SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

SUSAN W. KLINE*

INTRODUCTION

The employment law highlight of the 1999 survey period was the U.S. Supreme Court's decision, embodied in three separate opinions, that mitigating measures are considered in determining whether a plaintiff is entitled to protection under the Americans With Disabilities Act.[1] Meanwhile, the Seventh Circuit Court of Appeals took on the Great Taco Chips Caper and the Coffee Room Rebellion, and issued other significant decisions in various substantive and procedural areas of employment law. Although most employment law developments occur in the federal courts, there was some legislative and judicial action of interest to Indiana employment law practitioners at the state level, as well. This Article summarizes the survey period decisions of greatest import for Indiana employment law practitioners, but is not intended as a complete recitation of all decisions or developments.

I. TITLE VII

A. Hostile Environment Harassment

One of the most perplexing issues under Title VII is hostile environment harassment. The U.S. Supreme Court has made clear that harassment based on protected class status is an actionable form of discrimination and that harassment may occur either in the form of specific employment decisions with immediate consequences ("quid pro quo" harassment[2]) or a hostile working environment.[3] However, harassment must be "severe or pervasive" to rise to the level of a hostile environment.[4] Questions arise because severity and pervasiveness are very much in the eye of the beholder. The Seventh Circuit handed down several decisions during the survey period that focused on drawing the line between boorish but legal behavior and actionable harassment.

In *Hardin v. S. C. Johnson & Son, Inc.*,[5] the Seventh Circuit applied the principle that obnoxious behavior does not necessarily constitute actionable behavior under Title VII. Plaintiff Hardin's production line supervisor allowed a door to close in Hardin's face, startled Hardin by driving up behind her in an

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* Judicial Clerk to Chief Justice Randall T. Shepard, Indiana Supreme Court. B.S., 1980, Butler University; M.B.A., 1992, Butler University; J.D. , 2000, Indiana University School of Law—Indianapolis. The views expressed are those of the author.

1. *See* Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999).

2. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64 (1986).

3. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998).

4. *Meritor*, 477 U.S. at 67.

5. 167 F.3d 340 (7th Cir.), *cert. denied*, 120 S. Ct. 178 (1999).

electric cart, cut her off in a parking lot, and frequently used profane and abusive language.[6] Hardin sued for harassment based on her race and gender.[7] The offensive language included comments such as telling Hardin to "get your head out of your ass" and referring to Hardin as a "dumb motherfucker."[8] The evidence showed, however, that the supervisor spoke in an equally rude manner to all employees, regardless of their race or sex. Although the nonverbal incidents were directed only at Hardin, the court did not discern any racial or gender overtones that would bring the misconduct within the scope of Title VII.[9]

In *Minor v. Ivy Tech State College*,[10] the complained-of behavior was less blatant but allegedly sexual in nature. Guidance counselor Anne Minor complained that the college chancellor had plagued her with unnecessarily frequent telephone calls that had no apparent business purpose, and had spoken in a sexy tone during those calls. Minor described the calls as "stalker-like" and as having sexual overtones, but did not provide specifics.[11] On one occasion the chancellor, upon entering Minor's office, told Minor that he had been watching her through a window, and that same month the chancellor called Minor at home to wish her Merry Christmas, although he had already extended greetings to all employees at the office.[12] The only physical act of alleged harassment occurred when the chancellor, during a meeting with Minor and another employee whom the chancellor believed were spreading rumors about him, embraced Minor, kissed and squeezed her, and asked her "Now, is this sexual harassment?"[13]

Judge Posner, in the *Minor* opinion, readily disposed of the incident cited as insufficient to constitute sexual harassment, and in the process took the opportunity to make several general points.[14] He first addressed Minor's testimony regarding comments and rumors that Minor had heard about the chancellor from other employees. Courts, Judge Posner noted, "must be particularly assiduous to enforce the hearsay rule in sexual harassment cases" in the interests of protecting the privacy of victims and also of accused harassers, who might feel forced to settle or abandon suits to avoid further reputational damage.[15] Furthermore, displaying a (metaphorically) "hands-on" management style falls short of stalking, which is actionable.[16] Judge Posner acknowledged the importance of context in evaluating remarks, but distinguished between

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6. *See id.* at 345.

7. *See id*. at 343.

8. *Id*.

9. *See id*. at 346. The court also noted that the conduct was not sufficiently severe to constitute a hostile environment. *See id*.

10. 174 F.3d 855 (7th Cir. 1999)

11. *Id*. at 856.

12. *See id*.

13. *Id*. at 857.

14. *See id*. Although some of the alleged conduct fell outside the limitations period, the court concluded that even taking it into account, the claim fell short of actionability. *See id*.

15. *Id*. at 857.

16. *Id*. at 858.

objective characteristics such as accompanying gestures, facial expressions, and physical proximity between speaker and listener and "nebulous impressions concerning tone of voice, body language, and other nonverbal, nontouching modes of signaling."[17]

The Seventh Circuit has consistently made clear that sexually suggestive behavior must be fairly egregious for a plaintiff to prevail. In *Adusimilli v. City of Chicago*,[18] the plaintiff, an administrative assistant with the Chicago Police Department, complained about sexual innuendo in the form of comments and conduct. Her supervisor, claimed the plaintiff, had advised the plaintiff to break a banana in the middle rather than eat it whole, to avoid being laughed at.[19] A coworker, also concerned with the plaintiff's approach to fruit, suggested that the plaintiff wash her banana before eating it. The same coworker asked the plaintiff to explain the significance of putting one rubber band on top and another on the bottom.[20] Yet another coworker warned the plaintiff that waving at squad cars in front of the police station might lead people to believe that the plaintiff was a prostitute. Two police officers allegedly stared at the plaintiff's breasts, and one touched the plaintiff's upper arm during computer training. A third officer also stared at the plaintiff's breasts, asked another co-worker if that co-worker had worn a "low-neck top" the previous evening, and poked the plaintiff's fingers twice and her buttocks once.[21] The plaintiff reported the buttocks-poking to a lieutenant, but an investigation turned up insufficient evidence to justify corrective action. The accused poker was assigned soon after to duties that required him to work periodically at a computer terminal a few feet from the plaintiff's desk,[22] and he continued to stare at the plaintiff in an offensive manner.[23]

The court found the conduct "too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex."[24] The court characterized even the worst misconduct, the objectionable poke in the buttocks, as "relatively mild."[25] The plaintiff's argument that the City had created a hostile environment by assigning her accused harasser to work nearby was unsuccessful. The conduct that had triggered the complaint did not rise to the level of harassment, said the court, citing the often-quoted case of *Saxton v. American Telephone and Telegraph Co*.[26] In *Saxton*, a supervisor's mere presence did not create a hostile

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17. *Id*.

18. 164 F.3d 353 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 450 (1999).

19. *See id.* at 357.

20. *See id.*

21. *Id.*

22. *See id*.

23. *See id*. at 358.

24. *Id*. at 362 (quoting Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1168 (7th Cir. 1996)).

25. *Id.*

26. *Id*. (citing Saxton v. American Telephone and Telegraph Co., 10 F.3d 526, 536 n.18 (7th

environment although the supervisor had previously placed his hand on the plaintiff's leg above her knee, rubbed his hand on the plaintiff's upper thigh, forcibly kissed the plaintiff, and lurched out at the plaintiff from behind bushes.[27] Clearly, the Seventh Circuit will not interpret "severe or pervasive" in an expansive manner, and plaintiffs claiming harassment must make a very substantial evidentiary showing.

Courts are sometimes, although not always, less tolerant of harassment in the form of racial or ethnic slurs, as shown in the split opinion of *Sanders v. Village of Dixmoor*.[28] Plaintiff Sanders, a part-time police officer, was present during a transition meeting between an outgoing and an incoming Village police chief.[29] Sanders had supported the outgoing chief, who lost the position when a newly-elected mayor took office. During the discussion, Sanders interrupted several times to demand information about scheduling and about his own role after the transition. The new chief told Sanders twice that he did not wish to discuss that particular matter at that time, but Sanders persisted and, after a heated exchange, the new chief allegedly declared to Sanders, "Nigger, you're suspended."[30] Sanders brought suit for discriminatory suspension and a hostile work environment.[31]

A split panel affirmed summary judgment for the Village, on the basis that the single racial epithet did not create a hostile environment, and that Sanders waived the claim of discriminatory suspension by failing to argue that his suspension was based on race rather than on insubordination. Neither had Sanders argued constructive discharge at the trial court level.[32] Judge Evans dissented, stating that the court should be able to "tease" a discrimination claim from the allegations. In Judge Evans' view, the allegation that Sanders' white supervisor had used "as vile a racial epithet as has ever been uttered" in suspending Sanders was sufficient to create a triable issue of racial discrimination.[33]

The Seventh Circuit was even less receptive to a claim based on ethnic slurs in *Filipovic v. K & R Express Systems, Inc.*,[34] and affirmed summary judgment for the employer on a claim of national origin discrimination. Plaintiff Filipovic, a native of Yugoslavia and a Teamster, worked as a dockman.[35] Filipovic claimed that four comments by co-workers and supervisors related to his national origin, spread over the course of more than a year, created a hostile

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Cir. 1993)).

27. *See id*. (citing *Saxton*, 10 F.3d at 536 n.18).

28. 178 F.3d 869 (7th Cir.), *cert. denied*, 120 S. Ct. 529 (1999).

29. *See id*. at 869.

30. *Id*.

31. *See id*.

32. *See id*. at 870.

33. *Id*. at 872 (Evans, J., dissenting).

34. 176 F.3d 390 (7th Cir. 1999).

35. *See id*. at 393.

environment.[36] The court noted that Filipovic had undisputedly participated in the name-calling among co-workers.[37] Furthermore, the comments were "few in number, were not physically threatening, were spread out over more than a year, and were relatively mild compared to epithets that can be lodged against other racial, ethnic and religious groups."[38] Again citing *Saxton*, the court characterized the slurs as "simply part of the normal dock environment and [] too infrequent to constitute the 'concentrated or insistent barrage' necessary" for a hostile environment.[39]

Although the Seventh Circuit is not noted for being generously disposed toward hostile environment claims, two survey period cases stand in opposition to this trend. In *Smith v. Sheahan*,[40] the Seventh Circuit reversed summary judgment for the Cook County Sheriff's Department although the plaintiff's case rested on a single incident of harassment.[41] Smith, a female guard at the county jail, was violently assaulted by Gamble, a male guard, who was convicted for criminal assault as a result of the incident.[42] Smith and Gamble had argued, and Gamble called Smith a "bitch," threatened to "fuck [her] up," pinned her against a wall, and twisted her wrist hard enough to draw blood and to later require corrective surgery for ligament damage.[43] Smith complained to her employer, but the response was "an institutional shrug of the shoulders," with no disciplinary action, although Smith and Gamble were kept separate thereafter.[44] A departmental investigator downplayed the seriousness of the incident and jokingly advised Smith to "kiss and make up" with Gamble.[45] Smith offered affidavits from six other female guards as proof that Gamble targeted women for verbal abuse and physical threats.[46] Ultimately, even though management was aware of Gamble's criminal conviction, he was promoted and Smith was reassigned to guard inmates with psychiatric problems, which she considered a demotion.[47]

The district court found for the employer on the basis that sex-based harassment must be repeated to be actionable, and the plaintiff's claim was based on a single incident. A divided Seventh Circuit panel disagreed, noting that the

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36. *See id*. at 398. Some of the disparaging names that Filipovic cited, not all of which fell within the limitations period, were "Russian dick head," "dirty Commie," "piece of shit," "sheep fucker," "fucking foreigner," and "barbarian." *Id*. at 393.

37. *See id*.

38. *Id*. at 398.

39. *Id*. (quoting Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995)).

40. 189 F.3d 529 (7th Cir. 1999).

41. *See id*. at 530-31.

42. *See id*. at 530.

43. *Id*. at 531.

44. *Id*.

45. *Id*.

