RECENT DEVELOPMENTS IN EMPLOYMENT LAW

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INTRODUCTION

In some ways, the survey period has been an uneventful year of incremental interpretations of decades-old civil rights statutes and labor laws. Title VII, the biggest contributor to the nation's labor docket, is now more than forty years old, and the Americans with Disabilities Act has been around and analyzed for over twenty. But even old statutes produce new law, and a handful of recent decisions may significantly alter the scope of employer liability. For the first time, the Supreme Court has interpreted Title IX to allow lawsuits by plaintiffs claiming *retaliation* for their complaints about discrimination under that act. This survey period also saw the expansion of potential claims under the Age Discrimination in Employment Act (the "ADEA"), as the Supreme Court opened the door for plaintiffs who cannot show that their employers *intentionally* treated them unfavorably because of age. And in another important decision for employers and employees alike, the Supreme Court held that time employees spend walking between changing and production areas is compensable under the Fair Labor Standards Act, while time spent waiting to put on the first piece of gear is not.

Notably, the survey period reveals little influence by global events. Neither the attacks of September 11 nor the ensuing conflicts abroad have registered a sustained effect on discrimination claims. The Equal Employment Opportunity Commission ("EEOC") received 79,432 charges of discrimination against private employers and government entities in 2004,[1] and reports that claimants most frequently alleged race-, sex-, or retaliation-based discrimination.[2] While national origin discrimination charges jumped from 8025 in 2001 (largely pre-September 11) to 9046 in 2002, they fell to 8450 and 8361 in 2003 and 2004, respectively. Similarly, religious discrimination charges, which have steadily increased over the past decade, climbed from 2127 in 2001 to 2572 in 2002, and then fell somewhat to 2532 and 2466 in the following two years. By contrast, race claims fell slightly from 2001 to 2002, and sex claims moderately rose.[3] Trends aside, religious and national origin discrimination claims remain modest features of the employment landscape. Overall, only eleven percent of EEOC charges involved national origin claims, and only three percent involved claims of religious discrimination, while sex discrimination was claimed in thirty

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1. EEOC Releases Fiscal 2004 Year-End Data (Feb. 15, 2005), http://www.eeoc.gov/press/2-15-05.html.

2. *Id.* On average, these charges were processed in 165 days, and almost twenty percent resulted in favorable outcomes for the charging party. The agency filed 378 "merits" lawsuits, and recovered $420 million in relief. *Id.*

3. These statistics are found on various pages of the EEOC website. U.S. Equal Employment Opportunity Commission, Homepage, http://www.eeoc.gov (last visited July 5, 2006).

percent, race discrimination in thirty-five percent, and retaliation in twenty-nine percent of EEOC charges.[4]

In a survey period that has reverberated with controversy over fundamental rights, workplace rights remain fundamentally the same. With few exceptions, developments have been gradual, as employers and employees contest modest patches of legal terrain.

I. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Disparate Impact

This survey period produced important precedent under the Age Discrimination in Employment Act[5]—answering what the New York Times called "one of the most disputed questions in civil rights law: how to win an age discrimination case in the absence of proof that an employer deliberately singled out older workers for unfavorable treatment."[6] In *Smith v. City of Jackson*,[7] the Supreme Court held that the ADEA allows recovery in disparate-impact cases, though in a narrower band than support Title VII claims.[8] Confirmation that disparate impact claims are cognizable under the ADEA would have been far less noteworthy fifteen years ago. Disparate impact theory has long been a widely-accepted means of proving discrimination under Title VII, which was amended to codify such claims in 1991. And as *Smith* acknowledges, appellate courts had uniformly interpreted the ADEA to authorize "disparate-impact" theory recoveries in appropriate cases for decades.[9] But that changed in 1993,[10] when the Supreme Court decided *Hazen Paper Co. v. Biggins*.[11] Following *Hazen Paper*—a case that distinguished an employee's age from his seniority for purposes of analyzing motives under an intentional discrimination theory—the Seventh as well as First, Tenth, and Eleventh Circuits held (contrary to EEOC interpretation and regulation)[12] that no disparate impact liability could arise under the ADEA.[13] *Smith* thus returns the courts to what Justice Stevens calls a "pre-

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4. About sixteen percent of charges alleged sexual harassment, twenty percent alleged age discrimination, and nineteen percent contained complaints of discrimination based on a disability.

5. 29 U.S.C. §§ 621-634 (2000).

6. Linda Greenhouse, *Supreme Court to Consider Role of Intent in Age Bias*, N.Y. TIMES, Mar. 20, 2004, at A16.

7. 544 U.S. 228 (2005).

8. *Id.* at 232. The case was decided by a 5-3 vote (Chief Justice Rehnquist not participating).

9. *Id.* at 236-37.

10. *Id.* at 237 n.9 (detailing the split among circuits).

11. 507 U.S. 604 (1993).

12. *Compare* 29 C.F.R. § 1625.7(d) (2004).

13. *See Smith*, 544 U.S. at 237 n.9. Thus, in *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 422 (7th Cir. 2000), for example, the Seventh Circuit acknowledged a circuit split and affirmed its position that "disparate impact is not a theory available to age discrimination plaintiffs in this

Hazen Paper consensus" concerning disparate-impact liability.[14]

Smith v. City of Jackson examined the claim of certain police and public safety officers that salary increases received from their employer, the City of Jackson, Mississippi, were less generous than increases awarded officers under the age of forty.[15] Jackson had adopted a pay plan on October 1, 1998, to "attract and retain qualified people . . . and ensure equitable compensation to all employees regardless of age, sex, race and/or disability."[16] In May 1999, Jackson revised the plan, in part to raise starting salaries to the national average.[17] As a result, officers with less than five years of service received proportionately greater raises, while officers over forty tended to fall into the high-seniority group that received proportionately less.[18] A group of the older officers sued Jackson under the ADEA, claiming both deliberate age discrimination, and that the plan adversely impacted them (i.e., had a "disparate impact"). After the district court granted summary judgment on both claims, the court of appeals affirmed the dismissal of the disparate impact claim, prompting the Supreme Court to grant certiorari.[19]

Writing for the plurality,[20] Justice Stevens compared the ADEA to Section 703(a) of Title VII, which the Court had interpreted to prohibit "disparate impact" discrimination in *Griggs v. Duke Power Co.*[21] The Court reasoned: "Neither § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that 'limit, segregate, or classify' persons; rather the language prohibits such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individuals' race or age."[22]

Textual differences between the ADEA and Title VII, however, led the Court to recognize a narrower range of actionable practices.[23] Thus, Justice Stevens pointed to the "RFOA" clause, which allows employers to avoid liability if the disparate impact resulted from "reasonable factors other than age."[24] The Court also found that unlike Title VII, an employer's policy need not rest on a

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circuit."

14. *Smith*, 544 U.S. at 238.

15. *Id.* at 230.

16. *Id.* at 231.

17. *Id.*

18. *Id.*

19. *Id.* at 231-32. The appellate court remanded the intentional discrimination claim for further discovery. *Id.* at 231.

20. *Id.* at 229. Justice Stevens is joined by Justices Souter, Ginsburg, and Bryer in all parts of his opinion.

21. 401 U.S. 424 (1971).

22. *Smith*, 544 U.S. at 235 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985 (1988)).

23. *Id.* at 240.

24. *Id.* at 233 (citing § 4(f)(1) of the ADEA, 81 Stat. 603) ("permitting 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age'").

"business necessity," but only a "reasonable" judgment.[25] Further, the Court noted that *Wards Cove Packing Co. v. Antonio*[26] set the standard for ADEA disparate impact claims, though the 1991 Amendments revised that standard for Title VII cases.[27] Under *Wards Cove*, the plaintiff must show a close nexus between a specific practice and any observed statistical disparities to prove unlawful conduct.[28]

Applying these principles to the officers of Jackson, the Court found their claim inadequate. First, the officers fatally neglected "to identif[y] any specific test, requirement, or practice within the pay plan that" adversely affects older workers, *i.e.*, to isolate the specific employment practice that violates the statute.[29] And second, the record showed that Jackson based its plan on "reasonable factors other than age."[30] In finding a non-discriminatory basis for its plan, the Court noted that Jackson pegged wages for each of five basic positions to the survey numbers for comparable communities in the Southeast.[31] The "disparate impact," reasoned the Court, arose from Jackson's decision to base raises on seniority—an "unquestionably reasonable" decision given its goals to retain police officers.[32] That other methods may have achieved Jackson's legitimate goal did not matter.[33] "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."[34]

The subject of disparate-impact claims under the ADEA elicited a diversity of opinion from the Court. Justice Scalia concurred with Justice Steven's opinion, but deferred to the agency (in this case, the EEOC) interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[35] Calling this "an absolutely classic case for deference to agency interpretation," he pointed to EEOC regulations and statements clarifying that "employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity."[36] While concurring in the judgment, Justice O'Connor (joined by Justices Kennedy and Thomas) would have affirmed "the judgment below on the ground that

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25. *Id.* at 243.
26. 490 U.S. 642 (1989).
27. *Smith*, 544 U.S. at 240.
28. *Id.* at 241.
29. *Id.*
30. *Id.*
31. *Id.* at 241-42.
32. *Id.* at 242.
33. *Id.* at 243.
34. *Id.*
35. *Id.* (Scalia, J., concurring); 467 U.S. 837 (1984).
36. *Smith*, 544 U.S. at 244 (quoting Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981), and citing 29 C.F.R. § 1625.7(d) (2004)).

disparate impact claims are not cognizable under the ADEA."[37] In a lengthy opinion, Justice O'Connor disputed Justice Stevens's statutory interpretation, noting that Section 4(a) of the ADEA makes it unlawful for employers to engage in certain practices "because of such individual's age."[38] "That provision," she insisted, "plainly requires discriminatory intent, for to take an action against an individual '*because of such* individual's age' is to do so 'by reason of' or 'on account of' her age."[39]

A potentially significant expansion of potential employer liability under the ADEA, *Smith v. City of Jackson* should nevertheless protect employers who base their policies on reasonable factors other than age.

B. Disparate Treatment (Intentional Discrimination)

The Seventh Circuit turned its attention to disparate treatment—that is, intentional discrimination—in two ADEA cases decided during the survey period. In *Isbell v. Allstate Insurance Co.*,[40] the Seventh Circuit addressed claims that Allstate Insurance Co. intentionally discriminated against older workers when it reorganized its workforce and eliminated 6400 jobs. Doris Isbell worked for Allstate until the company enacted a plan to sell insurance through a network of exclusive independent contractors, rather than employees.[41] Effective June 30, 2000, Allstate discharged all of its employee agents, "regardless of age, productivity, or performance."[42] Allstate offered the employees four options, the first two creating independent contractor relationships, the third granting a year's pay as severance, and the fourth offering a severance pay-out for up to thirteen weeks' salary.[43] Isbell, who opted for a thirteen-week severance pay-out,[44] later sued Allstate, alleging (among other claims) discrimination under the ADEA.[45] Following entry of summary judgment for Allstate, she took her claims to the Seventh Circuit.[46]

Judge Manion, writing for the court, found that Isbell's ADEA claim lacked merit. To prove discrimination, Isbell attempted to produce circumstantial evidence of discriminatory intent. Specifically, she pointed to studies conducted by Allstate (or its consultants) that suggested independent contractors outperform employee agents.[47] These studies—shared with company executives and

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37. *Id.* at 247-48 (O'Connor, J., concurring).

38. *Id.* at 248 (citing 29 U.S.C. § 623(a) (2000)).

39. *Id.* at 249 (citation omitted).

40. 418 F.3d 788 (7th Cir.), *reh'g en banc denied* (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1590 (2006).

41. *Id.* at 790-91.

42. *Id.* at 791.

43. *Id.*

44. *Id.* at 792.

