Employment Law for Business

Third Edition

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About the Author

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Preface - Employment Law for Business

Employment - working- is a basic part of most lives. Employment provides needed financial resources for employees and their families. Employment, for some, provides confirmation of the individual's value to the organization and to greater society. Considering the financial aspects of working, and considering the personal feelings vested in the employment relationship, disputes between the employee and the employer take on added importance. Emotions run high in employment disputes.

The purpose of this textbook is to chart an employment law road map. Legal regulation of the workplace is complex and extensive. Mistakes may be costly and disruptive both to the employees involved and to the company. Knowledge is essential as company managers try to organize workplace activities in a manner producing profit for the company shareholders.

A textbook provides only a survey of a discipline, coupled with details in selected areas. No textbook can provide all the answers to problems faced in the marketplace. In addition, changes occur quickly in employment law through court rulings or legislative acts. Yesterday's legal ruling may not be today's rule. Considering the fluid nature of the law and the difficulties of trying to capture the relevant portions of a discipline in a textbook, the materials in this textbook present only a beginning for the field of employment law. Proficiency with the presented concepts will enable the reader to better understand the present laws and prepare for future changes.

As careful as I have tried to be, there are surely errors in this text. I take responsibility for these errors and welcome any comment or suggestions for improvement. I hope you will find this textbook as interesting and informative to read as it was exciting and challenging to write.

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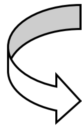
Chapter 1 - Introduction to the Regulation of Employment

A Note on Cognitive Objectives – Each chapter of this textbook begins with cognitive objectives. These objectives identify learning goals for the chapter. The objectives listed below identify the major learning goals for Chapter 1.

Chapter 1 - Cognitive Objectives



1. Explain the legal structure in the United States for regulation of the employment relationship; explain the interaction between federal and state employment law.
2. Explain and interpret the cases presented in this chapter and apply the corresponding legal principles to hypothetical employment problems.
3. Compare and contrast litigation and arbitration; explain the current law on arbitration of employment disputes.
4. Answer the questions found throughout the chapter.

Employment Issues & Case Analysis

"Democratic institutions awaken and foster a passion for equality which they can never satisfy."
"Americans are so enamored of equality that they would rather be equal in slavery than unequal in freedom."

Alexis De Tocqueville (French statesman, 1805-1859)

The times have changed! American employment law is a minefield for companies as they hire, promote, train, pay, discipline, or fire employees. Lawsuits and legal problems are much more common today than they were in the past. Employee loyalty toward his employer -- and loyalty back from the firm -- has lessened significantly over the last several decades. There are multiple reasons for the changing relationship between employer and employee.

Increased national and international competition has forced many companies to reduce labor costs and forgo programs benefiting employees. Loyalty to long-term employees is more difficult in the current combative international marketplace. In addition, society has changed. Social tensions about race, gender, ethnicity, or religion are now openly discussed and debated. Congress and state legislatures have added or strengthened civil

rights laws. The new laws have increased both the chances of winning an employment lawsuit and the damages available for successful plaintiffs. Thus, more lawsuits are filed and the relationship between employer and employee is further strained.

In 1835, Alexis De Tocqueville wrote his treatise *Democracy in America*, the source of this chapter's opening quotations. America was struggling then with the goal of equality, especially on race and gender issues. America is still struggling with the goal of equality. Racial, gender, and religious differences are highlighted and often magnified when issues of job hiring or firing are involved. Notions of equality and justice - always difficult - have become especially controversial regarding employment and discrimination. Does America want equality of opportunity or equality of outcome? Employers and employees both are sometimes caught in the middle.

We begin our analysis of employment law with a legal opinion, *Sharbine v. Boone Exploration*. The case is presented to show specific legal points and to illustrate the process of case analysis. The legal topics presented in *Sharbine* will arise in later textbook chapters.

The court opinions found throughout this textbook are edited. A significant amount of text is removed to improve readability and to reduce the length and complexity of opinions. Most of the material removed from the court opinions relates to issues not covered in this textbook. The legal essence of each court opinion is preserved with the text that is included. Court language that is removed is replaced with three periods, " . . .". Personal comments that are not part of a court opinion are marked within a case with brackets in bold type, for example, **[The preceding rule illustrates . . .]**. These personal comments are intended to clarify a legal point that may be confusing after reading the court language. In *Sharbine* and other opinions in the textbook, court citations to relevant supporting cases also are omitted.

Many court opinions will present analysis of legal "motions" made by the litigants. For example, one party may move (make a motion) for "summary judgment." A court grants summary judgment when a lawsuit presents no genuine issues of material fact and one party is entitled to win as a matter of law. For a court to use summary judgment, either both parties agree on the important facts, or, even assuming the plaintiff's version of the facts is correct, the plaintiff still does not have a valid legal cause of action. Juries are used in our system of jurisprudence to decide questions of fact. If a factual determination is not needed, the court then may dispense with a jury trial and rule immediately on the legal issues presented.

Sharbine v. Boone Exploration presents a defendant making a motion to dismiss the lawsuit brought against it by the plaintiff. Inside the opinion, the court analyzes when it is appropriate to grant this motion.

Sharbine
v.
Boone Exploration
2010 U.S. Dist. LEXIS 21628 (W.D. Ark. 2010)

BACKGROUND

Barbara M. Sharbine was hired by Boone Exploration, Inc. to work as an oil-field worker in Columbia County, Arkansas. She was placed on a crew with five male co-workers. Sharbine alleges that starting on December 22, 2006, through January 3, 2007, her male co-workers used crude and profane language around her and in reference to her. These comments included remarks about Sharbine's genitals and what they would like to do to her in a sexual manner. During this time, a male co-worker also dropped his pants in front of Sharbine and exposed himself to her.

Sharbine complained about this behavior to her supervisor. She claims that her co-workers were never reprimanded or told to cease the inappropriate behavior.

On January 3, 2007, Sharbine was terminated from her employment with Boone. Sharbine claims that Jerry Blankenship, her supervisor, told her that she was being terminated because she was "a good-looking woman on an all male crew." She also claims that Blankenship told her, "You should have expected [it] and should have been able to deal with it."

On June 19, 2007, Sharbine filed a charge of discrimination against Boone with the Equal Employment Opportunity Commission ("EEOC"). In her charge, Sharbine claimed that while employed by Boone, she was discriminated against on the basis of her sex. On October 2, 2008, the EEOC issued a determination that there was reasonable cause to believe that Sharbine had been subjected to unlawful harassment. The EEOC then invited the parties to attempt to reach a resolution of the matter. No resolution was reached, and on February 9, 2009, the EEOC issued Sharbine a Notice of Right to Sue letter. **[A “right to sue” letter will be discussed later in the textbook, Chapter 5.]**

On May 8, 2009, Sharbine filed suit in this Court against Boone Exploration, Inc. In her complaint, Sharbine alleges that her civil rights were violated on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended at 42 U.S.C. § 2000e and the Arkansas Civil Rights Act ("ACRA"), Ark. Code Ann. § 16-123-101, et seq. She also claims that Boone's actions were outrageous under Arkansas's common law tort of outrage. In lieu of an answer, Boone filed a Motion to Dismiss . . ..

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) states that a complaint should be dismissed if it fails to state a claim upon which relief may be granted. . . . A motion to dismiss should be granted when all factual allegations stated in the complaint fail to "state a claim to relief that is plausible on its face" or when the law is dispostive on the issue. **[Citations omitted]** When considering a motion to dismiss, the court will presume that all allegations in the complaint are true, resolve all doubts and inferences in the non-moving party's favor, and view the pleadings in the light most favorable to the non-moving party. . . .

DISCUSSION

In her complaint, Sharbine alleges . . . a Title VII sexual harassment claim, . . . and a claim for the tort of outrage. Taking her allegations as true, the Court must determine if Sharbine has alleged sufficient facts in her complaint to state a claim against Boone for each cause of action.

1) Sharbine's Outrage Claim

Under Arkansas law, to establish a claim for the common law tort of outrage, a plaintiff must be able to establish: 1) that the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; 2) that the conduct was extreme and outrageous, was beyond all possible bounds of decency, and was utterly intolerable in a civil community; 3) that the actions of the defendant were the cause of plaintiff's distress; and 4) that the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. **[Citations omitted]** . . . To determine if conduct is "extreme and outrageous," courts look at "the conduct at issue; the period of time over which the conduct took place; the relation between the plaintiff and defendant; and defendant's knowledge that plaintiff is particularly susceptible to emotional distress by reason of some physical or mental peculiarity." **[Citations omitted]** A plaintiff does not meet the burden if his complaint merely describes "insults, indignities, threats, annoyances, petty oppressions, or other trivialities." **[Citations omitted]** "The standard that a plaintiff must meet in order to satisfy the elements of outrage in Arkansas 'is an exceptionally high one.'" **[Citations omitted]** This standard is even higher in employment cases. **[Citations omitted]**

In Sharbine's complaint, she alleges that over a two week period her co-workers used crude and profane language in her presence and made inappropriate sexual remarks about themselves and her. A co-worker also dropped his pants and exposed himself to her on one occasion. Sharbine

complained to her supervisor about the conduct but her co-workers were never reprimanded or told to stop the behavior. After reporting the behavior, Sharbine was fired. The reason given for her termination was that she was a "good-looking woman on an all male crew." She was also told, "You should have expected (it) and should have been able to deal with it." . . . Sharbine alleges that Boone should have known that she would suffer emotional distress as a result of it refusing to stop the inappropriate conduct of her co-workers. She further alleges that both her co-workers' conduct and the conduct of Boone was "extreme, outrageous, and utterly intolerable in a civilized society." Sharbine claims that Boone's conduct, in tacitly approving the conduct of her co-workers, was the cause of her distress. . . .

After reviewing Sharbine's complaint and taking her allegations as true, the Court finds that although the alleged conduct by Boone and her co-workers may have been inappropriate, it was not so extreme as to support a claim of outrage in Arkansas. In this state, the courts take a strict view in recognizing outrage claims. **[Citations omitted]** A high burden is placed upon a plaintiff when seeking such a claim, especially in employment cases. **[Citations omitted]** Here, Sharbine simply claims that the conduct of Boone and her co-workers was extreme and outrageous. However, this alone is not enough to support a claim of outrage. **[Citations omitted]** Thus, Sharbine has failed to meet the exceptionally high burden required to state a claim of outrage in Arkansas. Accordingly, Boone's Motion to Dismiss for the tort of outrage should be granted and the claim dismissed.

2) Sharbine's Title VII Claims

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Discrimination based upon sexual harassment is generally separated into two categories -- hostile work environment and quid pro quo claims. Both are cognizable under Title VII. **[Citations omitted]**. The difference between a quid pro quo harassment claim and that of a hostile work environment is that one involves threats to retaliate against an employee if she "denies [the harasser] some sexual liberties," and those threats are carried out, while the other involves "bothersome attention or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." **[Citations omitted] [Sexual harassment will is presented later in the textbook, Chapter 11.]**

In order to prevail on a quid pro quo harassment claim, a plaintiff must show: 1) she was a member of a protected group; 2) she was subjected to unwelcome harassment in the form of sexual advances or requests for sexual favors; 3) the harassment was based on sex; and 4) her submission

to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment. **[Citations omitted]** Here, Sharbine alleges that she was a female working on an all male crew and that she was subjected to unwelcome sexual comments by her co-workers. She does not claim that these comments included any threats, implied or express, of retaliation if she refused to submit to her co-workers' sexual advances. Thus, Sharbine has not alleged sufficient facts to state a plausible claim for quid pro quo harassment. Accordingly, Boone's Motion to Dismiss regarding a claim of quid pro quo harassment should be granted and the claim dismissed.

In order to prevail on a hostile work environment claim based upon sexual harassment by a non-supervisory employee, a plaintiff must show: 1) that she belongs to a protected group; 2) that she was subjected to unwelcome harassment; 3) that a causal nexus exists between the harassment and plaintiff's protected group status; 4) that the harassment affected a term, condition, or privilege of her employment; and 5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. **[Citations omitted]** In her complaint, Sharbine alleges that she was a female working on an all male crew, that she was subjected to unwelcome sexual comments by her co-workers, that she was harassed because she was a good looking woman, that her employment was affected to the point that she complained of the behavior, and that her employer knew of the harassment and did nothing to stop it. Boone argues that these allegations are not so severe or pervasive as to alter a condition or privilege of Sharbine's employment. Therefore, she cannot prevail on a sexual harassment hostile work environment claim under Title VII. However, at this stage of the litigation Sharbine is only required to state a claim that, if supported by the evidence, would entitle her to the relief she requests. She has met this burden. Sharbine's allegations are sufficient to state a plausible claim for hostile work environment based upon sexual harassment. Accordingly, Boone's Motion to Dismiss regarding this claim should be denied.

Title VII also prohibits an employer from retaliating against an employee for engaging in a protected activity. In order to make out a claim of retaliation under Title VII, a plaintiff must show: 1) that she engaged in protected activity; 2) that her employer took an adverse employment action; and 3) that there was a causal nexus between the protected activity and the adverse action. **[Citations omitted]** Here, Sharbine alleges that she complained about the sexual harassment to her supervisor. She also claims that after she complained of the harassment, Boone fired her. These allegations are sufficient to state a plausible claim of retaliation under Title VII. Accordingly, Boone's Motion to Dismiss regarding Sharbine's claim of retaliation should be denied.

. . .

CONCLUSION

For the reasons discussed herein, the Court finds that Defendant's Motion to Dismiss with respect to Plaintiff's claim under the common law tort of outrage should be and hereby is granted. Defendant's Motion to Dismiss with respect to Plaintiff's claims for quid pro quo harassment under Title VII and the ACRA should be and hereby are granted. . . .

IT IS SO ORDERED, this 9th day of March, 2010.

/s/ Harry F. Barnes

Hon. Harry F. Barnes

United States District Judge

Questions:

1. What reasons cited by the court in *Sharbine* make the case appear either **fair** or **unfair** to you?

2. Why was Sharbine unable to prove the tort of outrage? That is, what evidence did the plaintiff lack in winning her lawsuit against Boone Exploration?

3. In another Arkansas case, *Kelley v. Georgia Pacific*, 300 F.3d 910 (Ct. App, 8th Cir. 2002), the court analyzed the firing of Alton Kelley. Ostensibly, Kelley was fired for violating workplace rules. Kelley claimed he was fired because he complained about his supervisor's immoral behavior in supplying Kelley's nineteen-year-old daughter with illegal narcotics and taking her to a strip club. How would you analyze this dispute, considering the opinion in *Sharbine*?

The Legal Structure for Regulation of the Employment Relationship

As we begin our analysis of employment law, we need to understand the American legal structure, that is, federalism. Federalism in the United States involves an agreement between the state governments to be organized under the Constitution of the United States. With our version of federalism, states have abandoned some areas of sovereignty to the central (federal) government. In that regard, the following clause is from Article VI of the U.S. Constitution:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary.* [1]

[1] USCS Const. Art. VI, §1, Cl. 2 (2006).

Under Article VI, our federal Constitution is supreme over state constitutions and statutes. In addition, federal statutes, when properly authorized by the Constitution, also override state law. However, the Constitution does not grant complete power to the federal government and there are areas of regulation where the states are supreme. Basically, the states are supreme in those areas where the Constitution does not grant power to the federal government. Federal legislative power is conferred in the Constitution, Article 1, Section 8, found in the Appendix at the end of Chapter 13. The legal position of the people and the states vis-à-vis the federal government is confirmed in the following two amendments to the Constitution:

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[2]

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[3]

Federalism is discussed in the following case excerpt from *Christian Civic Action Committee v. McCuen*. Our system of federalism is examined further in the excerpt from *IGF Insurance Company v. Hat Creek.*

Christian Civic Action Committee
v.
McCuen

884 S.W.2d 605 (Ark. 1994)

. . .

Dissent: *Dudley, J.* . . . All power inheres in the people, but the people may not exercise all power. The will of the majority must prevail, but only if it is within the balances and limitations of the Constitution. The majority is a true sovereign, but only when held in check by those balances and limitations. It is a dualism that is institutionalized in our constitutional structure, for as the American Constitution was the first in history to incorporate the principle that men make government and that all government derives its authority from consent, it was also the first to place effective limits on government. *See,* Henry Steele Commager, *Commager On Tocqueville* 21-22 (1993).

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[2] USCS Const. Amend. 9 (2006).

[3] USCS Const. Amend. 10 (2006).

This paradox inherent in our democracy is carried an additional step in our system of federalism. The people of a state are to be governed by the will of the majority, but that will is held in check by balances and limitations of both the United States and the state constitutions. . . .

Under our system of federalism the Supreme Court of the United States gives the ultimate construction of the Constitution of the United States, and the state supreme courts give the ultimate construction of state constitutions on matters of state law. At times the courts must take anti-majority positions to uphold the constitution at issue. This is the foundation of the just rule by the majority.

IGF Insurance Company
v.
Hat Creek

76 S.W.3d 859 (Ark. 2002)

Glaze, J. - This appeal involves the application and interpretation of Arkansas's statutes pertaining to the enforceability of an arbitration clause in an insurance contract . . ..

[Background Facts] On February 10, 1999, Hat Creek Partnership purchased from IGF Insurance Company a multiple peril crop insurance policy (MPCI) that covered Hat Creek's crops planted during the 1999 crop year in Cross County, Arkansas. During the early part of March 1999, Hat Creek's growing wheat was totally destroyed by wild geese. Hat Creek notified IGF in mid-March that wildlife had damaged its wheat crop, and on March 26, 1999, Robert Burns, an IGF adjuster, came to Hat Creek's farm to meet with Paul McCain, a representative of the farm. McCain informed Burns that the wheat had not yet been fertilized, but that it needed to be fertilized, if the crop was not damaged to such a degree that it could not be saved. After examining the wheat fields, Burns represented to McCain that the crop was a total loss. Burns then advised McCain that he would be back in a few days to finish up the claim and pay the loss; based on Burns's representations, Hat Creek did not fertilize the wheat crop.

When Burns did not return to the farm, McCain called to advise Burns that some of the wheat was trying to come back. Burns advised McCain not to worry about the crop because it had failed. On April 7, 1999, Burns came back to the farm to complete plant counts in connection with the wheat

crop, and on April 8, 1999, Burns met with McCain and informed him, for the first time, that more than 1100 acres of Hat Creek's wheat crop was not insured.

Hat Creek subsequently filed suit against IGF, alleging that IGF had breached the insurance contract and that the company and its agent, Burns, were liable for negligent misrepresentation. The complaint sought $120,000 in losses, and asserted that, due to Burns's representations that the loss would be paid, the wheat was not fertilized. Burns's representations came at a time when fertilization of the wheat was at a critical point, and Hat Creek claimed that, as a result of Burns's statements that the wheat should not be fertilized and no money should be spent on it, Hat Creek lost all opportunity to salvage any portion of the wheat crop and the crop was a total loss.

IGF filed an answer in which it asked the trial court to stay the action, based on a written agreement to arbitrate contained in the MPCI policy. The arbitration clause read, in pertinent part, as follows:

20. Arbitration (a) If you and we fail to agree on any factual determination, the disagreement will be resolved in accordance with the rules of the American Arbitration Association. Failure to agree with any factual determination made by FCIC must be resolved through the FCIC appeal provisions published at 7 C.F.R. Part 11.

. . . On March 27, 2000, IGF filed a motion to compel arbitration in which it argued that the arbitration agreement was enforceable under the Federal Arbitration Act. Hat Creek responded by citing *Ark. Code Ann. § 16-108-201* (Supp. 2001), under which arbitration agreements contained in insurance contracts are not enforceable against insureds. . . . After a hearing on July 18, 2001, the trial court denied IGF's motion to compel arbitration. IGF brings this appeal from that order.

[Legal Analysis] . . . For its first point on appeal, IGF contends that the FAA, rather than the Arkansas Uniform Arbitration Act, applies to this dispute and calls for arbitration between the parties. IGF notes the strong federal preference for arbitration. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995), the Supreme Court stated that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate," and held that the Act was to have an "expansive interpretation" in order to reach all transactions or contracts that fall within the broad scope of Congressional powers relating to interstate commerce. Further, 9 U.S.C. § 2 states the following:

A written provision in . . . a contract evidencing a transaction

> *involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*
>
> . . . Hat Creek responds that the Arkansas General Assembly has specifically exempted insurance policies from the kinds of contracts containing arbitration clauses that are generally held to be enforceable. Notably, Ark. Code Ann. § 16-108-201 (Supp. 2001) provides as follows: *A written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that this subsection shall have no application to personal injury or tort matters, employer-employee disputes, nor to any insured or beneficiary under any insurance policy or annuity contract.*
>
> . . . The Arkansas statute purporting to prevent the enforceability of arbitration clauses in insurance contracts "directly or indirectly affects or governs" the crop insurance contract authorized by the FCIC, and it is therefore inconsistent with, and preempted by, the federal statute. The trial court erred in concluding otherwise, and we reverse its denial of IGF's motion to compel arbitration. **[The court is stating that where valid federal laws exist, these laws supersede conflicting state laws.]**

Questions:

1. What did Judge Dudley mean when he stated in dissent, in *Christian Civic Action Committee,* that "[T]he people of a state are to be governed by the will of the majority, but that will is held in check by balances and limitations of both the United States and the state constitutions"?

2. Judge Dudley also stated, "Under our system of federalism the Supreme Court of the United States gives the ultimate construction of the Constitution of the United States, and the state supreme courts give the ultimate construction of state constitutions on matters of state law." How is this statement reconciled with Article VI, §3 of the Constitution, quoted above? (*This Constitution . . . shall be the supreme Law of the Land.)*

3. An arbitration clause was the focus of the legal dispute in *IGF Insurance Company*. Why is arbitration a popular tool for settling disputes? How might an arbitration clause be relevant in an employment setting? How might such a clause be relevant for general business usage? (See Arbitration, page 12 and following.)

4. What was the conflict between Arkansas law and federal law in *IGF Insurance Company*? What was the result of this conflict? Why had the state of Arkansas, through Ark. Code Ann. § 16-108-201, attempted to eliminate binding arbitration in certain matters?

5. The above court opinion refers to the Federal Arbitration Act. The proper name of the statute is the United States Arbitration Act of 1925, Pub. L. No. 68-401, (codified as amended at 9 U.S.C. 1-14, 201-208 (2003)).

Arbitration

Alternative dispute resolution (ADR) is a term that refers to resolving a dispute through a means other than the judiciary. A leading form of ADR, especially in the business community, is arbitration. Arbitration involves an agreement between parties to present their dispute (either a present or a future dispute) to a neutral third party for resolution. Usually, the agreement to arbitrate will provide the decision of the neutral party, the arbitrator, is binding and final on the parties. That means the losing party is usually not able to appeal the decision to a court for review.

The main attraction of arbitration lies in its speed and cost. Arbitration is significantly faster and less expensive than traditional litigation. In addition, arbitration is private, allowing the parties to preserve confidentially in the resolution process. Arbitration is also less "adversarial", allowing the parties a better opportunity to preserve a working relationship for future projects.

The Supreme Court of the Unites States has affirmed arbitration as a tool for the employment relationship.[4] In a lawsuit against Circuit City, a former employee challenged the enforceability of the following arbitration clause signed by the employee during the employment application process:

Circuit City Arbitration Clause

> "I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort." . . .

[4] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

The Supreme Court ruled the above agreement was enforceable and barred the former employee from suing Circuit City for civil rights violations.[5] Employers are legally allowed to require all employees to agree to binding arbitration of all employment disputes, within limits. Arbitration does not necessarily favor any one side and employees are able to win in arbitration as well as in litigation. However, many employers are willing to trade some uncertainty in arbitration for the speed, cost-savings, and confidentiality of arbitration.

Critics of arbitration as used by the business community point to the often "hidden" nature of arbitration agreements and the uneven resources available to businesses versus employees or consumers. Indeed, arbitration agreements may go unnoticed as employees or consumers may not read their agreements in detail. And business or employer use of mandatory arbitration is, at times, a tool to limit class action lawsuits, thus disallowing individuals to join forces in a lawsuit against a business or employer.[6] Proponents of ending mandatory arbitration as part of employment relationships have introduced in Congress the Arbitration Fairness Act. Support for this new law has been limited.

The following recent Supreme Court case reaffirms the power of arbitration agreements. How do you access the court's language that "the arbitrator's construction holds, however good, bad, or ugly"?

OXFORD HEALTH PLANS LLC
V.
JOHN IVAN SUTTER

2013 U.S. LEXIS 4358 (2013)

JUDGES: KAGAN, J., delivered the opinion for a unanimous Court.
Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. . . . In this case, an arbitrator found that the parties' contract provided for class arbitration. The question presented is whether in doing so he "exceeded [his] powers" under §10(a)(4) of the Federal Arbitration Act (FAA or Act), 9 U. S. C. §1 et seq. We conclude that the arbitrator's decision survives the limited

[5] In a related case, the Supreme Court upheld the right of the Equal Employment Opportunity Commission (EEOC) to bring an independent lawsuit against an employer for civil rights violations, even if the employee involved has agreed to arbitrate the dispute. EEOC v. Waffle House, 534 U.S. 279 (2002).
[6] See, e.g., American Express Co et al v. Italian Colors Restaurant et al., U.S. Supreme Court, No. 12-133 (2013).

judicial review §10(a)(4) allows.

I

Respondent John Sutter, a pediatrician, entered into a contract with petitioner Oxford Health Plans, a health insurance company. Sutter agreed to provide medical care to members of Oxford's network, and Oxford agreed to pay for those services at prescribed rates. Several years later, Sutter filed suit against Oxford in New Jersey Superior Court on behalf of himself and a proposed class of other New Jersey physicians under contract with Oxford. The complaint alleged that Oxford had failed to make full and prompt payment to the doctors, in violation of their agreements and various state laws. Oxford moved to compel arbitration of Sutter's claims, relying on the following clause in their contract:

"*No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator*." . . .

The state court granted Oxford's motion, thus referring the suit to arbitration.

The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did. Noting that the question turned on "construction of the parties' agreement," the arbitrator focused on the text of the arbitration clause quoted above. . . . He reasoned that the clause sent to arbitration "the same universal class of disputes" that it barred the par-ties from bringing "as civil actions" in court: The "intent of the clause" was "to vest in the arbitration process everything that is prohibited from the court process." . . . And a class action, the arbitrator continued, "is plainly one of the possible forms of civil action that could be brought in a court" absent the agreement. Accordingly, he concluded that "on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained." . . .

Oxford filed a motion in federal court to vacate the arbitrator's decision on the ground that he had "exceeded [his] powers" under §10(a)(4) of the FAA. . . .

II

Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." . . . That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of re-solving disputes straightaway." . . . If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial re-view process." . . .