46. *See id*.

47. *See id*. at 532.

standard is severe "or" pervasive.[48] The district court had also taken into account the fact that the plaintiff made the choice to work in the "aggressive setting" of the jail.[49] Again, a Seventh Circuit majority disagreed, noting that "[t]here is no assumption-of-risk defense to charges of workplace discrimination," although it did acknowledge that workplace cultures vary from setting to setting, and that juries would appropriately apply common sense, with due consideration to social context.[50] Judge Bauer dissented from the decision to remand the case for trial, stating that the proper claim was for battery, and the bullying of a woman by a man did not justify expanding the claim into a Title VII case.[51]

In contrast, in *Wilson v. Chrysler Corp.*,[52] the dispositive factor for the court was the source and quantity of alleged incidents rather than the severity of individual incidents.[53] Plaintiff Wilson, an assembly line worker, complained of sexually explicit cartoons taped to her work station on three occasions; fake penises placed on cars in her work area on two occasions, and a lewd greeting card signed by a supervisor and three foremen as well as by thirty-four co-workers.[54] Wilson also complained of a co-worker positioning his hand so that when Wilson bent down, her breasts would touch his hand.[55] Wilson cited many other incidents, including lewd comments and verbal abuse, that fell outside the limitations period, but the court noted that at least some would likely still be cognizable claims under a continuing violation theory, based on the alleged pattern of escalating misconduct.[56]

The district court concluded that the only incident that Wilson reported to her employer was the greeting card, which was not sufficient to either trigger heightened employer liability for supervisory harassment or to adequately put the employer on notice of the pattern of harassment.[57] The Seventh Circuit, however, noted that Wilson claimed that her complaints to management had been more frequent. The court also looked to the possibility of constructive notice, which "may be presumed where the work environment is permeated with pervasive harassment."[58] Based on the public, exhibitionist nature of the actions alleged, the court found it incredible that management could have been oblivious to the incidents in the plant.[59]

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48. *Id*. at 533.

49. *Id*. at 534.

50. *Id*. at 534-35; *see also* Filipovic v. K & R Express Systems, Inc., 176 F.3d 390, 398 (7th Cir. 1999) (noting that ethnic slurs were part of the normal working environment of a loading dock)).

51. *Smith*, 189 F.3d at 536.

52. 172 F.3d 500 (7th Cir. 1999).

53. *See id*. at 511.

54. *See id*. at 508, 510.

55. *See id*. at 507.

56. *See id*. at 510.

57. *See id*. at 508-09.

58. *Id*. at 509.

59. *See id*. at 509. This conclusion by the court put Chrysler in a legal quandary because

The court found a triable issue on the hostile environment claim. Wilson presented an unusual case because she claimed that she was targeted by a number of alleged harassers who launched a multifaceted campaign of frequent and almost routine hostile or abusive actions.[60] The court summarized Wilson's charge as harassment so pervasive that it was virtually an institutional norm. Therefore, the majority concluded that the evidence presented justified a trial on the merits.[61]

Wilson was less successful with her retaliation charge.[62] While on disability leave, Wilson was terminated for the stated reason that paranoid schizophrenia rendered her unqualified to return to work.[63] The majority held that Wilson was estopped from arguing her qualification to return to work by the fact that she had applied for and accepted social security disability benefits, although she later sought to retract her application and return the money.[64] A plaintiff receiving social security disability benefits may still bring a claim under the Americans With Disabilities Act (ADA) because total disability under the social security rules is defined differently from "qualified individual with a disability" under the ADA.[65] But here, the inquiries were parallel—whether Wilson did in fact suffer from paranoid schizophrenia. Wilson had not been consistent in her claim, which made the panel wary that she was "playing fast and loose with the courts."[66]

Judge Easterbrook, in a separate concurrence, was not convinced that social security disability benefits would always be incompatible with other claims based on the plaintiff's fitness to work.[67] A social security applicant might, the judge pointed out, credibly argue that he was disabled in law under the social security rules but not in fact.[68] Here, however, Wilson did not contend that anyone with paranoid schizophrenia remained employed by Chrysler, nor had Wilson sought other employment since 1991. This lack of initiative, according to Judge Easterbrook, belied Wilson's contention that she filed for social security disability benefits only out of fear of losing her employment benefits.[69]

In addition to the question of how much is enough to constitute a hostile environment, courts struggle with the issue of who qualifies as a supervisor in harassment cases. In June 1998, the U.S. Supreme Court held that employers are strictly liable for harassment committed by supervisors, even if the victim suffered no tangible adverse employment action.[70] Employers who negligently

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it could not argue that it adequately responded to complaints that it claimed it never heard.

60. *See id.* at 511.
61. *See id.*
62. *See id.* at 513.
63. *See id*. at 503.
64. *See id*. at 504, 506.
65. *Id*. at 505.
66. *Id*. at 505.
67. *See id*. at 511-12.
68. *See id*. at 512.
69. *See id*. at 513.
70. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). If the employee suffered

fail to act reasonably in discovering or remedying the harassment are also liable for harassment committed by the victim's co-workers.[71] In *Parkins v. Civil Constructors of Illinois, Inc.*,[72] the truck driver plaintiff claimed harassment in the form of foul language, sexual anecdotes and references, and unwelcome touching.[73] Two of the alleged harassers were foremen, whom the plaintiff characterized as supervisors.[74] Looking to the common law of agency, Judge Manion writing for the Seventh Circuit noted that the focal question was not job title, but actual supervisory authority.[75] Supervisory status turns on the ability to affect terms and conditions of the victim's employment, primarily the power "to hire, fire, demote, transfer, or discipline. . . ."[76] Here, because the plaintiff worked with as many as ten different foremen whose authority was limited to directing the plaintiff where to drop off or pick up a load, neither of the two alleged harassers qualified as a supervisor.[77]

A final area of developing harassment law is same-sex harassment. In 1998, the U.S. Supreme Court held that same-sex harassment comes within the scope of Title VII if it occurs "because of" the plaintiff's sex.[78] The Seventh Circuit reversed summary judgment for an employer and remanded for trial on a same-sex harassment claim in *Shepherd v. Slater Steels Corp*.[79] Plaintiff Shepherd, who worked in a manufacturing stockroom, complained of a series of statements and actions by one Jemison, the only other co-worker in Shepherd's area.[80] Jemison allegedly frequently exposed himself and fondled his own penis in Shepherd's presence. He also waved his penis inches from Shepherd's face and, upon seeing an ill Shepherd lying face-down on a bench, told Shepherd to turn over or he was "liable to crawl up on top of [you] and fuck [you] in the ass."[81] Shepherd complained to his superiors, but upon returning from a meeting in which Jemison was confronted with Shepherd's allegations, Jemison dropped his pants, shoved his thumb between his own buttocks, and then removed the thumb and flicked it in Shepherd's direction.[82] Further complaints by Shepherd were brushed off with advice to ignore the offensive conduct, and the objectionable

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no tangible adverse employment action, the employer may present an affirmative defense by showing that (1) it took reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer, or to otherwise avoid harm. *See id*.

71. *See* Smith v. Sheahan, 189 F.3d 529, 533 (7th Cir. 1999).
72. 163 F.3d 1027 (7th Cir. 1998).
73. *See id*. at 1031.
74. *See id*. at 1032.
75. *See id*. at 1033.
76. *Id*. at 1034.
77. *See id*.
78. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).
79. 168 F.3d 998 (7th Cir. 1999).
80. *See id*. at 1000-01.
81. *Id*. at 1001.
82. *See id*.

behavior continued and became more hostile.[83] Shepherd ultimately filed a sexual harassment charge with the EEOC, and a week later Jemison and Shepherd engaged in a physical fight that resulted in injuries that required medical treatment for both combatants. Although Shepherd claimed that Jemison instigated the battle by swinging a block of wood at Shepherd,[84] the employer disciplined both workers and offered a "last chance agreement" that would have separated the two but reduced Shepherd's pay rate.[85]

The district court looked to evidence that Jemison had offended female as well as male co-workers with his sexual conduct, and concluded that the harassment was not because of sex.[86] A divided Seventh Circuit reviewed the *Oncale* decision, which discusses two ways a plaintiff may establish same-sex harassment as actionable discrimination. First, credible evidence that the harasser is homosexual may justify an assumption that the harasser targeted members of his or her same sex, at least regarding proposals of sexual activity. Second, the plaintiff may show that the harassment involved gender-specific and derogatory terms that demonstrated hostility towards persons of the plaintiff's gender.

Judge Rovner, writing for the majority, did not find Shepherd's allegations to fall within either category, but also concluded that these two types of situations were exemplary, not exclusive.[87] In assessing the facts as stated by Shepherd, she found that, although the record did not demonstrate whether Jemison was gay, Jemison's behavior could be interpreted as sexual interest, which would support an inference that Shepherd was harassed because he was a man. Alternatively, a fact-finder might conclude that Jemison was simply crude and engaged in whatever behavior would cause Shepherd discomfort. This case, Judge Rovner noted, went beyond sexual references that were incidental to common workplace horseplay and crudity.[88]

In remanding for trial, the majority held that sexual statements or conduct such as saying "fuck me" or grabbing one's crotch are merely taunts with sexual content if their use has little to do with the gender of the listener or observer.[89] Such juvenile vulgarity is not actionable. If, however, "the context of the harassment leaves room for the inference that the sexual overlay was not incidental—that the harasser was genuinely soliciting sex from the plaintiff or was otherwise directing harassment at the plaintiff because of the plaintiff's sex . . . .", a triable issue of fact is raised.[90] Because the conduct complained of by Shepherd went far beyond "casual obscenity," the majority remanded for

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83. *See id*.
84. *See id*. at 1002
85. *Id*. at 1003.
86. *See id*.
87. *See id*. at 1009.
88. *See id*. at 1010.
89. *Id*.
90. *Id*. at 1011.

trial.[91] Judge Bauer dissented, as he did in *Smith v. Sheahan*, and stated his agreement with the trial court's holding that although the behavior at issue was outrageous and offensive, it was not based on gender and therefore not actionable under Title VII.[92]

B. Reverse Discrimination and Affirmative Action

The University of Wisconsin's Psychology Department voted to offer Paul Hill a tenure-track position.[93] The Dean of the College of Letters and Sciences objected because he wanted the department to hire a female instead. The Department had two positions to fill for the semester, and put forth the names of two male candidates, to which the Dean responded by e-mail "[t]wo male candidates cannot go forward."[94] The Department stood firm, the Dean blocked Hill's recommendation, and the position went unfilled. Hill sued, and the trial court upheld the University's action as a valid affirmative action plan. Thus did the Seventh Circuit, in *Hill v. Ross*, venture onto the shifting sands of when affirmative action plans are permissible.[95]

The court cited the *Bakke* principal that race (or, as in this case, sex) may be considered in a hiring decision, but cannot be dispositive unless the affirmative action plan's purpose is to correct the effects of past discrimination.[96] Judge Easterbrook described affirmative action plans as ranging along a spectrum, with detailed hiring quotas to overcome past discrimination on one end, and plans that do not involve preferential treatment, but actively seek out minority candidates, on the other. In *Hill*, the University did not claim that it adopted its hiring plan to remedy past discrimination.[97]

In ordering a remand, the court outlined the appropriate analysis, citing the U.S. Supreme Court decision in *Johnson v. Transportation Agency of Santa*

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91. *Id*. The district court disregarded some statements in Shepherd's affidavit that it ruled inadmissible as contradicting his deposition testimony, and also found that the harassment ceased when the employer completed its investigation. Furthermore, it noted that there was some evidence that the accused harasser had engaged in sexually offensive conduct in front of female as well as male employees. *See id*. at 1003. The Seventh Circuit disagreed with the first two conclusions, based on an alternative interpretation of Shepherd's deposition responses. *See id*. at 1004, 1006. As to the sexual misconduct in front of a female employee, the Seventh Circuit majority acknowledged that a factfinder could reasonably infer from this evidence that the harassment was not because of sex, but that the evidence was not compelling enough to make that conclusion inevitable. *See id*. at 1011.