45. *Id.*

46. *Id.*

47. *Id.* at 794.

foreshadowing the company's reorganization—also revealed the distribution of agents by tenure and age, and noted "a potential generational mismatch between [Allstate's] agents and the new customers" it seeks.[48] One noted that "[p]roductivity declines slightly by . . . age," but concluded that "[p]roduction by agent type remains constant" across age cohorts.[49] A second study "highlighted the age distribution of the Company's agents and explored the options for eliminating the employee-agent role in the agent workforce."[50] The study also noted that younger agents produced "slightly more new business," though found a weak relationship between age and production overall.[51]

This circumstantial evidence did not, according to the court, satisfy Isbell's burden to provide "a 'convincing mosaic' from which a jury could infer discriminatory intent on the part of Allstate."[52] The court found significant Isbell's failure to produce evidence that decision-makers relied on the studies when adopting the plan.[53] Further, Isbell's theory not only disregarded the termination of employees *regardless of age*, but that Allstate offered to hire them as independent contractors *regardless of age*.[54] Without hesitation, the court affirmed the district court judgment.

Olson v. Northern FS, Inc.[55] examined the intersection of direct and indirect methods of proof. The case arose from Northern FS's decision to hire twenty-two-year-old Jacob Bloome to replace veteran salesman Chuck Olson.[56] Olson had variously sold crop products and grain buildings for Northern FS until it stopped selling buildings in 2000.[57] In August, Steve Keelan met with Olson about his future with the company, and allegedly told Olson that he was undesirable in the business world because of his age.[58] At Keelan's request, Olson and another employee subsequently occupied what Northern FS described as a "temporary" crop sales position.[59] But when Northern FS hired Bloome, Keelan moved Olson back to the warehouse. Eleven days later, and following Olson's rejection of a truck-driving position based on eye problems, Northern FS terminated his employment.[60] He "was 59 years old, and had spent 41 years with Northern FS and its predecessors."[61]

Reviewing summary judgment for Northern FS, Judge Evans explained that

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48. *Id.*
49. *Id.*
50. *Id.* at 795.
51. *Id.*
52. *Id.* (internal quotation marks and citation omitted).
53. *Id.*
54. *Id.*
55. 387 F.3d 632 (7th Cir. 2004).
56. *Id.* at 634.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

Olson could prove discrimination by two methods: he could present direct or circumstantial evidence that an employer treated him adversely because of his age, which he labels the "direct method"; or he could present "a convincing mosaic" of circumstantial evidence of discriminatory intent, a method he labels "indirect."[62] Taking the direct method first, Judge Evans agreed with the district court that Keelan's age comments—made five months before the discharge and outside the context of the discharge decision—were a "stray remark."[63] The comments were too remote, therefore, to qualify as "direct" evidence of discrimination.[64]

Judge Evans moved on, however, to reject the district court's finding that Olson could not state a prima facie case of discrimination under the *McDonnell Douglas*, or indirect method.[65] The parties agreed that the fifty-nine-year-old Olson belonged to a protected class, that he met Northern FS's legitimate job expectations, and suffered an adverse job action.[66] But Northern FS argued, and the district court accepted, that Olson and Bloome were not similarly situated because they had different academic credentials.[67] The panel found this application of *McDonnell Douglas* too rigid.[68] Citing other Seventh Circuit decisions, the court re-formulated the prima facie case to require (instead of the original fourth prong) only that the employer "hired someone else who was substantially younger or other such evidence that indicates that it is more likely than not that his age . . . was the reason for the discharge."[69] The court concluded Olson satisfied his prima facie burden.[70]

In the final stage of this analysis, Judge Evans faulted the district court's conclusion that Olson lacked evidence of pretext, i.e., evidence that the company's stated reason for his discharge was not the real one.[71] Northern FS had claimed ignorance, explaining that Keelan knew nothing about Olson's desire for a permanent crop salesman position. But Judge Evans returned to Keelan's age-related comments. He noted that even if "stray remarks," these

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62. *Id.* at 635.

63. *Id.*

64. *Id.*

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> [T]o establish a *prima facie* case of employment discrimination under the indirect method, a plaintiff must show: (1) he was a member of a protected class; (2) he was meeting his employer's legitimate job expectations; (3) he suffered an adverse employment action; and (4) similarly situated employees not in the protected class were treated more favorably.

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

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 635-36 (quoting Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1089-91 (7th Cir. 2000)).

70. *Id.* at 636.

71. *Id.*

comments should have been considered in examining Olson's claims of pretext.[72] Together with "Northern FS's unusual decision to hire someone with no sales experience to replace an experienced, highly successful salesman,"[73] the court found this evidence sufficient to support a reasonable inference that Keelan's explanation was pretextual.[74] Olson's case, concluded the court, merited a trial.[75]

II. TITLE IX

Title IX of the Education Amendments of 1972[76] prohibits recipients of federal education funding from discriminating based on sex.[77] Over twenty years ago, the Supreme Court held that Title IX implies a private right of action.[78] Subsequent decisions have delineated that right, holding that Title IX: (1) allows private parties to seek monetary damages for intentional violations of Title IX,[79] (2) prohibits "deliberate indifference" to sexual harassment of a student by a teacher,[80] and (3) bars student-to-student sexual harassment.[81] Earlier this survey term, the Court held that Title IX prohibits retaliation as well.[82]

Jackson v. Birmingham Board of Education[83] examines the plight of Roderick Jackson, a physical education teacher and girl's basketball coach for the Birmingham, Alabama school district. Shortly after complaining that the girls' team at his school "was not receiving equal funding and equal access to athletic equipment and facilities,"[84]Jackson began receiving negative work evaluations, and he was removed as the girls' coach in May of 2001. Jackson filed suit alleging retaliation in violation of Title IX; the district court dismissed the claim, and the Eleventh Circuit affirmed.[85]

With the aid of syllogism, Justice O'Connor disagreed with the interpretation of the Eleventh Circuit. Title IX "prohibits a funding recipient from subjecting

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72. *Id.*

73. *Id.* The opinion cited the Supreme Court's clarification in *Reeves*, that "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case, and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (internal quotation marks and citation omitted).

74. *Id.*

75. *Id.*

76. Pub. L. No. 92-318, 86 Stat. 373, *as amended*, 20 U.S.C. §§ 1681-1688 (2000).

77. *See* 20 U.S.C. § 1681(a) (2000).

78. Cannon v. Univ. of Chi., 441 U.S. 677, 690-93 (1979).

79. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

80. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-91 (1998).

81. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642 (1999).

82. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005).

83. *Id.*

84. *Id.* at 171.

85. *Id.* at 172.

any person to 'discrimination' 'on the basis of sex,'" she wrote for the majority.[86] Retaliation, she continued, is a form of discrimination.[87] And because it is "an intentional response" to an allegation of sex discrimination, it is "on the basis of sex."[88] The Court concluded that, "when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX."[89]

In holding retaliation actionable, the majority emphasized that reporting is "integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished."[90] The Court also rejected the School Board's lack of notice defense.[91] To the contrary, it found that, "funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979."[92]

Justice Thomas dissented, along with Chief Justice Rehnquist and Justices Scalia and Kennedy. Thomas maintained that the ordinary and natural meaning of Title IX's prohibition of discrimination "on the basis of sex" means discrimination "on the basis of the plaintiff's sex, not the sex of some other person."[93] The dissent stated that, "at bottom . . . retaliation is a claim that aids in enforcing another separate and distinct right" and "[t]o describe retaliation as discrimination on the basis of sex is to conflate the enforcement mechanism with the right itself."[94]

Though *Jackson*, like *Smith*, widens the class of *potential* plaintiffs making federal discrimination claims, its practical consequences are harder to assess. Employers who properly document employee performance deficiencies may register little effect of this re-minted claim.

III. TITLE VII

A. When Is Sex Discrimination Based on Sex?

Title VII of the Civil Rights Act of 1964[95] makes it unlawful for employers to discriminate "because of . . . sex." Historically, courts divided sexual harassment cases into two categories: 1) *quid pro quo* cases, where submission to a sexual demand is a condition of employment,[96] and 2) hostile environment

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86. *Id.* at 173 (quoting 20 U.S.C. § 1681 (2000)).
87. *Id.* at 173-74.
88. *Id.* at 174.
89. *Id.*
90. *Id.* at 180.
91. *Id.* at 182.
92. *Id.* (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 690-93 (1979)).
93. *Id.* at 185 (Thomas, J., dissenting).
94. *Id.* at 189.
95. 42 U.S.C. §§ 2000e to 2000e-17 (2000).
96. *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977), is the landmark decision on this form of harassment.

cases, where verbal or physical conduct unreasonably interferes with the employee's work environment.[97] In both categories, sexual conduct typically supplied the "based on sex" element of discrimination. In other words, the *means* of discrimination supplied the *motive*. But as discrimination law developed, it became apparent that non-sexual conduct could be both harassing and based on sex.[98] Now, more than twenty-five years after Catherine MacKinnon published her influential book *Sexual Harassment of Working Women*,[99] courts and employers still struggle to determine when sexual harassment is discrimination "because of" or "based on" sex.

Several cases in the Seventh Circuit explored these issues during the survey year. In *Venezia v. Gottlieb Memorial Hospital, Inc.*,[100] the court examined sexual harassment claims by a husband and wife against the same employer.[101] Frank and Leslie Venezia claim that each suffered sexual harassment and a hostile work environment at Gottlieb Memorial Hospital, Inc. Leslie began her work in December 1993, and served as Director of Child Care at the time of her resignation on July 12, 2002. Frank joined Memorial as a maintenance worker in November 2000, and resigned on October 24, 2002.

The district court had dismissed the Venezias' complaint as inactionable, relying on *Holman v. Indiana*.[102] *Holman* addressed what has become a familiar specter in harassment law: the "equal opportunity harasser"—that is, an employee who harasses both sexes and so discriminates against neither.[103] In *Holman*, both husband and wife had alleged that the same supervisor made sexual advances toward each, and retaliated when those advances were refused.[104] Because the alleged discrimination fell equally on both sexes, the court concluded it could not be sex-based.[105] Consequently, *Holman* affirmed the Rule 12(b)(6) dismissal of the plaintiffs' complaint.[106]

Distinguishing *Holman*, Judge Wood (writing for the panel) noted that the Venezia's claims involved different supervisors and different work settings.[107]

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97. The Supreme Court recognized hostile environment harassment as sex discrimination in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

98. Even early EEOC compliance manuals acknowledged that sex discrimination could encompass harassment by non-sexual means. *See, e.g.*, EEOC COMPLIANCE MANUAL (CCH) § 615.6, at 3217 (1982).

99. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

100. 421 F.3d 468 (7th Cir. 2005).

101. *Id.* at 469.

102. 211 F.3d 399 (7th Cir. 2000).

103. *Id.* at 400-01.

104. *Id.*

105. *Id.* at 403. *Holman* identifies the critical issue as "whether members of one sex are exposed to disadvantageous terms or conditions of employment *to which members of the other sex are not exposed*." *Id.* (internal quotation marks and citation omitted).

106. *Id.* at 407.