Here, Oxford invokes §10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. "It is not enough . . . to show that the [arbitrator] committed an error -- or even a serious error." . . . Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. . . . Only if "the arbitrator act[s] outside the scope of his contractually delegated authority" -- issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract" -- may a court overturn his determination. . . . So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.
. . .

. . . Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error -- even his grave error-- is not enough. So long as the arbitrator was "arguably construing" the contract -- which this one was -- a court may not correct his mistakes un-der §10(a)(4). . . . The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." . . . The arbitrator's construction holds, however good, bad, or ugly.

In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under §10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Ox-ford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

The Common Law

In summary, under the United States system of federalism, the federal government has been granted certain powers by the Constitution. When the federal government is exercising its granted powers, it is supreme over any state legislation or action. In other areas, where the Constitution does not confer power on the federal government, the state laws are supreme.

When there is an absence of federal or state statutes, the courts create law through a process called the **common law**. In creating common law, the courts have discretion to establish rules of law that suit the courts, subject to constitutional protections of individual rights. Common law exists at the state level only. There is no federal common law, and each state is autonomous. If a state legislature is not satisfied with the state's common law rule on a given topic, the legislature can pass a statute changing (overruling) the court-created common law rule.

During the common law process, the state court will examine the legal history of the state to discover if the issue raised in a current court battle has been adjudicated in the past. If so, a court is inclined generally to follow its prior ruling (precedent), a process called *stare decisis* (let the decision stand). *Stare decisis* adds stability and consistency to the legal system. The state's citizens know that laws created by past court cases are not likely to be changed in their case. However, the state's highest court has the power to overrule its prior rule and establish a new line of precedent. This ability to change the law provides a necessary ingredient of flexibility to adapt to changes in society.

In the following chart of federalism, the sources of law are presented in rank order. That is, the U.S. Constitution is the highest source of law. Next highest is federal statutory law, and so on.

The Legal Process- An Overview

1st Tier - Law Sources

1. US Constitution
2. Federal Statutory Law
3. State Constitution
4. State Statutory Law
5. Local Law

Above sources are created by lawmakers and interpreted by courts – Stare Decisis is important regarding precedents

2nd Tier - The Common Law Process

- Stare Decisis, **or**
- Overruling Precedent, **or**
- Creating First Precedent

Common law is created by and found only in state court opinions

***Questions*:**
Could the United States remove government regulation of the employment relationship? Would marketplace competition satisfy the needs of society? For example, if a firm chooses to discriminate against women, this firm would lose access to valuable female employees. Female customers also may choose to patronize other firms that do not so discriminate. In short, the firm discriminating based on gender would have fewer customers and a weaker employee base. This firm would then, theoretically, eventually fail in the marketplace. Other nondiscriminatory firms would grow in strength. Does this marketplace role produce a satisfactory result without the societal cost of litigation?

A Duty to Monitor and Intercede

As another example of creating law at the state level, consider the following case. *Doe v. XYC Corporation* represents a New Jersey court expansion of negligent hiring and negligent supervision, concepts presented later in the textbook. Some state courts may follow this expansion; other state courts will reject the New Jersey precedent.

DOE V. XYC CORPORATION
2005 N.J. Super. LEXIS 377 (2005)

WEISSBARD, J.A.D. - Even the workplace is not free from the scourge of child pornography, as the present case illustrates.

Plaintiff Jane Doe (Jane), on behalf of her minor daughter Jill Doe (Jill), appeals from a summary judgment dismissing her complaint against defendant XYC Corporation which sought to hold defendant responsible for the activities of one of its employees (Employee) who was Jane's husband and the stepfather of Jill. We reverse. We hold that an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third-parties. No privacy interest of the employee stands in the way of this duty on the part of the employer.

The case having been dismissed on summary judgment, we set out the facts, as well as the inferences from the facts, in the light most favorable to plaintiff. . . .

A. EMPLOYEE'S WORKPLACE HISTORY.
Defendant employed approximately 250 employees at its headquarters in Somerset County, where Employee was an accountant. **[The defendant is actually the United States Golf Association, headquartered in New Jersey.]** His workspace consisted of a small cubicle located along a wall which also contained the cubicle of another accountant, as well as corner offices of defendant's Director of Finance and its Controller, Pamela Martin. The cubicles had no doors and opened into a hallway.

Sometime in 1998 or 1999, Corey Shelton, defendant's former Internet Services Manager, informed George Griesler, defendant's Senior Network Administrator, that he had noted, on reviewing computer log reports, that Employee had been visiting pornographic sites. Griesler and Shelton told Employee to stop the activity but did not inform any of their supervisors. In early 2000, Employee's immediate supervisor, Keith Russinoff, also told Griesler that Employee was visiting inappropriate websites. Russinoff asked Griesler if he could track Employee's Internet usage and Griesler conducted a limited investigation by reviewing computer logs for a day or two and

isolating those visited by Employee. Although Griesler had the ability to open those websites, he did not do so, nor did he print out a list of the sites in question. Based on the website titles, Griesler recognized the sites as pornographic, although he only recalled the name of one site, "Sextracker," that Employee had visited several times. Griesler advised Russinoff and Jessica Carroll, defendant's Director of Network and PC Services, about the results of his investigation, but was shortly thereafter admonished by Carroll not to access any employee's logs, including that of Employee, ever again.

Carroll recalled being told by Griesler that Employee's server logs revealed that he was visiting pornographic sites on his office computer, including "bestiality" and "necrophilia" sites. Carroll did not report the matter further or discuss it with Employee, because of a company policy communicated by e-mail to certain management personnel from Kevin O'Connor, Senior Director of Business Information Systems, that prohibited monitoring of or reporting the Internet activities of employees. Violation of the policy could result in a penalty ranging from reprimand to termination.

Around December 2000, another accounting department employee, Mary Ann Carlson, told her manager, Jill Ray, that Employee was acting strangely by shielding his computer screen and quickly minimizing it so that others could not see what he was doing. Carlson saw Employee act in this manner two or three times a day, and discussed his behavior with Ray, who had also seen it at least five times. They surmised that Employee was viewing pornography. Ray eventually discussed the matter with the Manager of Financial Reporting, Suzanne Colon, advising her that she and Carlson were uncomfortable with Employee's conduct. Nevertheless, no action resulted from their complaints.

In February 2001, Carroll herself looked at the sites Employee had been visiting and concluded that they were pornographic. She did not open the sites and did not discuss her findings with anyone or take any action.

In late March 2001, Carlson discussed Employee's computer activities with Russinoff, telling him that while walking past Employee's cubicle she had seen a picture of a woman in a bikini with "very large breasts" in a "sultry pose" on Employee's computer screen. Russinoff acknowledged to Carlson that he had also seen Employee blocking his computer screen. That same month, Russinoff went into Employee's cubicle during lunch when Employee was out, and clicked on the "websites visited" on Employee's computer. Russinoff discovered that Employee had visited "various porn sites" and printed out what was displayed on the screen. The printout identified obvious porn sites ("Big Fat Monkey Blowjobs," "Yahoo Groups - Panties R Us Messages" and "Sleazy Dream Main Page") as well as one that specifically spoke about children: "Teenflirts.org: The Original Non Nude Teen Index." Russinoff, however, did not scroll down the "websites visited" to see what other sites Employee had visited. Russinoff was not sure what the various "Yahoo Groups" sites were and did not open any of the sites to further investigate their contents. Russinoff showed the printout to his boss, Colon, who showed signs of disgust. Later that day, Russinoff met with Colon and her boss, Pamela Martin, "to discuss what to do." They decided that Russinoff should talk to Employee. Russinoff met with Employee on March 6, 2001 and told him that there had been reports of inappropriate computer usage.

He told Employee to stop these activities and Employee said he would. Russinoff confirmed his conversation with Employee in an e-mail to Colon and Martin on March 7, 2001. Employee appeared to stop his activities, but in early June 2001, Russinoff saw that he had started again. Nevertheless, he told no one and left on a business trip, not returning until after Employee's arrest on child pornography charges on June 21, 2001.

B. EMPLOYEE'S CONDUCT WITH JILL.

Employee and plaintiff were married in October 2000. For about five months prior to his arrest, Employee had been secretly videotaping and photographing Jill at their home in nude and semi-nude positions. Jill was ten years old at the time. Jill had been at defendant's headquarters for Take Your Daughter To Work Day and had attended company outings. As a result, supervisory personnel were aware that defendant had married a woman with a young child.

On June 15, 2001, Employee transmitted three of the clandestinely-taken photos of Jill Doe over the Internet from his workplace computer to a child porn site in order to gain access to the site. Employee later acknowledged that he stored child pornography, including nude photos of Jill Doe, in his workplace computer. He admitted to downloading over 1000 pornographic images while working for defendant. Employee was arrested on June 21, 2001 following a June 19, 2001 search of his work space and work computer based on a search warrant. At that time, his computer showed e-mails being sent to pornographic websites and interactions with others regarding child pornography. Indeed, photographs of Jill found in a dumpster at defendant's headquarters apparently led to his arrest. According to Martin, her search of Employee's desk on June 20 as part of defendant's exit policy turned up a folder with seventy downloaded pornographic photos, including ones of young females. In addition, the Prosecutor's Office, in searching Employee's computer, found numerous child pornography images. Specifically, Detective DeBella searched Employee's workplace computer as it was on the day of Employee's arrest and found that Employee had indeed been visiting "Incest Taboo" and "Young Girls Nude 13 to 17 years old."

C. DEFENDANT'S MONITORING CAPABILITIES.

Defendant possessed and could have implemented software that would have permitted it to monitor employees' activities on the Internet. Specifically, defendant's Director of Network Services testified that defendant tried Web Trends, the most common such software, which would allow it to monitor where anybody goes on the Internet, and for how long they visit a particular site. Moreover, Griesler, then defendant's Network Administrator, described how readily defendant could have discovered the child pornography sites Employee visited everyday on his work computer. Griesler testified that defendant's network maintained log files by date. Each daily file identified all websites accessed on each particular day. By entering a code, Griesler could have isolated all of Employee's websites visited for any given day for months and could have opened them. Of course, another way to have monitored websites Employee visited, at least recently, would have been to simply open his computer and click on "websites visited," which is what Russinoff did in March 2001.

Defendant recognized its right to monitor employee website activity and e-mails by promulgating and distributing a policy to that effect during the relevant time period. Specifically, the policy made clear that e-mails were the property of defendant and were not confidential. According to that policy, anyone who became aware of the misuse of the Internet for other than business reasons was to report it to Personnel.

II

Plaintiff's complaint, filed February 6, 2004, was in two counts. The first count alleged, in part, that:
15. **XYC Corp.** knew or should have known that Employee was using its computer and internet at his workstation to view and download child pornography and to interact with child pornography web sites.
16. Given the nature of the offense, **XYC Corp.** had a duty to report Employee to the proper authorities for the crimes committed on its property during the course of the work day.
17. **XYC Corp.** negligently, carelessly, with reckless indifference and or intentionally breached its aforesaid duty.
18. As a direct and proximate cause of **XYC Corp.**'s breach of duty, Employee was able to continue clandestinely photographing and molesting Jill Doe resulting in Jill Doe suffering severe and permanent harm.
. . .

III

In granting summary judgment, the motion judge, in a detailed oral opinion covering thirty pages of transcript, correctly focused on the critical issue as being "whether or not the employer had a duty, as argued by the plaintiffs, to do more than it did with respect to this defendant employee and whether there was a standard of conduct to which the duty required this corporate defendant to conform," citing *Restatement (Second) of Torts* § 328B (1965). The judge went on to note *Restatement*, *supra*, § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action") and § 317, which we consider most relevant to the issues under review:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant
(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
(ii) is using a chattel of the master, and
(b) the master
(i) knows or has reason to know that he has the ability to control his servant, and
(ii) knows or should know of the necessity and opportunity for exercising such control.
. . .

V

In analyzing plaintiff's claim, the following issues must be addressed: (1) whether defendant had the ability to monitor Employee's use of the Internet on his office computer; (2) assuming defendant had the ability to do so, whether it had the right to monitor Employee's activities; (3) whether defendant knew, or should have known, that Employee was using the office computer to access child pornography; (4) whether defendant had a duty to act to prevent Employee from continuing his activities; and (5) whether any failure to act on the part of defendant proximately caused harm to Jill. We discuss each question in turn.

A. DEFENDANT'S ABILITY TO MONITOR EMPLOYEE'S INTERNET ACCESS ON HIS WORK COMPUTER.

The first question is readily answered in the affirmative. In response to an interrogatory asking whether it had the "capability . . . to monitor and/or track employee use of the internet and/or e-mails at work on their work computer," defendant responded that it "could have implemented software that would have permitted it to monitor employees' activity on the Internet." . . .

B. DEFENDANT'S RIGHT TO MONITOR EMPLOYEE'S ACTIVITIES ON HIS OFFICE COMPUTER.

Defendant argued, and the motion judge agreed, that Employee's privacy interest trumped defendant's right to monitor his computer use at work. We disagree.

. . . In the present case, we deal with whether defendant employer could monitor Employee's use of his workplace computer in the context of civil litigation brought by a third-party claiming injury resulting from those computer activities. On this question, we have found no authorities directly on point. . . .

In this case, defendant had an e-mail policy which stated that "all messages composed, sent or received on the e-mail system are and remain the property of the [defendant]. They are not the private property of any employee." Further, defendant reserved the "right to review, audit, access and disclose all messages created, received or sent over the e-mail system as deemed necessary by and at the sole discretion of [defendant]." Concerning the internet, the policy stated that employees were permitted to "access sites, which are of a business nature only" and provided that:

Any employees who discover a violation of this policy shall notify personnel. Any employee who violates this policy or uses the electronic mail or Internet system for improper purposes shall be subject to discipline, up to and including discharge.

The written e-mail policy contained an acknowledgement page to be signed by each employee. While the record does not contain a copy of such acknowledgement signed by Employee, there is no suggestion that he was not aware of the company policy. In addition, as we have noted, Employee's office, as with others in the same area, did not have a door and his computer screen was visible from the hallway, unless he took affirmative action to block it. Under those circumstances, we readily conclude that Employee had no legitimate expectation of privacy that would prevent his employer from

accessing his computer to determine if he was using it to view adult or child pornography. As a result, we turn to whether defendant had reason to investigate Employee's use of his computer.

C. INFORMATION KNOWN OR ATTRIBUTABLE TO DEFENDANT CONCERNING EMPLOYEE'S PORNOGRAPHY ACTIVITIES.
We see no need to repeat the facts set out earlier in this opinion. Assessing those facts and the reasonable inferences to be drawn from them, as we must in the summary judgment context, we conclude that defendant, through its supervisory/management personnel, was on notice that Employee was viewing pornography on his computer and, indeed, that this included child pornography. Knowledge includes "implied" knowledge, which "means knowledge based on other known facts that would inform a reasonably prudent person of the ultimate fact." . . .

D. DID DEFENDANT HAVE A DUTY TO PREVENT EMPLOYEE FROM CONTINUING HIS ACTIVITIES?
With actual or imputed knowledge that Employee was viewing child pornography on his computer, was defendant under a duty to act, either by terminating Employee or reporting his activities to law enforcement authorities, or both? We conclude that such an obligation exists. The existence of a duty is a matter of law, "deriv[ing] from considerations of public policy and fairness." . . .

We begin by noting that it is a crime, both state and federal, to possess or view child pornography. . . Given the public policy against child pornography, . . . and the fact that "public policy favors the exposure of crime," . . . we agree with plaintiff that defendant had a duty to report Employee's activities to the proper authorities and to take effective internal action to stop those activities, whether by termination or some less drastic remedy.

At this point, we return to the *Restatement*, *supra*, § 317. That section places upon a master, in this case defendant, the duty to control his servant, here Employee, while the servant is acting outside the scope of his employment, as in the present case, to prevent the servant from "intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them." . . . [W]e discern no sound reason not to apply it here. Defendant was under a duty to exercise reasonable care to stop Employee's activities, specifically his viewing of child pornography, which by its very nature has been deemed by the state and federal lawmakers to constitute a threat to "others;" those "others" being the children who are forced to engage in or are unwittingly made the subject of pornographic activities. We reject defendant's argument that a "special relation" must exist between the master (in this case the employer) and the person who is likely to be harmed. . . .

Returning to § 317, all of the requirements for liability in that section are present here. The servant was "using a chattel of the master" and the master both "knows or has reason to know that he has the ability to control his servant" and "knows or should know of the

necessity and opportunity for exercising such control." Under these circumstances, a risk of harm to others was "reasonably within the [master's] range of apprehension. . .

E. DID DEFENDANT'S BREACH OF DUTY PROXIMATELY CAUSE HARM TO PLAINTIFF

. . .

One of the underlying principles of tort law is that "an actor's conduct must not only be tortious in character but it must also be a legal cause of the invasion of another's interest. . . .

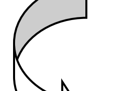
In the present context, there are two distinct proximate cause-of-injury issues. First, whether defendant's breach of duty could be said to have resulted in the specific action of Employee which is claimed to have caused harm to Jill, that action being identified as the transmission of three images via e-mail on June 15, 2001. Thus, the inquiry becomes whether there were sufficient facts in the record from which a reasonable fact-finder could conclude that had defendant not breached its duty, no harm would have resulted. In other words, had defendant acted to stop the activities of Employee when it had, or reasonably should have had, sufficient information on which to act, could the harm to Jill have been averted? If so, then proximate cause has been established.

. . . It is true, as defendant contends, that Employee could still have possibly utilized a computer elsewhere, such as at home or at a library, to transmit Jill's photos. But that possibility does not negate proximate cause as a matter of law; it simply presents a contested issue for a jury. . . .

The second proximate cause question, however, cannot be resolved on the present record. Plaintiff must establish that Jill suffered some harm to her person as a result of the Internet transmission of her photos. Of course, that harm could be psychological in nature, but there must be a showing of some harm proximately caused by defendant's breach of duty. Perhaps because the arguments before the motion court were focused on liability, little, if anything, was said about damages. As a result, we remand the matter to the Law Division at which time the issue of proximately caused harm may be addressed within the summary judgment context. . . .

Chapter 2 - Wrongful Discharge

Chapter 2 - Cognitive Objectives



1. Explain the rule of employment-at-will and apply the rule to the doctrine of wrongful discharge.
2. Identify and briefly describe federal and state civil rights laws, as they relate to employment-at-will.
3. Identify and apply contract law exceptions to employment-at-will, including an analysis of express and implied contracts.
4. Identify and apply tort law exceptions to employment-at-will, including public policy, outrage, defamation, and tortious interference with a contractual relationship.
5. Compare and contrast an actual discharge to a constructive discharge.
6. Explain and interpret the cases in this chapter and apply the legal principles to hypothetical employment problems.
7. Answer the questions found throughout the chapter.

Employment-at-Will

Every employee is familiar with an employment discharge, a firing. In employment law, a discharge is wrongful if it violates either federal or state law. Analysis of an employee discharge case begins with the rule of employment-at-will.

American employment law has its origins in English legal history. Our employer-employee relationship was based on English law and the English feudal system. Under the English system in the late 1700s, when wealthy business or landowners had people work for them, the owners supplied almost all the employees' needs. Employees often lived in houses owned by their employers, even after the employees retired. The business owner settled employee disputes. The basic character of the employees' lives was controlled or influenced by the business owners. This personal relationship imposed certain duties on employers to care for employees.

As America moved from an agrarian society to an industrial society during the mid-1800s, the employment relationship became less personal. Industrialization and mass production required a less personal and more flexible relationship between employers and employees. Recognizing the changed relationship, American courts developed a new employment rule called **employment-at-will**. The employee could work for an employer and leave whenever the employee wished, that is, leave at the employee's will. More

important, the employer could hire and later fire employees at the employer's discretion. The employer no longer had any legal duty to keep or care for employees. Both parties were free to end the employment relationship at their will.

Early in the 1900s, employment-at-will was almost a rule without exception. Employers had maximum discretion in hiring and firing employees. That discretion began to erode later that century. Employment-at-will is a concept based on state law. Some of the state courts that created the rule for their states adjusted or overturned aspects of employment-at-will. State legislatures are also able to "overrule" the courts and several state legislatures have varied the at-will rule. Considering these possibilities, employment-at-will remains a powerful legal doctrine in most states. That is, most states still follow the basic concept of employment freedom embodied in the at-will rule. The following quote from *Smith v. American Greeting,* an Arkansas case, illustrates the expansive nature of employment-at-will:

> "Arkansas has long adhered to the employment-at-will doctrine which provides that a contract of employment for an indefinite term is terminable at the will of either party. . . . Under this doctrine an at-will employee may be discharged for good cause, no cause, or even a morally wrong cause."[1]

The major state law exceptions to the at-will rule are presented in the following sections of this chapter. In addition, the federal government is involved and has modified employment-at-will through the passage of federal civil rights laws. These laws reduce employer discretion to distinguish among employees based on the employees' sex, race, color, national origin, religion, age, or disability. Federal civil rights laws will be a primary focus of the textbook, beginning with Chapter 5.

***Questions*:**

1. Some courts and commentators have analyzed the equality of employment-at-will under the observation by Anatole France about the "majestic equality of the law which forbids the rich as well as the poor to sleep under bridges."[2] Comment on this observation.
2. Should the employment relationship be different from social relationships such as dating where either party is free to end the relationship at their will?
3. Should an employee be allowed to quit at their discretion, but the employer be unable to fire the employee at the employer's discretion?

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[1] 804 S.W.2d 683 (1991). See also Cisco v. King, 205 S.W.3d 808 (2005).
[2] 27 ATLA L.Rep. 58 (March 1984).

Contract Law Exceptions to Employment-at-Will

A contract is an enforceable agreement between two or more parties to sell and buy goods or services. [3] By definition, all employees work under an express or implied contract with their employers. An express contract is an actual agreement of the parties, stated in explicit language. An implied contract is inferred by the court based on the conduct of the parties and the surrounding circumstances. Employment contract terms include items such as hours to be worked, and payment for the hours worked. One potential contractual concern in employment contracts is the length of employment and permissible reasons for discharge.

Employment-at-will is a court-created rule that is used only in the absence of contractual promises between the parties regarding firing employees. For example, an employer is not free to discharge employees at-will in violation of express employment promises given in employment manuals and elsewhere. An example of a contract term regarding firing is that employees will only be fired upon good cause. If promises are made by the employer (or, less often, the employee), these promises will be recognized and enforced by the courts. Employers may thus extend protection, sometimes unintended, to employees beyond employment-at-will.

Some state courts liberally recognize implied contractual protection for employees. For example, providing an employee with an "**annual** salary" may imply that the employee is hired for 12 months, not at-will. Additionally, a minority of state courts will infer an implied covenant of good faith in every employment contract.[4] The exact meaning of this implied covenant varies by state, but generally the implied covenant of good faith requires employers to discharge employees only upon good cause.

As state common law varies on employment contract analysis, it is not possible to speak of one approach to contract issues. However, the following quote form an Arkansas case is illustrative of a majority state court approach to the contract issue:

> While a contract for an indefinite term is terminable at will, a contract for a definite term may not be terminated before the end of the term, except for cause or by mutual agreement, unless the right to do so is reserved in the contract. . . .There are two other exceptions to the at-will doctrine:
>
> (1) where an employee relies upon a personnel manual that contains an express agreement against termination except for cause; and

[3] Generally, contracts may be based on written or spoken words. Certain contracts, however, must be formed with a written component, under the Statute of Frauds.
[4] *See, e.g.*, Coombs v. Gamer Shoe Co., 778 P.2d 885 (Mont. 1989).

(2) where the employment agreement contains a provision that the employee will not be discharged except for cause, even if the agreement has an unspecified term. (Citations omitted)[5]

The following case presents a breach of contract argument against Wal-Mart Stores regarding an international employment agreement.

Lynn
v.
Wal-Mart Stores, Inc.

280 S.W.3d 574 (Ark. Ct. App. 2008)

LARRY D. VAUGHT, JUDGE.
James Lynn has appealed from a summary judgment for his former employer, . . . Wal-Mart Stores, Inc. . . . Lynn argues that he was fired for reporting inhumane workplace conditions in some foreign manufacturing facilities from which Wal-Mart buys goods, violating the public policy of this state, and that his termination breached a written employment contract for a specific term of three years. We find no error in the circuit court's entry of summary judgment to Wal-Mart, and we affirm.

[Facts] Lynn began working for Wal-Mart in 1993. In January 2002, he signed the following "Global Assignment Letter" in contemplation of his transfer to Costa Rica as a Global Services manager:

This Global Assignment Letter confirms our mutual understanding of the terms and conditions applying to your global assignment with Wal-Mart Stores Inc. or one of its affiliates.
The intent of this letter is to provide a statement of salary and benefits effected by your acceptance of this Global Assignment. Please refer to the Global Assignment Policy Manual for a detailed description of each of these terms as well as other important information related to your assignment. The content of this letter represents your compensation at the beginning of your assignment; the terms of this letter may change throughout the assignment based on salary increases, adjustments to the allowance tables, change of family status, overall policy changes or other individual circumstances as described in the Global Assignment Policy Manual.
. . . .
Date of letter: 12/20/2001
Position: Global Services Manager
International Effective Date: January 12, 2001
Anticipated duration of assignment: 3 years

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[5] Magic Touch Corporation v. Hicks, 260 Ark.App. 334, 335-336 (2007).

It is understood that this letter is not to be construed as an employment agreement nor a contract for employment and that each of these terms is described in detail in the Wal-Mart Global Assignment Policy Manual.

. . . [I]n April 2002, Wal-Mart opened an investigation of whether Lynn had an inappropriate relationship with a subordinate. On April 21, 2002, Lynn and this woman traveled to Guatemala on business. A "Wal-Mart Loss Prevention Associate," Juan Valverde, . . . reported that, late on the night of April 24, he saw Lynn enter the woman's room, heard sounds that he believed were indicative of sexual contact, and saw Lynn leave her room with messy hair and with his shirt out of his pants. . . . Although Lynn at first denied an inappropriate relationship, after he was informed that Wal-Mart had evidence of one, he admitted kissing her. Lynn and the woman then signed written statements acknowledging a romantic relationship. On May 7, 2002, Wal-Mart terminated Lynn for violating the company's fraternization policy, which provided that it was against company policy for a supervisor to become romantically involved with an employee he supervised and that employees who did so would be subject to immediate termination.

[**Complaint**] Lynn filed his complaint in the Benton County Circuit Court on June 17, 2005, alleging several causes of action that included wrongful discharge and breach of contract. He alleged that his termination for violating the company's fraternization policy was a pretext and that he had actually been fired because he had reported the factory-certification program's failure to Wal-Mart. He asserted that he had reported inhumane working conditions in the factories and that Wal-Mart employees were being pressured by Wal-Mart executives to alter factory-certification results. . . .