92. *See id*. at 1012 (Bauer, J., dissenting).

93. *See* Hill v. Ross, 183 F.3d 586, 588 (7th Cir. 1999).

94. *Id*. at 589.

95. *See id*.

96. *See id*. (citing University of California v. Bakke, 438 U.S. 265 (1978)).

97. *See id*. at 589.

Clara County[98] for guidance.[99] Because Hill had shown that race or sex had played a part in the employment decision, the burden shifted to the University to articulate a legitimate, nondiscriminatory reason for its action. Pursuit of an affirmative action plan could, depending on circumstances, provide such a rationale. Once the University supplied an "exceedingly persuasive" justification, taking into account no record of prior discrimination, the burden would again shift to Hill to prove that the stated reason was pretextual and the plan invalid.[100]

The court went on to discuss the use and misuse of statistics in justifying hiring targets, and the particular problem of applying such targets to relatively small employee populations. The University had set a departmental hiring goal of sixty-two percent women, which was based on the male-female ratio of doctorate degrees awarded since 1980.[101] If the Department employed 250 or more professors, the court reasoned, a major variance from a sixty-two percent female hiring rate would be unexpected and require justification. However, in this case the Department had four female tenure-track faculty members out of only ten total, and was hiring for two additional positions. Although a sixty-two percent female target ratio would translate into an average of seven female professors given gender-blind hiring practices, it is still statistically unlikely that the Department would have exactly seven females out of twelve tenure-track faculty at any particular time. Therefore, imposing a hiring quota on individual departments in isolation so that each exactly mirrored the relevant population would virtually require discriminatory hiring.[102] Such a plan, Judge Easterbrook concluded, was not sufficiently justified, nor did it take gender into account in a manner narrowly tailored to a persuasive justification. The University therefore faced an uphill battle in defending its actions on remand.[103]

The Seventh Circuit also addressed the issue of reverse discrimination, and clarified the relevant standard for analyzing such cases by adopting a "background circumstances" requirement for the plaintiff's prima facie case. In *Mills v. Health Care Service Corp.*,[104] a male health care claims processor complained that female candidates received preferential treatment in promotion decisions.[105] In affirming summary judgment for the employer, Judge Flaum, writing for the panel, reviewed the *McDonnell Douglas-Burdine* method of proving discrimination via indirect evidence. A plaintiff making such a case must demonstrate that she is a member of a protected class; she applied and was qualified for an available position; she was rejected; and the position was either filled by someone outside the protected class or remained open. The burden then

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98. 480 U.S. 616 (1987).
99. *See Hill*, 183 F.3d at 590.
100. *Id*.
101. *See id*. at 588.
102. *See id*. at 591.
103. *See id*. at 592.
104. 171 F.3d 450 (7th Cir. 1999).
105. *See id*. at 453.

shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. Once the defendant states such a reason, the burden shifts back to the plaintiff to prove that the stated reason is pretextual.[106]

The problem in reverse discrimination cases is satisfying the first prong because the plaintiff is not a member of a protected class.[107] The court discussed the variants on the McDonnell Douglas test adopted by other circuits, and recognized that a plaintiff could always avoid application of the test by relying on direct, rather than indirect, evidence of discrimination to get past summary judgment.[108] The court noted that it is uncommon for employers to discriminate against majority employees, and that merely eliminating the first prong of the McDonnell Douglas test would result in majority plaintiffs having a lighter prima facie burden than protected class plaintiffs. This would not only be anomalous given that it is protected class members who have historically suffered employment discrimination, it would also weaken the screening function of the prima facie test.[109]

Therefore, the court substituted a flexible requirement that a reverse discrimination plaintiff must show "background circumstances" evidencing discrimination. This might take the form of evidence showing that the employer was inclined for some reason to discriminate against majority candidates, or that there was something "fishy" about the facts of the case.[110] The hiring of a clearly less qualified minority applicant; a strongly expressed desire to hire a minority applicant; or, as alleged in the instant case, a disproportionate hiring pattern could be sufficient.[111]

Plaintiff Mills met his prima facie burden, but failed to present adequate evidence that his employer's stated reasons for promoting a female to the position he sought were pretextual.[112] The employer stated multiple reasons for selecting the woman, including her associate's degree in computer science, her higher oral and written interview scores, and the fact that she smiled more often during her interview.[113] Mills, who needed to show that each reason advanced was pretextual, could not do so, particularly given the Seventh Circuit's frequently repeated reluctance to function as a "super-personnel department" in reviewing business decisions.[114]

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106. *See id*. at 454.

107. *See id*. at 455. Under Title VII, the protected classes are race, religion, sex, color, and national origin.

108. *See id*. at 455-56.

109. *See id*. at 457.

110. *Id.* at 455 (citing Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

111. *See id.* (citing Duffy v. Wolle, 123 F.3d 1026, 1036-37 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998)).

112. *See id*. at 460.

113. *See id*. at 458.

114. *Id*. at 459 (citing Debs v. Northeastern Illinois University, 153 F.3d 390, 396 (7th Cir. 1998)).

C. Proving Pretext, and Subjective Hiring Criteria

The issue that tripped up the plaintiff in *Mills* is one that continues to evolve and that has provided the Seventh Circuit with some of its more interesting fact patterns. *Stalter v. Wal-Mart Stores, Inc.*[115] began simply enough with a handful of taco chips.[116] Plaintiff Stalter, an African-American unloader in the night receiving department of a Wisconsin Wal-Mart store, walked into the employee break room one night and saw an open bag of chips on the counter. According to Stalter, food left open on the counter was generally considered abandoned and available to everyone. According to Wal-Mart, only food left on the tables, not the countertop, was considered abandoned. In any event, as Stalter munched, two Caucasian employees, one of whom was the rightful owner, came in and the owner retrieved her chips. Stalter's previous relationship with the two had been difficult, but he apologized for eating the chips and offered a new bag of chips or a cup of coffee as compensation. The owner told Stalter that the pilferage was "no big deal" and to "forget about it."[117]

A few days later, however, a supervisor overheard a conversation about the incident, and asked for a written account from the two Caucasian employees, in which the chip owner acknowledged that she had told Stalter to forget the incident after he apologized. Wal-Mart then, as described by the court, proceeded to build a mountain out of a molehill of chips.[118] It terminated Stalter for gross misconduct in the form of theft. During discovery, Wal-Mart disclosed that the chip owner herself had also committed an act of gross misconduct, by failing to appear at work by her scheduled start time and lying to her supervisor about why she was absent. However, the Caucasian employee was warned, not terminated. Nonetheless, the district court granted summary judgment to Wal-Mart, finding inter alia that Stalter had technically committed theft and that theft was more serious than lying to a supervisor.[119]

The Seventh Circuit reversed, holding that Stalter had made a sufficient showing that his termination was really based on race, not theft.[120] First, the victim had dismissed the incident as trivial, and the punishment was as out of proportion to the offense as "swatting a fly with a sledge hammer."[121] A Caucasian employee who committed a comparable offense got off with a warning.[122] In addition, Wal-Mart's contention that termination was mandatory for theft was contradicted by its own policy, which did not require termination for theft, but did require termination for dishonesty. Further, whether the problem was actually a theft, or merely a misunderstanding, was an issue of fact.

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115. 195 F.3d 285 (7th Cir. 1999)
116. *See id*. at 286.
117. *Id*. at 287.
118. *See id*.
119. *See id*. at 288.
120. *See id*. at 286.
121. *Id*. at 290.
122. *See id*. at 290-91.

Finally, Wal-Mart originally claimed that the victim had complained to management about the theft on her own initiative, and only later corrected this story.[123] In summary, the court found that Wal-Mart's purported reason for terminating Stalter failed the "straight-face test" and remanded for trial.[124]

The leader of the Coffee Room Rebellion was less successful in showing pretext, and in *Flores v. Preferred Technical Group*,[125] the Seventh Circuit affirmed summary judgment for the employer.[126] Plaintiff Flores, a Hispanic assembly and packing worker, and her fellow union employees were accustomed to taking work breaks whenever they wanted. Their collective bargaining agreement, however, allowed the employer to forbid unauthorized breaks, and also prohibited work stoppages and strikes. In December 1996, the employer announced that it planned to begin enforcing the ban on unauthorized breaks. But when Flores and her co-workers heard rumors that the rule was not being uniformly enforced on all shifts, they decided to take action.[127] About a dozen employees, later joined by fifteen more, stormed the break room and began to harangue three supervisors about the policy.[128]

Flores admitted to being the loudest protestor and told a supervisor who was taking names to make sure to get hers right. She was among the last to leave, and a supervisor believed that he saw Flores encouraging another group to join the protest, although Flores claimed that she was merely greeting a friend. Flores was terminated for instigating a prohibited work stoppage. Two other Hispanic protestors were not terminated over the demonstration, although one was fired later that same shift for violating a safety rule by wearing a Walkman while working, and the other was not widely regarded as being of Hispanic heritage. One non-Hispanic worker, a temporary employee, was also terminated over the protest.[129]

The employer argued that Flores could not meet her prima facie burden, because she could not show that she was meeting legitimate performance expectations when she voluntarily violated work rules.[130] The court responded that under the facts of the case, no such showing was required, and focused on the issue of whether Flores was targeted for discipline based on race. The employer's stated basis for discharge was Flores' undisputed insubordination. Furthermore, the court agreed that firing all the insurgents would disrupt operations, so that the employer could legitimately make an example of the ringleader.[131] An employer's reason for an employment action need not be reasonable; only honest, and the court declined Flores' invitation to require, as

123. *See id*. at 291.
124. *Id*. at 290, 292.
125. 182 F.3d 512 (7th Cir. 1999).
126. *See id*. at 517.
127. *See id*. at 513.
128. *See id*. at 513-14, 516.
129. *See id*. at 514.
130. *See id.* at 515.
131. *See id*.

does the Sixth Circuit, that the employer's "honest belief" be supported by particularized facts.[132] The court did note, however, that reasonable beliefs are more likely to be viewed as honestly held.[133]

Flores' case boiled down to the following: twenty-seven workers rebelled, and the only two who were recognizably Hispanic were terminated by the end of the shift.[134] The court agreed that the numbers appeared "fishy" but, because Flores failed to link her own discharge to the other termination, concluded that Flores was fired as an "agent provocateur" and not because of her race.[135]

An Italian-American plaintiff was equally unsuccessful in *Indurante v. Local 705, International Brotherhood of Teamsters, AFL-CIO*.[136] Jack Indurante was hired as a business agent for the union but soon afterwards his boss, Daniel Ligurotis, was terminated for corruption.[137] Indurante himself was fired over two years later, and claimed, based on several remarks by union managers, that he lost his job as part of a concerted plan to eliminate Italian-Americans.[138] The alleged remarks were to the effect that all the Italian union employees were "mobsters and gangsters" who were going to be fired, and that "the days of the goombahs are over."[139] All but the last remark, which occurred five months after Indurante was fired, occurred about sixteen months prior to his termination.[140] The union's stated reason for terminating Indurante and five other business agents was a general house cleaning, to purge the organization of the corruption of the Ligurotis regime.[141] The court characterized the comments as "stray remarks," i.e. biased comments by decisionmakers that were unrelated to any adverse employment action.[142] Therefore, the court concluded, they provided some, but not sufficient, evidence of pretext.[143]

Indurante pointed to one non-Italian employee, Ligurotis' personal secretary, who was not only retained but promoted, as evidence that the house-cleaning rationale was pretextual.[144] The majority was not persuaded, because Indurante had undisputedly backed the Ligurotis regime, but Indurante presented no evidence that the very few employees retained had also been Ligurotis supporters.[145]