107. Venezia v. Gottlieb Mem. Hosp., Inc., 211 F.3d 399, 471 (7th Cir. 2005).

To exclude such claims, she concluded, would unjustifiably "exclude the possibility of a lawsuit by a husband and wife employed by the same large company, in which the wife reports to Supervisor A, who discriminates against women, and the husband reports to Supervisor B, who discriminates against men."[108] The court held the Venezias had pled claims "sufficiently distinct that it was error to dismiss them."[109]

Beyond this clarification of "equal opportunity harassment," the *Venezia* opinion demonstrates how little a Title VII plaintiff must allege to state a claim of discrimination "based on sex." The defendant hospital had alternatively argued that the dismissal should be affirmed because the complaint failed to set out sufficient allegations to support a claim for relief.[110] The court rejected this argument, finding that Frank had alleged "numerous instances of harassment that he claimed occurred 'because of his sex.'"[111] And although it found Leslie's claims a closer call, it held the allegation of harassment *directed solely at Leslie* sufficient to state a claim for relief.[112]

Notably, the specific allegations disclose no discernible connection between the harassment and Frank's or Leslie's sex. The harassment of Frank allegedly began with three anonymous notes claiming he got the maintenance job through his wife.[113] Further harassment consisted of: 1) notes implying that his wife's efforts to get him the job were sexual; 2) notes calling his friends "pigs"; 3) pictures of nude men left on his bulletin board; 4) crass inquiries from co-workers about his relationship with his wife; and use of profanity by a male supervisor who accused him of having a bad attitude; and 5) various hostile behavior from and shunning by co-workers.[114] Although these allegations include potentially sexual *means* of harassment—the nude photographs, for example—they supply no sex-based motive. The photographs and personal questions do not suggest his co-workers resented Frank *because he is a man*. To the contrary, the notes object to nepotism; moreover, Frank's supervisor was a man.

The allegations against Leslie also supply motives other than sex. Leslie Venezia alleged that: 1) Frank's co-worker tried to force her to fire an employee she had just hired; 2) when Leslie refused, the co-worker told other employees she "sat on his lap, in the presence of" Frank to demean him; 3) a note to Frank included a reference linking her to a vulgar photograph of a female body; and 4) someone slashed her tires and those of an employee after they had complained about a theft of money from the employee's desk.[115] Again, some of the

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108. *Id.*

109. *Id.*

110. *Id.* at 472.

111. *Id.*

112. *Id.* at 472-73 (conceding that some or all of the harassment could be unrelated to her sex but stating that it was too early to draw that conclusion).

113. *Id.* at 469.

114. *Id.* at 469-70.

115. *Id.* at 470.

harassment is sexual. But nothing connects that harassment to Leslie's sex, and the motive's alleged are sex-neutral (e.g., Leslie refused to terminate an employee or complained about theft).

That the Venezias' claims survived reflects the procedural posture of the case. Under Rule 12(b)(6), courts will not dismiss a complaint unless "no relief could be granted under any set of facts that could be proved consistent with the allegations."[116] Moveover, in *Swierkiewicz v. Sorema N.A.*,[117] the Supreme Court resolved a split in the circuits to hold that a plaintiff need not plead a prima facie case of discrimination to survive a motion to dismiss.[118] Still, *Venezia* is notable in suggesting that "sexual" means of harassment continue to help plaintiffs satisfy the "based on sex" element of their claims.

By contrast, it was the separation of sexual means from motives that occupied the court in *Shafer v. Kal Kan Foods, Inc.*[119] In this Title VII action, Thad Shafer alleged both that he had been sexually harassed by a male co-worker and that his employer, Kal Kan, had fired him in retaliation for complaining about the harassment. The circumstances of the alleged harassment are extreme—involving what Judge Easterbrook called, "four frightening encounters with Alan Dill, one of [Shafer's] co-workers" at Kal Kan.[120] In June 2001, Dill (who is apparently heterosexual) made an obscene remark about Shafer's "cheerleader ass," and pushed Shafer's head against him to mimic fellatio.[121] A few weeks later, Dill grabbed Shafer's arm hard enough to make him think it might break, and coerced a motion that mimicked masturbation. The following month, Dill ripped a fist of hair from Shafer's chest while he stood in the locker room. And in August 2001, Dill bit Shafer's neck. While Dill's motives are not immediately clear, Judge Easterbrook inferred a "[design] to demonstrate physical domination."[122]

The court easily disposed of Shafer's retaliation claim, affirming summary judgment where no evidence suggested the people who discharged Shafer knew about his harassment complaints.[123] The sexual harassment claim prompted a more interesting analysis. Judge Easterbrook initially rejected Shafer's sexual harassment claim on principles of agency.[124] Because Kal Kan had no reason to know of the harassment, because Shafer offered no evidence of an official complaint, and because no evidence suggested Kal Kan treated male and female complaints differently, the court rejected employer responsibility for Dill's

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116. Holman v. Indiana, 211 F.3d 399, 402 (7th Cir. 2000) (quoting Lewford v. Sullivan, 105 F.3d 354, 356 (7th Cir. 1997)).

117. 534 U.S. 506, 510 (2002).

118. *Id.* at 515.

119. 417 F.3d 663, 666 (7th Cir. 2005).

120. *Id.* at 664.

121. *Id.* at 665.

122. *Id.*

123. *Id.*

124. *Id.* at 666.

conduct.[125]

The opinion next addressed whether "Dill's behavior was sex discrimination."[126] Judge Easterbrook began this analysis by declaring Dill's conduct infrequent— applying the Supreme Court's definition of actionable harassment as sufficiently severe or pervasive to create an abusive working environment.[127] He then turned to "men at Kal-Kan," whose working conditions were both "placid" and no worse than women's.[128] Explaining the shift, Judge Easterbrook asserted that Dill abused Shafer for his weakness, not his sex.[129] "Shafer has not established that his encounters with Dill reflected more than personal animosity or juvenile behavior."[130] Thus, when analyzing the severity of the alleged harassment,[131] the court did not examine the severity of those four "frightening encounters" with Dill. Rather, Judge Easterbrook preemptively concluded that Kal Kan did nothing discriminatory in responding to the personal misconduct of one of its agents.

The court's analysis is noteworthy in several respects. First, *Shafer* does not confuse sexual means with sex-based motives. Although Dill may have used sexual means to harass Shafer, Judge Easterbrook inferred no animus toward men, but only toward Shafer. Second, the court analyzed the severity/pervasiveness of harassment as applied to *all men*, rather than Shafer. Yet if applied to other forms of harassment, this approach would exclude as sex-based discrimination severe or pervasive sexual conduct/speech toward a single woman. Nor would it recognize traditional *quid pro quo* harassment as sex-based.

Outside the context of sexual harassment, the Seventh Circuit recently considered whether an adverse job action that resulted from romantic favoritism amounted to discrimination "based on sex." In *Preston v. Wisconsin Health Fund*,[132] Jay Preston alleged that his former employer, a teamsters health and welfare fund, discriminated on account of his sex when it replaced him as fund director with Linda Hamilton.[133] Specifically, Preston alleged that the fund's decision-maker and chief executive officer, Bruce Trojak (another defendant in the case), favored Hamilton for personal reasons.[134] By the time defendants received summary judgment, deposition testimony had produced rumors of an affair, frequent dinners together, and after-dinner discussions at Trojak's

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125. *Id.*

126. *Id.*

127. *Id.*; *see* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

128. *Vinson*, 477 U.S. at 67.

129. *Id.*

130. *Id.*

131. Judge Easterbrook acknowledged that "[e]ven brief episodes of unwelcome sexual contact can impose harms that meet the 'severe' part of the Supreme Court's 'severe or pervasive' formula." *Id.*

132. 397 F.3d 539 (7th Cir. 2005).

133. *Id.* at 540-41.

134. *Id.* at 541.

apartment.[135]

The Seventh Circuit unequivocally rejected Preston's sex discrimination claim.[136] Writing for a unanimous panel, Judge Posner declared: "[a] male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman."[137] The opinion traces this holding to several principles. First, Judge Posner finds "[s]uch favoritism . . . not based on a belief that women are better workers, or otherwise deserve to be treated better, than men [but] is entirely consistent with the opposite opinion."[138] Second, the court reasoned that such favoritism has little effect on the workplace, "since the disadvantaged competitor is as likely to be another woman as a man—were Preston a woman, Trojak would still have fired her to make way for Hamilton."[139] Judge Posner concludes that, "[n]either in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination."[140]

The "based on sex" analysis of *Preston*—like *Shafer*'s—stands in some contrast with federal courts' long-standing recognition of harassment based on sexual attraction as discrimination. In the typical *quid pro quo* scenario, there is no necessary connection to any set of beliefs about "women" as a group. And sexual attraction has regularly supplied the *based on sex* element of such claims. But a critical difference remains. As Judge Posner points out, the *adverse* employment consequences of sexually-motivated favoritism are sex-neutral.[141] Although sex may determine (as a minimal qualification) the "favorite," sex plays no role in choosing the victim of favoritism. For good reason, *Preston* firmly preempts this potential expansion of employer liability under Title VII.

B. Severe and Pervasive Sexual Harassment: When Is Too Much Enough?

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court defined actionable harassment as that which is "sufficiently severe or pervasive, to alter the conditions of [the plaintiff's] employment and create an abusive working environment."[142] Although *Shafer* never determined whether the four instances of physical abuse could (if based on sex) qualify as an objectively or subjectively hostile work environment,[143] the Seventh Circuit found cursing and foul language

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135. *Id.*

136. *Id.* at 542.

137. *Id.* at 541.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.*

142. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

143. *Compare* Koelsch v. Beltone Elec. Corp., 46 F.3d 705, 706-08 (7th Cir. 1995) (finding allegations of two incidents, involving supervisor's rubbing of his bare foot against the plaintiff's leg and his grabbing her buttocks, respectively, insufficient to create hostile work environment under Title VII).

insufficient in *Racicot v. Wal-Mart Stores, Inc.*[144] Anne Racicot joined Wal-Mart in July 1999 as an "associate" in the seafood department.[145] According to Racicot, several ensuing incidents with co-workers Mike Condra and Dan Simpson created a hostile work environment based on her sex. Condra allegedly used foul language frequently in her presence. And Wal-Mart terminated Condra after a customer complained of hearing him call Racicot a "fucking bitch" (though Wacicot did not hear the comment herself).[146] Simpson allegedly yelled at Racicot regularly, cursed in her presence, and called her a "son of a bitch" (and similar names).[147]

To evaluate the objective hostility of this environment, the court set out to "consider all of the circumstances, including frequency and severity of the conduct, whether it is humiliating or physically threatening, and whether it unreasonably interferes with an employee's work performance."[148] Applying this standard, Judge Wood wasted little time in concluding that Racicot's claims fell short. The "limited number of incidents" reflected, in the court's view, "run of the mill uncouth behavior [rather] than an atmosphere permeated with discriminatory ridicule and insult."[149] Finding the conduct less than an "objectively offensive work environment," the court affirmed summary judgment in favor of Wal-Mart on Racicot's sexual harassment claim.[150]

Racicot registers no significant departure from previous Seventh Circuit analyses of hostile work environments. In *Wyninger v. New Venture Gear, Inc.*,[151] a case decided last survey period, the court reiterated its position that to be actionable, a hostile work environment must be "hellish."[152] By contrast, "occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers would be neither pervasive nor offensive enough to be actionable."[153] Thus, it was not mere vulgarity, but a "crude and shocking" solicitation of sex in conjunction with "a physically intimidating situation—a woman locked in a small room with three larger men, snickering at her refusal to discuss oral sex"—that *Wyninger* found potentially severe.[154]

In another case decided this survey period, *Moser v. Indiana Department of*

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144. 414 F.3d 675, 677-78 (7th Cir. 2005).

145. *Id.* at 676.

146. *Id.*

147. *Id.*

148. *Id.* at 677-78.

149. *Id.* at 678.

150. *Id.*

151. 361 F.3d 965 (7th Cir. 2004).

152. *Id.* at 977 (citation omitted).

153. *Id.*

154. *Id.*; Rogers v. City of Chicago, 320 F.3d 748, 750 (7th Cir. 2003) (finding that explicit sexual comments by a supervisor—comments including a compliment of the plaintiff's breasts and request that she put paper in a tray so he could "watch her put it in"—were insufficiently severe to create an objectively hostile environment).