Lynn stated that he was terminated in violation of Arkansas's public policy against falsifying business records and protecting the consumer from the deceptive trade practice of making a false representation concerning the source or certification of goods. . . .

Wal-Mart moved for summary judgment on the grounds that Lynn's allegations did not constitute a violation of Arkansas's public policy and that he did not have an enforceable employment contract. . . .

[**Holding**] The circuit court entered summary judgment for Wal-Mart, holding that, as a matter of law, even if Lynn's allegations were true, he was not terminated in violation of the public policy of Arkansas. ... The circuit court also granted summary judgment to Wal-Mart on Lynn's breach-of-contract claim because, as a matter of law, the Global Assignment Letter was not an employment contract. . . .

[**Analysis**] Summary judgment should be granted only when it is clear that there are no disputed issues of material fact. . . . All evidence must be viewed in the light most favorable to the party resisting the motion; he is also entitled to have all doubts and inferences resolved in his favor. . . .

We will first address Lynn's breach-of-contract argument. Lynn contends that the Global Assignment Letter was a contract for a definite period of time, three years, and was, therefore an exception to the at-will doctrine. He alleges that he established an issue of fact as to whether Wal-Mart breached that contract by firing him without cause. We disagree. It is readily apparent to us that the Global Assignment Letter was unambiguous and that it cannot reasonably be construed as promising to employ Lynn for the next three years. Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one equally reasonable interpretation. . . . The letter met neither requirement but simply set forth the location and other conditions of Lynn's employment, as an at-will employee, for the next three years. In fact, the letter expressly stated that it was *not* a contract of employment.

In any event, even if the Global Assignment Letter *was* a contract, Lynn clearly provided good cause for his termination by admittedly violating the fraternization policy. We therefore affirm on Lynn's breach-of-contract argument.

Employee Handbooks

Employment handbooks or manuals are a primary location where employment promises may be found. A key point is that employers are not obligated to provide employment manuals. Where manuals are provided, employers are not obligated to provide any contractual protection beyond at-will protection. However, employers at times use handbook language that, though unintended, creates employment protection. Other times, an employer will make explicit promises that are not kept. A court will simply apply whatever promises, if any, are found in the handbook or other employment communication.

The following policy statement is typical of language that might be included in an employment manual. How might the statement help a firm’s legal position?

ACME Company
Employee Manual

We realize the importance of the employment relationship - both to you and to our company. Much of our time is spent at work, with our jobs a central part of our daily activities. If you are hired, we hope the relationship we develop is successful for both parties. If you are not happy with employment at our company, we recognize your legal right to quit at any time, for any reason. We would wish you the best with your new activities. Similarly, we recognize our legal right to terminate any

> *employee at any time, for any reason. This legal rule, called employment-at-will, is designed to provide maximum discretion and flexibility for both employers and employees. This at-will employment relationship may not be changed by any written document or by conduct unless such change is specifically acknowledged in writing by an authorized executive for our company.*
>
> *We furnish new employees with a policy manual. This manual is not part of the employment contract. Rather, the manual is designed to aid employees in understanding our company and its policies. These policies and the manual will be changed from time to time.*

Questions:

1. Consider the following quote from *Kelley v. Georgia Pacific*, a case presented in Chapter 1. What is the court stating in this quote?

> On appeal, Mr. Kelley also contends that he presented sufficient facts to establish a wrongful termination claim. Because he did not raise this issue in the District Court, it is not before us on appeal. In any event, plaintiff's wrongful termination claim is without merit. The claim is based on a statement by Georgia Pacific 's Board Chairman contained in a letter sent after this action was commenced. The statement promises every employee freedom from discrimination, whether based on age, race, sex, color, religion, national origin, sexual orientation, disability, or any other factor prohibited by law. The plaintiff argues that his termination was a breach of the last clause of this promise, that is, that he was discharged because of discrimination based on some factor, other than those specifically listed, prohibited by law. We do not think that the facts of this case can be made to fit such a pattern. The word "discrimination" normally refers to an unjustified differentiation between classes of employees. Plaintiff's theory here, by contrast, is that he was discharged on account of his having reported to the employer conduct believed by the plaintiff to be immoral or illegal. To discharge an employee on such a basis may be morally unjustified or even, in the extraordinary case, unlawful, but it does not fit within the rubric of discrimination. In addition, the conduct engaged in by plaintiff that is at issue in this case had all taken place by the time of the issuance of the Chairman's statement. It cannot be argued that the plaintiff was relying upon the statement.[6]

2. Plaintiff was employed by defendant preparatory school as a French teacher for many years. The school signed and offered a full-time teaching contract for the new school year which included as the last sentence: "The School may refuse to reemploy the teacher without cause, and this contract shall not give rise to any entitlement to or expectation of reemployment." Plaintiff signed and returned the contract with the following notation: "I agree with all of the last paragraph except the last sentence. I deserve and expect just cause for non-renewal of continuation of my teaching." Defendant school did not respond to plaintiff's notation, but did employ plaintiff as a teacher during the school year. However, defendant did not offer plaintiff a contract for the following school year.

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[6] 300 F.3d 910, 911 (2002).

Plaintiff then filed suit asserting a claim for breach of contract. How should the court rule? (*Shively v. Santa Fe Preparatory School, Inc*., 21 Fed. Appx. 875 (10 Cir. 2001).)
3. Plaintiff worked for American Greetings Corporation. After being fired, he filed a complaint alleging the defendant's handbook for employees constituted an express contract prohibiting termination except for cause. The handbook stated: "*We believe in working and thinking and planning to provide a stable and growing business, to give such service to our customers that we may provide maximum job security for our employees*." Does this employment statement contractually protect employees against at-will dismissals? [*Smith v American Greetings Corp*., 804 S.W.2d 683 (Ark. 1991), holding that implied contract protection is not recognized in Arkansas.]

Tort Exceptions to Employment-at-Will

A tort is a private wrong or injury (civil, not criminal) for which the court will award damages, other than breach of contract. Tort law involves duties imposed by law on people based on their relations to one another. Coupled with contract law, tort law provides the other major state law exception to employment-at-will. Regarding the relationship of employer to employee, tort law imposes several duties. In most states, four of these duties include:

- ✓ A duty not to fire or reprimand an employee in a manner that violates public policy,
- ✓ A duty to treat employees in a manner that is not legally outrageous,
- ✓ A duty to refrain from defamation regarding employees, and
- ✓ A duty to refrain from tortious interference with a contractual relationship.

Public Policy

Under employment-at-will, an employer may fire an employee for any reason, good or bad. The courts in most states, however, have limited this discretion in firing. Under the label public policy, most state courts impose liability on an employer if an employee is fired for a reason that harms the public. The tort of public policy concerns what is right and just, affecting the citizens of a state collectively. The key here is the harm must extend beyond the employee fired and extend to the general public. This harm is found when the reason asserted to be the basis for a discharge is so repugnant to the general good to deserve the label “against public policy.” The courts look to the state’s constitution or statutes for guidance on public policy.[7]

Examples of public policy violations include:

(1) cases in which the employee is discharged for refusing to violate a criminal statute;

[7] Technically, though most states label public policy a tort action, in Arkansas public policy is labeled a contract claim based on an implied covenant of good faith. *See* Sterling Drug, Inc., v. Oxford, 743 S.W.2d 380 (1988).

> (2) cases in which the employee is discharged for exercising a statutory right, for example, filing a workers' compensation claim or voting in an election;
> (3) cases in which the employee is discharged for complying with a statutory duty, for example, serving on a jury; and
> (4) cases in which employees are discharged in violation of the general public policy of the state.[8]

Public policy is discussed in a second excerpt from *Lynn v. Wal-Mart Stores*, and in the following case, *Island v. Buena Vista Resort*.

Lynn
v.
Wal-Mart Stores, Inc.

280 S.W.3d 574 (Ark. Ct. App. 2008)

The next question is whether Lynn's termination fell within the public-policy exception to the at-will doctrine. A public-policy-discharge action is predicated on the breach of an implied provision that an employer will not discharge an employee for an act done in the public interest. . . . The public policy of the state is contravened if an employer discharges an employee for reporting a violation of state or federal law. . . . This exception is limited and is not designed to protect private or proprietary interests. . . .

Wal-Mart's purported failure to follow its private, internal policies or the labor laws of foreign countries does not implicate the public policy of this state. A well-established public policy of the State must be found in our statutes or in our constitution. . . . The statute that Lynn cites as embodying the public policy of Arkansas . . . cannot [be interpreted] as applying to Wal-Mart's statements in its annual report about its factory-certification process, even if we accept Lynn's factual allegations as true. Lynn has simply shown no nexus between his reports of problems with the factory-certification process and any public policy of this state. Even if we were to hold that Lynn's allegations did implicate public policy--which we do not--his admitted violation of Wal-Mart's fraternization policy provided independent, sufficient grounds for his termination.

[8] *See generally,* Smith v American Greetings Corp., 804 S.W.2d 683, (Ark. 1991).

Island
v.
Buena Vista Resort

103 S.W.3d 671 (Ark. 2003)

Thornton, J. - On September 6, 2000, appellant, Becky Island, filed a complaint against appellees, Buena Vista Resort and George Bogdanov. In her complaint, appellant asserted that she was an employee of Buena Vista Resort and that Bogdanov was the owner of Buena Vista Resort [BVR]. The complaint further alleged that during her employment with Buena Vista Resort, Bogdanov approached her and propositioned her for sex. The complaint also alleged that Bogdanov had made lewd comments to appellant on several occasions. Finally, the complaint alleged that when appellant rejected Bogdanov's sexual advances, she was treated poorly, and eventually terminated from her job. . . .

Based on the factual allegations, appellant asserted three causes of actions. . . . Finally, [appellant] asserted that she was wrongfully discharged in violation of the public policy of the State of Arkansas. . . .

We have repeatedly held that when an employee's contract of employment is for an indefinite term, either party may terminate the relationship without cause or at will. . . .However, we have also noted that an at-will employee cannot be terminated if he or she is fired in violation of a well-established public policy of the State, but such public policy must be outlined in our statutes. . . .
[T]he public policy of the State of Arkansas prohibits the termination of at-will employees based on retaliation for rejecting solicitations to engage in sex in exchange for compensation.

. . . Prostitution is a crime denounced by statute. It is defined as follows: "A person commits prostitution if in return for, or in expectation of a fee, he engages in or agrees or offers to engage in sexual activity with any other person." Ark. Stat. Ann. §§ 41-3002(1) (Supp.1983). . . . A woman invited to trade herself for a job is in effect being asked to become a prostitute. . . . A wage-paying job is logically and morally indistinguishable from the payment of cash. Indeed, it necessarily involves the payment of cash. . . . [I]t is an implied term of every contract of employment that neither party be required to do what the law forbids. . . . [T]he public policy of the State of Arkansas is violated when an at-will employee is terminated for rejecting a solicitation to engage in prostitution.

Questions:

1. An employer fired an armored-truck driver after the driver left the vehicle to rescue a robbery hostage. The driver was making a normal stop at a bank when he witnessed a man with a knife chasing the bank manager out of the bank. The driver locked the truck's doors and rescued the manager. The employer fired the driver for violating company policy forbidding drivers from leaving the armored trucks for any reason. Does this discharge violate public policy? (*Gardner v. Loomis Armored, Inc*., 913 P.2d 377 (Wash. 1996).)

2. In *Palmateer* v. *International Harvester Co.*, 421 N.E.2d 876 (1981), the Supreme Court of Illinois held that an employee stated a cause of action for discharge in violation of public policy where the employer, International Harvester (IH), allegedly fired the employee because he offered his help to the local police department to testify and gather evidence against another employee suspected of stealing IH property. The court stated, "There is no public policy more basic, nothing more implicit in the concept of ordered liberty than the enforcement of a State's criminal code. . . . Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy." International Harvester wanted any problems at the worksite to be handled internally, without the attendant bad publicity of a police investigation. Analyze the court decision in favor of the employee, considering that there is no law requiring an individual to volunteer information of a crime to the police.

3. In *Wal-Mart Stores v. Baysinger*,[9] the Arkansas Supreme Court ruled that discharging an employee based on the employee's filing of a workers' compensation claim violated public policy. The response of the legislature was A.C.A. §11-9-107 (2003). Identify and analyze the rationale for this statute.

CHAPTER 9. WORKERS' COMPENSATION

§**11-9-107.** Penalties for discrimination for filing claim

(a)(1) Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of the individual's claim for benefits under this chapter, or who in any manner obstructs or impedes the filing of claims for benefits under this chapter, shall be subject to a fine of up to ten thousand dollars ($ 10,000) as determined by the Workers' Compensation Commission.

(2) This fine shall be payable to the Second Injury Trust Fund and paid by the employer and not by the carrier.

(b) (1) In addition, the prevailing party shall be entitled to recover costs and a reasonable attorney's fee payable from the fine.

(2)Provided, however, if the employee is the nonprevailing party, the attorney's fee and costs shall, at the election of the employer, be paid by the employee or deducted from future workers' compensation benefits.

(c) The employer may also be guilty of a Class D felony.

[9] 812 S.W. 2d 463 (Ark. 1991).

(d) This section shall not be construed as establishing an exception to the employment at will doctrine.

(e) A purpose of this section is to preserve the exclusive remedy doctrine and specifically annul any case law inconsistent herewith, including, but not necessarily limited to: Wal-Mart Stores, Inc. v. Baysinger, 306 Ark. 239, 812 S.W.2d 463 (1991); Mapco, Inc. v. Payne, 306 Ark. 198, 812 S.W.2d 483 (1991); and Thomas v. Valmac Industries, Inc., 306 Ark. 228, 812 S.W.2d 673 (1991).

Outrage

Another tort potentially involved in an employee discharge is the tort of outrage, otherwise called intentional infliction of emotional distress. Though Arkansas courts recognize the tort of outrage, rarely does an employee win under this theory. (For example, outrage was rejected in *Sharbine v. Boone Exploration*, from Chapter 1.)

Arkansas courts have set up the following four elements a plaintiff must establish to prove outrage:

(1) The actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct;
(2) The conduct was "extreme and outrageous," was "beyond all possible bounds of decency," and was "utterly intolerable in a civilized community;"
(3) The actions of the defendant were the cause of the plaintiff's distress; and
(4) The emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it.[10]

One of the few successful outrage claims in Arkansas is *Tandy Corp. v. Bone*.[11] There the employer, Tandy Corporation, thought an employee, Bone, was stealing from a company store in Little Rock. Bone's supervisor and two security officers came to the store to conduct an investigation of the losses. Bone was questioned at thirty-minute intervals throughout the day.

Bone suffered from a personality disorder that made him especially susceptible to stress and fear. His psychiatrist had prescribed a tranquilizer for treatment. The security men investigating the store thefts cursed Bone, threatened him, and refused to allow him to take his medication. Bone was later asked to take a polygraph examination and consented. Then, he was in a highly agitated condition and again asked for his medication. The request was denied. Bone testified that on at least three occasions, he had asked to be allowed to take his medication, but each time his request was refused. He stated that once he reached in a desk drawer for his medicine, but one of the investigators slammed the drawer shut. Bone was eventually taken to another location in Little Rock for the polygraph examination, and, while there, hyperventilated. He was later hospitalized for a week.

[10] Faulkner v. Arkansas Children's Hospital, 69 S.W.3d 393, 403-04 (2002).
[11] 678 S.W.2d 312 (Ark. 1984).

In addition to *Bone*, another successful Arkansas outrage case is *Manning v. Metropolitan Life*, below:

Manning
v.
Metropolitan Life Insurance Company, Inc.

127 F.3d 686 (8th Cir. 1997)

Wollman, J. – **[Background Facts]** This case has its genesis in the West Memphis, Arkansas, office of Metropolitan Life, where the plaintiffs were employed prior to its closing in May of 1994. The West Memphis office was not an agreeable place to work. Most of the conduct that resulted in the plaintiffs' allegations was connected, at some level, to an adulterous affair that was alleged to have occurred between West Memphis branch manager Denise Mitchell and account representative and executive trainee candidate Charles Craig.

The sexual relationship between Mitchell and Craig pervaded the office environment. Craig, whom Mitchell referred to as "like an assistant manager," and who described himself as the "dominant male" of the office, flaunted his intimate influence with Mitchell over his fellow employees. Craig boasted openly and explicitly of sexual acts with Mitchell and of the preferential treatment that his relationship with Mitchell afforded him. Craig described his own sexual prowess in graphic terms, detailing his performance of oral sex upon Mitchell, and describing and fondling his genitals in front of female employees on an almost daily basis. He would often place his crotch in front of a seated female employee and demand that she address his penis, which he referred to as "Harvey." He also engaged in speculation about the sexual habits of others, such as accusing female account representatives of sleeping with their clients in order to secure business.

Additionally, Craig made crude, intimidating attempts to utilize his influence with Mitchell to solicit sexual favors from account representatives, who depended on Mitchell's support in order to satisfy Metropolitan Life's strict production requirements, and from other female employees under Mitchell's supervision. Craig made a frequent practice of approaching Smith, for example, to inform her that he would buy her lunch in exchange for oral sex. On one occasion, he told Pritchett, who was pregnant at the time, that he knew that she would like him to touch her breasts. Craig also informed at least one of the plaintiffs that if she

would have sex with him he would intervene on her behalf with Mitchell and prevent what he said was her impending termination for low production.

Plaintiffs' complaints to Mitchell protesting Craig's conduct were initially met with indifference and eventually returned with hostility and threats of termination. Describing himself as a former CIA mercenary and assassin, Craig seems to have taken pleasure from his veiled suggestions that he would have Pritchett and Smith, among others, killed for complaining about Mitchell's and Craig's behavior. Mitchell and Craig openly encouraged the perception that Craig had authority over the other employees, that his activities and behavior were not to be questioned, and that he was being groomed for a position in management. Plaintiffs' complaints were similarly dismissed without investigation by other Metropolitan Life supervisory personnel, including agency vice president Danny Gleason.

The plaintiffs also testified to having been encouraged by their supervisors to engage in various illegal or unethical practices, including the writing of policies in a state for which the agent was not licensed, the forgery of policyholders' signatures, and the targeting of elderly policyholders to convince them to use the accrued cash value in their existing policies with Metropolitan Life to purchase new and more substantial policies, an illegal practice known as "churning."

Eventually, persistent complaints by Pritchett, in particular, to the New York headquarters of Metropolitan Life produced an investigation. As a result, Mitchell was "repositioned," as Gleason termed it, as an account representative in the Jonesboro office of Metropolitan Life. Rather than being terminated, Craig was transferred to a similar office in Olive Branch, Mississippi (for whatever reason, Craig did not report for work at this new location, although it appears to be only some twenty-five to thirty miles distant from West Memphis).

[Legal Issues] The plaintiffs ultimately brought suit, alleging that Metropolitan Life's response to their complaints constituted retaliation in violation of Title VII of the Civil Rights Act of 1964. The plaintiffs further alleged that by tolerating various forms of sexual harassment and other clearly inappropriate behavior by its supervisors and employees, Metropolitan Life was guilty of the tort of outrage under Arkansas law.[12]

[12] The district court held that the plaintiffs' Title VII sexual harassment claims were barred by the applicable statute of limitations, a ruling that plaintiffs do not challenge on appeal.

> **[Outrage]** . . . We have recognized that the Arkansas courts take a very narrow view of claims of outrage. . . . The tort is clearly not intended to provide legal redress for every slight insult or indignity that one must endure. . . . Review of outrage claims in employment situations has been particularly strict, as "an employer must be given a certain amount of latitude in dealing with employees."
>
> . . . We turn, then, to the substance of these appeals. We are in agreement with the district court that JAML was not appropriate on the outrage claims of Williams, Miller, Smith, Foust, and Pritchett.[13] Each of these women was targeted by Craig and subjected to daily descriptions of his body parts, explicit updates on his sexual activity, and crude propositions made under the threat of adverse consequences or the promise of special favors. Each also testified that Craig's ongoing public affair with Mitchell rendered their protests fruitless. Complaints by the plaintiffs to their regional supervisors produced responses ranging from passivity to subtle hostility. All of these plaintiffs, moreover, described the extreme distress and accompanying symptoms that resulted from the actions of Craig and Mitchell and the indifference of Metropolitan Life. . . . We believe that a reasonable jury could find this conduct to have constituted the tort of outrage under Arkansas law. We therefore affirm the district court's denial of JAML on the outrage claims of Williams, Miller, Smith, Foust, and Pritchett.

Questions:

1. How did Craig and Mitchell's behavior satisfy the elements of outrage?
2. Why was the lawsuit successful against Metropolitan Life, that is, why was liability not limited to Craig and Mitchell?

Defamation

The tort of defamation is not involved directly in the decision to fire an employee. Defamation potentially is involved in what an employer states to others about the fired employee. The following elements must be proved to support a claim of defamation:

(1) the defamatory nature of the statement of fact;
(2) that statement's identification of or reference to the plaintiff;
(3) publication of the statement by the defendant;
(4) the defendant's fault in the publication;
(5) the statement's falsity; and

[13] The jury made the following damage awards on these plaintiffs' outrage claims: Williams ($ 1,500 compensatory/2,000 punitive); Miller ($ 10,500/19,500); Smith ($ 2,500/4,500); and Foust ($ 5,000/8,500). Pritchett was awarded $ 50,000 in compensatory and $ 225,000 in punitive damages as compensation for her outrage and retaliation claims. Metropolitan appealed the decision, claiming that the district court should have taken the case from the jury and ruled for Metropolitan as a matter of law (JAML). This appellate opinion is agreeing with the district court's analysis of the case.

(6) damages.[14]

Element (1), above, requires a statement that subjects the plaintiff to a loss of respect, damaging his or her reputation. Besides the above-listed six elements, the allegedly defamatory statement must also imply an assertion of an objective verifiable fact.[15] To decide whether a statement may be viewed as implying an assertion of fact, the following factors must be weighed:

(1) whether the author used figurative or hyperbolic language that would cancel the impression that he or she was seriously asserting or implying a fact;

(2) whether the general tenor of the publication cancels this impression; and

(3) whether the published assertion is susceptible of being proved true or false.[16]

Fear of defamation lawsuits has prompted many employers to refuse to comment about former employees. [17] This silence has rendered the task of checking references difficult. To ease the concerns about defamation, and possibly increase the flow of information from former employers, Arkansas and other states recognize a limited defense for employers in defamation cases – the **qualified privilege**. This privilege protects employers where statements are made in good faith about employees or former employees only to individuals who have a legitimate need to know the requested information.

Defamation and the qualified privilege are discussed in *Kadlec Medical Center v. Lakeview Anesthesia* and *Wal-Mart v. Lee,* presented later in this chapter, and *Cockram v. Genesco,* below.

JESSICA COCKRAM V. GENESCO, INC.

680 F.3d 1046 (8th Cir. 2012)

GRUENDER, Circuit Judge.

Jessica Cockram sued her former employer, Genesco, Inc., after the company made public statements about Cockram's involvement in an incident in which a pernicious racial slur appeared on a return receipt that Cockram handed to a customer. The district court . . . granted summary judgment in favor of Genesco on her defamation claim. Cockram now appeals, and we . . . remand the defamation claim.

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[14] Faulkner, *supra* note 10 at 402.
[15] *Id*. at 402-03.
[16] Dodson v. Allstate Ins. Co., 345 Ark. 430, 47 S.W.3d 866 (2001).
[17] Another approach used by employers is to ask former employeeees to sign a waiver of liability prior to issuing an employment reference.

I. BACKGROUND . . .

On October 17, 2008, in the course of her duties at a Journeys retail store owned by Genesco, Cockram assisted Keith Slater, an African-American, with a merchandise return. For efficiency in processing the return, Cockram entered a generic phone number, (913) 555-5555, into the store register. Unbeknownst to Cockram, Richard Hamill, a former employee whom Journeys had fired prior to this incident, had inserted into a store-level database a racial slur as one of the names associated with the phone number Cockram entered. Cockram unwittingly selected the entry with the racial slur from the list of names associated with the phone number. She then printed a return receipt that included the racial slur, signed it without reading it, and handed it to Slater.

The next day, Slater, accompanied by members of his family, returned to Journeys with the return receipt. Slater's sister demanded Cockram's name, and Cockram complied. Slater and his family were outraged about the incident and told people in and near Journeys about what had happened, resulting in what Cockram described as a "riot."

On October 20, Genesco fired Cockram. In response to inquiries about the incident, Genesco provided a statement ("first statement") on October 21, 2008, reading:

While we are continuing to investigate this incident, it now appears that an employee in one of our stores entered highly inappropriate statements in a form used to process a merchandise return. Needless to say, such an act was not authorized by Journeys, and will not be tolerated. This employee has been terminated.

At Journeys, we pride ourselves on valuing and respecting every customer. We are shocked and sickened that a former associate could be responsible for an act so out of keeping with our culture and our values. We profoundly regret this incident.

Multiple news stories regarding the incident quoted the first statement, and some people posting comments to the online versions of those stories labeled as racist the involved employee. Additionally, after Genesco released the statement, Cockram received numerous messages and calls from people who called her a racist, blamed her for the racial slur, and threatened her. These accusations and threats made Cockram fearful, and she moved out of her apartment and temporarily placed her young child with her parents.

On October 22, 2008, Genesco learned that a different former employee, later identified as Hamill, may have been involved with the return-receipt

incident. . . . Cockram sued Genesco for defamation . . .. [T]he district court granted summary judgment in favor of Genesco because it determined that Genesco's statements were substantially true. Cockram now appeals . . ..

II. DISCUSSION

. . . In a defamation action, a plaintiff must establish: "1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation." *Missouri ex rel. BP Prods. N. Am. Inc. v. Ross*, 163 S.W.3d 922, 929 (Mo. 2005) . . . In seeking summary judgment, Genesco argued that Cockram could not establish that the statements were false, that Genesco published them with the requisite degree of fault, and that Cockram's reputation was damaged. The district court addressed only whether the statements were false and determined that they were not. On appeal, Genesco reasserts its arguments that Cockram cannot establish the latter three of the six required elements. . . .

. . . The district court properly granted summary judgment to Genesco if, when viewing the evidence in the light most favorable to Cockram, there is "no genuine issue of material fact" and Genesco "is entitled to judgment as a matter of law." . . . "A genuine issue of material fact exists if a reasonable jury could return a verdict for" Cockram. . . . .

1. Falsity of the Statements

We must determine whether the "gist" or "sting" of the statements was false. . . . As a preliminary matter, we note that counsel for Genesco conceded at oral argument that the first statement could be read as referring to Cockram and that Genesco knew prior to issuing the first statement that Cockram's name had appeared in news reports. Moreover, Roger Sisson, an officer at Genesco, agreed during his deposition that the words "[t]his employee has been terminated" in the first statement referred to Cockram. Thus, there is no real dispute that the reference to an "employee" in the first statement could be interpreted as referring to Cockram.