Judge Rovner dissented, because based on the alleged references by two

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132. *Id*. at 516 (quoting Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998)).
133. *See id.*
134. *See id*.
135. *Id*. at 517.
136. 160 F.3d 364 (7th Cir. 1998).
137. *See id*. at 365.
138. *See id*. at 365-66.
139. *Id*. at 366.
140. *See id*.
141. *See id*. at 365.
142. *Id.* at 367.
143. *See id*.
144. *See id*. at 367-68.
145. *See id*. at 368.

decisionmakers to a plan to fire Italian-Americans, she considered a specific reference to the plaintiff unnecessary.[146] She observed that a remark such as "We're going to fire all of the Blacks" would almost certainly be accepted as direct evidence of discrimination, without a requirement that the remark individually refer to the plaintiff's employment situation.[147]

Another case involving pretext analysis, *Johnson v. Zema Systems Corp.*, dealt with the so-called "same-actor inference."[148] Johnson, a vice president of sales and marketing for a beer distributorship, was fired for the stated reasons of failure to meet performance expectations and implementation of a plan to reduce layers of management in the organizational structure.[149] Johnson, in support of his race discrimination claim, presented evidence that the sales force was segregated by race and that racially derogatory remarks were commonplace. Johnson also offered evidence that after his termination, his duties to supervise African-American salespersons were assigned to an African-American manager while his duties to supervise white salespersons were assigned to a white person. From this, the court concluded that a jury could find that Johnson was expected to manage and associate only with minority salespersons and that he was fired for refusing to observe these racial restrictions.[150]

The magistrate judge who initially recommended summary judgment for the employer relied partially on the "same-actor inference," reasoning that because the same person both hired and fired Johnson, the firing was unlikely to have been based on a discriminatory motive.[151] The Seventh Circuit noted the psychological assumption underlying this inference, i.e. that one would not normally hire from a group to which one has an aversion, because of the psychological cost of having to associate with someone from a disfavored group and of having to fire that person later. However, the court said, that assumption may not hold up in some circumstances, such as if the hiring supervisor expected to have minimal contact with the applicant. The court's research disclosed not a single case in any circuit in which the plaintiff had presented sufficient circumstantial evidence to survive summary judgment, but lost due to the same-actor inference.[152] The reason no such case appeared on the record, the court concluded, was that the same-actor inference is not evidence of nondiscrimination, but merely a shorthand means of describing the plaintiff's failure to make a sufficient evidentiary showing to warrant a trial on the merits.[153]

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146. *See id*. (Rovner, J., dissenting).

147. *Id*. at 369. Judge Rovner expressed her distress at the majority's citation of her opinion in *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997), which she stated did *not* stand for the proposition that generalized remarks do not constitute direct evidence of discrimination. *See Indurante*, 160 F.3d at 369 n.1.

148. 170 F.3d 734, 744 (7th Cir. 1999).

149. *See id*. at 737-38.

150. *See id*. at 744.

151. *Id*. at 744-45.

152. *See id.* at 745.

153. *See id*.

The magistrate judge had also taken note of the fact that, in this case, the "same actor" was Hispanic and, as a minority, would be less likely to discriminate against a fellow protected class member.[154] The Seventh Circuit rejected such a rule as absurd, and expressed skepticism even about the more limited assumption that members of the same race would be disinclined to discriminate against each other. Broad generalizations such as these, the court concluded, are of little use in analyzing whether a plaintiff has met her evidentiary burdens.[155] The court remanded for trial on the claim of racial discrimination.[156]

Just as plaintiffs claiming pretext face an uphill battle, so do plaintiffs who claim discrimination by the use of subjective selection criteria. In *Scott v. Parkview Memorial Hospital*,[157] the hospital implemented a social worker staff reduction by requiring all existing staff to reapply.[158] A panel of interviewers rated the candidates, and Scott's score of thirty-two fell below the passing score of thirty-nine.[159] He claimed discrimination based on sex and also based on age under the Age Discrimination in Employment Act, because younger women seemed to score higher.[160] The court, however, noted that the age differences were slight and that so few people were involved that the numbers could not be deemed significant.[161]

Scott failed to convince the court that the subjective interviewing process was a "smokescreen[] for bias" because the court noted that in many professions such processes are necessary.[162] Therefore, the court held that, "[u]nless the evidence demonstrates that an open-ended process was used to evade statutory anti-discrimination rules, subjectivity cannot be condemned."[163] The court's proper inquiry is not whether the employment decision was correct or whether the judge would have followed the same process, but whether the defendant honestly asserted that protected class played no part in its decision. Scott failed to present evidence that could support a conclusion that the hospital's selection rationale was dishonest, so the court affirmed summary judgment for the employer.[164]

D. "Same Transaction" Test for Compensatory Damage Cap

The Seventh Circuit addressed how to apply the $300,000 Title VII

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154. *Id.*
155. *See id*.
156. *See id*. at 746.
157. 175 F.3d 523 (7th Cir. 1999).
158. *See id*. at 524.
159. *See id*.
160. *See id*. at 524-25.
161. *See id*. at 525.
162. *Id*.
163. *Id*.
164. *See id*. at 526.

compensatory damage limit in *Smith v. Chicago School Reform Board of Trustees*.[165] Smith, a white high school teacher at a predominantly black school, claimed reverse discrimination based on a racially hostile atmosphere.[166] A jury awarded Smith over $2 million, but the Seventh Circuit characterized the proceedings as a "kangaroo court."[167] The district judge, combining errors of law with abuse of discretion, reacted to ongoing discovery and pretrial order skirmishes between the parties by effectively ordering the trial to go forward with evidence restricted to the plaintiff's version of events.[168] The Seventh Circuit held that the judgment could not stand, but went on to address potential damages.[169]

Plaintiff Smith, who transferred to a different school two times, claimed that she encountered discrimination at each of the three schools at which she taught. She sought damages of $300,000 per school.[170] The court looked to the plain language of the statutory recovery provision, which is stated as a single-party, not a single-claim, limit. "The unit of accounting," Judge Easterbrook stated, "is the litigant, not the legal theory."[171] The court also considered the perverse result if the limit was per claim; litigants might file multiple suits or, if stymied by claim preclusion, engage in creative pleading in pursuit of multiple awards.[172] If each racial slur could support an additional $300,000 award, the cap is pointless. The best approach, the court concluded, was a "same-transaction rule" borrowed from the law of preclusion.[173] Under such a rule, persons victimized multiple times could recover more than those injured only once. On the other hand, a single compensable incident might encompass multiple offensive acts. The court did not go on to apply this new standard to the facts of the case, leaving the issue for resolution on remand.[174]

II. AMERICANS WITH DISABILITIES ACT

A. Notable U.S. Supreme Court Decisions

The biggest Americans With Disabilities Act (ADA) news of the survey period was the U.S. Supreme Court's holding in both *Sutton v. United Air Lines, Inc.*[175] and *Murphy v. United Parcel Service, Inc.*[176] that, in determining whether

165. 165 F.3d 1142, 1149 (7th Cir. 1999).
166. *See id*. at 1144.
167. *Id*.
168. *See id*. at 1144-45.
169. *See id*. at 1148-49.
170. *See id.* at 1149-50.
171. *Id*. at 1150.
172. *See id*.
173. *Id*. at 1151.
174. *See id*.
175. 119 S. Ct. 2139 (1999).
176. 119 S. Ct. 2133 (1999).

a person has a disability under the ADA, mitigating measures must be considered.[177] Therefore, the proper analysis is whether the person is substantially limited in a major life activity when using a mitigating measure such as medication, corrective lenses, a prosthesis, or a hearing aid.[178] The Court extended this approach in *Albertson's, Inc. v. Kirkingburg*[179] to persons who have developed compensating behaviors that mitigate the effects of any impairment.[180] These decisions rejected the Equal Employment Opportunity Commission's (EEOC's) position that such mitigating measures should be disregarded in determining whether a claimant falls within the ADA's protection.

The U.S. Supreme Court also, in *Cleveland v. Policy Management Systems Corp.*,[181] held that persons who apply for and receive social security disability benefits are not automatically estopped from pursuing ADA claims.[182] Neither may courts strongly presume against benefit recipients' success on ADA claims. However, such recipients must explain why the contentions supporting the disability benefits are consistent with their assertions that they were qualified to perform the essential functions of their previous positions with or without reasonable accommodation, in order to survive summary judgment.[183]

B. Absenteeism Versus Disability as the Cause of Adverse Action

The Seventh Circuit also addressed several substantial ADA issues during the survey period. In *Foster v. Arthur Andersen, LLP*,[184] the court affirmed summary judgment for the employer.[185] Foster, a word processing specialist, was on final warning for insubordination and had been also warned that she was subject to termination if her attitude and performance showed no improvement. Two days after a counseling session at which Foster's final warning status was discussed, Foster arrived at work five minutes late wearing a splint on her hand.[186] Her supervisor asked if the splint was for carpal tunnel syndrome ("CTS"), and Foster said that she only had tendinitis. Foster did not ask for any accommodation despite the fact that she spent over ninety percent of her work day typing.[187] A month later, Foster was again late for work due to a doctor's appointment that ran longer than expected, and failed to call to inform her supervisor within the required thirty minutes of her scheduled work time. When Foster did arrive at work following the appointment, she presented a doctor's

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177. *See Sutton*, 119 S. Ct. at 2145; *Murphy*, 119 S. Ct. at 2137.
178. *See Sutton*, 119 S. Ct. at 2149; *Murphy*, 119 S. Ct. at 2137.
179. 119 S. Ct. 2162 (1999).
180. *See id*. at 2169.
181. 526 U.S. 795 (1999).
182. *See id*. at 797.
183. *See id*. at 798.
184. 168 F.3d 1029 (7th Cir. 1999).
185. *See id*. at 1036.
186. *See id.* at 1031.
187. *See id.*

note recommending a light duty assignment. Her injury was still diagnosed as tendinitis, although it was later identified as CTS.[188] Despite Foster's claim that her call was no more than six minutes late, she was terminated for failure to comply with work rules.[189]

The key issue became whether Foster was discharged "because of disability" so that she was protected under the ADA.[190] In interpreting this provision, the court looked to the Civil Rights Act of 1991 ("CRA 1991"), which covers other types of employment discrimination, but not disability discrimination. The statute was analogous, the court reasoned, because both Title VII, which was amended by CRA 1991, and the ADA use similar "because of" language.[191] CRA 1991 states that if the impermissible condition is "a motivating factor" in an employment decision, the statute has been violated. Other circuits had applied the "motivating factor" standard in ADA cases.[192] Under this standard, if the disability contributes in a significant way to the adverse employment action, an ADA violation has occurred.[193]

Here, Foster argued that the brief time period between her notice of tendinitis and her termination a day later was enough to create a triable issue on whether her request for an accommodation caused her termination. Although the court agreed that suspicious timing could be persuasive indirect evidence of discrimination, timing alone is not enough. Foster failed to otherwise link her tendinitis to her termination, and she lost on summary judgment.[194]

Absenteeism and CTS also led to an ADA claim in *Murphy v. ITT Educational Services, Inc.*,[195] in which a divided panel affirmed summary judgment for the employer.[196] Murphy, a telemarketer, worked on a flexible part-time basis, and more than one-third of the time failed to work her required minimum seventeen hours per week for reasons unrelated to her CTS.[197] Although Murphy's CTS was common knowledge at work, it did not affect her work, nor did she request any accommodation. Murphy resigned to accept a position with another company, but then learned of a potential promotion at ITT and withdrew her resignation. Murphy's final interviewer spoke with human resources personnel prior to the interview, because he was aware that Murphy had a disability and he had not interviewed a disabled candidate since the ADA went into effect.[198] This interviewer, who was the sole decisionmaker, ultimately eliminated Murphy from consideration for the promotion based on Murphy's

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188. *See id*.
189. *See id*. at 1031-32.
190. *Id*. at 1034.
191. *Id*. at 1033.
192. *Id*.
193. *See id*. at 1033-34.
194. *See id*. at 1034.
195. 176 F.3d 934 (7th Cir. 1999).
196. *See id*. at 939.
197. *See id*. at 935-36.
198. *See id*. at 936.