Corrections,[155] the plaintiff's sexual harassment allegations also fell short. In *Moser*, a female juvenile boot camp administrator complained about another employee's sexual speech. Specifically, she cited his speaking "down" to female employees, a reference to her "tits," comments about female job applicant's appearance, profanity, jokes, innuendo, and comments about the plaintiff's preference for good-looking men.[156] Preliminarily, the court noted that insofar as her allegations concerned "second-hand harassment"—that is, harassment not directed at or heard by Moser—that conduct (though relevant) was "less objectionable" than direct harassment.[157] It then found Moser's allegation's sufficient, only, to make a reasonable employee "uncomfortable."[158] Writing for the panel, Judge Ripple concluded that, "the handful of comments of a sexual nature [made] apparently in the context of headless jokes, as opposed to serious or threatening comments, simply does not rise to the level of harassment our court has held actionable."[159]

C. Retaliation: Must a Plaintiff Show Adverse Action in Employment?

Title VII makes it unlawful for an employer to punish an employee for complaining about statutory violations.[160] Courts have allowed plaintiffs to prove retaliation through either direct evidence or the *McDonnell Douglas* burden-shifting method of proof.[161] Under both methods, a plaintiff must generally show he has suffered an adverse employment action.[162] Yet the questions of what constitutes an "adverse employment action," and whether the action must involve the plaintiff's *employment*, continue to occupy the courts. In this survey period, the Seventh Circuit offered a thorough examination of both.

In *Washington v. Illinois Department of Revenue*,[163] the court found that although Title VII's anti-retaliation provision prohibits only "material" discrimination, it reaches adverse actions *outside* the workplace.[164] The case involved a Department of Revenue executive secretary, Chrissie Washington, who worked according to a "flexible" 7 a.m. to 3 p.m. schedule to care for a disabled child.[165] After Washington filed a race discrimination charge against her employer, a senior manager demanded that she work from 9 a.m. to 5 p.m. When Washington refused, she was assigned to another secretarial position with a different supervisor, and forced to re-apply for flex time. This application was

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155. 406 F.3d 895 (7th Cir. 2005).
156. *Id.* at 902.
157. *Id.* at 903.
158. *Id.*
159. *Id.* (citing Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998)).
160. 42 U.S.C. § 2000e-3(a) (2000).
161. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
162. *See, e.g.*, Moser v. Ind. Dep't of Corr., 406 F.3d 895, 903 (7th Cir. 2005).
163. 420 F.3d 658 (7th Cir. 2005).
164. *Id.* at 661.
165. *Id.* at 659.

refused. Afterward, Washington used a variety of vacation and other benefits to accommodate her schedule, took a leave of absence, and ultimately returned to work for a supervisor who allowed her to leave at 3 p.m.[166]

Writing for the panel, Judge Easterbrook began his analysis with Washington's contention that the anti-retaliation provision of Title VII, § 2000e-3(a), is significantly broader than Title VII's anti-discrimination provision, § 2000e-2(a), which solely addresses discrimination in the terms and conditions of employment.[167] He agreed in part. Surveying recent Seventh Circuit cases, Judge Easterbrook found that retaliation must be material, but could occur in or outside the workplace.[168] As examples of outside-the-workplace retaliation, he suggested: "The state's Department of Revenue might have audited Washington's tax returns in response to her complaint . . . or hired a private detective to search for" information that could pressure her to withdraw her complaint.[169]

The principle that adverse actions can violate Title VII's anti-retaliation provision *without* affecting the terms and conditions of a plaintiff's employment did not prove necessary to resolve Washington's claims. It recognizes, however, a significant trend in this circuit. In *Firestine v. Parkview Health System, Inc.*,[170] another case decided during the survey period, the court noted that in challenging the plaintiff's prima facie case of retaliation, the defendant had addressed whether she "suffered an 'adverse *job* action.'"[171] The court responded that "retaliatory conduct that can incur liability is not so limited in scope."[172] In *Herrnreiter v. Chicago Housing Authority*,[173] Judge Posner similarly noted that retaliation need not "involve an adverse employment action" to be actionable, and inventoried Seventh Circuit precedent supporting this position.[174]

In *Washington*, Judge Easterbrook further found that only *material* retaliation is actionable.[175] But having defined material adverse actions as those which would dissuade a "reasonable worker from making or supporting a charge of

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166. *Id.*

167. *Id.*

168. *Id.* at 661.

169. *Id.*

170. 388 F.3d 229, 235 (7th Cir. 2004).

171. *Id.*

172. *Id.*

173. 315 F.3d 742 (7th Cir. 2002).

174. *Id.* at 745.

175. Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 660 (7th Cir. 2005). Because Title VII does not define discrimination, courts have consistently limited that term to *material* differences in treatment. *Id.* The opinion explains:

> Courts have resisted the idea that federal law regulates matters of attitude or other small affairs of daily life [in part] . . . because almost every worker feels offended or aggrieved by many things that happen in the workplace, and sorting out which of these occurred because of [protected traits] would be an impossible task.

Id.

discrimination," he added a subjective element to this determination. "Reasonable workers," according to the court, could have vulnerabilities created by external or even subjective conditions.[176] An employer might know, moreover, "that a particular [employee] has a nervous condition or hearing problem that makes him miserable when exposed to music for extended periods."[177] If that employer retaliates by subjecting the employee to constant Muzak, the retaliation could be material.[178] Thus, while conceding that withdrawing flex time would not materially affect "a normal employee," the court found that Washington "was *not* a normal employee, [and her employer] knew it."[179] Washington's son and his medical condition created a vulnerability making regular hours "a materially adverse change *for her*, even though it would not have been for 99% of the staff."[180] Consequently, "[a] jury could find that the Department set out to exploit a known vulnerability and did so in a way that caused a significant (and hence an actionable) loss."[181]

The holding that Title VII's anti-retaliation provision can prohibit adverse action material *only* to the plaintiff represents a potential expansion of employer liability. By comparison, in *Herrnreiter*, Judge Posner divided material adverse actions into three categories: 1) "[c]ases in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished"; 2) "[c]ases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career prospects. . . ."; and 3) "[c]ases in which the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment. . . ."[182] Where, however, the action involves a "purely subjective preference for one position over another," Judge Posner has found no basis for "trundling out the heavy artillery of federal antidiscrimination law [lest] 'every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'"[183]

It remains to be seen whether, or by how much, *Washington* will shrink the barrier against Judge Posner's tide of trivial claims by chip-on-the-shoulder employees.[184] In the meantime, the Supreme Court is poised to decide if an

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176. *Id.* at 662.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* And its practical effect was to cut her hours, and thus her salary, by twenty-five percent. *Id.*

181. *Id.* at 663.

182. Herrnreiter v. Chicago Hous. Auth., 315 F.3d 742, 744-45 (7th Cir. 2002).

183. *Id.* at 745 (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)).

184. In *Moser v. Indiana Department of Corrections*, 406 F.3d 895 (7th Cir. 2005), a case decided before *Washington*, the court applied a traditional "adverse employment action" analysis

employer may be liable for any adverse treatment "reasonably likely to deter" the plaintiff from engaging in protected activity or merely ultimate employment decisions.[185]

D. Indirect Evidence and Summary Judgment: Does Desert Palace *Matter?*

In the unanimously-decided *Desert Palace, Inc. v. Costa*,[186] the Supreme Court held that a Title VII plaintiff needs no direct evidence of discrimination to receive a "mixed motive" jury instruction.[187] The "mixed-motive" instruction dates from the 1991 amendments to Title VII, which prevent an employer from defeating liability by showing it would have made the same decision even without an unlawful motive.[188] The instruction allows a jury to find liability if an employer's decision was motivated by both lawful and unlawful reasons. The 1991 amendments do not address, however, whether a plaintiff can establish "mixed-motive" liability through circumstantial or only direct evidence. Following the amendments, many courts had required plaintiffs to supply "direct evidence" of discrimination to argue a mixed-motive case to the jury.[189] *Desert Palace* categorically rejected this heightened requirement.[190] But the Court did not comment on how—if at all—mixed motive analysis affects the burden-shifting framework of *McDonnell Douglas* on summary judgment.

Desert Palace was decided in 2003, and promptly called "potentially the biggest employment case of the year."[191] District courts in Iowa and Minnesota soon found that *Desert Palace* transforms all single-motive into mixed-motive cases, and replaced *McDonnell Douglas* burden-shifting with a single inquiry: is there a genuine issue of fact that a protected characteristic (e.g., sex, race,

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to Rhonda Moser's retaliation claim. Moser alleged that her employer transferred her to a new position in retaliation for complaints about sexual harassment by another employee. *Id.* at 903. Moser's transfer did not change her title, salary or benefits. *Id.* at 904. Nevertheless, Moser contended that her duties diminished and she could no longer perform duties she enjoyed. *Id.* The court rejected her diminished duties argument as unsupported by evidence, and her "subjective preference for the former position" as failing (without additional evidence) to show an adverse action. *Id.* Turning, however, to Moser's final claim that her employer's discipline adversely affected her, the court found an issue of fact. Moser presented evidence that, "[t]he reality [was] that a discipline of any kind damages the reputation of an employee, and that [the] employee's career opportunities . . . greatly diminish." *Id.* The court found that viewed most favorably, this evidence may, "suggest a materially adverse employment action." *Id.* It did not, however, help Moser, who failed to prove the third element (causation) of her prima facie case. *Id.*

185. Burlington N. & Sante Fe Ry. v. White, 126 S. Ct. (2005).

186. 539 U.S. 90 (2003).

187. *Id.* at 92.

188. 42 U.S.C. § 2002e-2(m) (2000).

189. *See, e.g.*, Gagnon v. Sprint Corp., 284 F.3d 839, 848 (8th Cir. 2002).

190. *Desert Palace*, 539 U.S. at 101.

191. Daily Labor Report, No. 138, *High Court's Ruling in Mixed-Motive Case Did Not Clear Up Confusion, Attorneys Say* (July 18, 2003) (quoting management attorney Maurice Baskin).

religion) was a motivating factor in an adverse employment action?[192] The opinion has registered only a modest effect in the higher courts. The Supreme Court has applied the *McDonnell Douglas* framework post-*Desert Palace*,[193] and the Eighth, Ninth, and Tenth Circuits continue to do so.[194] In this survey period, the Fifth Circuit weighed in with an intermediate view. In *Keelan v. Majesco Software, Inc.*,[195] the court held that *Desert Palace* does not affect the *McDonnell Douglas* scheme until the plaintiff has set out a prima facie case of discrimination, *and* the defendant has articulated a legitimate, non-discriminatory reason for its actions.[196] But whereas a plaintiff could previously survive only by pointing to evidence of "pretext," the Fifth Circuit now permits plaintiffs to alternatively supply evidence that the defendant's legitimate reason is mixed with a discriminatory one.[197]

Like several others, the Seventh Circuit has yet to expressly analyze the relationship between *McDonnell Douglas* and *Desert Palace*. A few district courts within the circuit have recently commented that *Desert Palace* preserves the plaintiff's burden to set out a prima facie case of discrimination.[198] More significantly, the appellate courts continue to apply unmodified *McDonnell Douglas* burden-shifting, even when analyzing "pretext," to review the grant or denial of summary judgment. An informal survey of published summary judgment decisions under Title VII from October 2004 through early December 2005 confirmed this trend. Of the thirteen Seventh Circuit decisions reviewed, eight applied an unmodified pretext analysis under *McDonnell Douglas*. An additional five affirmed summary judgment based on a *McDonnell Douglas* analysis of the prima facie case. And none cited *Desert Palace*.

Despite early predictions, it appears unlikely the Seventh Circuit will reject *McDonnell Douglas* anytime soon. And for arguably good reason. *McDonnell Douglas* allows the plaintiff to raise a prima facie case of discrimination by pointing to "suspicious" circumstances, then asks the employer to articulate a legitimate explanation for its conduct, and mandates summary judgment unless the plaintiff can challenge that explanation. The controversy stems from an apparent conflict with mixed motives: if the presence of a legitimate reason does

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192. *See, e.g.*, Dare v. Wal-Mart Stores, 267 F. Supp.2d 987 (D. Minn. 2003); Griffith v. City of Des Moines, No. 4:01-CV-10537, 2003 WL 21976027 (S. D. Iowa July 3, 2003).

193. Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

194. *See, e.g.*, McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1123 (9th Cir. 2004); Peebles v. Potter, 354 F.3d 761 (8th Cir. 2004); Tesh v. U.S. Postal Serv., 349 F.3d 1270 (10th Cir. 2003); Allen v. City of Pocahontas, 340 F.3d 551, 558 n.5 (8th Cir. 2003).

195. 407 F.3d 332 (5th Cir.), *reh'g and reh'g en banc denied* (5th Cir. 2005).

196. *Id.* at 346.

197. Consistent with its earlier decisions, the Eighth Circuit held that *Desert Palace* did not affect summary judgment proceedings at all. Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005).

198. *See, e.g.*, Chen v. Northwestern Univ., No. 03-C-3928, 2005 WL 388570, at *12 (N.D. Ill. Feb. 17, 2005); Pruett v. The Columbia House Co., No. 2:02-CV-00224 RLY WT, 2005 WL 941675, at * 16 (S.D. Ind. Mar. 31, 2005).

not (in light of the 1991 Amendments) defeat a claim of intentional discrimination, how can failing to successfully challenge a legitimate reason defeat that claim on summary judgment? Alternatively, "if an employee can raise an inference of discrimination by satisfying the initial elements of a prima facie case, an employer may not necessarily escape liability altogether by offering an alternative explanation for its action."[199]

The indirect method itself, however, arguably accounts for mixed-motives. First, legitimate reasons can always co-exist with illegitimate ones, but that possibility does not create evidence of discrimination. Second, inferences must account for *all* the evidence. Thus, under *McDonnell Douglas*, it is ultimately the-back-and-forth, rather than the prima facie case in isolation, that sustains an inference of discriminatory motive.[200] Finally, facts that suggest the presence of additional, *illegitimate* reasons already demonstrate "pretext" under the *McDonnell Douglas* scheme. Thus, Seventh Circuit courts will find pretext where the proffered reason is insufficient, of itself, to explain the employer's conduct.[201] And to the degree the inferential force of the prima facie case survives a defendant's articulation of legitimate reasons, that case may suggest pretext as well.[202]

Whether justifiably or not, *Desert Palace* has not lived up to its billing. Two years later, it remains "business as usual" at summary judgment proceedings in the Seventh Circuit.

E. Direct Evidence of Discrimination: Single and Remote Remarks

During the survey period, the Seventh Circuit also published several notable decisions involving direct evidence of Title VII discrimination. In *Waite v. Board of Trustees of Illinois Community College District No. 508*,[203] the court found that a single (and facially ambiguous) remark could support a national origin discrimination verdict under Title VII.[204] A jury had awarded Paulette Waite, a Jamaican woman, $15,000 on her national origin discrimination claim, and her employer challenged that award on appeal.[205] Reviewing the record, the Seventh Circuit found sufficient evidence to support Waite's prima facie burden,

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199. Thomas v. Chrysler Fin., LLC, 278 F. Supp. 2d 922, 926 (N.D. Ill. 2003).

200. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court explained that whether a case should go to a jury will depend on factors including, "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 148-49.

201. *See, e.g.*, Hughes v. Brown, 20 F.3d 745, 747 (7th Cir. 1994).

202. *See Reeves*, 530 U.S. at 143 ("[T]he trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.").

203. 408 F.3d 339 (7th Cir. 2005).

204. *Id.* at 346.

205. *Id.* at 342, 346.

and to allow the jury to find the employer's "legitimate" reasons for her suspension pretextual. But that did not end the court's inquiry. Answering the defendant's claim that a jury cannot simply disbelieve the employer's explanation, but "must believe the plaintiff's explanation of intentional discrimination,"[206] the court examined the only direct evidence of discriminatory intent: a supervisor's pre-disciplinary comment that Waite had shown a "plantation mentality."[207] Waite testified at trial that this remark referred "to her national origin 'because it was usually said that Jamaicans in particular and Caribbean folks in general thought they were white and treated African-Americans like slaves.'"[208] Noting that her supervisor (an African-American) could have refuted this interpretation, but did not do so, and that she recommended discipline because Waite had left work for her to do (as might reflect a plantation mentality), the court affirmed the verdict for Waite.[209] The "jury was permitted to infer that this 'plantation mentality' remark was evidence of discriminatory animus."[210]

In a second case, the Seventh Circuit clarified the admissibility of direct evidence of discrimination, reversing the trial court's grant of judgment as a matter of law following the plaintiff's presentation of his race discrimination case at trial. In *West v. Ortho-McNeil Pharmaceutical Corp.*,[211] the district court barred Edward West from introducing eight racially offensive statements by his supervisor, Walter Pascale, as too remote in time from his allegedly discriminatory termination.[212] Distinguishing time-barred *acts* from remote-in-time *evidence*, the Seventh Circuit explained:

> On claims other than hostile work environment claims, acts outside the statutory time period cannot be the basis for liability, but the statute does not "bar an employee from using the prior acts as background evidence in support of a timely claim." . . . "[W]here, as here, the plaintiff timely alleged a discrete discriminatory act . . . acts outside of the statutory time frame may be used to support that claim."[213]

Finding that the exclusion of remote remarks abused the district court's discretion, the appellate court vacated the judgment, and remanded the case for a new trial.[214]

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206. The court did not address why evidence of pretext was not, of itself, sufficient to support the jury verdict in this case.

207. *Id.* at 342, 344.

208. *Id.* at 342.

209. *Id.* at 346.

210. *Id.* at 344.

211. 405 F.3d 578 (7th Cir.), *reh'g denied* (7th Cir. 2005).

212. *Id.* at 579.

213. *Id.* at 581 (internal citations omitted).

214. *Id.* at 581-82.

F. Other: Procedural Holdings of Note

The Seventh Circuit addressed several procedural issues during the survey period. In *EEOC v. Caterpillar, Inc.*[215] the court held, on interlocutory appeal, that in examining whether claims in an EEOC complaint fell within the scope of discrimination discovered during an EEOC investigation, a court cannot review the EEOC's own determination on this issue.[216] As explained by Judge Posner, this ruling rests on the difference between private lawsuits and those filed by the EEOC.[217] Private parties must exhaust administrative remedies.[218] Consequently, they may not sue on allegations not reasonably connected to an administrative charge.[219] But "[t]hat is not an issue," writes Judge Posner, "when the EEOC itself is the plaintiff, which is why a suit by the EEOC is not confined to 'claims typified by those of the charging party.'"[220] Rather, any violations identified during an EEOC investigation are actionable.[221] "[C]ourts may not limit a suit by the EEOC to claims made in the administrative charge, [and] they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation."[222]

Another noteworthy decision is *Torry v. Northrop Grumman Corp.*,[223] which addressed whether discovery can constructively amend the scope of a plaintiff's complaint. In her complaint, Nancy Torry solely alleged that her employer, Northrop, violated the Age Discrimination in Employment Act of 1967 ("ADEA").[224] Torry subsequently sought to discover evidence of race discrimination, but never amended her complaint.[225] Northrop argued that Torry's failure to amend her complaint barred her race discrimination claim.[226] The district court rejected this argument and considered both claims, but granted summary judgment in favor of Northrop.[227] On appeal, Northrop alternatively argued that the district court should never have reached the merits of Torry's race discrimination claim.[228]

Addressing this alternative argument, Judge Posner noted courts' reliance upon a "constructive amendment" doctrine, but turned to Federal Rule Civil

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215. 409 F.3d 831 (7th Cir. 2005).
216. *Id.* at 833.
217. *Id.* at 832.
218. *Id.* at 832-33.
219. *Id.* at 833.
220. *Id.* (quoting Gen. Tel. Co. v. EEOC, 446 U.S. 318, 331 (1980)).
221. *Id.*
222. *Id.*
223. 399 F.3d 876 (7th Cir. 2005).
224. 29 U.S.C. §§ 621-634 (2000).
225. *Torry*, 399 F.3d at 877.
226. *Id.*
227. *Id.*
228. *Id.*

Procedure 15(b) instead.[229] Under Rule 15(b), "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."[230] Judge Posner likened "trial by consent" to pretrial orders as superseding all pleadings.[231] In this view, consensually tried issues do not amend the complaint, but instead make it irrelevant.[232] Accordingly, Judge Posner found the parties had consented by extensively "pre-trying" Torry's race discrimination claim during discovery.[233] Citing Rule 15(b), he deemed Northrop's insistence that Torry formally amend her complaint "frivolous."[234]

Judge Posner's opinion sends clear warning that trial by consent includes "pretrial" without objection. The opinion says less, however, about what consensual "pretrial" of a claim requires. Northrop had acquiesced in "four years of discovery and other pretrial maneuverings without objecting to the fact that its opponent was patently engaged in endeavoring to prove racial as well as age discrimination."[235] Precisely when (during these four years) Northrop consented remains unclear. *Torry* appears, in any case, to extend circuit precedent. Several cases suggest a party can impliedly expand the scope of trial by briefing issues on summary judgment. For example, the defendant in *Ryan v. Illinois Department of Children & Family Services*,[236] a case cited by *Torry*, implicitly consented to try equal protection claims by addressing those claims in its summary judgment briefing, and by allowing the court to incorporate them in its pretrial order.[237] In *Walton v. Jennings Community Hospital, Inc.*,[238] and *Whitaker v. T.J. Snow Co.*,[239] the court also recognized that parties who join an issue in summary judgment proceedings impliedly consent to expand the plaintiff's complaint.[240] But a party's implicit consent to try un-pled claims

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229. *Id.* at 878.

230. *Id.* (quoting FED. R. CIV. P. 15(b)).

231. *Id.*

232. *Id.*

233. *Id.* at 879.

234. *Id.* Rule 15(b) provides that failure to amend "does not affect the result of the trial of" issues outside the pleadings.

235. *Id.*

236. 185 F.3d 751 (7th Cir. 1999).

237. *Id.* at 763.

238. 875 F.2d 1317, 1320 (7th Cir. 1989) (finding that where parties briefed and court ruled on tort-based theory on summary judgment, the complaint was amended beyond plaintiff's original contract-based theory).

239. 151 F.3d 661, 663 (7th Cir. 1998) (holding that where parties "squarely addressed the strict liability theory in their summary judgment briefs, the complaint was constructively amended to include that claim").

240. Elsewhere, the Seventh Circuit has warned that "the last minute assertion of such an issue into an answer to a motion for summary judgment does not constitute the trial of such an issue by express or implied consent within the meaning of Rule 15(b). Practical Constr. Co. v. Granite City Hous. Auth., 416 F.2d 540, 543 (7th Cir. 1969).

before summary judgment appears rare. This case should alert litigants to the power of pre-motion discovery to expand a plaintiff's case.

IV. AMERICANS WITH DISABILITIES ACT

A. What Is a Disability?

1. Actual Disability.—To invoke the protections of the Americans with Disabilities Act ("ADA"), an employee must establish a physical or mental impairment that "substantially limits" a "major life activity."[241] The "substantial limitation" requirement has been a subject of recent controversy. In 2002, the Supreme Court explained in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*[242] that, "'[s]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'"[243] The Court held that, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[244] Subsequently, the EEOC has insisted that *Toyota's* use of the phrase "prevents or severely restricts" lacks precedential value because the Court "clearly did not and could not raise the statutory standard for disability."[245] Recently, the Seventh Circuit agreed and concluded in *EEOC v. Sears, Roebuck & Co.*[246] that the Supreme Court did not intend to alter the ADA standard for determining "substantially limited."[247]

Despite the Seventh Circuit's alignment with the EEOC, the phrase "significantly limits" remains ambiguous, as *Sears* itself illustrates. In *Sears*, the court ultimately found that the plaintiff's inability to "walk the equivalent of one city block without her right leg and feet becoming numb" *substantially limited* the major life activity of walking.[248] It noted, however, her failure to provide evidence of distances she could walk, or how her abilities compared with average members of the population.[249] Despite finding such objective evidence helpful, the court deemed "substantially limiting" a subjective determination that resisted summary judgment.[250] At the same time, it urged employees to strongly consider using clear medical restrictions and statistical evidence to establish disability.