Genesco argues that the first statement was truthful as a matter of law because (1) Cockram did enter a racial slur into a form by selecting it from a list of names, and (2) her action was not authorized because she used a generic phone number, rather than entering Slater's actual information into the register as required by Genesco policy. We are not persuaded. When the entirety of the first statement is considered in the light most favorable to Cockram, it can be read as asserting that Cockram intentionally directed a racial slur at Slater, not just that she violated company policy requiring the entry of a customer's actual phone number to generate a return receipt.

> In other words, the first statement did not necessarily assert that Cockram was terminated merely because she violated company policy by entering a generic phone number into the register and generating a return receipt containing a racial slur without being conscious of the offensive output. It is not "[n]eedless to say" that Genesco would not authorize entering a generic phone number and blindly selecting a name entry in order to expedite a customer's return. And a reasonable jury may not consider such a practice by itself to be so out of line with Genesco's culture and values as to make Genesco "shocked and sickened." Instead, the use of these phrases in Genesco's statement reasonably could be read to imply that Cockram intentionally communicated the racial slur. Because Cockram denies that she intentionally produced a return receipt with a racial slur, and produced evidence supporting this assertion, a genuine issue of material fact exists as to whether the gist of the first statement was true. Thus, the district court erred by determining as a matter of law that the first statement was substantially true.
>
> . . .

Tortious Interference with a Contract

On occasion, a fired employee will claim a third party improperly persuaded the employer to bring about the discharge. This legal claim is titled, in Arkansas, tortious interference with a contract. The elements of tortious interference are:

(1) The existence of a valid contractual relationship;
(2) Knowledge of the relationship by the interfering party;
(3) Intentional interference inducing or causing a breach or termination of the relationship;
(4) Resultant damage to the party whose relationship has been disrupted; and
(5) The conduct of the defendant must be "improper."[18]

As implied above, an essential part of a tortious-interference claim is there must be some third party involved. A party to a contract and its employees and agents cannot be held liable for interfering with the party's own contract.[19]

[18] Mason v. Wal-Mart Stores, Inc., 333 Ark. 3, 969 S.W.2d 160 (1998).
[19] St. Joseph's Regional Health Center v. Munos, 326 Ark. 605, 934 S.W.2d 192 (1996); Fisher v. Jones, 311 Ark. 450, 844 S.W.2d 954 (1993).

Constructive Discharge

To sue an employer for wrongful discharge, it is usually necessary the employee suing prove that she or he was fired. However, in certain cases an employee may quit and keep the right to sue for wrongful discharge. This is possible where the employee can prove that she was "constructively discharged." A constructive discharge exists when an employer intentionally renders an employee's working conditions intolerable and thus forces him to resign. This legal theory may be used only when a reasonable person would have resigned under the same or similar circumstances.

In the following case, the plaintiff, Charles Oxford, resigned his position for Sterling Drug and later claimed he was constructively discharged from his position.

Sterling Drug, Inc.
v.
Oxford

743 S.W.2d 380 (Ark. 1988)

Holt, J. – **[Background Facts]** This is an outrage and wrongful discharge action. . . .From 1963 until October 31, 1983, . . .Charles G. Oxford . . . was employed under a contract for an indefinite term by what is now the National Laboratories Division of Lehn and Fink Industrial Products Division, Inc., a division of the appellant, Sterling Drug, Inc. . . .. In 1984 Oxford filed suit against Sterling alleging that through acts of its agents, Sterling had engaged in a systematic campaign from January of 1982 until August of 1983 designed to force Oxford's resignation because it believed that he had reported Sterling to the General Services Administration ("GSA") for submitting false information during GSA contract negotiations. . . .

Don Dunston, . . . a former Sterling employee and Oxford's supervisor, testified at trial that Ray Mitchell, president of Lehn and Fink Industrial Products Division, Inc., stated in October of 1981 that he believed Oxford had reported Sterling to the GSA for pricing violations. As a result of these violations, Sterling paid $ 1,075,000.00 to the federal government in a 1984 settlement. It was in October of 1981 that Sterling advised Oxford that his position, manager of contract sales, would be eliminated as of January 1, 1982, due to a company reorganization. In February of 1982, Oxford accepted a position as district sales manager, the lowest position in the National Laboratories Division hierarchy, for an area in east Texas. . . .

At trial, Oxford denied that he had reported Sterling to the GSA. Oxford also testified that Dunston reprimanded him for acts he had not done and that he was not given the stock he had won in a company sales contest. Additionally, he stated that because of his employment conditions, he left his territory in August of 1983 without receiving prior approval from Sterling. Oxford did not return to work, and Sterling discharged him on October 31, 1983. . . .

[Constructive Discharge] A constructive discharge exists when an employer intentionally renders an employee's working conditions intolerable and thus forces him to resign. . . . It exists only when a reasonable person would have resigned under the same or similar circumstances. There is sufficient evidence that Sterling engaged in a continuous campaign to force Oxford's resignation because it believed he had reported Sterling to the GSA for pricing violations and that a reasonable person would have resigned under the same or similar circumstances. . . .

Employment References

As identified above, the fear of defamation lawsuits has prompted many employers to refuse to comment about former employees. Alternately, some employers have a policy of commenting only after former employees provide a waiver of liability, releasing the employer from liability for comments made. In a similar fashion, employers may refuse to specifically comment on former employees, but may relay whether the employee would be rehired. A negative answer to this question raises a red flag for prospective employers.

What about employers who **do** comment on former employers, but fail to tell the entire story. The following dispute illustrates some of the legal difficulties involved where employers attempt to avoid negative comments about former employees.

KADLEC MEDICAL CENTER
V.
LAKEVIEW ANESTHESIA ASSOCIATES

527 F.3d 412; (5th Cir. 2008)

REAVLEY, Circuit Judge - Kadlec Medical Center and its insurer, Western Professional Insurance Company, filed this diversity action in Louisiana district court against Louisiana Anesthesia Associates (LAA), its shareholders, and Lakeview Regional Medical Center (Lakeview Medical). The LAA shareholders worked with Dr. Robert Berry--an anesthesiologist and former LAA shareholder--at Lakeview Medical, where the defendants discovered his on-duty use of narcotics. In referral letters written by the defendants and relied on by Kadlec his future employer, the defendants did not disclose Dr. Berry's drug use.

While under the influence of Demerol at Kadlec, Dr. Berry's negligent performance led to the near-death of a patient, resulting in a lawsuit against Kadlec. Plaintiffs claim here that the defendants' misleading referral letters were a legal cause of plaintiffs' financial injury, i.e., having to pay over $ 8 million to defend and settle the lawsuit. The jury found in favor of the plaintiffs and judgment followed. We reverse the judgment against Lakeview Medical, vacate the remainder of the judgment, and remand.

I. Factual Background

Dr. Berry was a licensed anesthesiologist in Louisiana and practiced with Drs. William Preau, Mark Dennis, David Baldone, and Allan Parr at LAA. From November 2000 until his termination on March 13, 2001, Dr. Berry was a shareholder of LAA, the exclusive provider of anesthesia services to Lakeview Medical (a Louisiana hospital).

In November 2000, a small management team at Lakeview Medical investigated Dr. Berry after nurses expressed concern about his undocumented and suspicious withdrawals of Demerol. The investigative team found excessive Demerol withdrawals by Dr. Berry and a lack of documentation for the withdrawals.

Lakeview Medical CEO Max Lauderdale discussed the team's findings with Dr. Berry and Dr. Dennis. Dr. Dennis then discussed Dr. Berry's situation with his partners. They all agreed that Dr. Berry's use of Demerol had to be controlled and monitored. But Dr. Berry did not follow the

agreement or account for his continued Demerol withdrawals. Three months later, Dr. Berry failed to answer a page while on-duty at Lakeview Medical. He was discovered in the call-room, asleep, groggy, and unfit to work. Personnel immediately called Dr. Dennis, who found Dr. Berry not communicating well and unable to work. Dr. Dennis had Dr. Berry taken away after Dr. Berry said that he had taken prescription medications.

Lauderdale, Lakeview Medical's CEO, decided that it was in the best interest of patient safety that Dr. Berry not practice at the hospital. Dr. Dennis and his three partners at LAA fired Dr. Berry and signed his termination letter on March 27, 2001, which explained that he was fired "for cause":

[You have been fired for cause because] you have reported to work in an impaired physical, mental, and emotional state. Your impaired condition has prevented you from properly performing your duties and puts our patients at significant risk. . . . [P]lease consider your termination effective March 13, 2001.

. . . After leaving LAA and Lakeview Medical, Dr. Berry briefly obtained work as a *locum tenens* (traveling physician) at a hospital in Shreveport, Louisiana. In October 2001, he applied through Staff Care, a leading *locum tenens* staffing firm, for *locum tenens* privileges at Kadlec Medical Center in Washington State. After receiving his application, Kadlec began its credentialing process. Kadlec examined a variety of materials, including referral letters from LAA and Lakeview Medical.

LAA's Dr. Preau and Dr. Dennis, two months after firing Dr. Berry for his on-the-job drug use, submitted referral letters for Dr. Berry to Staff Care, with the intention that they be provided to future employers. The letter from Dr. Dennis stated that he had worked with Dr. Berry for four years, that he was an excellent clinician, and that he would be an asset to any anesthesia service. Dr. Preau's letter said that he worked with Berry at Lakeview Medical and that he recommended him highly as an anesthesiologist. Dr. Preau's and Dr. Dennis's letters were submitted on June 3, 2001, only sixty-eight days after they fired him for using narcotics while on-duty and stating in his termination letter that Dr. Berry's behavior put "patients at significant risk."

On October 17, 2001, Kadlec sent Lakeview Medical a request for credentialing information about Berry. The request included a detailed confidential questionnaire, a delineation of privileges, and a signed consent for release of information. The interrogatories on the questionnaire asked whether "[Dr. Berry] has been subject to any disciplinary action," if "[Dr. Berry has] the ability (health status) to

perform the privileges requested," whether "[Dr. Berry has] shown any signs of behavior/personality problems or impairments," and whether Dr. Berry has satisfactory "judgement."

Nine days later, Lakeview Medical responded to the requests for credentialing information about fourteen different physicians. In thirteen cases, it responded fully and completely to the request, filling out forms with all the information asked for by the requesting health care provider. The fourteenth request, from Kadlec concerning Berry, was handled differently. Instead of completing the multi-part forms, Lakeview Medical staff drafted a short letter. In its entirety, it read:
This letter is written in response to your inquiry regarding [Dr. Berry]. Due to the large volume of inquiries received in this office, the following information is provided. Our records indicate that Dr. Robert L. Berry was on the Active Medical Staff of Lakeview Regional Medical Center in the field of Anesthesiology from March 04, 1997 through September 04, 2001. If I can be of further assistance, you may contact me at (504) 867-4076.

. . . .
II. Procedural History
Kadlec and Western filed this suit in Louisiana district court against LAA, Dr. Dennis, Dr. Preau, Dr. Baldone, Dr. Parr, and Lakeview Medical, asserting Louisiana state law claims for intentional misrepresentation, negligent misrepresentation, strict responsibility misrepresentation, and general negligence. Plaintiffs alleged that defendants' tortious activity led to Kadlec's hiring of Dr. Berry and the resulting millions of dollars it had to expend settling the Jones lawsuit. . . .

. . . The jury awarded plaintiffs $ 8.24 million, which is approximately equivalent to the amount Western spent settling the Jones lawsuit ($ 7.5 million) plus the amount it spent on attorneys fees, costs, and expenses (approximately $ 744,000) associated with the Jones lawsuit. The jury also found Kadlec and Dr. Berry negligent. The jury apportioned fault as follows: Dr. Dennis 20%; Dr. Preau 5%; Lakeview Medical 25%; Kadlec 17%; and Dr. Berry 33%. . . .

III. Discussion
A. The Intentional and Negligent Misrepresentation Claims
The plaintiffs allege that the defendants committed two torts: intentional misrepresentation and negligent misrepresentation. The elements of a claim for *intentional* misrepresentation in Louisiana are: (1) a misrepresentation of a material fact; (2) made with intent to deceive; and (3) causing justifiable reliance with resultant injury. To establish a claim

for intentional misrepresentation when it is by silence or inaction, plaintiffs also must show that the defendant owed a duty to the plaintiff to disclose the information. . . .

. . .
1. *The Affirmative Misrepresentations* - The defendants owed a duty to Kadlec to avoid affirmative misrepresentations in the referral letters. In Louisiana, "[a]lthough a party may keep absolute silence and violate no rule of law or equity, . . . if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to [disclose] the whole truth. . . . [Citations omitted]

. . . Consistent with these cases, the defendants had a legal duty not to make affirmative misrepresentations in their referral letters. A party does not incur liability every time it casually makes an incorrect statement. But if an employer makes a misleading statement in a referral letter about the performance of its former employee, the former employer may be liable for its statements if the facts and circumstances warrant. Here, defendants were recommending an anesthesiologist, who held the lives of patients in his hands every day. Policy considerations dictate that the defendants had a duty to avoid misrepresentations in their referral letters if they misled plaintiffs into thinking that Dr. Berry was an "excellent" anesthesiologist, when they had information that he was a drug addict. Indeed, if defendants' statements created a misapprehension about Dr. Berry's suitability to work as an anesthesiologist, then by "volunteer[ing] to speak and to convey information which . . . influence[d] the conduct of [Kadlec], [they were] bound to [disclose] the whole truth." ··· . . .

In sum, we hold that the letters from the LAA defendants were affirmatively misleading, but the letter from Lakeview Medical was not. Therefore, Lakeview Medical cannot be held liable based on its alleged affirmative misrepresentations. It can only be liable if it had an affirmative duty to disclose information about Dr. Berry. We now examine the theory that, even assuming that there were no misleading statements in the referral letters, the defendants had an affirmative duty to disclose. We discuss this theory with regard to both defendants for reasons that will be clear by the end of the opinion.

2. *The Duty to Disclose* - In Louisiana, a duty to disclose does not exist absent special circumstances, such as a fiduciary or confidential relationship between the parties, which, under the circumstances, justifies the imposition of the duty. Louisiana cases suggest that before a duty to disclose is imposed the defendant must have had a pecuniary interest in the transaction. . . .

Despite . . . compelling policy arguments, we do not predict that courts in Louisiana--absent misleading statements such as those made by the LAA defendants--would impose an affirmative duty to disclose. The defendants did not have a fiduciary or contractual duty to disclose what it knew to Kadlec. And although the defendants might have had an ethical obligation to disclose their knowledge of Dr. Berry's drug problems, they were also rightly concerned about a possible defamation claim if they communicated negative information about Dr. Berry. As a general policy matter, even if an employer believes that its disclosure is protected because of the truth of the matter communicated, it would be burdensome to impose a duty on employers, upon receipt of a employment referral request, to investigate whether the negative information it has about an employee fits within the courts' description of *which* negative information must be disclosed to the future employer. Finally, concerns about protecting employee privacy weigh in favor of not mandating a potentially broad duty to disclose. . . .

E. Summary and Remand Instructions

. . . The letters from Dr. Dennis and Dr. Preau were false on their face and patently misleading. There is no question about the purpose or effect of the letters. Because no reasonable juror could find otherwise, we uphold the finding of liability against Dr. Dennis and Dr. Preau. But because Lakeview Medical's letter was not materially misleading, and because the hospital did not have a legal duty to disclose its investigation of Dr. Berry and its knowledge of his drug problems, the judgment against Lakeview Medical must be reversed. . . .

Additional Cases

Wal-Mart Stores, Inc.
v.
Lee

74 S.W.3d 634 (Ark. 2002)

Imber, J. - Appellant Wal-Mart Stores, Inc., appeals from a judgment entered on September 6, 2000, in favor of Appellee David Clark and from the denial of its posttrial motions. A jury found in favor of David Clark on the issues of defamation, false-light invasion of privacy, and intrusion invasion of privacy. The judgment awarded by the jury totaled $651,000 in compensatory damages and $1,000,000 in punitive damages, plus costs and interest. We affirm.

[Background Facts] In 1998, employees in the Wal-Mart Maintenance Department informed their supervisors that fellow employees Gene Addington, Bob Kitterman, and David Clark were taking home tools and equipment from Wal-Mart without proper authorization. Wal-Mart Loss Prevention Officer Jim Elder was assigned to investigate potential theft. He interviewed the informants, who reiterated that they had observed David Clark taking Wal-Mart property and placing the items into his vehicle. Elder then conducted surveillance on Bob Kitterman, which revealed Kitterman removing tools from Wal-Mart and giving them to his son-in-law. Consensual searches of both Kitterman's and his son-in-law's residences resulted in the discovery of Wal-Mart property. According to Elder, Kitterman stated that he had given some stolen Wal-Mart merchandise to David Clark. Wal-Mart never conducted surveillance on Clark.

David Clark was employed by Wal-Mart from July 31, 1989, until he was officially terminated on August 24, 1998. On August 17, 1998, Elder interviewed David Clark in the Quail Room at Wal-Mart's Home Office in connection with Elder's theft investigation. What Elder and Clark discussed in that room was the subject of sharply conflicting testimony at trial. Clark testified that Elder told him Wal-Mart was investigating some missing life jackets and fishing poles and wanted to know if Clark had taken them. Clark stated that he consented to a search of his residence only to show Elder that he did not have any fishing equipment. Elder, on the other hand, admits to mentioning stolen fishing equipment in his conversation with Clark, but claims he did not indicate that was the thrust of his investigation. He testified that he also mentioned computers and tools. Wal-Mart contends that Clark gave an unlimited consent to search. . . .

After the Quail Room interview, Elder called Detective James Haskins of the Rogers Police Department and asked the detective to meet them at Clark's residence. Elder

stated that, though Wal-Mart does its own internal investigation, he always calls the police for safety reasons, as well as for the legality of the search and for evidence purposes. Detective Haskins stated at trial that Elder advised him "that Clark had given them permission to go over to his residence located in Rogers and ... recover some property that belonged to Wal-Mart." Detective Haskins testified that he believed Elder was referring to stolen property. The police report stated that on August 17 "Elder advised [Haskins] that he was en route to 402 East Spruce Street in order to conduct a consent search of this residence looking for stolen property." Detective Haskins arrived at the scene with Detective Scott Briggs, and the detectives presented Clark with a written consent-to-search form, which he signed. The detectives did not give Clark either verbal or written *Miranda* warnings. Clark's handwritten notes indicate that, prior to signing the form, Elder told him "Kitterman will be in jail tomorrow." The notes further describe Clark's recollection of the events that day:

> [T]he man with Rogers P.D. came over to me and said that he was there to protect Wal-Mart and he had a consent to search form allowing Wal-Mart to search my property.... After I had signed the form, Mr. Elder came over to where we were standing and ask [*sic*] if he was going to need a big truck like they had to have at Kittermans. I said I don't think so!! We then walked over to my shop building and I opened the door. Mr. Elder walked in and [Mr. Womack] said ... I'm going to turn you in to the IRS.... I then went into the house ... and gathered a handful of receipts from the Associate Store and went back outside to Mr. Elder. I held out the receipts to him and ask [*sic*] him to please look at them as all of the items in my shop belonged to me and that I used to repair equipment for Clarence Leis at the Associate Store for re-sale to our associates. Mr. Elder [*sic*] that doesn't matter Clarence Leis has got [*sic*] a lot of people in trouble. At this point ... I became very devastated by the whole thing. I told Mr. Elder that I can prove what belongs to me. He then said we will load it all and you can prove what belongs to you later.

Detective Briggs testified that he called dispatch and asked for the assistance of more officers. The evidence shows that a total of five police detectives and one police officer were eventually involved in the search. The police assisted Elder and Kenneth Womack, another Wal-Mart Loss Prevention Officer, in a search of Clark's home and a shop building on his property. Elder and Womack also enlisted the help of approximately ten to fifteen additional Wal-Mart employees.

The search lasted approximately seven hours, during which time Wal-Mart seized over 400 items, including computer parts, printers, VCRs, TVs, camcorders, fax machines, typewriters, and telephones, among other things. At the outset of the search, Clark told Elder that he repaired items for Wal-Mart and that Clarence Leis had given him some salvage merchandise to keep. As the items were being removed from Clark's home and shop, they were placed out in his yard so that they could be inventoried, photographed, and logged. Detective Haskins indicated that it was probably his decision to put the merchandise in the yard. However, Donna Jackson from Wal-Mart's Corporate Fraud Division testified that both Elder and Womack were instrumental in instructing other

employees which property was to be taken out onto the lawn. After the items had been inventoried, Wal-Mart placed them into a U- Haul truck.

While most of the property was on Clark's lawn, local media arrived to cover the story. The next morning, *The Morning News* featured the merchandise seizure on its front page with the headline "Police seize stolen electronic equipment believed to have come from Wal-Mart." The story was accompanied by a photograph of the property laid out in Clark's yard. The caption under the photograph read: "Rogers police and Wal-Mart employees examine about $50,000 worth of items collected from a Spruce Street residence Monday as part of a continuing theft investigation." The article listed Clark's street address, and Clark's wife was one of several people identifiable in the photograph. The article quoted Detective Haskins as a source of some of its information. On August 19, 1998, the *Benton County Daily Record* published a similar article.

In his written notes, Clark stated that the contents of his home and shop which were seized by Wal-Mart amounted to an accumulation of over twenty years of business and hobby. In addition to his work at Wal-Mart, Clark had maintained a workshop in his home since the 1970's where he operated an electronics repair business known as Clark's Repair Service. Clark also performed electronics repair work for many different departments of Wal-Mart, including the Wal-Mart Associates' Store. Clark was a frequent customer of the Associates' Store, a store where damaged or salvage merchandise from the retail stores is sent for sale to Wal-Mart employees at discounted prices. During much of the time in question, Clarence Leis was the manager of the Associates' Store. Leis often asked Clark to repair items for the store, and there was evidence that he informed Clark that he could keep some items that he could not repair. Clark did many of the repairs at home on his own time without charging Wal-Mart for anything other than the cost of parts. Elder stated that, during the course of his investigation of Clark, he interviewed a new manager of the Associates' Store. However, Elder admitted that he did not make any attempt to interview Leis before searching Clark's residence because Leis had not been with Wal-Mart for two years. Elder acknowledged that, on the day the property was seized from Clark's residence, Clark informed him that he was repairing items for Wal-Mart.

On August 25, 1998, loss-prevention officers Elder and Womack presented a case synopsis detailing the investigation to Wal-Mart supervisory personnel, the police, and the prosecutor's office. Melinda Hass, a Wal-Mart personnel manager, testified that David Clark was officially terminated from his employment with Wal-Mart, and that the decision to terminate him was based on Elder's report. According to both Melinda Hass and David Passmore, Wal-Mart's Director of Store Planning, Clark was officially terminated "[f]or violation of a company policy, not having a material pass or a proper permission from a supervisor to have Wal-Mart equipment."

Five months after the incident, the Benton County Prosecuting Attorney refused to formally file criminal charges against Clark. Wal-Mart filed an action in replevin to recover the property seized at Clark's residence, which was being held at the Benton County Sheriff's Office. Clark counterclaimed asserting violations of federal and state

civil rights laws and six other causes of action: the tort of outrage, negligent supervision, deceit, defamation, false-light invasion of privacy, and intrusion invasion of privacy. The jury trial in this matter lasted for eleven days. Wal-Mart was granted a directed verdict as to thirty-seven items appearing on a property list compiled by Wal-Mart and purporting to contain the items taken from Clark's residence. . . . Those thirty-seven items did not appear in the police inventory of items seized from Clark, and Clark claimed that none of those items came from his residence. Wal-Mart dismissed its replevin action as to every item that Clark identified as being seized from his home. Those items included goods that Clark had purchased from Wal-Mart, the Associates' Store, and Wal-Mart's Used Asset Division; items he was repairing for other customers; and a "half a dozen" items given to him by Clarence Leis.

At Wal-Mart's request, the trial on Clark's counterclaims was trifurcated into separate phases on liability, compensatory damages, and punitive damages. Clark voluntarily dismissed his claim for negligent supervision, and Wal-Mart's motion for directed verdict was granted with respect to Clark's claims for civil rights violations, outrage, and deceit. The jury, in answers to interrogatories, returned a verdict in Clark's favor on defamation, false-light invasion of privacy, and intrusion invasion of privacy. **[The privacy claims are covered in the following chapter.]** . . .

[Defamation Claim] Wal-Mart contends [on appeal] there is no evidence that any Wal-Mart employee published defamatory information about Clark, pointing out that no Wal-Mart employee was quoted in either *The Morning News* or the *Benton County Daily Record.* Wal-Mart argues that there is evidence to support the conclusion that the newspapers obtained their information from police communications rather than from Wal-Mart employees. Clark, on the other hand, argues there is substantial evidence, both direct and circumstantial, that Wal-Mart published defamatory information about him. . . .

The evidence presented at trial reflects five separate publications upon which the jury could have found Wal-Mart liable for defamation. Clark asserts that Elder first published defamatory information about him when Elder untruthfully communicated to Detective Haskins that Clark admitted having property at his residence that belonged to Wal-Mart. . . .

The publications concerning Clark that were disseminated over police radio form a second group of publications upon which the jury could have found Wal-Mart liable for the tort of defamation. According to Clark, Elder knew or should have known that his untruthful statements would be disseminated on police radio, where they would be picked up by the press and the public. . . .

Clark also points to circumstantial evidence to show that Wal-Mart published defamatory information to the media. Circumstantial evidence that a defamatory statement was overheard can be sufficient evidence of publication to support a verdict in favor of a defamation claim. *Wal-Mart Stores, Inc. v. Dolph,* 825 S.W.2d 810 (1992). In the *Dolph* case, Carolyn Dolph was accused of shoplifting in the presence of customers

entering and leaving a Wal-Mart store. Although there was no testimony from individuals who actually heard the accusations, this court held that the attendant circumstances provided sufficient evidence that defamatory statements were made in the presence and hearing of other people. . . .

[Qualified Privilege] Wal-Mart's next argument is that, even if the jury did find that Wal-Mart made defamatory statements about Clark that were communicated to third parties, Wal-Mart cannot be held liable for defamation because the information fell within a qualified privilege. Wal-Mart contends that Clark failed to present substantial evidence to defeat its qualified privilege. This court has clarified the conditions under which the qualified privilege may be invoked:

> A communication is held to be qualifiedly privileged when it is made in good faith upon any subject-matter in which the person making the communication has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty, although it contains matters which, without such privilege, would be actionable.

. . . The qualified privilege is lost if it is abused by excessive publication; if the statement is made with malice; or if the statement is made with a lack of grounds for belief in its truthfulness. . . .