poor attendance record.[199]

Murphy focused on the interviewer's awareness of her disability and his inquiry about it, but the court found that the inquiry was no more than an expression of concern for conducting the interview properly. If such inquiries violated the ADA, the court noted, employers would lose whether or not they had tried to do the right thing.[200] The majority therefore found no triable issue, even though the plaintiff's attendance problems had always been excused in her telemarketing position, because such attendance habits could make the plaintiff a poor fit for the outside sales representative position.[201]

Judge Ripple, dissenting, took a different view of the facts. He noted that Murphy had met the attendance expectations of the telemarketing position and, by working more than the required hours in some weeks, averaged more than the minimum over the entire work period.[202] The decisionmaker had admittedly expressed concern to another interviewer about Murphy's disability, which led the second interviewer to suggest to Murphy that Murphy write a letter explaining why her disability did not present a hiring risk.[203] Also, the second interviewer allegedly told Murphy that Murphy was denied the promotion because of the disability. Although the majority dismissed this evidence as speculation by a non-decisionmaker, Judge Ripple gave it greater credence.[204] Taken together, Judge Ripple believed, this evidence created a triable issue of fact.[205]

Absenteeism was again the central issue in Waggoner v. Olin Corp.[206] The plaintiff, who suffered disabling "visual disturbances," began work for Olin in June 1994.[207] In January 1995, she took a two-week medical leave for psoriasis. In May 1995, she began a five and a half month medical leave because of the visual disturbances. In the fourteen months that Waggoner worked for Olin, not counting the leaves, she was late or absent forty other times. Olin terminated Waggoner for poor attendance; Waggoner claimed that the discharge was due to her disability.[208]

The court framed the issue as at what point a request for disability-related time off work crosses the reasonable accommodation line. Waggoner, the court believed, was asking that the ADA assure her a job but not require that she perform it on a regular basis. However, "in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are the result of a disability. The fact is that in most cases, attendance

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199. *See id*. at 937.
200. *See id*. at 938.
201. *See id*. at 939.
202. *See id*. at 940-41 (Ripple, J., dissenting).
203. *See id*. at 939-40.
204. *See id*. at 940.
205. *See id*. at 941.
206. 169 F.3d 481 (7th Cir. 1999).
207. *See id.* at 482.
208. *See id*.

at the job site is a basic requirement of most jobs."[209] The court went on to say that it was not establishing a bright-line rule that time off work need never be tolerated; in some cases a reasonable accommodation might even be a part-time work schedule. However, Waggoner asked too much when she sought license to miss work at any time, for any duration.[210] A plaintiff with such an erratic pattern of absenteeism is not a "qualified individual with a disability" under the ADA, and an open-ended request for time off goes beyond a reasonable accommodation.[211] Therefore, the court affirmed summary judgment for the employer.[212]

C. The ADA and the Collateral Source Rule

The Seventh Circuit addressed some narrower issues under the ADA as well. In *Flowers v. Komatsu Mining Systems, Inc.*,[213] a jury found in favor of an ADA plaintiff who had received social security disability payments after he was terminated from employment.[214] In determining damages, the court applied the collateral source rule and determined that such payments could be set off against back pay awarded for the period during which the plaintiff was a qualified person with a disability.[215]

D. No ADA Right to "Bump" Into an Occupied Position

In *Pond v. Michelin North America, Inc.*,[216] a disabled employee, as defined under the ADA, sought the accommodation of "bumping" another employee from a position as she was entitled to do under the collective bargaining agreement.[217] Rather than relying on her rights under the union contract, the employee argued that the position should be considered vacant for ADA purposes.[218] The court reviewed the baseline ADA standard that the ADA does not override bona fide seniority rights, so that bumping a more senior employee is not a reasonable accommodation. It concluded that the same "no bumping" standard should apply to less senior employees as well, although the plaintiff could still pursue her rights under the collective bargaining agreement in the proper forum.[219]

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209. *Id*. at 484.
210. *See id*. at 485.
211. *Id*. at 482, 485.
212. *See id*. at 485.
213. 165 F.3d 554 (7th Cir. 1999).
214. *See id*. at 555-56.
215. *See id*. at 556.
216. 183 F.3d 592 (7th Cir. 1999).
217. *Id*. at 594.
218. *See id*. at 595.
219. *Id*. at 596.

E. Attorney Fee Awards for Frivolous Claims

The case of *Adkins v. Briggs & Stratton Corp.*[220] is a cautionary tale for plaintiff's counsel. Plaintiff Adkins, who suffered from narcolepsy, was caught sleeping at the wheel of his forklift.[221] Adkins admitted that his employer knew nothing of the narcolepsy, which was not diagnosed until four months after the incident. Nevertheless, Adkins pursued an ADA suit, which was dismissed for failure to state a claim, whereupon the employer sought attorney fees, which the trial court denied. The Seventh Circuit noted that employers are only entitled to attorney fees for suits brought in bad faith or that are frivolous, unreasonable, or lacking in foundation.[222] But here, the court said, "[n]o matter how you slice it, Adkins' claim was frivolous."[223] Further, the same standard of frivolousness applies for motions to dismiss and motions for attorney fees.[224] Still, the award of fees is discretionary, and the court remanded for reconsideration of the motion for fees in light of its holding that "[a] district court cannot . . . backpedal from a frivolous finding on a motion to dismiss to avoid imposing fees."[225]

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Subjective Interviewing Processes

A divided Seventh Circuit panel reversed a jury verdict for an age discrimination plaintiff in *Diettrich v. Northwest Airlines, Inc*.[226] Northwest Airlines reorganized its sales force and required all its salespersons to formally re-apply and undergo personal interviews.[227] Diettrich, at age fifty-three, was the oldest of the twelve candidates interviewed, although one candidate was fifty-two and another was fifty-one. The untrained interviewer was looking for "aggressive, results-oriented people who understood the critical situation" facing the airline.[228] Diettrich was the first to interview, and because the interviewer was still developing his interviewing style, faced questions that were different from those posed to later interviewees.[229] His thirty-minute interview was also ten minutes briefer than the other interviews. Diettrich scored lowest of the twelve candidates, and the fifty-two-year-old and fifty-one-year-old were second and third lowest, respectively.[230] The youngest candidate, age twenty-eight, got

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220. 159 F.3d 306 (7th Cir. 1998).
221. *See id*. at 307.
222. *See id.*
223. *Id.*
224. *See id*.
225. *Id*. at 307-08.
226. 168 F.3d 961 (7th Cir.), *cert. denied*, 120 S. Ct. 48 (1999).
227. *See id*. at 963.
228. *Id*.
229. *See id*.
230. *See id*.

the highest score.[231] All interviewees except Diettrich were rehired, and additional positions were filled with candidates from other departments and from outside the company.[232]

Based on this circumstantial evidence, a jury returned a verdict of age discrimination.[233] The Seventh Circuit reversed, because "none of these flaws [in the selection process] has a hint of age bias to it."[234] Further, "use of a subjective, even arbitrary, selection process is not proof of discrimination."[235] The scoring pattern was equally unpersuasive to the court because a sample of twelve is too small to be statistically significant; the age-score correlation could have occurred by chance. Furthermore, two candidates of virtually the same age as the plaintiff received job offers, and the interviewer was unaware of the interviewees' ages, which made it unlikely that he singled out the eldest of the group for rejection.[236]

B. "Fungibility" Cases and the Plaintiff's Prima Facie Burden

In *Miller v. Borden, Inc.*,[237] the Seventh Circuit clarified the plaintiff's burden in a "fungibility" situation, in which a plaintiff is terminated and is not replaced but her job duties are reassigned to younger employees.[238] Plaintiff Miller, a fifty-seven-year-old sales representative, was terminated and his sales accounts divvied up between two younger employees, ages forty-seven and forty-three, one of whom had a substandard performance record.[239] Borden admitted that Miller's performance was not the basis of discharge, but said that his territory was eliminated because it had lost its viability.[240]

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231. *See id*. at 966.

232. *See id*. at 964.

233. *See id*.

234. *Id*. at 966.

235. *Id*. (citing Richter v. Hook-SuperX, Inc., 142 F.3d 1024, 1031-32 (7th Cir. 1998); Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 515 (7th Cir. 1996)).

236. *See id*. While the court reversed the jury verdict in favor of the plaintiff, the court also sharply criticized Northwest Airlines' counsel for breaching professional ethics. The district court gave Northwest permission to conduct informal juror interviews after the verdict was returned for feedback on the effectiveness of particular trial techniques. However, Northwest used this information in support of a motion to overturn the verdict, conduct the court characterized as "clearly out of bounds." *Id*. at 964. The Seventh Circuit declined to affirm the verdict as a sanction for the misconduct because the plaintiff was not prejudiced by the breach, but urged the district court, which had limited its reaction to critical comments, to reconsider harsher action. It also instructed its own court clerk to send a copy of its opinion to Wisconsin's professional responsibility board. *See id*. at 965. Judge Flaum dissented, finding the condemnation embodied in the two court opinions sufficient. *See id*. at 966-67 (Flaum, J., dissenting).

237. 168 F.3d 308 (7th Cir. 1999).

238. *Id*. at 313.

239. *See id*. at 310-11.

240. *See id*. at 311.

Generally, an Age Discrimination in Employment Act (ADEA) plaintiff must show that (1) he was age forty or over; (2) he was meeting legitimate performance expectations; (3) he was discharged or demoted; and (4) the employer sought a younger replacement. The fourth element changes if the discharge involved a restructuring in which the discharged employee's responsibilities were assumed by other employees.[241] In such cases, "the inference of discrimination [] is premised on some degree of fungibility between the terminated employee's job and the younger employee's job."[242] Therefore, a "fungibility" plaintiff need only show that she was treated unfavorably compared to a similarly situated younger employee. An employer who fires a forty-plus employee and hires or retains younger employees for positions for which the former employee was qualified, therefore, bears the burden of explaining its actions. Although the younger employees need not be under forty, they must be significantly (at least ten years) younger than the plaintiff.[243]

Here, the district court had found the younger employees who assumed Miller's accounts not similarly situated because their geographic territories were not identical to Miller's. The Seventh Circuit took a different view, focusing instead on the fact that Miller's $1 million in accounts had been divided between younger sales staff in the same general region.[244] It was enough that Miller showed that his responsibilities had been absorbed by younger employees; he did not have to show that a single salesperson took over his entire geographic territory, including all of his former accounts.[245] Therefore, the panel reversed summary judgment for the employer and remanded for trial.[246]

C. Pregnancy Discrimination Act

Two facially similar cases under the Pregnancy Discrimination Act ("PDA") resulted in different outcomes during the survey period. In *Marshall v. American Hospital Ass'n*,[247] plaintiff Marshall was hired to work in a marketing and public relations capacity by a health care society, although she had no health care experience.[248] In Marshall's interview, the society director emphasized the importance of a conference held each September by the society, which generated forty percent of the society's annual revenue. Marshall, if hired, would be responsible for much of the conference organization.[249] Marshall knew when she interviewed that she was pregnant and due to deliver in June, but did not disclose

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241. *See id*. at 313.

242. *Id*. (quoting Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324, 1331 (7th Cir. 1995) (footnote omitted)).

243. *See id.*

244. *See id.* at 314.

245. *See id*.

246. *See id*. at 315.

247. 157 F.3d 520 (7th Cir. 1998).

248. *See id*. at 522.