In *Branham v. Snow*,[251] the Seventh Circuit considered whether the plaintiff Gary Branham's insulin-dependent diabetes substantially limited the major life

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241. 42 U.S.C. § 12102(2)(A) (2000).
242. 534 U.S. 184 (2002).
243. *Id.* at 196.
244. *Id.* at 198.
245. EEOC Brief, *EEOC v. United Parcel Service, Inc.*, 311 F.3d 1132 (9th Cir. 2002).
246. 417 F.3d 789 (7th Cir. 2005).
247. *Id.* at 799-800.
248. *Id.* at 802.
249. *Id.* at 795.
250. *Id.* at 808.
251. 392 F.3d 896 (7th Cir. 2004), *reh'g denied* (7th Cir. 2005).

activity of eating. The court noted that Branham had to regulate his eating significantly to avoid mild and severe reactions to insulin.[252] Branham would have to "respond, with significant precision, to the blood sugar readings he takes four times a day."[253] Branham's strict observance of these daily procedures, concluded the court, substantially limited his "eating," thus qualifying him as disabled under the ADA.[254]

The court addressed another aspect of disability—its requisite longevity—in *Hopkins v. Godfather's Pizza, Inc.*[255] In *Toyota*, the Supreme Court held that an impairment must be "permanent or long-term" to be covered under the ADA.[256] The Seventh Circuit applied this requirement in *Hopkins*, in which an employee's injured hand healed sufficiently for him to return to work within a month.[257] The court found the injury's "impact . . . neither permanent or long term," and thus insufficient to "constitute a disability under the ADA."[258]

A final issue addressed during the survey period is whether "substantial limitation" accounts for an employee's ability to perform a major life activity with help. In *Sutton v. United Air Lines, Inc.*,[259] the Supreme Court held that if a plaintiff uses measures "to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity."[260] *Casey v. Kwik Trip, Inc.*[261] applied this principle to housework aids. The plaintiff admitted that adaptive tools and techniques allowed her to grip and manipulate objects, and thus complete household tasks. Based on these admissions, the Seventh Circuit found she was not substantially limited in performing household chores.[262]

2. "Regarded as" Disability.—Under the ADA, "disability" includes not only substantially limiting physical and mental impairments, but the condition of being "regarded as" having them.[263] To make out a prima facie case of "regarded as" discrimination, a plaintiff must show that his employer believed him to be

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252. *Id.* at 903.

253. *Id.*

254. *Id.* at 904.

255. 141 F. App'x 473 (7th Cir.) (unpublished order), *reh'g and reh'g en banc denied* (7th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3532 (U.S. May 15, 2006) (No. 05-1153).

256. *Toyota*, 534 U.S. at 192.

257. *Hopkins*, 141 F. App'x at 475.

258. *Id.* at 476. By comparison, the EEOC finds that impairments of several months' duration are not short term. EEOC COMPLIANCE MANUAL (CCH) § 902.4(d), at 30 (2000), *available at* http://www.eeoc.gov/policy/docs/902cm.html.

259. 527 U.S. 471 (1999).

260. *Id.* at 482.

261. 114 Fed. App'x 215 (7th Cir. 2004) (unpublished order).

262. *Id.* at 219. Additionally, Casey had claimed a substantial limitation in the major life activity of working—a claim the court rejected as inconsistent with her alleged ability to perform her job. *Id.* at 220.

263. 42 U.S.C. § 12102(2)(A) (2000).

substantially limited in a "major life activity."[264] In *Nese v. Jullian Nordic Construction Co.*,[265] the employee attempted to satisfy this requirement with evidence that his employer intentionally altered his evaluation form.[266] The Seventh Circuit was not persuaded, concluding that an employer's false justification of an action to an employee does not make the employer guilty of discrimination.[267]

In *Kupstas v. City of Greenwood*,[268] the court distinguished an employer's belief the employee could not work from the belief he could not perform a particular job.[269] The evidence on summary judgment showed that his employer believed Rodney Kupstas, a truck driver and laborer, could not shovel for more than four hours a day or lift more than sixty pounds.[270] The court nevertheless held that "Kupstas's failure to provide evidence as to a class or range of jobs for which he otherwise was qualified, and from which [the employer] perceived him to be excluded, [was] fatal to his case."[271] Nor could Kupstas cure this insufficiency by arguing that certain job modifications implied that his employer considered him disabled.[272] The court noted that although "a jury could infer that an employer offered an accommodation because of some perceived impairment, the plaintiff still must demonstrate that the perceived impairment is one that would substantially limit a major life activity."[273] This, however, Kupstas had failed to do.

3. "Record of" Disability.—Disability, under the ADA, also includes having a "record of" a substantially limiting impairment.[274] Comparatively rare, "record of" discrimination claims involve plaintiffs with histories or classifications of disability. A persisting question has been whether a "record of" disability includes conditions that do not amount to a substantially limiting impairment. The EEOC has taken the position that such claims are not actionable.[275] In *Rooney v. Koch Air, LLC*,[276] the Seventh Circuit followed suit.[277] The court thus rejected the employee's "record of" claim, holding that evidence that an employer knew about an employee's medical history did not establish a record

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264. *Id.*

265. 405 F.3d 638 (7th Cir.), *cert. denied*, 126 S. Ct. 623 (2005).

266. *Id.* at 640.

267. *Id.* at 642.

268. 398 F.3d 609 (7th Cir. 2005).

269. *Id.* at 614.

270. *Id.* at 613.

271. *Id.* at 614.

272. *Id.*

273. *Id.*

274. 42 U.S.C. § 12102(2)(B), (C) (2000).

275. EEOC COMPLIANCE MANUAL (CCH) § 902.7, at 40-41 (2000), *available at* http://www.eeoc.gov/policy/docs/902cm.html.

276. 410 F.3d 376 (7th Cir. 2005).

277. *See id.* at 381.

of any substantially limiting impairment.[278]

B. Essential Job Functions: When Is a Disabled Individual "Qualified"?

The ADA protects only "qualified" individuals with a disability. Thus, to show disability discrimination, an employee must show that she can perform—with or without reasonable accommodation—the essential functions of her job.[279] A recurring issue in disability cases is whether particular job functions are essential. The Seventh Circuit addressed this issue in *Rooney*, finding "performing job-site visits" an essential function of an Assistant Customer Assurance Manager position.[280] In doing so, it placed significant weight on the employee's written job description, which included tasks requiring such visits, and on the time spent performing such tasks.[281] Notably, the EEOC also finds the employer's judgment, written job descriptions, and time spent on performing functions relevant in separating marginal from essential job functions.[282]

When assessing the ability to perform essential job functions, the Seventh Circuit continued to find insubordinate employees beyond the reach of ADA protection. In *Hammel v. Eau Galle Cheese Factory*,[283] a disabled employee could not show he could perform essential functions where he acted irresponsibly, "failed to follow or comply with company rules and policies and continued to make personal phone calls on work time and take unauthorized cigarette breaks."[284] The ADA, concluded the court, does not "protect an employee who is insubordinate and refuses to obey and accept direct orders from his supervisors."[285]

C. Accommodating Disability: What Is Reasonable?

Pivotal to many ADA analyses is whether a reasonable accommodation would allow an employee to perform essential job functions, and which accommodations qualify as "reasonable." The Seventh Circuit addressed the "reasonableness" of potential accommodations in two cases decided during the

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278. *Id.*

279. 29 C.F.R. § 1630.2(n)(3) (2005); Basith v. Cook County, 241 F.3d 919, 927 (7th Cir. 2001).

280. *Rooney*, 410 F.3d at 382.

281. *Id.*

282. 29 C.F.R. § 1630.2(n), also citing the consequences of not performing the function, the terms of a collective bargaining agreement, and the experience of past and present employees performing the job as potentially relevant. *But cf.* Zieba v. Showboat Marina Casino P'ship, 361 F. Supp. 2d 838, 843 (7th Cir. 2005) (finding the ability to concentrate potentially inessential to the job of bartender).

283. 407 F.3d 852 (7th Cir.), *reh'g en banc denied* (7th Cir.), *cert. denied*, 126 S. Ct. 746 (2005).

284. *Id.* at 863.

285. *Id.*

survey period. In *Zieba v. Showboat Marina Casino Partnership*,[286] the court held that an employer may be required to accommodate an employee's request for an open-ended schedule.[287] Although such requests are often found unreasonable, the court determined that shorter shifts with definite start and finish times could bring them within the employer's accommodation duty.[288] Conversely, though courts generally find reasonable accommodations to include re-assignment, the Seventh Circuit recently held that an employer owed no duty to grant an employee's request to change supervisors in *Bradford v. City of Chicago*.[289] Ricardo Bradford alleged that working with a particular supervisor worsened his stress-related medical condition, and requested a transfer as "medically necessary."[290] The court rejected this accommodation as unreasonable, finding that the discretion to assign supervisors squarely resides with the employer.[291] The court relied on *Weiler v. Household Finance Corp.*,[292] which reasoned: "In effect, [the employee] asks us to allow her to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows this shift in responsibility."[293]

D. Prohibited "Medical Examinations" Under the ADA

In a decision employers should note, the Seventh Circuit held that a test used by an employer to measure personality traits was a prohibited "medical examination" under the ADA.[294] In *Karraker v. Rent-a-Center, Inc.*,[295] Rent-a-Center required employees seeking management positions to take a test designed to assess personality traits, such as an employee's ability to function in a fast-paced environment.[296] The same test, however, could also measure traits related to mental illness (e.g., depression, paranoia, hysteria).[297] Because the test was designed—at least in part—to disclose mental disorders, the court found it a "medical examination" under the ADA.[298] Regardless of whether Rent-a-Center used the test merely to measure personality traits, it operated to "exclud[e] employees with disorders from promotions."[299]

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286. *Zieba*, 361 F. Supp. 2d 838.
287. *Id.* at 842-43.
288. *Id.*
289. Bradford v. City of Chicago, 121 F. App'x 137, 140 (7th Cir. 2005) (unpublished order).
290. *Id.*
291. *Id.*
292. *Id.*; 101 F.3d 519 (7th Cir. 1996).
293. *Weiler*, 101 F.3d at 526.
294. 42 U.S.C. § 12112(d)(1) (2000).
295. 411 F.3d 831 (7th Cir. 2005).
296. *Id.* at 833.
297. *Id.* at 833-34.
298. *Id.* at 837.
299. *Id.* at 836-37.

E. Judicial Estoppel

The Seventh Circuit has previously found that applying for Social Security Disability Benefits does not necessarily forfeit an employee's ADA claim, but requires explanation:

> A plaintiff may declare that she was totally disabled in her SSDI application, then declare that she was a qualified individual under the ADA, but she must show that this apparent inconsistency can be resolved with reference to variance between the definitions of "disability" contemplated by the ADA and SSDI. Thus, "a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation."[300]

The Seventh Circuit recently applied this analysis in *Opsteen v. Keller Structures, Inc.*[301] In the course of seeking social security and ERISA benefits, Christopher Opsteen represented that he could not work with or without accommodation, and provided corroborating medical evaluations.[302] Reviewing his ADA claim, the court noted that Opsteen offered no explanation for what amounted to irreconcilable positions, and concluded that Opsteen was judicially estopped from showing he could perform the essential functions of his job.[303]

V. FAMILY MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 ("FMLA") allows an employee up to twelve weeks of unpaid leave for serious health conditions that prevent her from performing her job.[304] Courts in this circuit addressed both leave eligibility and return-to-work requirements during the survey year.