Here, the jury could have concluded that Clark did not admit receiving stolen property or taking Wal-Mart property home without authorization and that Clark did not identify merchandise belonging to Wal-Mart at his residence. Under this view of the evidence, Elder would not have had any grounds to believe that his statements in the case synopsis were truthful. Statements are not protected by a qualified privilege where the author of the statements lacks a belief in their truthfulness. Viewing the evidence in the light most favorable to Clark, we hold that substantial evidence supports the jury's conclusion that Wal-Mart exceeded the scope of its qualified privilege. **[The court is "viewing the evidence in the light most favorable to Clark" because Wal-Mart is asking the court to reverse the jury decision. A court will only reverse or overturn the jury decision if the court believes that the decision is unsupported or contradicted by the evidence. A court will not reverse a jury decision simply because the court disagrees with the decision. Therefore, on appeal the court views the evidence in the light most favorable to the decision of the jury at trial. In refusing to reverse, the Arkansas Supreme Court upholds the jury verdict for Clark.]**

Managerial Applications

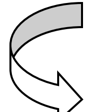
The following steps should help reduce successful wrongful discharge lawsuits. The appropriateness of each preventive measure will depend on the size and nature of your firm. The measures should be tailored to the employer's individual situation so all parties involved feel comfortable with the approach taken.

1. The employment-at-will rule should be highlighted on the employment application and in the employee handbook. Employee policy statements, handbooks, and manuals should avoid any promise of employee tenure or promises of just cause for employee dismissals, unless the company expressly wishes to extend such employee protections.
2. Employers should have clear written rules for employees. These rules should be consistently applied to all employees. If your company wishes to use a progressive disciplinary system, be careful to keep the flexibility to impose harsher sanctions where proper.
3. All significant employee problems should be thoroughly documented in the employee file.
4. Problem employees should be given the chance to raise their performance up to the expected level. It may be important to a jury in a wrongful discharge trial the employer gave the employee a reasonable chance to succeed.
5. No termination should be made by supervisors without review by higher management. The employee file should be reviewed to ensure there is documentation on employee problems. Depending on the size of the employer, it may be advisable to have one "termination czar" - one individual responsible for all terminations. This approach fosters consistency and fairness in the termination process. The termination czar would be somebody well-spoken and sensitive to employee needs.
6. Employees should have a procedure within the company to argue their side in any termination cases.
7. If employees are fired in person, the manager should avoid debating or arguing with the employee. Rather, benefits available from the company should be discussed (for example, letters of reference, severance pay, or placement services). When appropriate, the employee should be given the chance to resign rather than being fired. If employees are fired by letter, the letter should avoid going beyond the basic facts involved in the termination.
8. The possible benefits available to terminated employees, above, only should be available where the terminated employee agrees to sign a waiver of liability for the employer, in consideration for the benefits received.
9. There should be an exit interview allowing the employee to discuss any claims of unfair treatment. This last chance interview may allow the employer to detect potential problems before they develop into later lawsuits.

Note: Some firms prefer to have at least two supervisors present when firing an employee. This is usually a good approach, but care needs to be taken to avoid defamation or invasion of privacy lawsuits by the employee.

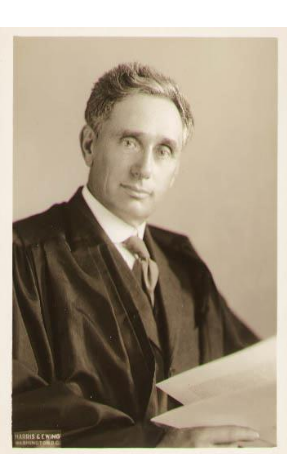
Chapter 3 - Employment Privacy

Chapter 3 - Cognitive Objectives



1. Identify, explain, and apply the various federal and state sources of privacy protection.
2. Identify employer concerns on misuse of employment technology, for example, misuse of e-mail.
3. Apply privacy laws to the issue of monitoring employee activities.
4. Explain and interpret the cases in this chapter and apply the legal principles to hypothetical employment problems.
5. Answer the questions found throughout the chapter.

Introduction – The Right to Privacy



Supreme Court Justice Louis D. Brandeis

Privacy is always an issue in modern society, where technology allows invasions of personal privacy. The United States government coordinates information gathering through the National Security Agency, an intelligence agency Department of Defense responsible for the collection and analysis of foreign communications. Recent leaks of intelligence information from an NSA contractor have raised privacy concerns around the world.

Privacy has been a legal issue in the United States for over a century. Writing in the *Harvard Law Review* in 1890, Louis Brandeis and Samuel Warren proposed the courts recognize a new legal right, the right to privacy.[1] The right to privacy, as proposed, was a basic right to be left alone. In a 1928 Supreme Court case, *Olmstead v. United States*,[2] then Supreme Court justice Brandeis stated in his dissent the right to privacy is "the most comprehensive of rights and the most valued by civilized men."

Since Brandies and Warren wrote about privacy in 1890, the law has gradually recognized this right. The right to privacy, as currently recognized by the courts, is not comprehensive. Rather, the right to privacy varies depending on the parties involved, the location of the disputed privacy invasion, and the activities involved in the dispute.

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[1] "The Right to Privacy," 4 Harv.L.Rev. 193 (1890).
[2] 277 U.S. 438 (1928).

Employer Monitoring at Work

Privacy today remains a controversial issue. One area of controversy that affects many individuals is privacy at work. Technological tools available to employers enable monitoring of activities that, in the past, remained private. Concerns about employee productivity, employee theft or industrial espionage have prompted an increasing number of employers to engage in workplace monitoring in a fashion that raises privacy concerns.

One survey reported that around four out of five major U.S. firms record or review employee workplace activities and communications. The activities monitored include telephone calls, e-mail messages, Internet activities, and computer files. Employer surveillance techniques include videotaping employees, recording telephone conversations, logging Internet sites visited, and analyzing computer use regarding time logged on and keystroke counts.[3]

As intrusive as the preceding monitoring activities may appear to some individuals, monitoring employee telephone conversations, e-mail or Internet usage concerns employment behavior, an *a priori* legitimate area of concern to employers. New technologies extend the reach of information available to employers to allow for the possibility of employer use of employee information unrelated to workplace activities. For example, employers have tools available that allow identification of employees that will, at some future, point, suffer from or be at risk for genetic diseases or disorders. The genetic information could be used to deny employment to those individuals that will present future health care risks. The appropriateness of using genetic information is an example of how science and technology will continue to produce new employment privacy disputes.

Privacy Rights under the Law

There is no single legal source of privacy rights in the United States. Whatever rights exist are drawn from various sources. These privacy rights are either explicit in the law or implied from other related rights.

Privacy under the U.S. Constitution

A primary source of privacy rights in America is the U.S. Constitution. The word “privacy” does not appear in the text of the Constitution. However, the Supreme Court has found implied guarantees of privacy in the Bill of Rights, including the First Amendment (freedom of religion, speech, the press, and association), the Fourth Amendment (protection against unreasonable search and seizure), and the Fifth Amendment (freedom from self-incrimination). A majority of the Supreme Court held for the first time the Constitution protects zones of privacy in 1965. In the case, *Griswold*

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[3] Eric Rolfe Greenberg, et al., “Workplace Testing, Monitoring & Surveillance,” American Management Association, 2000, p.1.

v. Connecticut, the Supreme Court invalidated a Connecticut law that imposed restrictions of the sale of contraceptives.[4] The holding was based on the right of privacy.

Employment privacy under the Constitution is the focus of the following decision, *Rosario v. U.S.A.* An important point about workplace privacy is that U.S. Constitutional protections only restrict government behavior. The Constitution was designed to create a system of government while restricting the power of this new government. Individual rights are preserved from intrusions by the government. The U.S. Constitution does not restrict private business activities. Private employers cannot violate employees' federal constitutional right to privacy, regardless of the company's behavior.

Rosario
v.
United States of America

538 F. Supp. 2d 480
United States District Court, District of Puerto Rico (2008)

RAYMOND L. ACOSTA, J. - [**Background Facts]** This action was instituted by 22 federal police officers who, at the time of the events alleged in the complaint, were carrying out police work for the Department of Veterans Affairs (DVA) at the San Juan Veterans Affairs Medical Center in Puerto Rico ("SJ-VAMC") . . .. Plaintiffs claim that defendants' surreptitious video surveillance of their locker-break room ran afoul of the Federal Tort Claims Act ("FTCA") . . . as well as deprivation of their rights to "due process of law, equal protection of the laws and the pursuit of their life, liberty and profession." . . .

[Fourth Amendment] - The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". U.S. Const. amend. IV.

In order to ascertain whether or not a breach of the Fourth Amendment has been effected, the court must initially determine whether defendants "infringed an expectation of privacy that society is prepared to consider reasonable." . . . "[A] privacy expectation must meet both subjective and objective criteria: the complainant must have the actual expectation of privacy, and that expectation must be one which society recognizes as reasonable." . . .

"One has a subjective expectation of privacy if one has taken efforts to preserve something as private." . . ."What a person knowingly exposes to

[4] Griswold v. Connecticut, 381 U.S. 479 (1965).

the public, even in his own home or office, is not a subject of Fourth Amendment protection." **. . .** But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." . . .

"Although there is no "talisman" that determines whether society will find a person's expectation of privacy reasonable, a court may consider (1) the nature of the search, (2) where the search takes place, (3) the person's use of the place, (4) our societal understanding that certain places deserve more protections than others, and (5) the severity of the search." . . ..

[Expectation of Privacy] - Defendants argue that plaintiffs had prior notice of the possibility of cameras being installed in the locker-break room by virtue of the VA Handbook as well as the Master Agreement with plaintiffs' Union.

. . . However, contrary to Vega-Rodriguez [**a case analyzed by the court in an omitted section of this opinion**], where specific notice was given regarding the cameras that were indeed installed, the documents provided by defendants in support of their argument do not have this effect. . . .

The VA Handbook 0730 merely restates the Fourth Amendment standard. It reads:

j. Search of Employee Workplaces. The authority to search Government furnished and assigned personal lockers and office desks without a warrant will depend on whether the employer retains the right to inspect these areas and the employee's reasonable expectation of privacy.

Further, art. 47 of the VA's Master Agreement with plaintiffs' Union simply states that surveillance might be conducted "for safety and security reasons."

. . . Defendants contend that there is no reasonable privacy expectancy under the circumstances present in this case. However, . . . we find that there is sufficient indicia in the record that the locker-break room was intended to be used by a limited group of people for activities intended to be carried out outside the presence of the general public to meet both the subjective and objective requirements under the Fourth Amendment. The purpose of the room was inherently private. It was designated for a particular category of employees to safeguard their personal belongings and working instruments as well as to eat snacks. . . .

[Reasonableness of Search] - However, it is not enough for plaintiffs to establish the reasonableness of their expectation of privacy. Given the underlying purpose of the Fourth Amendment, i.e., protect against

unreasonable searches, in addition to asserting that the privacy expectations are indeed reasonable, plaintiffs must also prove that the employer's search was in fact unreasonable. . . .

In setting forth the applicable analysis for determining the standard of reasonableness of searches in the workplace the Supreme Court noted the need to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion... In the case of searches conducted

by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." . . .

Even though defendants argue that the surveillance video camera was installed to address problems relative to "a rash of complaints lodged by female police officers alleging sexual orientation discrimination, sexual harassment, defamation and hostile work environment", only evidence specifically pertaining to the allegations of P.O. Raquel Rosario as well as defendants' responses thereto were filed together with defendants' motion. . . .

According to the evidence submitted, a complaint was lodged by female P.O. Raquel Rosario accusing a fellow police officer of sexual harassment. . . . The Police Chief . . . decided that a surveillance camera should be installed in the Police Service locker-break room. A hollow was made in the ceiling and the camera was focused on Raquel Rosario's locker. . . .

In judging the reasonableness of the employer's conduct the court must examine whether or not it was warranted due to the extant circumstances and if so, whether its reach was sufficiently limited to deal with the particular situation it sought to address. . . .

It is axiomatic that sexual harassment and discrimination negatively affect the working environment. However, apart from the fact that the documents submitted in this case pertain just to one particular alleged victim - as opposed to the "rash of complaints by female police officers" referred to by defendants - there is no evidence in the record indicative that any of the alleged sexual discriminatory conduct took place in the locker-break room. In other words, there does not seem to be a logical connection between the conduct sought to be curtailed and the preventive measures taken. All we have before us is reference to the two anonymous notes whose content in no way manifest an impending danger situation.

Accordingly, faced with the limited information currently available to the court it cannot be reasonably concluded that defendants had a valid reason to have covert cameras installed in the locker-break room. In other words,

> even though defendants have a legitimate interest in eradicating sexual discrimination in the workplace there is not sufficient evidence in the record at this time to warrant encroachment into plaintiffs' privacy interests via surveillance video.
>
> Accordingly, defendants' request to dismiss the Fourth Amendment claim is hereby **DENIED.**

Questions:
1. The above court opinion identified the importance of an employee's reasonable expectation of privacy. Does an expectation of privacy differ depending on the party conducting the search?
2. What practical advice does the *Rosario* case provide employers?

Privacy under Federal Statutory Law – The Electronic Communications Privacy Act

There is no comprehensive federal statute on privacy. There is, however, piecemeal federal legislation protecting privacy. Unlike the Constitution, these federal laws generally do apply to private businesses. One primary such law, applicable both to government agencies and to private businesses or individuals, is the Electronic Communications Privacy Act of 1986 (ECPA).[5]

Title I of the ECPA amends older federal wiretapping laws (the Wiretap Act) to include in the list of prohibited behavior intercepting wireless and electronic communications, such as email messages or cordless telephone conversations.[6] The Wiretap Act, as amended, provides a civil cause of action against "any person who--(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."[7]

In addition, Title II of the ECPA (the Stored Communications Act) prohibits unauthorized access to stored electronic communications.[8] This Act establishes civil liability for one who:
"(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
(2) intentionally exceeds an authorization to access that facility;
and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system . . ."[9]
There are important defenses available under the law, including the following exceptions:

[5] Pub. L. No. 99-508, 100 Stat. 1848.
[6] 18 U.S.C. §§2510-22 (2000).
[7] 18 U.S.C. §2511(1).
[8] 18 U.S.C. §§2701-11 (2000).
[9] 18 U.S.C. §2701(a).

- ✓ Under the Electronic Communications Privacy A ct, employers are free to monitor or intercept electronic messages where employees have consented to such monitoring; and
- ✓ Employers may monitor electronic communications whenever such monitoring is "in the ordinary course of business." This phrase, not defined by the ECPA, is generally interpreted to allow an employer to monitor or intercept communications where necessary to protect its business, company property, and customer concerns.
- ✓ It is not unlawful under the ECPA to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public.

The case *Watkins v. L.M. Berry & Co.*[10] provides an example of court analysis regarding telephone conversations. Though *Watkins* preceded the ECPA, it is still valid law and often cited by other courts. In the case, Watkins, a sales representative, received a call at work from a friend who asked about a job interview that Watkins had had with another company. Watkins' supervisor had been listening in on the call. The next day, the company fired Watkins. She sued, claiming her employer violated the Wiretap Act by listening to her personal telephone conversation. The court provided a general rule: "[I]f the intercepted call is a business call, then the [employer's] monitoring of it was in the ordinary course of business. If it was a personal call, the monitoring was probably, but not certainly, *not* in the ordinary course of business."[11] In the case at hand, Watkins was an at-will employee. She was thus contractually free to resign her employment at any time. During the intercepted telephone conversation, Watkins was not discussing any confidential company information, nor was she making any plans causing legal problems for her employer. Her telephone conversation was personal, not related to her employer's business, and the monitoring was not in the ordinary course of business.

As used in the ECPA, "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.[12] This means that oral communications are not protected unless the speaker has a reasonable expectation that the conversation is private.

The Electronic Communications Privacy Act is a focus of *Fisher v. Mt. Olive Lutheran Church*, found at the end of this chapter. In addition, the ECPA is involved in the following dispute between Deborah Bailey and her former husband, Jeff Bailey.

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[10] 704 F.2d 577 (11th Cir.1983).
[11] *Id*. at 582.
[12] 18 U.S.C. §§2510(2) (2000).

Bailey
v.
Bailey

United States District Court for the Eastern District of Michigan
2008 U.S. Dist. LEXIS 8565 (2008)

Sean F. Cox, J. – [**Background Facts**] - This case arises out of Defendant Jeffrey Bailey's installation of a key logger on a computer shared by him and his now ex-wife, Plaintiff Deborah Jo Bailey.

Plaintiff and Defendant Bailey were married in 1987 and had three children. Unfortunately, the marriage began to deteriorate. Defendant Bailey had suspicions about Plaintiff's use of the internet, which he believed was excessive. According to Defendant Bailey, in fall of 2005 he clicked onto his wife's email account, titled joy2u. He saw several alerts that there were messages for Plaintiff from a website called Killer Movies Forum. Defendant Bailey clicked on the hyperlink associated with the alerts and read the messages. The messages were from a person known as "Finti" and were of a sexual nature. Plaintiff admitted to sexual discussions with Finti and others, but denies her children were aware of the discussions.

Shortly after Defendant Bailey discovered Plaintiff's sexual discussions, she opened a new email account titled chloedebb@yahoo.com. Around the same time, Defendant Bailey downloaded a free trial version of a key logger software and installed it on both home computers. The program is designed to record every keystroke made on the computer and store it in a text file on the computer's hard drive. . . . Defendant Bailey used the key logger program to learn the password for both Plaintiff's chloedebb@yahoo.com email account and her private messaging system on the Killer Movies Forum. Defendant Bailey learned that Plaintiff was continuing her internet sexual activities.

On January 9, 2006, Defendant Bailey left the marital home with the three children and went to Ohio to stay with his brother. In anticipation of divorce proceedings, Defendant Bailey provided his attorney, Defendant Todd Pope, with copies of emails and messages taken from the home computer. Throughout the divorce proceedings, Defendant Bailey supplied Defendant Pope with copies of emails and messages he said he was able to access because he had Plaintiff's passwords . . ..

Plaintiff argues that she would not have lost custody of her children if her emails and internet messages had not been disclosed. She also attributes emotional problems and distress she claims to suffer to the loss of custody of her children. . . .

18 U.S.C. § 2511 - The Wiretap Act - Plaintiff alleges Defendants Pope and Bailey violated 18 U.S.C. § 2511 when they obtained Plaintiff's emails and messages using the passwords learned from the key logger. Section 2511 provides, in pertinent part:

(1) Except as otherwise specifically provided in this chapter any person who -

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

* * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection?

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

The parties dispute whether Defendants' conduct is actionable under the Wiretap Act because, according to Defendants, there was no "interception" as that term has been interpreted by the courts. Specifically, the parties disagree on whether "interception" requires that the electronic communication be intercepted contemporaneously with its transmission. There is no Sixth Circuit authority on the issue.

Although the issue has not been addressed by the Sixth Circuit, the Circuits that have addressed the issue have agreed that the definition of "intercept" "encompasses only acquisitions contemporaneous with transmission." . . . The general reasoning behind these decisions is that based on the statutory definition and distinction between "wire communication" and "electronic communication," the latter of which conspicuously does not include electronic storage, Congress intended for electronic communication in storage to be handled solely by the Stored Communications Act. This interpretation is reasonable and consistent with the language of the statute. . . .

Defendants are entitled to summary judgment on Plaintiff's claim for violation of 18 U.S.C. § 2511.

18 U.S.C. § 2701 - Stored Communications Act

Plaintiff alleges Defendant Bailey violated 18 U.S.C. § 2701 when he accessed her email and messages. Section 2701 provides, in pertinent part:

(a) Offense - Except as provided in subsection (c) of this section whoever -

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

"Electronic storage is defined as either "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17).

Defendant Bailey argues that the Stored Communications Act does not apply because the emails and messages he accessed were already opened by Plaintiff. . . . The fact that Plaintiff may have already read the emails and messages copied by Defendant does not take them out of the purview of the Stored Communications Act. The plain language of the statute seems to include emails received by the intended recipient where they remain stored by an electronic communication service. The phrase "such communication" in § 2510(17)(B) refers to "wire or electronic communications" as mentioned in (17)(A) - it does not also include the requirement that the electronic communications be "incidental to the electronic transmission thereof." If that were the case, there would be no need to write them as two separate meanings. However, as a point of clarification, Stored Communications Act protection does not extend to emails and messages stored only on Plaintiff's personal computer. *In re Doubleclick Inc.,* 154 F. Supp. 2d 497, 511 (S.D.N.Y. 2001)("the cookies' residence on plaintiffs' computers does not fall into § 2510(17)(B) because plaintiffs are not 'electronic communication service' providers."). Defendant does not set forth any other basis for dismissing the claim. Accordingly, Defendant Bailey is not entitled to summary judgment on Plaintiff's claim for violation of 18 U.S.C. § 2701.

Privacy under Federal Statutory Law – Other Acts

Beyond the ECPA, other federal privacy laws are crafted narrowly to cover specific concerns. For example, during the confirmation process for Supreme Court nominee Robert Bork, nominated by President Reagan in 1987, a weekly newspaper printed a list of videocassettes rented by the Bork family. This intrusion into private affairs, lawful at the time, was offensive to many people. The result was the Video Privacy Protection Act, listed below. That federal privacy law and others follow:

- ✓ The Computer Fraud and Abuse Act[13] (providing a cause of action against one who intentionally accesses a computer without authorization and obtains information from the computer).
- ✓ The Fair Credit Reporting Act (1970)[14] (prohibiting consumer reporting agencies from disclosing consumer data except in specified circumstances).
- ✓ The Right to Financial Privacy Act (1978)[15] (providing individuals with the right to notice of a request before a financial institution may disclose records to government agencies).
- ✓ The Financial Services Modernization Act (1999)[16] (also known as the Gramm-Leach-Bliley Act, placing restrictions on financial institutions regarding consumer data and privacy).
- ✓ The Cable Communications Policy Act (1984)[17] (prohibiting cable operators from disclosing personal data regarding subscribers without the consent of the subscriber).
- ✓ The Video Privacy Protection Act (1988)[18] (protecting personal data held by videotape service providers).
- ✓ The Privacy Act (1974)[19] (protecting individuals from invasions of privacy by the government. Numerous exceptions exist to protect the government).

Privacy under State Constitutional or Statutory Law

Several state constitutions extend privacy protection to private (nongovernmental) action. Other states extend privacy protection through statutory enactments. Generally, most state constitutions and statutes are silent on a broad right to privacy. Miscellaneous state laws protecting specific areas of privacy, as in the following Arkansas constitutional provision and statute, often mirror federal legislation:

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[13] 18 U.S.C. §1030.
[14] 15 U.S.C. §§1681-1681t.
[15] 12 U.S.C. §§3401 *et seq*.
[16] 12 U.S.C. §§24a, 248b, 1820a, 1828b, 1831v-1831y, 1848a, 2908, 4809; 15 U.S.C. Sections 80b-10a, 6701, 6711-6717, 6731-6735, 6751-6766, 6781, 6801-6809, 6821-6827, 6901-6910; and others.
[17] 47 U.S.C. §§521 *et seq*.
[18] 18 U.S.C. §§2710 *et seq*.
[19] 5 U.S.C. §§552a *et seq*.

Constitution of the State of Arkansas
Unreasonable searches and seizures

The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.[20]

Arkansas Code of 1987

§5-60-120. Interception and recording

(a) It shall be unlawful for a person to intercept a wire, landline, oral, telephonic communication, or wireless communication, and to record or possess a recording of such communication unless such person is a party to the communication or one (1) of the parties to the communication has given prior consent to such interception and recording.

(b) Any violation of this section shall be a Class A misdemeanor.

(c) **(1)** It shall not be unlawful for such an act to be committed by a person acting under the color of law.

(2) It is an exception to the application of subsection (a) of this section that an officer, employee, or agent of a public telephone utility or company that is licensed by a federal or state agency to provide wire or wireless telecommunication service to the public provides information, facilities, or technical assistance to a person acting under the color of law to intercept a wire, wireless, oral, or telephonic communication.

(3) It shall not be unlawful under this section for an operator of a switchboard, or an officer, employee, or agent of any public telephone utility or telecommunications provider whose facilities are used in the transmission of a wire communication to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the telecommunications provider or public telephone utility of such communication.

(d) The provisions of this section do not apply to telecommunication services offered by a telecommunications provider or public telephone utilities or a Federal Communications Commission licensed amateur radio operator.

(e) Nothing in this section shall be interpreted to prohibit or restrict a Federal Communications Commission licensed amateur radio operator or anyone operating a police scanner from intercepting communications for pleasure.[21]

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[20] Ark. Const. Art. 2, §15 (2001).
[21] A.C.A. §5-60-120 (2001).

Privacy under State Common Law

Most states do recognize a common law right of privacy that applies to private business. The privacy rights recognized through the common law, however, are narrow and less extensive than the constitutional concept of privacy. Privacy at the state level is generally protected through a lawsuit for the tort of invasion of privacy. A state common law right to privacy is based usually on the four branches of privacy, below, from the Restatement (Second) of Torts:

Intrusion – This tort is an intrusion upon a person's right to seclusion or solitude. There is liability only if the interference with the plaintiff's seclusion is a substantial one, highly offensive to the ordinary reasonable person. Examples could include an employer spying without justification on an employee's private activities at home or accessing an employee's private bank records.

Public Disclosure of Private Facts – This tort requires public disclosure of private information about a person that, even though true, produces publicity of a highly objectionable kind. An example might be the disclosure of names and details about employees fired for viewing pornography at work. The charges are true and the firing in itself may be legally proper. The disclosure of the specifics, however, to a public audience might be a separate tort.

False Light in the Public Eye – This tort involves the defendant revealing information about a person that places that person in a false light. A plaintiff here must prove:

(1) The false light in which he was placed by the publicity would be highly offensive to a reasonable person, and

(2) The defendant had knowledge of or acted in reckless disregard to the falsity of the publicized matter and the false light in which the plaintiff would be placed.

Appropriation – Here a defendant is charged with use of a person's name or likeness without permission. This invasion of privacy would include activities such as the unauthorized use of a person's name in an advertising campaign.

The following case, *Wal-Mart Stores v. Lee*, continued from Chapter 2, presents two of the four branches of invasion of privacy, intrusion and false light.

Wal-Mart Stores, Inc.
v.
Lee (Cont.)

74 S.W.3d 634
Supreme Court of Arkansas, 2002

Imber, J. - Appellant Wal-Mart Stores, Inc., appeals from a judgment entered on September 6, 2000, in favor of Appellee David Clark and from the denial of its posttrial motions. A jury found in favor of David Clark on the issues of defamation, false-light invasion of privacy, and intrusion invasion of privacy. The judgment awarded by the jury totaled $651,000 in compensatory damages and $1,000,000 in punitive damages, plus costs and interest. We affirm. . . .