249. *See id*.

her pregnancy.[250]

Marshall got the job and began work in December. Two weeks after starting, she told the director that she was due to have a baby in June, and that she planned to take eight weeks off after giving birth. The director expressed concern about the effect on the conference, and indicated that another finalist for the position had not had "this issue."[251] Shortly thereafter, the director asked Marshall to draft a couple of letters and was displeased with the results.[252] A society associate director wrote a memo to the director documenting concerns about Marshall's progress in booking speakers for the conference and her relationship with others working on the project. In early February, the society fired Marshall for the stated reason that Marshall's health care inexperience made her unable to perform satisfactorily.[253]

The court discussed three types of circumstantial evidence that a PDA plaintiff may offer as direct proof of pregnancy discrimination:[254] first, suspicious timing or ambiguous statements or behavior that create an inference of discriminatory intent; second, evidence of systematically better treatment for similarly situated but non-pregnant employees; third, evidence that the plaintiff was qualified for a position but passed over for a non-pregnant employee, for stated reasons that lack credibility.[255] Marshall relied on the first approach, pointing out that her performance issues all arose after her pregnancy disclosure, and concluding that the disclosure was responsible for the director's abrupt change in attitude. [256]

The court, however, was not persuaded. Marshall not only announced a pregnancy, but also indicated that she was planning a two-month leave during the most critical time of year for the organization. Furthermore, the director who hired Marshall was aware that Marshall was trying to become pregnant, although the director did not expect an imminent delivery. Therefore, the court found, the timing of events alone was not sufficient for the plaintiff's case to survive summary judgment. The court discounted the statements the director made when she learned of Marshall's pregnancy because they were not contemporaneous with the discharge and Marshall failed to demonstrate a causal relationship.[257]

Marshall was equally unsuccessful in arguing that the stated reason for her discharge, lack of health care experience, was pretextual because the director knew of that shortcoming when she hired Marshall. The court noted that Marshall had offered assurances that she would learn the field quickly, and that Marshall had offered no evidence that she had in fact come up to speed as rapidly as promised. Overall, the court concluded, Marshall failed to show that she was

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250. *See id*. at 522-23.

251. *Id*. at 523.

252. *See id*. at 523-24.

253. *See id*. at 524.

254. *See id.* at 525 (citing Troupe v. May Dep't Stores, 20 F.3d 734, 736 (7th Cir. 1994)).

255. *See id.*

256. *See id*.

257. *See id*. at 526.

fired because she was pregnant, rather than because she was planning an extended leave during the organization's busiest work period while still in her first year of employment.[258]

In *Maldonado v. U.S. Bank*,[259] a different panel of judges focused on a fairly subtle distinction and reached an opposite conclusion from the *Marshall* court based upon apparently similar facts. Maldonado applied for a part-time teller position at the bank, and learned in her February 1997 interview that part-timers filled in for absent full-time tellers, particularly during summer vacation months.[260] Three days after the interview, Maldonado learned she was pregnant and due to deliver in July, but did not pass the information along to her prospective employer. On February 20, she began teller training and received a manual that specifically stated that employees were probationary for the first three months, and that a year's service was required for pregnancy leave. On March 3, Maldonado told her supervisor about the pregnancy. The next day, Maldonado was fired.[261] Maldonado claimed that she was told that she was terminated because of her "condition" in that the bank needed someone to work the entire summer.[262]

The court began with the premise that an employer cannot discriminate based on an assumption that pregnancy will prevent an employee from fulfilling her job responsibilities.[263] On the other hand, women claiming pregnancy discrimination bear the burden of showing that they were treated differently because of pregnancy, i.e., that pregnancy was a motivating factor for the adverse employment decision. PDA plaintiffs may offer direct proof that is incriminating itself or indirect proof that eliminates other plausible and legitimate motives for the adverse employment action.[264]

The bank did not deny that it terminated Maldonado because of her pregnancy. The court's concern was that Maldonado was not fired for excessive absenteeism, which is permissible, but for anticipated absenteeism related to her pregnancy.[265] Anticipatory adverse action might, the court noted, be allowable in some narrow circumstances, but only if the employer has "a good faith basis, supported by sufficiently strong evidence, that the normal inconveniences of an employee's pregnancy will require special treatment."[266]

Here, the court held, such a good faith basis was lacking.[267] Maldonado's supervisor did not discuss Maldonado's ability to work through her pregnancy prior to the termination, and Maldonado had asked for neither leave nor special

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258. *See id*. at 527.
259. 186 F.3d 759 (7th Cir. 1999).
260. *See id*. at 764.
261. *See id*.
262. *Id*. at 765.
263. *See id*. at 761.
264. *See id*. at 763.
265. *See id*. at 766.
266. *Id*. at 767.
267. *See id*.

treatment. In fact, Maldonado indicated that she intended to work up until her delivery and might not even carry the fetus to term.[268] The court distinguished Maldonado's situation from that of the plaintiff in *Marshall*, who asked for special treatment.[269] Therefore, the court reversed summary judgment for the employer based on the genuine issue of material fact regarding the reason for Maldonado's termination.[270]

IV. FAMILY & MEDICAL LEAVE ACT

The most significant Family & Medical Leave Act (FMLA) case during the survey period was *Haefling v. United Parcel Service, Inc.*,[271] in which the Seventh Circuit held that the FMLA definition of "serious health condition" as one that requires absence for "more than three calendar days" means three consecutive days.[272] UPS terminated Haefling, a driver, for excessive absenteeism.[273] Ten months earlier, Haefling's car had been rear-ended by a dump truck and he had suffered a neck injury. UPS attendance records showed that Haefling missed thirty-two days out of 257 scheduled days; Haefling attributed nine of the absences to his neck injury.[274]

The court looked to the FMLA's purpose, which was to cover serious illnesses lasting more than a few days. It considered unlikely the possibility "that Congress intended to elevate minor illnesses lasting a day or two to the stuff of federal litigation."[275] Therefore, FMLA plaintiffs must offer proof of incapacity spanning more than three consecutive calendar days.[276] Haefling failed to do so, or even to offer adequate proof that he suffered from a "serious health condition" as defined under the FMLA.[277]

V. FAIR LABOR STANDARDS ACT

A. Compensation for On-Call Time

Two survey period cases dealt with the ongoing issue of compensation for on-call time. In *DeBraska v. City of Milwaukee*,[278] the City implemented a policy that required police officers who were off work for illness or injury to remain at home unless granted permission to go out for purposes such as seeing a doctor,

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268. *See id*. at 767-68.
269. *See id*. at 767.
270. *See id*. at 768.
271. 169 F.3d 494 (7th Cir.), *cert. denied*, 120 S. Ct. 64 (1999).
272. *Id*. at 499.
273. *See id*. at 495.
274. *See id*. at 496-97.
275. *Id*. at 499.
276. *See id*.
277. *Id*. at 500.
278. 189 F.3d 650 (7th Cir. 1999).

buying groceries, or attending religious services.[279] Nearly 1900 officers sued, claiming that because their activities were severely restricted, the time at home should be compensated as "on call" time.[280] With straight pay for the normal eight-hour work day, and time and one-half for the remaining sixteen hours of the day, the officers sought thirty-two hours of pay for each day of sick leave, and even more on weekends. [281]

Judge Easterbrook, writing for a unanimous panel, quickly disposed of the plaintiffs' claim, on the basis that an officer who is sick or injured is not fit for work and therefore is not "engaged to wait" for a work assignment.[282] He went on to impliedly endorse the policy itself, stating that "[i]t is the physical limitations that confine the officer to home; all the Police Department does is demand that officers end their leave, and come back to work, when they are at last able and eager to roam about like healthy people."[283]

A group of emergency medical technicians ("EMTs") were equally unsuccessful in persuading Judge Easterbrook in *Dinges v. Sacred Heart St. Mary's Hospitals, Inc*.[284] The EMTs, who received $2.25 per hour of on-call time, were required to arrive at the hospital within seven minutes of receiving a page. The EMTs averaged one call to work every other fourteen to sixteen hour on-call period.[285]

Although the EMTs argued that a seven-minute response time was less time than any appellate court had found sufficient to allow "effective" use of time for personal pursuits, Judge Easterbrook did not find the response time dispositive.[286] He noted that the entire city where the hospital was located was within a seven-minute radius of the hospital, so that the EMTs could spend their on-call time at home or elsewhere around the community. The EMTs focused on restricted activities, such as using a noisy lawn mower whose sound would drown out a page; attending concerts at which pagers were prohibited; and shopping outside the city.[287] The hospital emphasized available activities such as cooking, eating, sleeping, exercising, doing housework, and attending children's sports activities.[288] Overall, Judge Easterbrook concluded, although seven minutes might be a minimum, it was enough given the facts of the case to allow effective use of the on-call time for personal activities.[289]

In his analysis, Judge Easterbrook characteristically focused on the deal the parties had struck. In close cases, he said, private arrangements should be

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279. *See id*. at 651.
280. *Id.*
281. *See id*.
282. *Id.* at 652.
283. *Id*.
284. 164 F.3d 1056 (7th Cir. 1999).
285. *See id*. at 1057.
286. *Id*. at 1058.
287. *See id*. at 1057.
288. *See id*. at 1058.
289. *See id*. at 1059.

enforced.[290] Further, if the EMTs were treated as working while on-call, and therefore eligible for full pay, the hospital would logically react by eliminating the on-call program and hiring additional EMTs to be on the premises at all times, to eliminate premium overtime pay. The hospital would incur higher costs as a result, but EMTs like the plaintiffs would either receive less pay or spend more hours at the hospital, so both sides would be less well off.[291] The Fair Labor Standards Act (FLSA), Judge Easterbrook concluded, does not require such an inefficient result.[292]

Police officers also brought suit in *DiGiore v. Ryan*,[293] which centered on the general principle that the FLSA does not allow exempt employees' pay to be "docked" for partial day absences, work rule violations, or other reasons related to work quality or quantity.[294] The Illinois State Police Department had accident, physical fitness, and disciplinary policies that applied to both exempt and non-exempt employees, and that allowed discretionary suspensions without pay.[295] The plaintiffs pointed to five instances from 1989 through 1991 in which exempt employees been suspended without pay, including some split-week suspensions. In 1997, prior to the suit, the Department had determined that its actions had been improper, and compensated the officers for the lost pay.[296]

The court held that a general policy that creates a theoretical possibility of impermissible pay deduction does not violate the exemption standards of the FLSA. An employee must either show an actual practice of deduction or a policy that creates a "significant likelihood" of improper salary deductions by "effectively communicat[ing] that deductions will be made in specified circumstances."[297] Here, the policies at issue applied to all Department employees, but the Department had a review procedure to ensure that application of the policies to individual situations complied with the FLSA.[298] Furthermore, the five improper deductions fell short of an actual practice of improper salary deductions and, even if they had risen to that level, they were rectified within the "window of correction" allowed under the FLSA.[299] Thus, the court affirmed summary judgment for the Department.[300]

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290. *See id.*
291. *See id.*
292. *See id*.
293. 172 F.3d 454 (7th Cir. 1999).
294. *Id*. at 462.
295. *See id*. at 457-58.
296. *See id*. at 458.
297. *Id*. at 462 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).
298. *See id*. at 463.
299. *Id*. at 464.
300. *See id*. at 467.