A. The 1250 Requirement Must Be Met Annually

Under the FMLA, an employee is entitled to twelve weeks of unpaid leave per twelve month period, but only if he has been employed "for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave."[305] Recently, the U.S. District Court for the Northern District of Indiana examined whether the 1250 hour requirement is a one-time-only determination. In *Sills v. Bendix Commercial Vehicle Systems LLC*,[306] the employee contended that "once she met the initial eligibility

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300. Feldman v. Am. Mem'l Life Ins. Co., 196 F.3d 783, 791 (7th Cir. 1999) (quoting Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805 (1999)).

301. 408 F.3d 390 (7th Cir. 2005).

302. *Id.* at 391.

303. *Id.* at 392.

304. 29 C.F.R. § 825.102 (2005).

305. 29 U.S.C. § 2612(a)(1) (2000); 29 C.F.R. § 825.110(a)(2).

306. Sills v. Bendix Commercial Vehicle Sys. LLC, No. Civ. 1:04-CV-149, 2005 WL

requirements to take FMLA . . . it was unlawful for her employer to discontinue her FMLA leave if she did not meet the 1,250 hour requirement annually."[307] The court rejected this position, holding that the employee must have worked at least 1250 hours the year prior to every twelve-month period in which she seeks leave.[308]

B. Collective Bargaining Agreement Can Heighten Return-to-Work Requirements

In *Harrell v. United States Postal Service*,[309] the postal service denied reinstatement to an employee who had been released to return to work by his medical doctor based on conditions imposed not by the FMLA but postal regulations.[310] Rejecting Mr. Harrell's challenge under the FMLA, the district court determined that postal regulations had the force of a valid collective bargaining agreement and they, rather than the FMLA, controlled his right to reinstatement.[311]

Mr. Harrell's claim was temporarily revived on appeal. A unanimous panel held that a collective bargaining agreement could not impose greater return-to-work requirements than the FMLA.[312] It concluded that test requirements "impose a greater burden on the employee and therefore cannot be employed, consistent with § 2652, in implementing the return-to-work provisions of the FMLA."[313]

On rehearing, however, the court reversed course. Finding that "Congress did not clearly address[] the question at issue through the statutory language,"[314] the panel deferred to a "reasonable interpretation" contained in Department of Labor regulations.[315] Specifically, the court looked to 29 C.F.R. § 825.310(b), providing: "*If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall apply.*"[316] This subsection, according to the court, "not only provides for compliance with a CBA, it also indicates that the CBA may impose more stringent return-to-work requirements on the employee than those set forth in the statute."[317] The judgment of the district court was therefore affirmed.

2674926, *8 (N.D. Ind. Oct. 20, 2005).

307. *Id.* at *6.

308. *Id.* at *7.

309. 415 F.3d 700 (7th Cir. 2005), *modified on reh'g*, 445 F.3d 913 (7th Cir. 2006).

310. He failed to supply certain information and to undergo an employer medical examination.

311. Harrell v. U.S. Postal Serv., 445 F.3d 913, 917 (7th Cir. 2006).

312. *Harrell*, 415 F.3d at 713-14.

313. *Id.* at 713.

314. *Harrell*, 445 F.3d at 925.

315. *Id.*

316. *Id.* (emphasis added).

317. *Id.*

VI. Federal Labor Standards Act

Under the Equal Pay Act ("EPA") amendment to the Fair Labor Standards Act of 1938,[318] an employer cannot discriminate by paying wages to one sex at a lesser rate than paid to the other sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[319] The Seventh Circuit examined whether the EPA prohibits a common employer practice—paying "new hires" at least as much as they previously earned—in *Wernsing v. Department of Human Services*.[320]

Jenny Wernsing brought an EPA claim against her employer, arguing that it discriminated against her by paying her less than a man recently hired in the same position.[321] The court began its analysis by observing that the EPA only forbids pay differences "based on sex," and "exempt[s] any pay differential based on any other factor other than sex."[322] Applying this exemption, it found "wages at one's prior employer" to be a "factor other than sex."[323] *Wernsing* rejected, moreover, the view of four other circuits that former wages are a "factor other than sex only if the employer has an 'acceptable business reason' for setting the employees' starting pay in this fashion."[324] Writing for the panel, Judge Easterbrook asserted that the EPA, "asks whether the employer has a reason other than sex—not whether it has a 'good' reason."[325] He also rejected Wernsing's argument that because women earn less than men, market wages must be ignored as discriminatory.[326] Although conceding that wage patterns for some jobs might reflect discrimination, the court found no such evidence in the summary judgment record.[327] Lacking evidence of discrimination, Wernsing was not entitled to a trial.[328]

VII. Equal Protection

The Seventh Circuit issued two significant equal protection decisions during the survey period. In *Nanda v. Moss*,[329] the court denied qualified immunity to a medical school dean who acquiesced in a professor's termination *knowing* that her supervisor might have had a discriminatory motive, and knowing that proper

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318. 29 U.S.C. § 206(d) (2000).
319. *Id.*
320. 427 F.3d 466, 467 (7th Cir. 2005).
321. *Id.*
322. *Id.* at 468 (quoting 29 U.S.C. §206(d) (2000)).
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.* at 470.
327. *Id.*
328. *Id.* at 471.
329. 412 F.3d 836 (7th Cir. 2005).

procedures had been disregarded.[330] Navreet Nanda, a "woman of Asian and Indian descent, accepted a tenure track position" with the University of Illinois as a professor in the college of medicine.[331] A new department head subsequently recommended to the dean that Nanda be dismissed, and the dean made that recommendation to the board of trustees which terminated her contract. This process excluded the faculty advisory committee, which had participated in all prior contract terminations.[332] The dean, moreover, had received faculty letters protesting the termination as discriminatory and knew that another female professor had complained of harassment by the department head.[333] Nanda sued the dean, among others, alleging that he violated her equal protection rights based on sex and ethnicity under 42 U.S.C. § 1983. The dean moved for summary judgment, claiming qualified immunity as a government official.[334] The district court denied his motion.

Affirming the denial of summary judgment, the Seventh Circuit rejected the dean's argument that he was "merely negligent, but not deliberately indifferent, in failing to follow up on the complaints, concerns and allegations levied against [the department head]."[335] To the contrary, the court noted that the dean had ignored Nanda's complaints, the complaints of other faculty members, the recommendation of the faculty advisory committee, and allegations of harassment against the department head.[336] It similarly characterized the dean's post-recommendation appointment of another female faculty member to handle the plaintiff's internal grievance as "too little and too late to qualify him for immunity."[337] The court next examined whether the constitutional right at issue was clearly established at the time of the alleged violation. Prior cases, it noted, had established that "schools are required to give male and female students equivalent levels of protection."[338] Consequently, a reasonable university administrator was on notice as of 1998 that recommendation of a female professor's termination amidst allegations of gender and ethnic discrimination, coupled with false reports of approval by an advisory committee, violated federal law.[339]

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330. *Id.* at 844-45.

331. *Id.* at 838.

332. *Id.* The dean was also aware that the Faculty Review Committee had subsequently asked the department head to withdraw his termination recommendation.

333. *Id.* at 839-40.

334. *Id.* at 841. "Government officials performing discretionary functions are entitled to qualified immunity from suit unless their conduct violated clearly established constitutional rights of which a reasonable person would have known." *Id.* (citation and internal quotation marks omitted).

335. *Id.* at 843.

336. *Id.*

337. *Id.*

338. *Id.* at 844.

339. *Id.* at 844-45.

A few months after the *Nanda* decision, *Lauth v. McCollum*[340] rejected a police officer's challenge to his termination under a demanding standard of review for public employees pursuing "class of one" equal protection claims.[341] Chester Lauth, the police officer, was sanctioned by the local board of police commissioners for mishandling a missing child report. Lauth brought a "class of one" suit[342] against the chief and others, alleging that his discipline deprived him of equal protection in violation of the Fourteenth Amendment to the U.S. Constitution.[343] He pointed to another officer who had, years earlier, committed a similar infraction without consequence, and he attributed the difference in treatment to animosity toward his role in unionizing the police force.

Reviewing summary judgment against Lauth, the court described the classic "class of one" equal protection violation as occurring when "a public official, with no conceivable basis for his action other than spite or some other improper motive (improper because unrelated to his public duties), comes down hard on a hapless private citizen."[344] Because such plaintiffs do not belong to any "suspect" or favored class, explained the court, they must defeat "any reasonably conceivable state of facts that could provide a rational basis for the classification."[345] Without such limits, wrote Judge Posner, class-of-one cases could "effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors."[346] Turning to Lauth, the court found evidence of discrimination lacking. Lauth offered no evidence that another officer was similarly situated but deliberately treated differently, or that "totally illegitimate animus" solely motivated his discipline.[347]

That *Lauth* and *Nanda* reached different results owes less to their differing panels, than to their different claims. Judge Posner noted that "the case for federal judicial intervention in the name of equal protection is especially thin" when the unequal treatment in a "class of one" case arises from the employment relationship and that the court could find no "'class of one' cases in which a public employee has prevailed. . . ."[348]

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340. 424 F.3d 631 (7th Cir. 2005).

341. *Id.* at 634.

342. Class of one cases are those in which a plaintiff argues only that he is being treated "arbitrarily worse than some one or ones identically situated to him," not that he is a member of a class being discriminated against by the defendant. *Id.* at 633; *see, e.g.*, Village of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000).

343. *Lauth*, 424 F.3d at 631-32.

344. *Id.* at 633.

345. *Id.* at 634 (citation and internal quotation marks omitted).

346. *Id.* Posner also stated that class-of-one cases run amok would "inject the federal courts into an area of labor relations that Congress disclaimed a federal interest in." *Id.* at 633.

347. *Id.* at 634.

348. *Id.* at 633.

VIII. OTHER FEDERAL LAW DEVELOPMENTS

Less easily categorized, a handful of federal cases published during the survey term nevertheless merit individual discussion. One such case is *City of San Diego v. Roe*,[349] in which the Supreme Court examined the speech rights of a public employee. The case arose from police officer John Roe's sale of sexually explicit videos on the Internet.[350] The videos depicted him removing a generic police uniform and masturbating.[351] Roe challenged his resulting termination, contending the videos were protected as speech on a matter of public concern. The Ninth Circuit reversed the district court's dismissal of his claim, and the Supreme Court agreed to undertake review.[352]

Although recognizing that public employees' off-duty speech may enjoy First Amendment protection, the Supreme Court found that Roe's conduct affected "legitimate and substantial" employer interests.[353] The Court noted that Roe "took deliberate steps" to link his expression to his police duties—using a police uniform, including a law enforcement reference on his website, and listing his occupation as "in the field of law enforcement."[354] The Court determined that this purposeful connection harmed Roe's employer.[355] And it disagreed with Roe's contention that the videos contain speech on a matter of public concern.[356] In a per curiam opinion, the Court reversed the Ninth Circuit's reinstatement of Roe's First Amendment claim.[357]

The Seventh Circuit recently applied *Roe* in *Schad v. Jones*.[358] George Schad alleged that the police department transferred him to a less prestigious position in retaliation for exercising his First Amendment rights. Citing *Roe*, the Seventh Circuit noted that public employees do not relinquish the right to free speech by accepting government employment.[359] But as in *Roe*, the court found the speech at issue—here, Schad's relaying of a dangerous suspect's location to another officer—unprotected.[360] Schad had communicated internal (rather than public) department information, with no goal of public comment. His "judgment call"

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349. 543 U.S. 77 (2004) (per curiam).

350. *Id.* at 78.

351. *Id.* at 78-79.

352. *Id.* at 79-80.

353. *Id.* at 81.