[Intrusion Invasion-of-Privacy Claim] Wal-Mart contends that Clark failed to establish the essential elements of the tort of intrusion. . . . [T]he tort [of intrusion] consists of three parts:

(1) An intrusion;
(2) That is highly offensive;
(3) Into some matter in which a person has a legitimate expectation of privacy. . . .

A legitimate expectation of privacy is the "touchstone" of the tort of intrusion. . . . Wal-Mart first argues that there could be no substantial intrusion because Clark consented to the search by Wal-Mart. . . . Clark contends that Elder tricked him into agreeing to the search by telling him that Wal-Mart was only looking for some missing life jackets and fishing poles. He maintains that any consent he gave was limited to a search for fishing equipment. . . .

In this case, the jury heard the conflicting stories of Clark and Elder regarding the scope of Clark's verbal consent. As reflected by its verdict, the jury accepted Clark's trial testimony as more credible and concluded that his verbal consent was limited in scope.

In support of its contention that Clark consented to the search, Wal-Mart also relies on a written consent-to-search form signed by Clark. In this case, the court instructed the jury that a person validly consents to an intrusion if, in the totality of the circumstances, the consent is given freely and without coercion. . . . The voluntariness of consent must be judged in light of the totality of the circumstances. . . .

Clark indicated that he had never been asked to sign a consent-to-search

form before, and he stated that Detective Haskins did not inform him of his right to withhold consent. Clark was consistent in his testimony that, at the time he signed the form, no one had mentioned searching for electronics or computers. Though the consent form was broadly worded, Clark still thought the search was limited to life jackets and fishing equipment, and he knew that he did not have "a truckload of ... life jackets or fishing equipment."

Clark told the jury that he felt threatened at the time he signed the consent-to-search form. He felt like Wal-Mart was trying to "railroad" him. Clark testified that, just prior to signing the form, Elder informed him that Kitterman would soon be arrested. Elder left Clark with the impression that he would be fired if he did not consent to the search. Additionally, due to the police presence, Clark feared that he would be arrested. . . .

The jury determined that Clark's written consent was not given freely and without coercion and, thus, was not valid consent. Considering the totality of the circumstances now before us, we conclude that there is substantial evidence to support the jury's decision.

[False-Light Invasion-of-Privacy Claim] For its final point on appeal, Wal-Mart contends that the trial court erred in submitting the false-light invasion-of-privacy claim to the jury because Clark failed to demonstrate the elements of false light by clear and convincing evidence. . . . The trial court instructed the jury that, to prevail on his claim of false-light invasion of privacy, Clark was required to prove six essential propositions:

First, that he has sustained damages.

Second, that Wal-Mart gave publicity to a matter concerning David Clark that placed him before the public in a false light.

Third, that the false light in which David Clark was placed would be highly offensive to a reasonable person.

Fourth, that Wal-Mart had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which David Clark would be placed.

Fifth, that Wal-Mart had serious doubts as to the truth of the matter publicized.

And sixth, that David Clark's damages were proximately caused by Wal-Mart's giving of such publicity. . . .

The evidence reflects three separate episodes upon which the jury could have based liability for false light: (1) the case synopsis, (2) the newspaper articles, and (3) the publicity created on Clark's lawn. . . . Thus, we hold that the record in this case reveals evidence of a clear and convincing nature upon which the jury could have based its verdict that Wal-Mart created publicity that placed Clark in a false light.

Questions:

1. An Arkansas employer requires all employment applicants to submit to a drug-screening test. Has the employer violated the applicants' right to privacy?

2. In an attempt to reduce employee theft, an employer installs secret cameras to monitor employee activities? Has the employer violated the employees' right to privacy?

3. What are the newest spy devices available in the marketplace?

E-Mail & Communications Technology

Technology used by employees at work has expanded from the telephone to computers, the Internet, e-mail, and a growing array of new communication devices. These new technology tools have created new employer legal problems. The widespread use of e-mail and the Internet has created legitimate concerns about employee misuse or misconduct. A survey conducted by the American Management Association found over 50% of companies have fired employees for misusing e-mail or the Internet while on the job. Viewing pornography was the major Internet misuse. E-mail offenses included violations of company policies, breaching confidentiality rules, excessive personal use, and offensive language or inappropriate content.[22]

It is now almost certain that lawsuits brought against a company will involve a demand to produce the company's e-mail records. E-mail records may subject a company to liability for harassment or discrimination. E-mail misuse may be involved in trade secret theft or defamation. E-mail records may create unexpected contractual obligations.[23]

As pointed out above, company responses to technology concerns include monitoring of employee use of e-mail, the Internet, the telephone, company computers, or any other company device or property. A major legal problem an employer may face is monitoring without disclosure. Secret monitoring of employee activities may be legal under above-discussed privacy laws. However, there are no guarantees and employers could lose such cases. The best, safest course of action is monitoring only after employees clearly are told of such. Employees should sign a form stating that they are aware of and consent to the monitoring described in the company policy statement.

Employees may be unaware that e-mail messages are usually more accessible and permanent than written (hard copy) communications. The following e-mail facts are

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[22] Gohring, Nancy, *Over 50% of companies have fired workers for e-mail, Net abuse* (Computerworld Security), Feb. 28, 2008, at 1, *available at* <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9065659&source=rss_topic17> (last visited February 6, 2009).

[23] The ease and low cost of retaining email has also created litigation expense problems. One defendant was ordered to review and produce for the court millions of pages of e-mail stored on computer tapes. (In re Brand Name Prescription Drugs Antitrust Litigation, 1995 WL 360526 (N.D. Ill. 1995).) The cost of producing the documents is borne by the defendant. Document retention policies should be reviewed considering these costs.

important to know:

- *E-mail messages are not anonymous*. E-mail can be traced electronically to its source.
- *E-mail is not private*. The computer systems that use e-mail at work are the property of the company. Employers have the right to supervise the use of this company property, including the right to provide surveillance of e-mail messages in most situations.
- *E-mail messages and remarks are generally admissible in court.*
- *"Deleted" e-mail messages are not actually deleted*. Employees and employers both are occasionally surprised to learn that e-mail messages may be accessible by computer specialists years after the messages are "deleted." The deleted messages still exist and are available until overwritten by other messages or until removed by specialized means. Further, e-mail messages are stored in multiple locations including the sender's desktop, mail server, and/or ISP, or the recipient's desktop, mail server, and/or ISP. Multiple locations increase e-mail evidence. (There are commercial software programs available to destroy deleted data, making retrieval impossible or difficult.)

The following statement is a sample disclaimer used by some companies as an attachment to every e-mail message sent using company computers:

> *This message (and any associated files) is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged or confidential. If you are not the intended recipient you are notified that any dissemination, copying or distribution of this message, or files associated with this message, is strictly prohibited. If you have received this message in error, please notify us immediately by replying to the message and deleting it from your computer. Any views or opinions presented are solely those of the author and do not necessarily represent those of this company.*

Questions:

1. NarusInsight is an example of programs allegedly used by government agencies like the FBI to analyze messages or as an electronic filtering tool to gather information from traffic flowing through Internet service provider. In addition, "Echelon" is an automated global interception system that is reported capable of intercepting billions of phone calls, e-mail messages, Internet downloads, and satellite transmissions on a daily basis. Echelon is used by intelligence agencies in the United States and around the world. How do these programs affect a company's privacy policies?

2. What concerns exist for the business community regarding cybercrime? Visit http://www.usdoj.gov/criminal/cybercrime/.

Additional Cases

In the following case, Mt. Olive Lutheran Church employed Randall Fischer as a youth minister. While at the church, an employee, Rose Salzmann, accidentally intercepted a telephone conversation between Fischer and another man. Salzmann was using the church's cordless telephone when she intercepted Fisher's conversation. Fisher and the other man allegedly engaged in an open homosexual discussion.

Fischer's telephone call was made in a room in the church that was available for Fischer and others to use when privacy was needed. After learning of the incident, Mt. Olive's senior pastor, Ray Connor, hired a computer consultant to access Fisher's personal e-mail account, maintained on Hotmail. Fischer's personal e-mail was not connected to or maintained on the church's computers. The computer consultant accessed the Hotmail account by using suggestions from Reverend O'Connor to guess Fischer's password. The e-mail account allegedly contained explicit homosexual messages to and from various individuals. The congregation voted to release Fischer from his role at the church.

Fischer brought suit based on asserted violations of various privacy related laws. It is important to note that Fisher sued the church, the senior pastor, Connor, and the two employees initially involved in intercepting the telephone conversation, Salzmann and Sandra Janiszewski. Legal representation would be needed for all four parties. Depending on the church's insurance coverage, each defendant could be required to hire legal representation. In the American system of jurisprudence, each side in a lawsuit is usually responsible for paying for their legal representation costs, regardless of which side wins the dispute. Thus, the church could eventually win this dispute, while the employees involved suffer significant personal expenses in their legal representation.

Again, the church could have insurance coverage providing for legal representation for the employees. Alternately, the church could volunteer to pay the legal bills for all parties involved. Regardless of the facts in this dispute, employees should be aware of their legal exposure at work.

Fischer
v.
Mt. Olive Lutheran Church, Inc.

207 F.Supp.2d 914
United States District Court, Western District, Wisconsin, 2002

Crabb, J. – **[Litigation Facts]** This is a civil action for monetary relief in which plaintiff Randall David Fischer contends that defendants violated various privacy-related statutory and common laws in the course of terminating plaintiff's employment, including the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510- 21; Wisconsin Communications Privacy Act, Wis. Stat. § 968.31; Electronic Communications Storage Act, 18 U.S.C. §§ 2701-11; Computer Fraud and Abuse Act, 18 U.S.C. § 1030; right to privacy (intrusion upon privacy of another and public disclosure of public facts), Wis. Stat. § 895.50; defamation; trespass; breach of contract; tortious interference with a contract; intentional infliction of emotional distress and false imprisonment. . . **.[The following case excerpt will present only the plaintiff's claims under the Electronic Communications Privacy Act and the Electronic Communications Storage Act.]**

Presently before the court is defendants' motion for summary judgment. Because I find that there are questions of fact for the factfinder, I will deny defendants' motion for summary judgment as to plaintiff's claims of violations of the Electronic Communications Privacy Act, the Wisconsin Communications Privacy Act and right to privacy (intrusion on the privacy of another) as to all defendants as well the Electronic Storage Communications Act as to defendants Connor and Mt. Olive and defamation as to defendants Salzmann and Janiszewski. In contrast, because no genuine issue of material fact exists, I will grant defendants' motion for summary judgment as to plaintiff's claims of violations of the Computer Fraud and Abuse Act as to all defendants, the Electronic Storage Communications Act as to defendants Salzmann and Janiszewski and defamation as to defendants Connor and Mt. Olive. In addition, plaintiff has stipulated to the dismissal of his remaining claims, including public disclosure of private facts (right to privacy), trespass, breach of contract, tortious interference with a contract, intentional infliction of emotional distress and false imprisonment. . . .

[Background Facts] Defendant Mt. Olive Lutheran Church, Inc. employed plaintiff Randall David Fischer as its Minister of Youth and Children's Ministries by virtue of a "call." Plaintiff's employment obligations included providing counseling services to minors and adults on an as needed basis. Defendant Rose C. Salzmann is the secretary of the Mt. Olive church and shared an office at the church with plaintiff. Defendant Ray Connor is the pastor and defendant Sandra K. Janiszewski is the business manager at Mt. Olive.

The church's bylaws dictate that plaintiff's call can be revoked only by a 2/3 vote of the congregation. By acceptance of the call, plaintiff agreed: to teach faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all symbolical books

of the Evangelical Lutheran Church: To exemplify the Christian faith and life, to function in an atmosphere of love and order characteristic of the Body of Christ at work, and to lead others toward Christian maturity: To show a due concern for all the phases of mission and ministry.

In the spring of 1998 or 1999, plaintiff opened a Microsoft Hotmail email account from a computer terminal at the Scofield Public Library. The Hotmail account is web-based, free and resides on a server that is part of the Microsoft Network. Plaintiff used his Hotmail account for personal purposes. . . . Plaintiff accessed his Hotmail account from the church's computers using the church's Internet service provider, among other places.

On the morning of June 10, 1999, plaintiff arrived early at the church and read his email messages on his Hotmail account. Plaintiff saw that he had received an email message from "John Jacobsen," who asked that plaintiff call him. Plaintiff did not recognize the name immediately. At approximately 10:00 a.m., plaintiff informed defendant Salzmann that he was going down the hall to the associate pastor's office, without telling her that he was going to make a telephone call. Plaintiff often used this vacant office for telephone calls. He shared a small office with defendant Salzmann. Defendant Connor had told plaintiff to use the office to make personal phone calls or in any situation in which he needed privacy.

A short time later, defendant Salzmann left her office to place schedules in the mail trays. She took along a cordless telephone because her primary job is answering the telephone. The church has six telecommunication lines, two for computers and four for telephones. The cordless phone ties into one line of the telephone system. Calls ring on the cordless phone as well as on the hardwired phones located throughout the church. Because defendant Salzmann received church-related calls at home, she tried to call home to check her answering machine for messages. Instead of hearing a dial tone, she heard two male voices involved in a sexually graphic conversation. She recognized one voice as plaintiff's. According to plaintiff, the other man on the telephone was John Jacobsen, a tutor he had known in college who was having a sexual identity crisis to whom he was listening as Jacobsen talked about his sexual experiences and feelings, at times in graphic detail. . . .

Defendant Salzmann became concerned about the possibility of improper contact between plaintiff and children participating in the church's youth programs, given plaintiff's position in the church. Shaking from fear and shock, defendant Salzmann walked to defendant Janiszewski's office because she believed the conversation she had overheard was an extremely serious matter that should be witnessed by another employee. Defendant Salzmann gave defendant Janiszewski the cordless phone and whispered something about plaintiff's being on the line. . . .. (Defendant Janiszewski heard a voice describing graphically how to insert objects into a person's bowels without injuring the bowels and then she heard the other person stating that he would like to split plaintiff's bowels. Plaintiff states that neither party made these statements.) At first, defendant Janiszewski believed that the caller was threatening violence to plaintiff or

others at the church and instructed defendant Salzmann to use another phone line to call the police, which Salzmann did. . . .

[The court opinion continues with the explicit sexual conversation Janiszewski then allegedly heard between Fischer and the other man. The conversation left no doubt to Janiszewski that Fischer was a willing participant in the sexual exchange. Fischer denies the sexual conversation took place. From what was being said and from the various groans and noises she heard, Janiszewski believed the two men were masturbating. Later, Janiszewski confronted Fischer about his telephone conversation and asked him to leave the building.]

After plaintiff left the church, defendant Janiszewski called defendant Connor and described briefly what had transpired. A police detective called the church and asked defendants Salzmann and Janiszewski to come to the police station and provide statements. As defendants Salzmann and Janiszewski were about to leave for the station, defendant Connor arrived. Defendants Connor, Salzmann and Janiszewski decided to examine the vacant office and found very wet tissue in the wastebasket, which defendant Connor thought was fresh semen. According to plaintiff, he left nothing in the wastebasket and has never masturbated on the church's premises. In order to preserve the tissues, Angela Janiszewski placed them in a bag. . . .

Shortly after defendants Salzmann and Janiszewski returned to the church, plaintiff returned as well. Defendant Connor met with plaintiff in Connor's office to discuss what had happened. Defendant Janiszewski joined the meeting when the church's lawyer advised Janiszewski that a witness should be present at any meetings with plaintiff. Defendant Connor told plaintiff that he was being suspended with pay pending an investigation. (According to defendants Connor and Janiszewski, plaintiff stated that he had told his wife "everything" and that his marriage was over, that he had nothing left to live for and that he had checked his life insurance policy to assure his family would be adequately provided for and that he was contemplating suicide. Plaintiff states that defendant Connor refused to listen to him and that he told Connor only that a suspension would ruin his reputation in the church and community and that he had told his wife of defendants' accusations.) . . .

During his meeting with plaintiff, defendant Connor became concerned that plaintiff might harm himself. He stepped out of the meeting and asked defendant Salzmann to call the police, which she did. The same two detectives returned immediately and interviewed both plaintiff and defendant Connor. Defendant Connor told the detectives that comments plaintiff made during the meeting led him to believe that plaintiff was suicidal. Defendant Connor did not ask the police to take any particular action; his purpose in calling was only to have the police make an assessment of plaintiff's mental condition and take whatever action they deemed appropriate. According to Detective Steven Meilahn, plaintiff told both detectives that "after the incidents of the morning, [plaintiff] went home to check his life insurance and that he just wanted to go to the swimming pool and hug his wife and children" and Meilahn concluded that "[i]n my mind, our interview confirmed the concerns of Pastor Connor." Relying on their own assessment, the

detectives concluded that it would be appropriate to detain plaintiff at North Central Health Care pursuant to Wis. Stat. § 51.15. Plaintiff asked whether he could see his wife and kids before he was taken to North Central and the detectives told him no. As plaintiff left with the detectives, he asked defendant Connor to tell his wife "what happened." Plaintiff was held overnight at North Central involuntarily. . . .

In response to police recommendations, defendant Connor retained a computer expert, Curt Brodjieski, on June 10, 1999, to examine the church's computer files that plaintiff used and to check plaintiff's email messages for any improper sexual communications with minors. Using the church's computer, Brodjieski accessed plaintiff's Hotmail account by using a password guessed at by defendant Connor. Brodjieski printed the email messages that he found in plaintiff's Hotmail account. The emails, from senders with male names, referred to plaintiff as "my hot man," "my favorite stud" and "sweetie" and included the statements "miss you babe" and "as always you were a treat!" Plaintiff states that before June 10, 1999, there were no such email messages in his account. . . .

On June 14, 1999, defendant Connor and Randy Balk, Chair of the Board of Elders of the church, visited plaintiff at his home to deliver his final paycheck and to encourage him to resign in order to avoid having his misconduct brought to the attention of others. Plaintiff's wife asked what documentary evidence the church had to support its claims. Defendant Connor told her that he could provide the information only if plaintiff signed a release. Plaintiff never supplied such a release. . . .

Notice to the congregation of a special meeting to be held on July 7, 1999, for the purpose of revoking plaintiff's call was published in the June 26 and July 4, 1999 church bulletins. Ron Fischer, plaintiff's brother, secretly recorded the congregation meeting and the tape was later transcribed. The transcript shows that at the July 7 meeting, Colin Pietz, counsel for the church, outlined the nature of plaintiff's June 10 telephone call. Pietz did not refer to any emails. At the meeting, plaintiff implied that the church had no documents to support its charges. Pietz responded that he had copies of plaintiff's emails with him and asked whether plaintiff would consent to their being included in the record of the meeting. Plaintiff declined to give his consent. The contents of the emails were not disclosed to any board of the church or to the congregation. Those in attendance voted 91 to 43 (with 2 abstentions) in favor of terminating plaintiff's call effective July 9, 1999, unless plaintiff chose to resign earlier. Plaintiff refused to resign and his call was terminated on July 9, 1999.

OPINION

A. *Electronic Communications Privacy Act*

The Electronic Communications Privacy Act, also known as the Wiretap Act, prohibits the intentional interception of wire, oral or electronic communications and the intentional disclosure of the contents of a wire, oral or electronic communication by one knowing or having reason to know that the information was obtained through an interception that violates the act. . . .Defendants stipulate that plaintiff's telephone conversation constitutes a "wire communication" as defined under the act. The only issue is whether defendants intercepted plaintiff's telephone call intentionally.

Under the Wiretap Act, "intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." . . . The act also has a provision known as the "business extension" exemption, which reads as follows:
(5) "electronic, mechanical or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than--
(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business . . .. The statute clearly exempts a cordless telephone extension that has been either (1) provided by the telephone company or (2) purchased by the subscriber from a third-party vendor, as long as the phone is being used in the ordinary course of the subscriber's business. Thus, the crux of the dispute lies in whether the cordless phone used by defendants Salzmann and Janiszewski to listen to plaintiff's conversation was "being used by the subscriber or user in the ordinary course of its business." . . . If so, the cordless phone is not a "device" and defendants' act of interloping does not fall within the statute's definition of interception. The Wiretap Act does not define the phrase "ordinary course of its business."

The parties have set out two dramatically different versions of events with respect to the content of plaintiff's telephone conversation. Somewhat surprisingly, defendants rely on plaintiff's version of the facts in support of their position that the call was business in nature and thus outside the scope of the Wiretap Act. Specifically, defendants argue that, according to plaintiff, he was counseling Jacobsen during work hours, a task that falls within his job description, which includes counseling adults on an as needed basis. In contrast, plaintiff argues that his call was personal and that defendants Salzmann and Janiszewski had an obligation to stop listening as soon as they determined that the call was personal in nature. In failing to do so, they violated the act. . . .

Defendants argue that according to plaintiff's version of the facts, his telephone call was a business call because he was counseling Jacobsen during work hours using his employer's telephone equipment. However, it is undisputed that defendant Connor permitted plaintiff to make personal calls on the premises. Although it is also undisputed that plaintiff's employment duties included counseling adults on an as needed basis it is unclear whether his duties encompassed conversations with an alleged college friend, such as Jacobsen, or an adult who is not member of the congregation, even if the call occurred during work hours. Viewing the facts in a light most favorable to the non-moving party, as I must on a motion for summary judgment, I cannot conclude that plaintiff's alleged counseling of Jacobsen rendered the phone conversation business in nature. . . . **[The court is not ruling on the ultimate question of whether intercepting Fisher's telephone conversation violates the ECPA or, alternately, whether the call interception was in the ordinary course of business. Rather, the court is stating the**

issue is not clear and a trial is needed to make the ultimate factual determination. Thus, summary judgment for Mt. Olive is not appropriate at this juncture.]

C. *Electronic Communications Storage Act*
In 1986, Congress added the Electronic Communications Storage Act, also known as the Stored Communications Act, to the Wiretap Act. . . . The Court of Appeals for the Fifth Circuit has held that the Wiretap Act protects email messages from being intercepted during transmission. . . . In contrast, the Stored Communications Act indicates that an email message is protected while stored at "a facility through which electronic communication service is provided." . . . Specifically, the Stored Communications Act states that it is a violation for anyone who:

"intentionally accesses without authorization a facility through which an electronic communication service is provided ... and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system" violates the act. . . .

. . .[D]efendant Mt. Olive [argues it] did not violate the act when it hired Brodjieski to access plaintiff's email account on June 10, 1999. . . . [A]ccessing plaintiff's Hotmail account intentionally is not enough in and of itself to violate the act. Plaintiff must also show that defendants obtained, altered or prevented his authorized access to his email account. . . . Interestingly, each side's version of the facts supports the other side's legal position. Plaintiff alleges that the emails never existed. If that were the case, there would have been nothing for defendants to obtain or alter and therefore they could not have violated the act. On the other hand, if defendants' version of the facts is correct, they would have obtained plaintiff's email in violation of the act. In addition, it is disputed whether defendants Connor and Mt. Olive prevented plaintiff from accessing his email account by changing his password. These are questions of fact for the factfinder. Accordingly, defendants' motion for summary judgment will be denied as to violations of the Stored Communications Act as to defendants Connor and Mt. Olive. Because plaintiff concedes that defendants Salzmann and Janiszewski never accessed his email account, I will grant defendants' motion for summary judgment as to this claim as to these two defendants. . . .

Chapter Appendix

Constitution of the United States
Selected Provisions

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Right to Privacy
by
Samual D. Warren and Louis D. Brandeis
Harvard Law Review.
Vol. IV - December 15, 1890, No. 5

[Footnotes & selected text omitted]

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, -- the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession -- intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable. Occasionally the law halted, as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action per quod servitium amisit, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded. Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

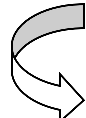
Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone". Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability -- indeed of the necessity -- of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. . . .

It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required. Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

Chapter 4 - Employee, Agent or Independent Contractor?

Chapter 4 - Cognitive Objectives



1. Identify and describe the three major categories of hired individuals.
2. Identify and apply the rules for determining employee or independent contractor status.
3. Identify and apply the rule of *respondeat superior* to employment torts, distinguishing results based on employees and agents versus independent contractors.
4. Identify and apply the rules on negligent hiring and negligent supervision of employees
5. Beyond *respondeat superior*, identify and discuss other liability or cost factors related to employment distinctions regarding employees and agents versus independent contractors.
6. Explain and interpret the cases in the chapter and apply the legal principles to hypothetical employment problems.

Status of Hired Individuals

All businesses must hire individuals to perform the functions required of the business. Companies must hire people to stock shelves, sell goods, pay invoices, and make products. Our legal system allows businesses to hire people into one or more of three categories: **agents, employees, and/or independent contractors**. That is, a business may hire an individual solely as an employee, as an employee and an agent, as an agent and an independent contractor, solely as an agent, or in any other combination of the three hiring categories. The specific relationship(s) created in the hiring process has significant legal ramifications.

Generally speaking, an employee is one who is hired to work under the **direction and control** of the employer. An employee is told by the employer what tasks to perform, with the employer keeping the right to tell the employee exactly how to perform those tasks. An agent also works under the direction and control of the hiring party (which for an agent is titled the principal). The key distinction between an employee and an agent is the agent is hired with the power to **represent** the hiring party, the principal. That means, for example, an agent may have the power to sign checks for the company, to enter contracts for the purchase of raw materials, to enter contracts with vendors, or to hire other agents or employees for the company. An employee does not have the capacity to represent the employer.

An independent contractor is an individual (or a company) hired by an employer to perform a specific task. The key distinction between an independent contractor and either an employee or an agent is the independent contractor performs the task according to the contractor's own methods. An independent contractor is not (or should not be) under the employer's control over the details of performing the task. For example, a company may hire an electrician to install wiring in an addition to the company offices. The company will designate the task that it wishes to have completed (the wiring). The company will not direct the electrician in the exact methods to be used in installing the wiring. The independent contractor uses professional judgment and skill to decide the proper installation techniques.

At any given time, one individual may fill more than one role for an employer. For example, consider an employee who stocks merchandise for a grocery store. The employee has a part-time business pressure cleaning parking lots for area businesses. The grocery store may hire the employee to work occasionally as an independent contractor pressure cleaning the grocery store's parking lot. The result is the individual is an employee for purposes of stocking merchandise and an independent contractor for purposes of cleaning the parking lot. The different employment roles filled by the individual may lead to significant legal differences in various possible lawsuits.

Employee or Independent Contractor

On the status of hired individuals, it is often most difficult to determine whether an individual is an employee or an independent contractor. Because of the cost or legal advantages associated with independent contractor status, discussed below, there is often an incentive to classify (or misclassify) an individual as an independent contractor, versus an employee.