B. Gross Revenue Test Inapplicable to Retaliation Claims

In *Sapperstein v. Hager*,[301] the court held that an employee may bring a retaliation claim under the FLSA even if the employer's gross revenues fall below the jurisdictional minimum of $500,000.[302] Plaintiff Sapperstein, a mechanic, reported his employer to the Illinois Department of Labor for allegedly violating state and federal child labor and minimum wage laws.[303] The business's manager filed an affidavit stating that gross annual sales for the relevant year were $497,253. The district court dismissed for lack of subject matter jurisdiction.[304] A unanimous Seventh Circuit panel reversed, although it noted that factual determinations related to jurisdiction are usually afforded great deference.[305] Here, however, the court found abuse of discretion in crediting the affidavit of a biased witness, without offering the plaintiff an opportunity to contest the assertion, particularly given how close the reported revenues were to the jurisdictional minimum.[306]

Furthermore, the court found an alternative basis for jurisdiction. The FLSA prohibits "any person" from discharging or discriminating against an employee for filing a complaint under the FLSA.[307] Although "employer" is defined as an enterprise with at least $500,000 in gross annual sales, there is no similar dollar requirement to qualify as a "person."[308] Furthermore, corporations, as well as individual named defendants, fall within the definition of "persons."[309] The FLSA does not require that the complaint result in a finding that the Act was actually violated; it is enough if the plaintiff believed in good faith that a violation might have occurred. Furthermore, the court held, filing a claim with a state's labor department qualifies as such a protected activity. Accordingly, the plaintiff's retaliation claim was remanded for trial.[310]

C. Indiana Developments

Although most employment law developments occur at the federal level, the Indiana General Assembly did enact an employment-related statute during the survey period. The new law, which became effective July 1, 1999, limits the number of hours sixteen- and seventeen-year olds may work during school weeks.[311] These teens may work only thirty hours per week.[312] However, if the

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301. 188 F.3d 852 (7th Cir. 1999).
302. *See id*. at 854-55.
303. *See id*. at 854.
304. *See id*. at 855.
305. *See id.* at 856 (citing Olander v. Bucyrus-Erie Corp., 187 F.3d 599, 607 (7th Cir. 1999)).
306. *See id*.
307. *Id*.
308. *Id*.
309. *Id*.
310. *See id*. at 857.
311. *See* IND. CODE § 20-8.1-4-20 (Supp. 1999).
312. *See id.* § 20-8.1-4-20(f), (g).

employer has written permission from the child's parent or legal guardian, the child may be employed up to forty hours during a school week[313] and up to forty-eight hours in a non-school week.[314] Previously, no permission was required for work up to forty hours a week.[315]

The law also clarified that sixteen- and seventeen-year-olds may not work past 10:00 p.m. on nights following a school day.[316] With permission, seventeen-year-olds may work until 11:30 p.m., and on two nonconsecutive school nights may work as late as 1:00 a.m.[317]

During the survey period, the Indiana Supreme Court also contributed to the body of employment law when it decided a case that dealt with employer liability to employees of independent contractors. In *Carie v. PSI Energy, Inc.*,[318] PSI Energy ("PSI") had outsourced certain equipment maintenance to an independent contractor.[319] One task required the removal of a cover and attached fixture from a large piece of equipment, by means of a forklift. Plaintiff Carie was working on a crew assigned to this task, under the supervision of a foreman who knew that the cover was not self-supporting without the forklift. Another crew member removed the cover and fixture with a PSI forklift, but the forklift stalled and the foreman left to find a PSI employee to fix the forklift, telling his crew to "leave it alone, don't touch it."[320]

While the foreman was gone, PSI mechanics arrived and provided directions for driving the forklift without stalling.[321] Another forklift came along and needed to pass, and Carie's co-worker removed the forklift hooks from the cover and fixture so that he could back the forklift up and clear a passage.[322] The cover and fixture, left unsupported, fell over and seriously injured Carie and another co-worker.[323]

The court began with the general rule that employers are not liable for negligence by independent contractors whom they hire. However, Indiana recognizes five exceptions to this general rule, including the "due precaution" exception which comes into play if an act to be performed will probably result in injury to others absent due precautions.[324] The essence of this exception, the court noted, is the foreseeability of a peculiar risk and the concomitant need for

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313. *See id.* § 20-8.1-4-20(j).

314. *See id.* § 20-8.1-4-20(k).

315. *See It's Up to Parents: Draw the Line on Teen Work Hours*, S. BEND TRIB., Sept. 21, 1999, at A10.

316. *See* IND. CODE § 20-81-4-20(h).

317. *See id.* § 20-8.1-4-20 (*l*).

318. 715 N.E.2d 853 (Ind. 1999).

319. *See id*. at 854.

320. *Id*.

321. *See id*.

322. *See id*. at 854-55.

323. *See id*. at 855.

324. *Id*.

some special precautions.[325] The question then became whether PSI should have foreseen that the maintenance task would probably result in the type of injury the plaintiffs suffered unless due precaution was taken. The court concluded that it was not foreseeable that a forklift would stall while moving the cover and fixture, and that an employee of the independent contractor would then move the forklift so as to leave the cover and fixture unsupported.[326] Thus, a unanimous court reversed the court of appeals and affirmed the trial court's grant of summary judgment for PSI.[327]

D. Good Friday Holiday For State Employees

The Indiana Civil Liberties Union ("ICLU") took on Indiana's policy of giving state employees Good Friday off as a legal holiday in *Bridenbaugh v. O'Bannon*.[328] The ICLU argued that the policy violated the Establishment Clause of the First Amendment to the U.S. Constitution.[329] The Seventh Circuit upheld the policy.[330]

The ICLU argued that the practice, in effect since 1941, lacks any secular justification, and has the principal or primary effect of advancing religion.[331] The Attorney General's office responded that, because Lincoln's Birthday and Washington's Birthday have been moved by the governor and are thus observed by state employees on the day after Thanksgiving and the day before or after Christmas, Good Friday provides the only holiday for the four months between Martin Luther King, Jr.'s Birthday and Memorial Day. The valid secular justification, therefore, was providing a long spring weekend for state employees in order to boost their morale and productivity.[332] The State also submitted evidence that Good Friday makes sense; over thirty percent of Indiana schools are closed that day and forty-four percent of employers in a nine-state region, including Indiana, allow their employees the day off. Therefore, state employees are more likely to have children out of school and spouses off work that day.[333] The court analogized the policy to previously-upheld Sunday closing laws; because the fact that the chosen day of rest coincides with a day of religious observance by most Christians does not render Sunday closing laws illegal.[334] It also noted that, although there are few secular aspects to Good Friday, there are many secular aspects to Easter, so that a long Easter weekend is comparable to

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325. *See id*. at 856.
326. *See id*. at 857.
327. *See id*. at 858.
328. 185 F.3d 796 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1267 (2000).
329. *See id*. at 796.
330. *See id*.
331. *See id*. at 797-98.
332. *See id.* at 797.
333. *See id*. at 799.
334. *See id*. at 800.

an extended holiday at Thanksgiving or Christmas.[335]

The ICLU argued that the holiday advances religion, and the court agreed that it made things easier for those employees wishing to attend religious services. However, the court noted that the same is true of Thanksgiving and Christmas, and the fact that the state practice harmonized with the tenets of certain religions does not violate the Establishment Clause.[336] Furthermore, Indiana does not promote the religious aspects of the day, unlike its endorsement of Dr. Martin Luther King Jr.'s principles in connection with Martin Luther King Jr.'s Birthday. Thus, a divided panel affirmed that Indiana did not violate the Establishment Clause by giving its employees Good Friday off. Judge Fairchild dissented.[337]

VI. PROCEDURAL ISSUES, INCLUDING SOVEREIGN IMMUNITY

A. Sovereign Immunity

In June, 1999, the U.S. Supreme Court decided *Alden v. Maine*,[338] in which a 5-4 majority held that, under the Eleventh Amendment, Congress lacked the power to subject the states to suit under the Fair Labor Standards Act ("FLSA") in either federal or state court.[339] The petitioners, a group of probation officers, had sued the state of Maine in federal court claiming unpaid overtime wages under the FLSA.[340] The court dismissed the case when the U.S. Supreme Court announced its decision in *Seminole Tribe of Florida v. Florida*,[341] holding that Congress lacks the power under Article I of the U.S. Constitution to abrogate the States' sovereign immunity from suits commenced or prosecuted in federal courts.[342] Following the dismissal, the probation officers brought suit in state court, but the suit was dismissed under the doctrine of sovereign immunity. The Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."[343] Therefore, the petitioners had no

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335. *See id*. at 801.

336. *See id*.

337. *See id*. at 802, 804 (Fairchild, J., dissenting) (arguing that Good Friday does not have the relevant attributes of Sundays, Christmas, and Thanksgiving in that "it is a day of solemn religious observance, and nothing else. . . ." (quoting Metzl v. Leininger, 57 F.3d 618, 620 (7th Cir. 1995))).

338. 119 S. Ct. 2240 (1999).

339. *See id*. at 2246.

340. *See id*.

341. 517 U.S. 44 (1996).

342. *See Alden*, 119 S. Ct. at 2246.

343. *Id*. More recently, in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), the Court reached a similar conclusion regarding the Age Discrimination in Employment Act. Although the ADEA contains clear language stating Congress' intent to abrogate the States' immunity, the abrogation was held ineffective because it exceeded Congress' Fourteenth

forum for their case and the States became effectively exempt from the provisions of the FLSA.

B. Enforceability of Arbitration Agreements

Two survey period cases dealt with the enforceability of arbitration agreements. In *Koveleskie v. SBC Capital Markets, Inc.*,[344] the Seventh Circuit held that Title VII claims can be subject to mandatory arbitration.[345] Koveleskie was a securities trader, and the securities exchanges with which she registered required that she agree to arbitrate disputes with her employer.[346] She sought to invalidate that clause as a violation of Title VII, pointing to the Civil Rights Act of 1991 language which states that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including arbitration, is encouraged to resolve disputes arising under Title VII."[347] Koveleskie argued that this language, in light of the relevant legislative history, did not authorize compelled arbitration of Title VII cases.[348]

The Seventh Circuit looked to Supreme Court precedent upholding involuntary arbitration of ADEA claims for securities traders and to the trend among circuits that had addressed the issue in the context of a Title VII claim.[349] The panel concluded that it agreed with the majority of circuits, that Congress intended to encourage, and not to preclude, pre-dispute arbitration agreements.[350]

The court reached a consistent, although not unanimous, conclusion in *Michalski v. Circuit City Stores, Inc*.[351] After Title VII plaintiff Michalski had been employed for over a year, Circuit City asked all its employees to agree to binding arbitration of employment related disputes.[352] Employees had to sign a special form to opt out of the program, or were counted as having acquiesced. The district court held the agreement invalid for lack of consideration on Circuit City's part.[353]

The Seventh Circuit panel majority, however, viewed the opt-out agreement as significant, because the employee was free to decline mandatory arbitration. The majority found mutual consideration in Circuit City's reciprocal agreement to submit claims to arbitration.[354] Because Michalski promised to arbitrate disputes in exchange for a promise of continued employment, and because both

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Amendment authority. *See id*. at 637.

344. 167 F.3d 361 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999).

345. *See id*. at 362.

346. *See id*. at 363.

347. *Id.* at 364.

348. *See id*.

349. *See id*. (citing, inter alia, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

350. *See id*. at 365.

351. 177 F.3d 634 (7th Cir. 1999).

352. *See id*. at 635.

353. *See id*.