354. *Id.*

355. *Id.* "[T]he debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute." *Id.*

356. *Id.* at 83-84. "[P]ublic concern," it explained, "is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *Id.*

357. *Id.* at 85.

358. 415 F.3d 671 (7th Cir. 2005).

359. *Id.* at 674.

360. *Id.* at 676.

did not, therefore, amount to constitutionally protected speech.[361]

Returning to the private sector, the Seventh Circuit decided a significant question under the National Labor Relations Act ("NLRA") in *Brandeis Machinery & Supply Co. v. National Labor Relations Board*,[362] holding that employee handbook language urging employees to report pro-union "harassment" violated section 8(a)(1) of the NLRA. The language at issue advised employees:

> This is a non-union organization. It always has been and it is certainly our desire that it always will be that way. . . . You have a right to join and belong to a union and you have an equal right NOT to join and belong to a union. If any other employee should interfere or try to coerce you into signing a union authorization card, please report it to your Supervisor and we will see that the harassment is stopped immediately.[363]

The National Labor Relations Board ("Board") found that by encouraging employees to report co-workers who solicit union support, the employer's handbook unlawfully interfered with the right to organize collectively.[364]

Although finding substantial evidence to support the Board's decision, the Seventh Circuit applied a different analysis. The court began with the proposition that "proponents of unions may 'engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited.'"[365] Moving to the Brandeis handbook, the court deemed its reporting provision at odds with the right to solicit. First, the policy appeared in a section of the handbook that explained Brandeis's desire to remain union-free, rather than as part of a general anti-harassment policy.[366] Second, the warnings only encouraged reports of pro-union harassment, rather than all harassment related to union organizing efforts.[367] And third, the policy was disseminated to all employees upon hire, rather than as specific incidents or threats arose.[368] The resulting absence of "limiting principles"—that is, the absence of guidelines to

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361. *Id.* at 678. More recently, the Supreme Court has issued a broader basis for such rulings, holding that: "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).

362. 412 F.3d 822 (7th Cir. 2005).

363. *Id.* at 825-26.

364. *Id.* at 829; *see also* 29 U.S.C. § 158(a)(1) (2000).

365. *Brandeis*, 412 F.3d at 830 (quoting Ryder Truck Rental, Inc., 341 NLRB No. 109, 2004 WL 963370, at *1 (N.L.R.B. Apr. 30, 2004), *order enforced*, Ryder Truck Rental, Inc. v. NLRB, 401 F.3d 815 (7th Cir. 2005)).

366. *Id.* at 831.

367. *Id.* There was no "equal protection" guarantee, as found in prior cases, indicating that the company would seek to stave off harassment regardless of the alleged harasser's union leanings. *Id.*

368. *Id.*

help employees determine whether perceived harassment actually violated the NLRA—increased the chances that pro-union employees would be disciplined for legally unobjectionable conduct.[369] Affirming the judgment of the Board, the court wrote: "It is incumbent upon employers to use language that 'is not reasonably subject to an interpretation that would unlawfully affect the exercise'" of their rights under the NLRA.[370]

A different sort of statutory protection came under scrutiny in *Roquet v. Arthur Andersen LLP*.[371] There, the Seventh Circuit examined the "unforeseen business circumstances" exception to the federal Worker Adjustment and Restraining Notification ("WARN") Act's requirement that employers provide sixty days' notice of impending layoffs to employees.[372] In March 2002, news of Andersen's criminal indictment triggered a "massive client defection,"[373] leading the company to notify employees on April 8, 2002, of layoffs that were to begin a little more than two weeks later. Andersen admittedly knew the Department of Justice was investigating its document shredding and other matters as early as November 2001.[374] Nevertheless, the court found Anderson's March indictment unforeseeable.[375] Noting that the Supreme Court had only recently agreed to consider the "rather unprecedented step [of] indicting (and convicting) the company as an entity,"[376] the court determined that "a reasonable company in Andersen's position would have reacted as it did. Confronted with the possibility of an indictment that threatened its very survival, the firm continued to negotiate with the government until the very end and turned to layoffs only after the indictment became public."[377] The employees' WARN claim against Andersen failed, and summary judgment against the plaintiffs was affirmed.[378]

IX. OTHER STATE LAW DEVELOPMENTS

Several state court decisions hold particular interest for employers. Notably, in *Montgomery v. Board of Trustees of Purdue University*,[379] the Indiana Court of Appeals affirmed the dismissal of a former Purdue employee's claim under

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369. *Id.*

370. *Id.*

371. 398 F.3d 585 (7th Cir.), *reh'g and reh'g en banc denied* (7th Cir.), *cert. denied*, 126 S. Ct. 375 (2005).

372. *Id.* at 586.

373. *Id.* at 587.

374. *Id.*

375. *Id.* at 589.

376. *Id.* at 589 n.1.

377. *Id.* at 589.

378. *Id.* at 591; *see* Roquet v. Arthur Andersen LLP, 126 S. Ct. 375 (2005) (denying certiorari).

379. 824 N.E.2d 1278 (Ind. Ct. App.), *trans. granted and opinion vacated*, 841 N.E.2d 181 (Ind. 2005).

Indiana's Age Discrimination Act ("IADA"). The IADA applies to all employers *except* "a person or governmental entity which is subject to the federal Age Discrimination in Employment Act" ("ADEA").[380] Applying this exception, the court found that while Purdue is immune from ADEA liability for *monetary* damages,[381] the university could be subjected to injunctive sanctions.[382] It concluded that Purdue thus fell outside the scope of the IADA,[383] and affirmed the trial court's dismissal of Michael Montgomery's claim.[384] On August 11, 2005, however, the Indiana Supreme Court accepted transfer and vacated the decision of the appellate court. The status of IADA claims against state universities remains uncertain.

The plaintiff in *Keene v. Marion County Superior Court*[385]—a significant wrongful termination case—initially fared no better than Montgomery. Robert Keene was notified by his employer on August 25, 1998, that it would discharge him one month later.[386] Ultimately terminated on September 25, 1998, Keene did not file his wrongful termination claim based on alleged age discrimination until September 25, 2000.[387] In a matter of first impression, the court of appeals held that the limitations period had already expired. The two-year statute of limitations governing actions against the state "relating to the terms, conditions, and privileges of employment"[388] began to run, according to the court, "at the time the decision to discharge Keene was communicated to him in the notice of August 25, 1998."[389] Subsequently, however, Keene petitioned for transfer, arguing that the limitations period should not run until he discovered the age of his replacement and thus the basis for his claim. The Indiana Supreme Court granted transfer on July 13, 2005, vacating the opinion of the appellate court.[390] The question of when an action for age discrimination accrues for purposes of Indiana Code section 34-11-2-2 thus remains to be decided.

Employee plaintiffs fared only slightly better in the private arena, arguably winning their most significant victory in *Burgess v. E.L.C. Electric, Inc.*[391] Matthew Burgess and other employees sued their public contractor employer

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380. IND. CODE §§ 22-9-2-1 to -2 (2005).

381. *Montgomery*, 824 N.E.2d at 1281.

382. *Id.* at 1281-82 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000)). In *Kimel*, the Supreme Court held that the ADEA did not properly abrogate States' Eleventh Amendment immunity, and therefore that state employee plaintiffs alleging discrimination based on age were limited to suits for injunctive relief. *Kimel*, 528 U.S. at 91.

383. *Montgomery*, 824 N.E.2d at 1281.

384. *Id.* at 1282-83.

385. 823 N.E.2d 1216 (Ind. Ct. App.), *trans. granted and opinion vacated* (Ind. 2005).

386. *Id.* at 1217.

387. *Id.*

388. IND. CODE § 34-11-2-2 (2005).

389. *Keene*, 823 N.E.2d at 1218.

390. *Id.* at 1216.

391. 825 N.E.2d 1 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005).

under Indiana's Common Construction Wage Act ("the Act"),[392] seeking unpaid wages, liquidated damages, and attorneys fees.[393] The trial court granted summary judgment in favor of the contractor and found that the Employee Retirement Income Security Act ("ERISA") preempted the Act.[394] The appellate court held, as a matter of first impression, that the Act has no connection with ERISA for purposes of federal preemption.[395] Accordingly, it reversed, allowing the employees to proceed with their claims.[396]

CONCLUSION: ON THE HORIZON

Two cases beyond the survey period warrant particular attention. In *IBP, Inc. v. Alvarez*,[397] the Supreme Court consolidated appeals by Maine poultry workers and employees of a meat processing plant to decide when the workday begins under the Fair Labor Standards Act. In its unanimous November 2005 decision, the Court distinguished time that employees spend walking (dressed) between changing and production areas and the time spent waiting to put on the first piece of gear.[398] The first is compensable time under the FSLA, according to the Court, while the second is not.[399]

To reach this conclusion, Justice Stevens recounted how Congress had rejected the Court's broad interpretation of the workday by passing the Portal-to-Portal Act, which amended the FSLA to exclude time spent "walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are 'preliminary or postliminary' to that principal activity."[400] The Court also relied on its ruling an *Steiner v. Mitchell*,[401] that time spent donning protective clothes was compensable.[402] Finally, it adopted a continuous workday theory, concluding that once started, work does not stop as the employee moves from the changing area to the production line.[403] By comparison, the Court held that the FSLA excludes the time employees spend waiting in line for safety equipment and protective gear

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392. IND. CODE §§ 5-16-7-1 to -5 (2005).

393. *Burgess*, 825 N.E.2d at 7. The Employees sought "damages equal to the amount of unpaid wages representing the difference between the amount each Plaintiff was paid by ELC and the amount each Plaintiff should have received from ELC had he or she been paid the prevailing wage scale rate as required by statute." *Id.* (quoting Appellant's App. at 14).

394. *Id.* at 4-5.

395. *Id.* at 12.

396. *Id.* at 16.

397. 126 S. Ct. 514 (2005). This case was consolidated with *IBP, Inc. v. Alvarez* for review by the U.S. Supreme Court.

398. *Id.* at 518.

399. *Id.* at 521.

400. *Id.* at 520.

401. 350 U.S. 247, 248 (1956).

402. *IBP, Inc.*, 126 S. Ct. at 521.

403. *Id.* at 522, 525.

when they arrive at work.[404] Waiting, according to the Court, was two steps removed from the beginning of productive activity, thus falling within the Portal-to-Portal Act's exception for "activities which are preliminary to or postliminary to a principal activity or activities."[405]

An important case likely to be decided in the coming survey period is *Arbaugh v. Y & H Corp.*[406] On May 16, 2005, the Supreme Court granted certiorari in *Arbaugh*, which addressed whether the fifteen-employee threshold of Title VII[407] is an unwaivable jurisdictional requirement—a subject of conflicting opinions in circuit courts.[408] In *Sharpe v. Jefferson Distributing Co.*,[409] for example, the Seventh Circuit asserted that, "[a] plaintiff's inability to demonstrate that the defendant has 15 [or more] employees is just like any other failure to meet a statutory requirement," and concluded that "[s]urely [this] is not the sort of question a court . . . must raise on its own, which a 'jurisdictional' characterization would entail."[410] But bound by precedent, the Fifth Circuit in *Arbaugh* remained with the Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits in treating the "employer" definition as creating a jurisdictional requirement.[411]

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404. *Id.* at 527.

405. *Id.* at 528 (quoting 29 U.S.C. § 254(a)(2) (2000)).

406. 380 F.3d 219 (5th Cir. 2004), *cert. granted*, 544 U.S. 1031 (2005).

407. 42 U.S.C. § 2000e(b) (2000).

408. *Arbaugh*, 380 F.2d at 223.

409. 148 F.3d 676, 677 (7th Cir. 1998), *abrogated on other grounds*, Papa v. Kay Indus., 166 F.3d 937, 939-40 (7th Cir. 1999).

410. *Id.* at 677-78.

411. *Arbaugh*, 380 F.3d at 224.