One complicating factor is the definition of an employee varies depending on the law involved. That is, there exist multiple definitions of an employee. The appropriate definition varies by the type of dispute. If a dispute is based on a specific federal or state statute, that statute may provide the appropriate definitions. If there is no statutory definition, courts may use a general common law of agency (as done in *Conagra Foods v. Draper*, below). This test is found in Restatement (Second) of Agency § 220(2) (1958), following:

Restatement (Second) of Agency - Factors to Consider in Differentiation - Employees and Independent Contractors -

(a) the extent of control which is by the agreement the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by time or by the job;
(h) whether or not the work is part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not a business.[1]

The above Restatement factors are placed in chart form below, with an accompanying explanation of the meaning of the factors.

Primary Analytical Factor
(a) the extent of control which, by the agreement, the master may exercise over the details of the work; *Explanation – The more control exercised by the employer over the details of the work performance, the more likely the court will find the employed individual to be an employee.*
Secondary Analytical Factors
(b) whether or not the one employed is engaged in a distinct occupation or business; *Explanation – If the employed individual has a distinct occupation separate from the employer, this points to independent contractor status.*
(c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; *Explanation – Work usually done by a specialist without employer direction is usually done by an independent contractor.*
(d) the skill required in the particular occupation; *Explanation – The higher the skill level required, the more likely the individual performing the work is an independent contractor.*

[1] Draper v. Conagra Foods, 212 S.W.3d 61, 67 (Ark. 2005).

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; *Explanation – Usually, an employer provides the workplace tools for employees; an independent contractor generally provides the tools for the contractor's work.*
(f) the length of time for which the person is employed; *Explanation- The longer a person is employed by a single employer, the more likely that person is to be an employee.*
(g) the method of payment, whether by the time or by the job; *Explanation- Employees are generally paid salary or hourly wages; independent contractors often are paid for tasks performed.*
(h) whether or not the work is a part of the regular business of the employer; *Explanation – Work that is a regular part of an employer's business often is performed by employees (to maintain employer control over critical work tasks); less critical work outside an employer's core business may be delegated to independent contractors.*
(i) whether or not the parties believe they are creating the relation of master and servant; and *Explanation – The parties' intentions to create an employer/employee relationship, or an employer/independent contractor relationship, are considered by the courts.*
(j) whether the principal is or is not in business. *Explanation – A principal is not as likely to have employees if the principal is not in business, but rather likely to have independent contractors.*

In addition to the above common law test, other employment tests exist and are used by in specific circumstances. For example, the Internal Revenue Service uses a twenty factor analysis to determine employee versus independent contractor status in tax disputes. Regardless of the test used, the main analytical points from the common law test remain important.

The following case involves Conagra Foods and its poultry business. Conagra attempted to use "independent contractors" to transport poultry from farms to Conagra's processing facilities. One reason for this approach is Conagra could be responsible for its employees accidents in transportation, but not responsible for accidents by independent contractor drivers. The Arkansas Supreme Court uphelp a jury finding that the transport drivers were actually Conagra employees, not independent contractors as Conagra hoped.

CONAGRA FOODS, INC.
V.
DRAPER

SUPREME COURT OF ARKANSAS
276 S.W.3d 244 (Ark. 2008)

JUDGES: JIM GUNTER, Associate Justice. This appeal arises out of an automobile accident occurring on January 28, 2003, involving an automobile driven by . . . Homer Otis Draper and a truck and trailer hauling . . . ConAgra's poultry to its processing plant in Batesville. The truck and trailer were owned by Patterson-Salter Trucking, Inc. ("PST") and driven by Charlie Von Garrett. . . .

Homer and Colleen Draper ("the Drapers") filed suit against both PST and ConAgra in the Sharp County Circuit Court for damages arising out of personal injuries that he sustained in the accident. . . . ConAgra . . . [defended by arguing PST was not its agent or employee, thus negating Conagra's liability]. . . . A jury returned a verdict in favor of the Drapers, finding that PST was not an independent contractor at the time of the accident . . ..

I. **Sufficiency of the Evidence –**
For its first point on appeal, ConAgra argues that the circuit court erred in ruling that PST's independent-contractor status was a jury question. It further contends that the circuit court erred in denying its motions for directed verdict at the close of the Drapers' case and at the close of all the evidence, because there was no substantial evidence that PST was ConAgra's employee. Rather, ConAgra asserts that reasonable minds could not have differed as to PST's status as an independent contractor. . . .

Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. . . . Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. . . . It is not our place to try issues of fact; rather, we simply review the record for substantial evidence to support the jury's verdict. . . .

The Restatement Second of Agency § 220(2) (1958) sets out factors that are to be weighed in drawing the line between independent contractor and

employee:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
. . .
In the present case, ConAgra moved for directed verdict at trial, arguing that the Drapers failed to produce sufficient evidence on . . . the extent of control ConAgra could exercise over the details of the work, . . . and whether PST was engaged in business. Therefore, we will only address these . . . factors.

A. **Control**
. . . ConAgra and PST entered into an "Independent Contractor Agreement." PST is referred to in the agreement as "Independent Contractor." PST agreed to "indemnify and hold ConAgra harmless against all expenses, obligations or losses of any kind whatsoever for claims, debts, personal injuries or property damage arising out of the work to be per-formed by Independent Contractor for ConAgra." PST also agreed to "pay for his own expenses, taxes and fees in con-nection with performance of this contract, shall obtain and pay for any required permits or leases and shall comply with all applicable government laws and regulations." The agreement further provided that PST would employ all labor and furnish all equipment necessary to perform the contract. . . .

In the present case, there is sufficient evidence that ConAgra exerted the control of an employer of PST by instructing PST how to protect ConAgra's poultry. The Independent Contractor Agreement provided that:

"[a]lthough Independent Contractor is free to use his best judgment in performing the contract as specified in paragraph nine, he hereby agrees that he will perform the contract in such a manner as to reduce to a minimum bruising of or death to the broilers."

While this provision of the agreement leaves the manner in which PST is to perform the contract to the judgment of PST, there was testimony given at trial that showed that ConAgra gave specific instructions to PST on how to protect the poultry. According to Jack Patterson's testimony, PST was required to switch to metal cages in order to continue the business relationship with ConAgra. When the weather was cold, ConAgra required PST to install front boards and side boards on the trailers. Garrett testified that in hot weather, ConAgra would instruct him where to park the trailer and whether to put it under fans or a sprinkler. This testimony shows that with regard to the protection of the poultry, PST was not entirely free to

do the work in its own way. . . . Therefore, there is sufficient evidence that ConAgra did exert control over the means by which PST would protect the poultry, which supports the jury's finding of an employer-employee relationship.

B. **Whether PST is a business**
The next factor to consider is "whether or not the one employed is or is not a business." . . . ConAgra asserts that this factor favors its argument that PST was an independent contractor because PST was a separate corporation engaged in a distinct business. ConAgra asserts that PST was a trucking company, while ConAgra was a vertically integrated poultry company. The Drapers argue that PST was not a separate business because its sole function was to supply equipment and drivers to ConAgra.

In Arkansas Transit, . . . we affirmed the circuit court's ruling that contract drivers who did not engage in work other than hauling mobile homes for the appellant's business were not engaged in a distinct occupation or business. Here, Patterson testified that the purpose of creating PST was to provide trucks and drivers to Banquet Foods, which later became ConAgra. PST did not have any customers other than ConAgra. In fact, PST was so dependent upon maintaining its deal with ConAgra that PST went out of business when its agreement with ConAgra was terminated. Therefore, fair-minded people could come to the conclusion that PST was not engaged in a distinct occupation or business because PST's sole purpose was to provide trucks to ConAgra, its only customer. . . .

. . . [W]e hold that there was substantial evidence to support the jury's verdict that PST was not an independent contractor. . . .

Questions:
Explain how each of the Restatement (Second) of Agency factors identified could be relevant regarding the task of classifying employment status for the Conagra driver in the above case. For example, how does the “skill required” in the employment task help settle whether the PST driver is an employee or independent contractor?

Tort Liability Regarding Hired Individuals – Respondeat Superior

Respondeat superior[2] is a legal doctrine providing for potential vicarious liability for an employer for employee (or agent) torts. A tort is the legal term used for behavior that is wrong and will subject the actor to potential liability to the individual harmed by the behavior. (One example is the tort titled negligence, roughly defined as careless behavior causing a foreseeable injury to another party.) Under *respondeat superior*, not only is the employee committing the tort responsible, so is the employer.

An employer is usually not responsible for torts committed by independent contractors. The rationale for *respondeat superior* lies in the employer's potential control over employees and agents, a factor lacking in the employer/independent contractor relationship.

Under *respondeat superior*, an employer is only liable for employees or agents torts committed within the scope of the job. The key test – scope of the job – may be easy or difficult to apply, depending on the facts of the dispute. Typically, the scope of the employment requires assessing whether the individual is carrying out the object and purpose of the enterprise, as opposed to acting only in his own interest.[3]

As an example, assume an employee is hired to clean rest rooms for a company. While working for the company cleaning rest rooms, the employee negligently leaves dangerous cleaning chemicals within the reach of children. If any children are injured through the negligent acts of the employee, the employer is responsible for the harm suffered. The negligence here, leaving cleaning chemicals within the reach of children, is clearly within the scope of the employees job, that is, the job of cleaning rest rooms. The negligent act was committed by the employee while he was carrying out the object and purpose of his job, as opposed to acts only in the employee's own interest.

The following case, *Roberts v. H-40 Drilling*, presents *respondeat superior* questions regarding an employee leaving work.

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[2] *Respondeat superior* is Latin for "let the master answer."
[3] *See, e.g.*, *J.B. Hunt Transp., Inc. v. Doss*, 899 S.W.2d 464 (1995).

ROBERTS V. H-40 DRILLING, INC.

501 Fed. Appx. 759 (10th Cir 2012)

OPINION BY: David M. Ebel

. . . Joel Roberts and his wife, Robyn Roberts, appeal from the district court's order granting summary judgment in favor of H-40 Drilling, Inc. (H-40) on their claim for damages under the theory of respondeat superior. .[W]e affirm.

BACKGROUND

At about 4 p.m. on June 13, 2008, Tim Danner, an employee of H-40, completed his shift at a drilling site in Beaver County, Oklahoma, got into his personal vehicle and headed out to a doctor's appointment that he had scheduled earlier that day. . . .As Mr. Danner was driving to the doctor's appointment he encountered two semi-trucks parked directly across from each other on opposite sides of a private road leading into and out of the drilling site. H-40, a drilling company, leased the road from J-Brex Company, the drill site operator . . .. As Mr. Danner was driving his vehicle between the semis, he struck and injured Mr. Roberts, who in turn sued Mr. Danner for negligence and H-40 under the theory of respondeat superior.

DISCUSSION

"Generally a master is not liable for the acts of its servant under the doctrine of respondeat superior unless the servant is acting within the scope of [his] employment at the time of the accident. When an employee is going to or coming from work the employee is not considered to be within the scope of employment." . . .

Mr. Roberts' argument on appeal is two-fold. First, he argues that what is considered as going to and coming from work is defined more broadly in the oilfield business. We disagree. Although a few cases cited by Mr. Roberts happen to concern drilling companies, for all intents and purposes, the same rule has been applied by Oklahoma courts to determine respondeat superior liability regardless of the nature of the employer's business.

Oklahoma does recognize an exception to the "going and coming rule," where in the course of coming to or going home from work, the employee "render[s] [a] service for [the employer] by [the employer's] consent,

either express or implied." Haco Drilling Co. v. Burchette, 1961 OK 145, 364 P.2d 674, 677 (Okla. 1961). For example, in Haco, the court held that the defendant employer was properly found liable under the theory of respondeat superior where the defendant employee stopped on his way to work to pick up ice and water in a container furnished by the employer. In examining whether the employee was rendering a service for his employer, the court noted that the employer: (1) furnished the container; (2) gave instructions to the employee as to the time, place and method of obtaining the water; and (3) all the employees working on the shift drank the water . . . .

Mr. Danner was not rendering any service for H-40 when the accident occurred; instead, he was on his way home from work, intending to stop on the way for a personal doctor's appointment. As such, the district court properly entered summary judgment in favor of H-40 and against Mr. Roberts. The judgment of the district court is AFFIRMED.

Independent Contractors

As a general rule, an employer is not liable for torts committed by independent contractors. This lack of liability may be explained using the prior example of an employee negligently cleaning the company rest rooms. If an independent contractor is hired to clean rest rooms for the employer, and the contractor negligently leaves dangerous cleaning chemicals within the reach of children, the contractor alone (and not the employer) is generally responsible for harm suffered by customers. This principle is illustrated in *Taylor v. Gill*, below.

Taylor
v.
Gill

934 S.W.2d 919
Supreme Court of Arkansas, 1996

BROWN, Justice - Appellants Rick Taylor and Joyce Taylor appeal from a $40,000 judgment entered against them relating to a lawnmower injury sustained by appellee Jackie Gill. The Taylors raise several arguments for reversal, one of which is the lack of an agency relationship between them and the operator of the lawnmower, Kenny Willis. . . . We agree with the Taylors that Willis was not acting as their agent when the injury occurred, and we reverse the judgment as it pertains to them.

[Background Facts] Kenny Willis and the Taylors lived in the same neighborhood in Stuttgart and were friends who would, on occasion, assist each other in meeting various needs. For example, Rick Taylor would help Willis with mechanical work on his truck, while Willis would mow the Taylors' yard because the Taylors did not own a lawnmower. Other neighbors, including Jackie Gill, would do the same. No payment was made for these services, and Willis was not paid for the mowing involved in this case.

On April 16, 1994, a day when Rick Taylor was out of town, Willis began mowing the Taylors' yard. He was neither asked nor told to do so but was merely mowing the yard as a favor to the Taylors. Both Rick and Joyce Taylor later testified at trial that they did not know Willis would be mowing their yard on that day. Although neither of the Taylors was home when Willis commenced his task, Joyce Taylor returned from work while he was cutting the grass in her yard. She noticed that Willis was doing this but did not ask him to stop, although she acknowledged at trial that she could have done so. While Willis was mowing in a ditch on the Taylors' property, the lawnmower hit a rock or piece of gravel which shot out from the side of the lawnmower, soared some 20 feet, and struck Jackie Gill, who was standing on the other side of a pickup truck, in the eye. Gill lost partial use of his eye.

[Legal Issues] Gill filed a complaint against Kenny Willis and the Taylors and sought damages for the personal injury he sustained as a result of Willis's alleged negligence. The complaint asserted that Willis, acting as the Taylors' agent, operated the lawnmower unsafely in an area where gravel and rocks were located without first determining whether it could be done without causing injury to Gill.

At the ensuing trial, the Taylors moved for a directed verdict at the close of Gill's evidence and urged, among other things, the lack of substantial evidence to support an agency relationship. The directed-verdict motion was denied. The Taylors put on no proof, and the circuit court submitted the case to the jury on interrogatories. The jury found that Willis was 80% at fault, while Gill was 20% at fault. The jury assessed Gill's damages at $50,000 and found that an agency relationship existed between Willis and the Taylors. The court, as a result of the verdict, reduced the $50,000 award due to Gill's measure of fault and entered a $40,000 joint and several judgment against the Taylors and Willis. **[A joint and several judgment means that both parties are liable for the full judgment amount should either party be unable to pay his/her proportionate share of the judgment.]**

[Legal Elements of an Agency Relationship] . . . This court has used different definitions of agency that were appropriate for the particular cases, but each of them includes the element of control by the principal. . . We said the two essential elements of an agency relationship are

(1) that an agent have the authority to act for the principal, and

(2) that the agent act on the principal's behalf and be subject to the principal's control. . . .

Prior to the *Troll Book Clubs* case, this court observed that a gratuitous undertaking could fall under the umbrella of an agency arrangement. "An agency may be defined as a contract, either express or implied, upon a consideration, *or a gratuitous undertaking,* by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which that other assumes to do the business and render an account of it." . . . [I]t is only necessary that there be submission by the one giving the service to the direction and control of the one receiving it as to the manner of performance. . . .

[Case Analysis] Thus, focusing on the evidence most favorable to Gill, it is clear that the Taylors, who did not own a lawnmower, were benefited by the services provided by Willis. Furthermore, they did not reject Willis's work on prior occasions; nor did they do so in this case despite the fact that Joyce Taylor returned home while he was cutting the grass and had the opportunity and authority to stop the work as the homeowner. Based on these facts, and the inference that Rick Taylor and Willis were exchanging favors, Gill urges that there is substantial evidence that Willis was acting as the Taylors' agent when the injury occurred.

The Taylors concede that under Arkansas law an agency may be implied from the conduct of the parties even absent an express agreement. . . . They further concede that they were receiving a benefit from the mowing services provided by Willis. But they maintain that there was a dearth of proof on:

(1) mutual consent to the agency relationship, even by implication;

(2) the ability of the Taylors to control the conduct of Kenny Willis; and

(3) Willis's submission to that control.

We agree.

Although no evidence was presented that Willis was asked to cut the Taylors' grass on this particular day, a jury could reasonably conclude, based on the prior conduct of the parties, that Willis had authority to do this work. However, . . . an agent is "a person who, by agreement with another called the principal, acts for the principal and is *subject to his control.*" . . .The only evidence tending to establish a right of control in the

Taylors over the work performed by Willis comes from the following colloquy between Gill's counsel and Joyce Taylor on direct examination:
GILL'S COUNSEL: If Mr. Willis had been doing something that you did not approve of when you drove up on April sixteenth in mowing your yard, would you have told him to do it differently?
JOYCE TAYLOR: Yes, sir.
GILL'S COUNSEL: Being your yard, you had control?
JOYCE TAYLOR: Yes, sir.

We view this colloquy in the context in which the service was performed-as an unsolicited favor to the Taylors. Giving this evidence its most probative value, it proves only that the Taylors could have prevented Willis from mowing because of their status as property owners. For example, had Joyce Taylor observed Kenny Willis mowing in an off-limits area like a flower bed, or at a time when the lawnmower's noise was distracting, she could have stopped him. That authority, however, does not meet the requirement . . . of proving an express or implied agreement between Willis and the Taylors that Willis was subjecting himself to the control of the Taylors with respect to the methods employed in mowing the yard. . . .

We think the evidence presented in this case does no more than relegate Willis to a status akin to that of an independent contractor. [A]n independent contractor . . . contracts to do work according to his own methods and without being subject to the control of the employer, except as to the results of the work. . . . [T]he right to control and not the actual control determines whether one is a servant or an independent contractor. . . .

Questions:
1. What tort did Willis commit in the above case? Who was responsible for this tort?
2. Why did the plaintiff sue the Taylors also and not just the operator of the lawn mower, Kenny Willis?

Intentional Torts

An intentional tort is a wrong perpetrated by one who intends to do an act the law has declared as wrong. This differs from the prior examples of the tort of negligence. In negligence, an individual is carelessly but not intentionally committing a wrong. Regarding an intentional tort committed by an employee, courts have generally held the employer is not liable under respondeat superior unless the tort is “expectable,” that is, the tort was somehow foreseeable. This concept is developed in *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc*, found below.

Regions Bank & Trust
v.
Stone County Skilled Nursing Facility, Inc.

49 S.W.3d 107
Supreme Court of Arkansas (2001)

Hannah, J. – This case arises from the sexual assault of a semi-comatose quadriplegic nursing home patient, Vicki Elder, by certified nursing assistant Bill McConnaughey. Appellant Regions Bank, the personal representative of Vicki Elder, argues that the trial court erred in granting summary judgment. The complaint alleges claims of negligence in failing to provide Elder the care and attention reasonably required by her condition, negligence based upon respondeat superior, and negligence in supervision of McConnaughey as an employee. . . . **[Only the portion of the opinion pertaining to respondeat superior is presented below.]**

Facts
On November 3, 1996, Elder was a semi-comatose quadriplegic patient at Stone County Skilled Nursing Facility. Her communication was limited to smiling and communicating with her eyes. On this same date, Marlie O'Dell Foster and Bill McConnaughey were certified nursing assistants (CNA's) working as a team in cleaning and turning patients. They had just completed cleaning and turning Elder, and had placed her on her right side, when another CNA came into the room and asked Foster to assist her in placing a patient in a whirlpool bath.

Foster left McConnaughey in the room with Elder. Their care for her at that time was virtually finished when Foster left. All that had to be done was to pull down her gown and pick up the dirty linen. However, Foster returned to Elder's room a short time later and discovered McConnaughey sexually assaulting Elder. Foster indicated that Elder had been moved by McConnaughey after she left the room. Elder was repositioned on her back with her legs spread to facilitate McConnaughey's sexual assault on her with his hand. Foster testified in deposition that she was so taken aback by what she was seeing that she just stood there for some time observing the act. In her deposition, she described the act in graphic detail that leaves no doubt as to what was occurring.

When McConnaughey realized he had been caught, he flushed red and pulled down Elder's gown. Foster did not confront McConnaughey, but rather first spoke with a fellow CNA who counseled Foster to wait and see if it happened again. However, Foster instead went to the charge nurse, Becky Diaz, and reported what she had seen. Diaz told Foster she would

report it to Kathy Baldwin, the director of nursing. However, Baldwin was off that day and Diaz was unable to contact her or the administrator, Vicki Sandage. Diaz did check Elder that evening and found that she was resting peacefully and showed no signs of bruising or injury. Diaz reported the assault to Sandage the next day, twenty-two hours after the assault. Sandage then reported the assault to Elder's father, Elder's doctor, and to the police. McConnaughey was suspended.

Prior to these events, McConnaughey originally began work at Stone County Skilled Nursing Facility in housekeeping. He was hired based upon an interview and a recommendation from a local plumber. After two months, he transferred to a CNA's position. This transfer required McConnaughey to undergo a seventy-two-hour CNA's course. The first sixteen hours were spent in a classroom, and the remaining hours were spent under instruction while working with patients. Prior to hiring McConnaughey, Stone County Skilled Nursing Facility checked the DNA registry and the abuse hotline. These calls did not reveal any previous problems with McConnaughey.

McConnaughey had been a CNA for about a month when the assault occurred. He had completed a six-and-one-half-page, single-spaced checklist of skills, all showing completion and approval by the same nurse on the same day.

It appears McConnaughey had done well in housekeeping and, until this assault, had done well in nursing, so far as his superiors were aware. They testified in deposition that nothing in his interview, conduct at work, or anything done in his duties caused them concern that he might commit such an assault as this. There was no evidence to put Stone County Skilled Nursing Facility on notice that McConnaughey posed a danger of committing a sexual assault on a patient.

Standard of Review
As we have often stated, summary judgment is to be granted by a trial court if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. . . .

Respondeat superior
The assault was a criminal act undertaken for McConnaughey's own personal interest. The act itself is evidence it was undertaken for sexual gratification. . . . That the assault was undertaken for his own purposes is also made clear by the acts committed by McConnaughey just prior to the assault, which were wholly unrelated to his duties to clean and care for

Elder. He and Foster had already cleaned, turned, and placed Elder on her right side. She was positioned in the manner in which they intended to leave her. The only thing left for McConnaughey to do was to pull down Elder's gown and pick up the dirty linen. When Foster returned, however, she found Elder moved and repositioned on her back, her legs spread, so as to facilitate the sexual assault. This criminal assault did not occur incident to McConnaughey's employment duties. . . .

. . . [A]n act of an employee, in order to render the employer liable, must pertain to something that is incident to the employee's duties and which it is his duty to perform or for the benefit of the employer. . .. [T]he master is subject to liability for his servant's intentional tort "if the act was not unexpectable in view of the duties of the servant." Restatement, Torts (2d), 245 (1958). Whether the employee's action is within the scope of the employment depends on whether the individual is carrying out the "object and purpose of the enterprise," as opposed to acting exclusively in his own interest.

Applying these principles to the facts before us, we agree with the trial court that McConnaughey's sexual assault of Elder was unexpectable. . . . Because McConnaughey's actions were not expectable in view of his duties as a CNA, Stone County Skilled Nursing Facility may not be held liable for the sexual assault and was thus entitled to summary judgment as a matter of law. . . .

[The court did rule that Regions Bank & Trust, as representative of Vicki Elder, was entitled to a trial on its claim that Stone County Skilled Nursing Facility did not provide reasonable care under the circumstances to its patient, Ms. Elders.]

Negligent Hiring & Negligent Supervision

Beyond *respondeat superior*, an employer may be liable for an employee's torts based on the employer's own negligence in the hiring, retaining, or supervising of the employee. For example, hiring an ex-convict with a drinking problem to work as a bouncer at a tavern may be careless (negligent) behavior by the employer. Further, allowing a drunk ex-convict bouncer forcibly to eject tavern patrons without supervision may be negligent supervision by the employer. A reasonable employer could foresee that such a decision would subject the tavern patrons to an unreasonable risk of harm.[4]

[4] See *American Automobile Auction, Inc. v. Titsworth*, 730 S.W.2d 499 (1987).

An employer has a duty to use reasonable care under the circumstances in how it selects, trains, and supervises employees. Reasonable care will depend heavily on the individual facts of each employment opportunity. Hiring an employee to, for example, bath a nursing home patient will require more care in the selection and supervision process than would hiring an employee to sell movie theater tickets.

Depending on the circumstances, a lack of reasonable care by an employer may be found in the following examples:

- ✓ Failure to read a job applicant's resume or job application;
- ✓ Ignoring conflicting or overlapping dates on the resume or application;
- ✓ Failure to inquire about gaps in dates on the resume or application;
- ✓ Ignoring "red flags" such as previous firings;
- ✓ Failing to perform a background check on an applicant;
- ✓ Ignoring or inadequately responding to problems with an employee after the employee is hired.

Several of the above-listed examples of careless behavior are found in the following case, *CA v. William Hart High School District*.

C.A., A MINOR
V
WILLIAM S. HART UNION HIGH SCHOOL DISTRICT

SUPREME COURT OF CALIFORNIA

270 P.3d 699 (2012)

WERDEGAR, J.--C.A., a minor, sued his public high school guidance counselor and the school district for damages arising out of sexual harassment and abuse by the counselor. The trial court sustained the school district's demurrer, and the Court of Appeal affirmed. On review, the question presented is whether the district may be found vicariously liable for the acts of its employees . . . -not for the acts of the counselor, which were outside the scope of her employment . . . , but for the negligence of supervisory or administrative personnel who allegedly knew, or should have known, of the counselor's propensities and nevertheless hired, retained and inadequately supervised her.

We conclude plaintiff's theory of vicarious liability for negligent hiring, retention and supervision is a legally viable one. Ample case authority establishes that school personnel owe students under their supervision a protective duty of ordinary care, for breach of which the school district may be held vicariously liable. . . . If a supervisory or administrative employee of the school district is proven to have breached that duty by negligently exposing plaintiff to a foreseeable danger of molestation by his guidance counselor, resulting in his injuries, . . . liability falls on the school district . . . .