354. *See id*. at 636.

parties were bound by the agreement, the arbitration agreement was deemed enforceable.[355]

Judge Rovner dissented, focusing on the illusory nature of Circuit City's obligation.[356] Nowhere, Judge Rovner noted, did the agreement and related documents clearly provide that Circuit City was bound to the same extent as its employees. Circuit City's Dispute Resolution Rules and Procedures stipulated that Circuit City retained the right to alter the terms and conditions of the program, or to terminate the agreement completely.[357] Judge Rovner was also concerned that large national employers with significant arbitration experience might have some distinct advantages in the arbitration process. Characterizing the agreement as a "bait and switch" tactic affecting civil rights, she declined to join the majority in upholding the agreement.[358]

C. The Few-Employees Exemption

Another recurring issue in the Seventh Circuit was Title VII's definition of "employer." In *Komorowski v. Townline Mini-Mart and Restaurant*,[359] the court focused on Title VII's inapplicability to employers of fewer than fifteen employees.[360] Townline Mini-Mart ("Townline") fell below the fifteen-employee benchmark from March through August 1996, but from September 1996 on, it exceeded the threshold. The plaintiff was terminated in November 1996, allegedly in retaliation for complaining about sexual harassment that began in October 1996. She filed her complaint in January 1997.[361]

Title VII defines "employer" as "ha[ving] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."[362] The plaintiff argued that, for new employers, the "current calendar year" should be the first full calendar year following the discriminatory act, or alternatively, the year the complaint was filed. Otherwise, she argued, new employers would have carte blanche to violate Title VII during the first year of operations.[363] The district court disagreed, holding that "current calendar year" referred to the year in which the alleged discrimination occurred, so that the defendant was not an employer within the Title VII definition.[364]

The Seventh Circuit affirmed, noting as a threshold issue that a defendant's failure to meet the statutory definition of "employer" does not deprive a district court of subject matter jurisdiction. The plaintiff must, however, establish, along

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355. *See id*. at 637.
356. *See id*. (Rovner, J., dissenting).
357. *See id*. at 638.
358. *Id.* at 639.
359. 162 F.3d 962 (7th Cir. 1998).
360. *See id*. at 964.
361. *See id*.
362. *Id*. at 965.
363. *See id*.
364. *Id*. at 964.

with the other statutory requirements, that the employer meets or exceeds the fifteen-employee threshold. The court then reviewed precedent and the plain language of Title VII, and agreed with the defendant that "current calendar year" is the year in which the alleged discrimination occurred. [365]

The "few-employees" exemption to Title VII, the ADA, and the ADEA was also the focus of *Papa v. Katy Industries, Inc*.[366] The threshold for Title VII and the ADA is fifteen employees; for the ADEA it is twenty.[367] Plaintiff Papa worked for Walsh Press Company, Inc. ("Walsh"), a wholly owned subsidiary of Katy Industries, Inc. ("Katy"). Walsh employed fewer than fifteen employees, although Katy and all its various subsidiaries employed over a thousand people. Katy ordered the reduction in the workforce that led to Papa's termination. Katy set the salaries of Walsh employees. Walsh employees participated in Katy's pension plan. Katy funded Walsh's operations. Walsh's computer operations were integrated with Katy's. Walsh used a subaccount of Katy's checking account. Walsh could not issue checks over $5,000 without Katy's approval. Based on all of these interrelationships, Papa argued, the affiliated group of corporations should be considered an integrated enterprise for purposes of applying the employee threshold.[368]

The Seventh Circuit opinion, written by Judge Posner, acknowledged a lack of clarity in the relevant standard. In revisiting the standard, Judge Posner started with a review of the purpose for the few-employee exemption, i.e. to spare small employers the potentially fatal expense and burden of compliance with anti-discrimination laws.[369] This purpose is equally applicable, he stated, regardless of whether the small employer's owner is a poor individual or a wealthy corporation; rich people, he noted "aren't famous for wanting to throw good money after bad."[370] Therefore, treating all affiliated groups as single employers could destroy small firms, which Congress sought to avoid by means of the exemption.[371]

Judge Posner noted only three situations in which the exemption should not be available.[372] The first is where traditional creditors could "pierce the corporate veil" due to neglect of formalities or holding out of the parent as the real party in interest.[373] The second is where a corporation has fragmented itself expressly to avoid the anti-discrimination laws. The third is where the parent corporation actually directed the discriminatory act, practice, or policy, in which case the parent would itself be the violator. This approach, Judge Posner explained, offers the advantage of consistent principles regarding affiliate

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365. *Id*.
366. 166 F.3d 937 (7th Cir.), *cert. denied*, 120 S. Ct. 526 (1999).
367. *See id*. at 939.
368. *See id*.
369. *See id.* at 940.
370. *Id*.
371. *See id*.
372. *See id*.
373. *Id*. at 940-41.

liability from statute to statute.[374] It also eliminates an arbitrary distinction between a small affiliate that obtains legal and financial advice, systems support etc. from a parent corporation versus one that obtains such services from an independent contractor.[375]

Therefore, Judge Posner, and the rest of the panel, concluded that this new standard should supplant the "four factor test" applied by the parties, which focuses on interrelation of operations, common management, common ownership, and centralized control of labor relations and personnel.[376] Applying the new standard, neither of the three special situations applied.[377] Therefore, the court affirmed the district court holding that the plaintiff's employer fell below the employment thresholds for Title VII, the ADA, and the ADEA.[378]

D. Defining the Limitations Period Following Receipt of EEOC Right-to-Sue Letters

In *Houston v. Sidley & Austin*,[379] the focal issue was the ninety-day limitations period that begins with the plaintiff's receipt of a right-to-sue letter from the EEOC.[380] Houston, a pro se plaintiff suing under Title VII, the ADA, and the ADEA, filed her charges as required with the EEOC. On May 27, 1998, the EEOC sent a right-to-sue letter via certified mail, telling Houston that she had ninety days from receipt of the letter to bring suit. The Post Office delivered the first notice of the letter to Houston's address on June 2, and a second on June 7. Houston picked up the letter on June 9, and filed suit on September 4, which was untimely if the limitations period had begun to run on June 6 or earlier.[381]

Sidley & Austin argued that Houston acted unreasonably in waiting seven days from her first notice to pick up the letter. The district court agreed, and granted summary judgment for the employer.[382] The Seventh Circuit reviewed earlier cases in which it had held that the limitations period begins to run when a claimant receives actual notice of the right to sue. However, this actual notice rule is inapplicable to plaintiffs who do not receive actual notice through no fault of their own.[383]

Here, the first notice left by the Post Office informed Houston that she must pick her letter up by June 12, or it would be returned to the sender. She did so, and complied with the letter's requirement of filing suit within ninety days thereafter. The Seventh Circuit declined to examine Houston's reasons for not

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374. *See id*. at 941.
375. *See id*. at 942.
376. *Id*. at 940.
377. *See id*. at 943.
378. *See id*. at 939, 943.
379. 185 F.3d 837 (7th Cir. 1999).
380. *See id*. at 838.
381. *See id*.
382. *See id*.
383. *See id*. at 839.

picking the letter up earlier, and adopted a bright-line rule that a plaintiff who picks up a certified right-to-sue letter within the time allowed by the Post Office presumptively has ninety days from actual receipt to file suit.[384] his presumption is apparently quite strong because the court went on to say that it could not imagine any circumstances that would overcome it.[385] The court therefore reversed the district court's grant of summary judgment.[386]

E. "Forensic Vocational Expert" Testimony

A creative form of expert testimony failed to survive judicial scrutiny in *Huey v. United Parcel Service, Inc.*[387] Plaintiff Huey offered a letter from a "forensic vocational expert" who held a Ph.D. in human resource development, in support of Huey's claim that UPS had retaliated against him for claiming discrimination.[388] Judge Easterbrook noted that the expert had done nothing beyond interviewing the plaintiff and reviewing documents received from the plaintiff's counsel. The expert provided no reasoning to support his conclusion that the plaintiff was a "victim of a retaliatory discharge by UPS for racially motivated reasons . . . ."[389]

Judge Easterbrook firmly stated that "[t]his will not do as the work of an expert."[390] Experts must substantiate opinions offered; they may not merely state conclusions. Expertise, the judge noted, is necessary but not sufficient under Federal Rule of Evidence 702.[391] If this expert in fact possessed the requisite specialized skills, he failed to apply them, and a unanimous panel agreed that the district court was correct in excluding the testimony, and affirmed the jury verdict for the employer on the retaliation claim.[392]

F. Claim Preclusion and Virtual Representation

A final procedural issue of note was raised in *Tice v. American Airlines, Inc*.[393] Federal Aviation Administration rules prohibit persons age sixty or older from piloting or copiloting commercial aircraft, but do not similarly restrict flight officers.[394] American Airlines ("American") did not allow pilots who reached age sixty to downbid to flight officer positions because it used the flight officer position for pilot training, and therefore offered that position only to persons

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384. *See id*. The Postal Service manual generally specifies a holding period of at least three and no more than 15 days. *See id*. at 840.

385. *See id*. at 839.

386. *See id*. at 840.

387. 165 F.3d 1084 (7th Cir. 1999).

388. *Id*. at 1086.

389. *Id*.

390. *Id*.

391. *See id.* at 1087.

392. *See id*.

393. 162 F.3d 966 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 2395 (1999).

394. *See id*. at 968.

eligible to advance to a pilot position.[395]

American had, in previous suits, successfully defended this policy.[396] In *Johnson v. American Airlines, Inc.*,[397] brought by a group of twenty-two pilots under the ADEA, the up-or-out practice was upheld as a bona fide occupational qualification ("BFOQ").[398] In *Murnane v. American Airlines, Inc.*,[399] American's policy of not hiring anyone over age thirty as a flight officer was also upheld.[400] Finally, *EEOC v. American Airlines, Inc.*,[401] was brought on behalf of a class of pilots ages forty and older, who were denied flight officer employment because they had too few remaining years to progress to pilot and serve the minimum number of years as a pilot to satisfy American's policy.[402] American argued that Tice and his co-plaintiffs were precluded from relitigating the issue, on the theory that they were "virtually represent[ed]" by the plaintiffs in these earlier suits.[403]

The Seventh Circuit, however, distinguished the interests of the Tice plaintiffs from the earlier plaintiffs. In *Murnane* and *EEOC*, the plaintiffs were suing because they were not hired; Tice was a current employee. Tice's complaint was about being forced into retirement because pilots age sixty or older could not downbid to flight officer, although pilots younger than age 60 were permitted and sometimes even required to do so. "Downbidding" was not raised as an issue in either *Murnane* or *EEOC*. Although the Tice claim was more comparable to *Johnson*, Tice could not have joined *Johnson* because at the time that case was brought, he was too young to qualify for the plaintiff class. In fact, his interests were contrary to those of the *Johnson* plaintiffs, because forcing out older workers could have created opportunities for younger workers such as, at that time, Tice.[404]

The court focused on the three requirements for claim preclusion: (1) a final judgment on the merits in an earlier suit, (2) an identity of cause of action, and (3) an identity of parties or privies. Here, the privity required under the third element depended on a virtual representation theory.[405] Although virtual representation is a highly nebulous concept, it has rarely been used to deny plaintiffs their day in court.[406] Circumstances that might qualify as virtual representation include control or participation in the earlier suit, acquiescence, deliberate manipulation to avoid preclusion, or a close relationship to a party to

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395. *See id*. at 968-69.
396. *See id*. at 969.
397. 745 F.2d 988 (5th Cir. 1984).
398. *See Tice*, 162 F.3d at 969 (citing *Johnson*, 745 F.2d at 988).
399. 667 F.2d 98 (D.C. Cir. 1981).
400. *See Tice*, 162 F.3d at 969 (citing *Murnane*, 667 F.2d at 98).
401. 48 F.3d 164 (5th Cir. 1995).
402. *See Tice*, 162 F.3d at 969 (citing *EEOC*, 48 F.3d at 164).
403. *Id*. at 968.
404. *See id*. at 969.
405. *See id*. at 970.
406. *See id*. at 970-71.

the earlier suit.[407] The court also noted that formal procedures for certifying classes could easily be circumvented if courts could create de facto class actions through a liberal application of virtual representation.[408]

Therefore, absent any formal successor interest, virtual representation requires first, that the later party was aware of the earlier litigation while it was going on and that the earlier litigation could foreclose his own claims, and also either actual participation by the later party or a duty to participate. Rights under the ADEA are individual, not group-based, as is clear from the language that "no employee shall be a party plaintiff to any action under it unless he gives his consent in writing . . . ."[409] Here, there was no evidence of manipulation. Tice could not have participated in any of the earlier actions. Tice did not acquiesce to virtual representation. And, finally, Tice had no relationship with the earlier plaintiffs.[410] Thus, his claim was not precluded.[411]

CONCLUSION

Employment law continues to evolve, commanding an ever-increasing share of the federal caseload. Nebulous concepts such as hostile environment, reasonable accommodation and virtual representation provide much fodder for debate. The U.S. Supreme Court clarified an important aspect of the ADA when it held that mitigating measures are considered in deciding who is entitled to protection, but each year far more issues are raised than are resolved. Practitioners face continuing challenges in the years ahead in keeping abreast of the developing law.

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407. *See id*. at 971.

408. *See id*. at 973.

409. *Id*. (quoting 29 U.S.C. § 216(b)).

410. *See id*. at 973-74.

411. *See id*. at 974.