 1038 (11th Cir. 2002), *cert. granted sub nom.* Raytheon Co. v. Hernandez, 123 S.Ct. 1255 (2003).

469. Subsequent to the events that gave rise to the litigation, Hughes was acquired by Raytheon Company. *Id*. at 1038 n.1.

470. *Id*. at 1040.

471. *Id*.

472. *Id*.

473. *Id*. at 1044.

474. Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 816 (2003).

475. *Id*. at 850.

476. *Id*.

heightened evidentiary burden on the plaintiff in a Title VII case in which discriminatory animus may have constituted one of two or more reasons for the employer's challenged actions."[477] The Ninth Circuit opined that the approach was "consistent with recent Supreme Court cases underscoring that no special pleading or proof hurdles may be imposed on Title VII plaintiffs."[478] It is yet to be seen, however, whether the Supreme Court will agree with the Ninth Circuit's analysis.

477. *Id*.
478. *Id*.