Accordingly, we reverse the judgment of the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

. . . Through a guardian ad litem, plaintiff C.A. alleged that while he was a student at Golden Valley High School in the William S. Hart Union High School District . . . he was subjected to sexual harassment and abuse by Roselyn Hubbell, the head guidance counselor at his school. Plaintiff was born in July 1992, making him 14 to 15 years old at the time of the harassment and abuse . . ..

Plaintiff was assigned to Hubbell for school counseling. Representing that she wished to help him do well at school, Hubbell began to spend many hours with plaintiff both on and off the high school premises and to drive him home from school each day. Exploiting her position of authority and trust, Hubbell engaged in sexual activities with plaintiff and required that he engage in sexual activities, including sensual embraces and massages, masturbation, oral sex and intercourse. As a result of the abuse, plaintiff suffered emotional distress, anxiety, nervousness and fear.

The suit names as defendants Hubbell [and] the District . . .. [P]laintiff alleges "[d]efendants knew that Hubbell had engaged in unlawful sexually-related conduct with minors in the past, and/or was continuing to engage in such conduct." Defendants "knew or should have known and/or were put on notice" of Hubbell's past sexual abuse of minors and her "propensity and disposition" to engage in such abuse; consequently, they "knew or should have known that Hubbell would commit wrongful sexual acts with minors, including Plaintiff." Plaintiff bases this belief on "personnel and/or school records of Defendants [that] reflect numerous incidents of inappropriate sexual contact and conduct with minors by teachers, staff, coaches, counselors, advisors, mentors and others, including incidents involving Hubbell, both on and off the premises of such Defendants." Plaintiff's injuries were the result not only of the molestation but of the District's "employees, administrators and/or agents"

> failing to "properly hire, train and supervise Hubbell and ... prevent her from harming" plaintiff.
>
> . . .
>
> DISPOSITION
>
> The judgment of the Court of Appeal is reversed, and the matter is remanded to that court for further proceedings consistent with our opinion.

Other Liability or Cost Considerations

Beyond *respondeat superior*, there are other are significant differences to the employer between hiring employees and hiring independent contractors. For employees, it is the employer's legal duty to withhold a percentage of wages for federal and state income tax purposes. It is the employer's duty to both withhold and pay 7.65% of employee wages into Social Security (FICA), for a total of 13%. It is the employer's duty to pay for federal unemployment compensation insurance (FUTA), based on employee wages.

In addition, the Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect employee benefit plans. ERISA establishes standards for contributions to and administration of employee retirement plans, if an employer chooses to have retirement plans. ERISA does not require an employer to offer retirement benefits or plans. ERISA does not cover payments to independent contractors.

The Fair Labor Standards Act of 1938 (FLSA) was enacted to provide for minimum wage levels and extra compensation for hours worked beyond 40 hours per week, for employees. The FLSA also limits hours worked by children and the law requires employment records to be kept by the employer.

Workers compensation laws, designed to provide compensation to injured employees, generally do not apply to independent contractors. Employers are required to buy workers compensation insurance to provide for this coverage. Federal civil rights laws, a topic of later chapters in this textbook, may not apply to the employer/independent contractor relationship.

None of the above-described employer duties applies to employer payments to independent contractors. The employer pays the contractor the agreed on amount, with no deductions or added payments to the government required of the employer. Further, any employee benefit plans the employer chooses to offer employees are usually not available to independent contractors. Last, employees generally have no contractual duty to complete any particular employment task. That is, an employee is generally free to

quit at any time, suitable or ill-timed for the employer. Conversely, independent contractor are generally contractually committed to completion of specific tasks. The contractor would be liable for breach of contract if the job is not completed as agreed.

Several of these employee/independent contractor differences are summarized in the following chart. In each instance, there are added costs associated with hiring individuals as employees or agents versus independent contractors. However, a business cannot exist easily where most hired individuals are independent contractors. The employer must usually exercise control over hired individuals to carry out the company's profit objectives.

Employer Costs, Responsibilities, and/or Liability Exposure	**Is the Employer Responsible?**	
	For Employees or Agents	*For Independent Contractors*
FICA/FUTA/FLSA/ERISA	Yes	No
Withholding Taxes	Yes	No
Federal Civil Rights Laws	Yes	Probably no, but varies by court
State Civil Rights Laws	Yes	Yes or no, depending on state
Tort Liability	Yes	Usually, no
Worker's Compensation	Yes	Usually, no
Liability for job completion	No	Yes

Chapter 5 -
Civil Rights Legislation and the EEOC

Chapter 5 - Cognitive Objectives

1. Identify and describe federal civil rights legislation.
2. Describe the EEOC and explain enforcement of federal civil rights laws.
3. Identify, describe and apply selected provisions of the EEOC's Charge Processing Procedures.
4. Describe and apply the concept of illegal civil rights retaliation.

5. Identify, describe and apply selected provisions of the Arkansas Civil Rights Act.

> ***"We have talked long enough in this country about equal rights. ... It is time now to write the next chapter-and to write it in the books of law."***

Lyndon B Johnson, 36th U.S. President, in a message to Congress regarding the need for new civil rights protections (1963).

> ***"The Court today completes the process of converting [Title VII of the Civil Rights Act of 1964] from a guarantee that race or sex will not be a basis for employment determinations, to a guarantee that it often will."***

Antonin Scalia, Associate Justice, U.S. Supreme Court, in a dissenting opinion in a 6-3 ruling that permitted affirmative action in hiring (1987).

Federal Civil Rights Laws

The debate outlined by the above quotations continues today. Federal and state civil rights laws are a source of joy and outrage, hope and frustration. The following materials present a brief overview of major federal and state civil rights statutes, as they relate to employment issues.[1] Later chapters will provide in-depth coverage of the various civil rights categories.

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[1] Civil rights issues as they relate to, e.g., housing, education, or public accommodations are outside the scope of this textbook.

The Equal Pay Act was passed by Congress in 1963, requiring women be paid the same as men when performing the same jobs. This law marked the beginning of the modern civil rights era.[2] The following year, Congress passed what is considered one of the most important pieces of employment legislation, the Civil Rights Act of 1964. The 1964 Civil Rights Act prohibits employment discrimination based on gender (including pregnancy), race, color, national origin, or religion. After 1964, other laws extended protection to age and disability discrimination. Today, the major federal civil rights protections are contained in the following legislation:

- ✓ The Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- ✓ Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
- ✓ The Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older from age discrimination;
- ✓ Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government; and
- ✓ Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;
- ✓ The Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.

In addition to the specific protections afforded by the civil rights categories above, the laws also protect individuals against retaliation for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices. The following chart summarizes the basic civil rights protections.

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[2] Civil rights laws were passed as early as 1866, i.e., the Civil Rights Act of 1866, 42 U.S.C. section 1981 *et. seq*. However, these early laws did not provide broad civil rights protections.

Civil Rights Summary Chart

EPA Protected Categories	***Title VII Protected Categories***	***ADEA Protected Categories***	***ADA Protected Categories***	***All Statutes – General Protections***
•Sex (Protection extends only to discrimination in job compensation)	•Race •Color •National origin •Sex (including pregnancy) •Religion	•Age (Protection extends only to those age 40 or older)	•Disability	Protection against retaliation for participation in civil rights activities or expressed opposition to discrimination

Civil rights protections regarding employment extend to any job decisions, employment practices, or other terms, conditions, and privileges of employment. Examples of possible civil rights violations include the following:

- ✓ Failure to hire
- ✓ Termination
- ✓ Denial of promotion
- ✓ Undesirable reassignment
- ✓ Awards
- ✓ Leave
- ✓ Compensation
- ✓ Benefits
- ✓ Training
- ✓ Retaliation
- ✓ Referral practices

The Equal Employment Opportunity Commission

The U.S. Equal Employment Opportunity Commission (EEOC) is the primary government agency charged with enforcement of federal civil rights laws. The EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies. The EEOC is an independent federal agency originally created by Congress in 1964 to enforce Title VII of the Civil Rights Act of

1964. The EEOC is administered by five Commissioners and a General Counsel, appointed by the President and confirmed by the Senate.

One key aspect of federal civil rights legislation is that an aggrieved individual does not have the right to file a lawsuit alleging a violation of federal civil rights laws without first working with the EEOC. An individual may file a lawsuit only after receiving a "right to sue" letter from the EEOC. There are also strict time limits for bringing forth a claim of illegal discrimination. These points and other issues are addressed in the following publication from the EEOC. Editorial additions to the EEOC materials are indicated with brackets and bold type. In reviewing EEOC publications, it should be noted that the EEOC does occasionally express legal opinions that are rejected by the courts.

The EEOC'S Charge Processing Procedures[3]

V. Who Can File a Charge of Discrimination?

- Any individual who believes that his or her employment rights have been violated may file a charge of discrimination with EEOC.
- In addition, an individual, organization, or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity. . . .

VI. How Is a Charge of Discrimination Filed?

- A charge may be filed by mail or in person at the nearest EEOC office. Individuals may consult their local telephone directory (U.S. Government listing) or call 1-800-669-4000 (voice) or 1-800-669-6820 (TTY) to contact the nearest EEOC office for more information on specific procedures for filing a charge.
- Individuals who need an accommodation in order to file a charge (*e.g.*, sign language interpreter, print materials in an accessible format) should inform the EEOC field office so appropriate arrangements can be made. . . .

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[3] The U.S. Equal Employment Opportunity Commission, FEDERAL LAWS PROHIBITING JOB DISCRIMINATION: QUESTIONS AND ANSWERS - FEDERAL EQUAL EMPLOYMENT OPPORTUNITY (EEO) LAWS, May 2002, *available at* http://www.eeoc.gov/facts/qanda.html. [Federal employees should see the EEOC fact sheet, Federal Sector Equal Employment Opportunity Complaint Processing, as EEOC procedures and federal civil rights laws may apply differently to federal employees.]

VII. What Information Must Be Provided to File a Charge?

- The complaining party's name, address, and telephone number;
- The name, address, and telephone number of the respondent employer, employment agency, or union that is alleged to have discriminated, and number of employees (or union members), if known;
- A short description of the alleged violation (the event that caused the complaining party to believe that his or her rights were violated); and
- The date(s) of the alleged violation(s). . . .

VIII. What Are the Time Limits for Filing a Charge of Discrimination?

All laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court. There are strict time limits within which charges must be filed:

- A charge must be filed with EEOC within 180 days from the date of the alleged violation, in order to protect the charging party's rights.
- This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local anti-discrimination law. **[In Arkansas, the 180-day limit applies as the state does not have a state agency in charge of civil rights enforcement. Arkansas relies on the EEOC for enforcement activities.]** For ADEA charges, only state laws extend the filing limit to 300 days.
- These time limits do not apply to claims under the Equal Pay Act, because under that Act persons do not have to first file a charge with EEOC in order to have the right to go to court. However, since many EPA claims also raise Title VII sex discrimination issues, it may be advisable to file charges under both laws within the time limits indicated. . . .

IX. What Agency Handles a Charge that is also Covered by State or Local Law?

Many states and localities have anti-discrimination laws and agencies responsible for enforcing those laws **[Arkansas does not]**. EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Through the use of "work sharing agreements," EEOC and the FEPAs avoid duplication of effort while at the same time ensuring that a charging party's rights are protected under both federal and state law.

- If a charge is filed with a FEPA and is also covered by federal law, the FEPA "dual files" the charge with EEOC to protect federal rights. The charge usually will be retained by the FEPA for handling.
- If a charge is filed with EEOC and also is covered by state or local law, EEOC "dual files" the charge with the state or local FEPA, but ordinarily retains the charge for handling.

X. What Happens after a Charge is Filed with EEOC?

The employer is notified that the charge has been filed. From this point there are a number of ways a charge may be handled:

- A charge may be assigned for priority investigation if the initial facts appear to support a violation of law. When the evidence is less strong, the charge may be assigned for follow up investigation to determine whether it is likely that a violation has occurred.
- EEOC can seek to settle a charge at any stage of the investigation if the charging party and the employer express an interest in doing so. If settlement efforts are not successful, the investigation continues.
- In investigating a charge, EEOC may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred. When the investigation is complete, EEOC will discuss the evidence with the charging party or employer, as appropriate.
- The charge may be selected for EEOC's mediation program if both the charging party and the employer express an interest in this option. Mediation is offered as an alternative to a lengthy investigation. Participation in the mediation program is confidential, voluntary, and requires consent from both charging party and employer. If mediation is unsuccessful, the charge is returned for investigation.
- A charge may be dismissed at any point if, in the agency's best judgment, further investigation will not establish a violation of the law. A charge may be dismissed at the time it is filed, if an initial in-depth interview does not produce evidence to support the claim. When a charge is dismissed, a notice is issued in accordance with the law which gives the charging party 90 days in which to file a lawsuit on his or her own behalf. . . .

XI. How Does EEOC Resolve Discrimination Charges?

- If the evidence obtained in an investigation does not establish that discrimination occurred, this will be explained to the charging party. A required notice is then issued, closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf.
- If the evidence establishes that discrimination has occurred, the employer and the charging party will be informed of this in a letter of determination that explains the finding. EEOC will then attempt conciliation with the employer to develop a remedy for the discrimination.
- If the case is successfully conciliated, or if a case has earlier been successfully mediated or settled, neither EEOC nor the charging party may go to court unless the conciliation, mediation, or settlement agreement is not honored.
- If EEOC is unable to successfully conciliate the case, the agency will decide whether to bring suit in federal court. If EEOC decides not to sue, it will issue a notice closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf. In Title VII and ADA cases against state or local governments, the Department of Justice takes these actions. . . .

XII. When Can an Individual File an Employment Discrimination Lawsuit in Court?

A charging party may file a lawsuit within 90 days after receiving a notice of a "right to sue" from EEOC, as stated above. Under Title VII and the ADA, a charging party also can request a notice of "right to sue" from EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving this notice. Under the ADEA, a suit may be filed at any time 60 days after filing a charge with EEOC, but not later than 90 days after EEOC gives notice that it has completed action on the charge.

Under the EPA, a lawsuit must be filed within two years (three years for willful violations) of the discriminatory act, which in most cases is payment of a discriminatory lower wage. . . .

XIII. What Remedies Are Available When Discrimination Is Found?

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include:

- back pay,
- hiring,
- promotion,
- reinstatement,
- front pay,
- reasonable accommodation, or
- other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination).

Remedies also may include payment of:

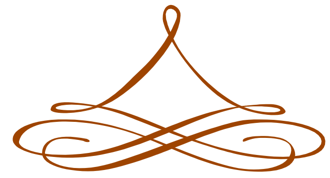
- attorneys' fees,
- expert witness fees, and
- court costs.

Under most EEOC-enforced laws, compensatory and punitive damages also may be available where intentional discrimination is found. Damages may be available to compensate for actual monetary losses, for future monetary losses, and for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference. Punitive damages are not available against the federal, state or local governments.

In cases concerning reasonable accommodation under the ADA, compensatory or punitive damages may not be awarded to the charging party if an employer can demonstrate that "good faith" efforts were made to provide reasonable accommodation.

An employer may be required to post notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

The employer also may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.



Retaliation

Later chapters will cover specific categories of civil rights protection. For example, race, gender, and religious discrimination will be separately analyzed. In addition to the traditional claims of illegal discrimination based on protected categories, an employee or job applicant may bring a claim that he was discriminated against in ***retaliation*** for the employee's protected behavior.

There are three essential elements of a retaliation claim:
1) The employee or applicant is engaged in ***protected activity.*** This activity could include expressed opposition to illegal discrimination or participation in a civil rights complaint process;
2) The employee or applicant suffers ***adverse employment action***. This could include a refusal to hire, firing, demotion, or any undesirable employment action; and
3) There is a ***causal connection*** between the protected activity and the adverse action. This involves establishing that the employee or applicant's protected activity precipitated the adverse employment action.

Protected Activity
If an employee believes she is the victim of retaliation, she must first establish she engaged in a protected activity. The engagement may take many forms:

- ✓ Employee statements made to management or others indicating the employee believes the company is engaged in illegal discrimination;
- ✓ Statements made by someone close to the employee (for example, the employee's spouse) indicating a belief that the employer is engaged in illegal discrimination;
- ✓ Employee statements indicating an intention to file a civil rights complaint with the appropriate government authority;

- ✓ Employee refusal to obey an order from company management because of a reasonable belief that the order violates civil rights laws.

The employee's protected activities must be performed in a manner that is reasonable under the circumstances. Applying a requirement of "reasonableness" regarding protected activities attempts to balance the right of individuals to oppose employment discrimination with an employer's need for a productive work environment.

Peaceful protests or picketing regarding perceived employment discrimination is generally considered reasonable. Informing a company's customers of the belief that the company is engaged in illegal discrimination may also be considered reasonable.[4] Conversely, threats of violence are not protected activities. Also, courts have held that photocopying and distribution of confidential company information is not a reasonable, protected activity[5]; nor is badgering a subordinate employee attempting to coerce a statement in support of a claim of illegal discrimination.[6]

Causal Connection
An employee must prove that the employee's protected activities caused the employer to take adverse action against the employee. Proof of the casual connection between the protected activity and the adverse employment action may come through either direct or circumstantial evidence. Circumstantial evidence typically involves the following showing:

- ✓ The adverse action taken against the employee closely followed the employee's complaints (protected activities);
- ✓ The person who undertook the adverse action was aware of the employee's protected activities; and
- ✓ There exists a lack of legitimate, nondiscriminatory reasons for the employment actions taken against the employee.

In an important decision in June 2013, the Supreme Court held (5-4) that Title VII retaliation claims must be proven according to traditional principles of but-for causation. The "but for" test requires that a plaintiff must prove the employer would not have taken adverse action against the plaintiff except for the plaintiff's protected activity. This is a more difficult legal standard for the plaintiff than a lesser "mixed motive" standard (proving that a plaintiff's protected activity was merely one of various reasons for the adverse employment action). The lesser standard is applicable to proving cases of discrimination based on a protected status, for example, race, religion or gender.

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[4] Sumner v. United States Postal Service, 899 F.2d 203 (2d Cir. 1990).
[5] O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996).
[6] Jackson v. St. Joseph State Hospital, 840 F.2d 1387 (8th Cir.), cert. denied, 488 U.S. 892 (1988).

Writing for the majority in University of Texas Southwestern Medical Center v. Nassar, Justice Kennedy stated:

> An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision. This principle is the result of an earlier case from this Court, Price Waterhouse v. Hopkins, 490 U. S. 228 (1989), and an ensuing statutory amendment by Congress that codified in part and abrogated in part the holding in Price Waterhouse, see §§2000e–2(m), 2000e–5(g)(2)(B). The question the Court must answer here is whether that lessened causation standard is applicable to claims of unlawful employer retaliation under §2000e–3(a). Although the Court has not addressed the question of the causation showing required to establish liability for a Title VII retaliation claim, it has addressed the issue of causation in general in a case involving employer discrimination under a separate but related statute, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §623. See Gross v. FBL Financial Services, Inc., 557 U. S. 167 (2009). In Gross, the Court concluded that the ADEA requires proof that the prohibited criterion was the but-for cause of the prohibited conduct. The holding and analysis of that decision are instructive here.[7]

Another difficult question is how far does retaliation protection extend? That is, the employee or applicant is protected. Is the employee's spouse protected? Girlfriend? The Supreme Court answers this question below in *Thompson versus North American Stainless*.

[7] 570 U. S. ____ (2013).

THOMPSON
V.
NORTH AMERICAN STAINLESS, LP

SUPREME COURT OF THE UNITED STATES
131 S. Ct. 863 (2011)

Justice Scalia delivered the opinion of the Court.

Until 2003, both petitioner Eric Thompson and his fiancee, Miriam Regalado, were employees of respondent North American Stainless (NAS). In February 2003, the Equal Employment Opportunity Commission (EEOC) notified NAS that Regalado had filed a charge alleging sex discrimination. Three weeks later, NAS fired Thompson. Thompson then filed a charge with the EEOC. After conciliation efforts proved unsuccessful, he sued NAS in the United States District Court for the Eastern District of Kentucky under Title VII of the Civil Rights Act of 1964, . . . claiming that NAS had fired him in order to retaliate against Regalado for filing her charge with the EEOC. The District Court granted summary judgment to NAS, concluding that Title VII "does not permit third party retaliation claims." . . . [T]he Sixth Circuit . . . affirmed . . .. The court reasoned that because Thompson did not "engag[e] in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado," he "is not included in the class of persons for whom Congress created a retaliation cause of action." . . .

I

Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge" under Title VII. . . . The statute permits "a person claiming to be aggrieved" to file a charge with the EEOC alleging that the employer committed an unlawful employment practice, and, if the EEOC declines to sue the employer, it permits a civil action to "be brought . . . by the person claiming to be aggrieved . . . by the alleged unlawful employment practice." . . .

It is undisputed that Regalado's filing of a charge with the EEOC was protected conduct under Title VII. In the procedural posture of this case, we are also required to assume that NAS fired Thompson in order to retaliate against Regalado for filing a charge of discrimination. This case

therefore presents two questions: First, did NAS's firing of Thompson constitute unlawful retaliation? And second, if it did, does Title VII grant Thompson a cause of action?

II

With regard to the first question, we have little difficulty concluding that if the facts alleged by Thompson are true, then NAS's firing of Thompson violated Title VII. In *Burlington N. & S. F. R. Co.* v. *White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), we held that Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct. We reached that conclusion by contrasting the text of Title VII's antiretaliation provision with its substantive antidiscrimination provision. Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin " 'with respect to . . . compensation, terms, conditions, or privileges of employment,' " and discriminatory practices that would " 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.' . . .. In contrast, Title VII's antiretaliation provision prohibits an employer from " 'discriminat[ing] against any of his employees' " for engaging in protected conduct, without specifying the employer acts that are prohibited. . . . Based on this textual distinction and our understanding of the antiretaliation provision's purpose, we held that "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." . . . Rather, Title VII's antiretaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." . . .

We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired. . . . NAS raises the concern, however, that prohibiting reprisals against third parties will lead to difficult line-drawing problems concerning the types of relationships entitled to protection. Perhaps retaliating against an employee by firing his fiancee would dissuade the employee from engaging in protected activity, but what about firing an employee's girlfriend, close friend, or trusted co-worker? . . .

Although we acknowledge the force of this point, we do not think it justifies a categorical rule that third-party reprisals do not violate Title VII. As explained above, we adopted a broad standard in *Burlington* because Title VII's antiretaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text. We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family

member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. . . .

III

The more difficult question in this case is whether Thompson may sue NAS for its alleged violation of Title VII. . . .

[W]e conclude that Thompson falls within the zone of interests protected by Title VII. Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation--collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.

* * *

The judgment of the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

EEOC Charge Statistics
FY 2007 through FY 2012

The Equal Employment Opportunity Commission (EEOC) compiles the following data. Under the EEOC reporting system, the number for total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the eight types of discrimination listed.

	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Total Charges	79,432	75,428	75,768	82,792	95,402	99,412
Race	30,510	33,937	33,579	35,890	35,395	33,512
	37.0%	35.6%	36.0%	35.9%	35.4%	33.7%
Sex	24,826	28,372	28,028	29,029	28,534	30,356
	30.1%	29.7%	30.0%	29.1%	28.5%	30.5%
National Origin	9,396	10,601	11,134	11,304	11,833	10,883
	11.4%	11.1%	11.9%	11.3%	11.8%	10.9%
Religion	2,880	3,273	3,386	3,790	4,151	3,811
	3.5%	3.4%	3.6%	3.8%	4.2%	3.8%
Retaliation - All Statutes	26,663	32,690	33,613	36,258	37,334	37,836
	32.3%	34.3%	36.0%	36.3%	37.4%	38.1%
Age	19,103	24,582	22,778	23,264	23,465	22,857
	23.2%	25.8%	24.4%	23.3%	23.5%	23.0%
Disability	17,734	19,453	21,451	25,165	25,742	26,379
	21.4%	20.4%	23.0%	25.2%	25.8%	26.5%

Arkansas Civil Rights Laws

In 1993, Arkansas passed the Arkansas Civil Rights Act protecting against discrimination based on race, religion, ancestry or national origin, gender, or the presence of any sensory, mental, or physical disabilities. There are a few areas where the Arkansas Civil Rights Act differs from federal civil rights legislation. In most areas, analysis under the Arkansas Civil Rights Act will mirror corresponding analysis of federal civil rights laws.

The Arkansas Civil Rights Act of 1993

§ 16-123-102 Definitions.
For the purposes of this subchapter:
(1) "Because of gender" means, but is not limited to, on account of pregnancy, childbirth, or related medical conditions;
(2) "Compensatory damages" means damages for mental anguish, loss of dignity, and other intangible injuries, but "compensatory damages" does not include punitive damages;
(3) "Disability" means a physical or mental impairment that substantially limits a major life function, but "disability" does not include:
(A) Compulsive gambling, kleptomania, or pyromania;
(B) Current use of illegal drugs or psychoactive substance use disorders resulting from illegal use of drugs; or
(C) Alcoholism;
(4) "Employee" does not include:
(A) Any individual employed by his or her parents, spouse, or child;
(B) An individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility; or
(C) An individual employed outside the State of Arkansas;
(5) "Employer" means a person who employs nine (9) or more employees in the State of Arkansas in each of twenty (20) or more calendar weeks in the current or preceding calendar year, or any agent of such person;
(6) "National origin" includes ancestry;
(7) "Place of public resort, accommodation, assemblage, or amusement" means any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds, but "place of public resort, accommodation, assemblage, or amusement" does not include:

(A) Any lodging establishment which contains not more than five (5) rooms for rent and which is actually occupied by the proprietor of such establishment as a residence; or

(B) Any private club or other establishment not in fact open to the public; and

(8) "Religion" means all aspects of religious belief, observance, and practice.

§ 16-123-103. Applicability

(a) The provisions of this subchapter relating to employment shall not be applicable with respect to employment by a religious corporation, association, society, or other religious entity.

(b) It shall not constitute employment discrimination under this subchapter for an employer to refuse to accommodate the religious observance or practice of an employee or prospective employee if the employer demonstrates that he is unable to reasonably make such accommodation without undue hardship on the conduct of the employer's business.

(c) A defendant may avoid liability under this subchapter by showing that his actions were based on legitimate, nondiscriminatory factors and not on unjustified reasons.

(d) Provided the conduct at issue is based on a bona fide business judgment and is not a pretext for prohibited discrimination, nothing in this subchapter shall be construed to prohibit or restrict:

(1) An insurer, hospital, medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or any bank, savings and loan, or other lender from underwriting insurance or lending risks or administering such risks that are based on or are not inconsistent with federal or state law;

(2) A person covered by this subchapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or are not inconsistent with federal or state law; or

(3) A person covered by this subchapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that is not subject to federal or state laws that regulate insurance.

(e) This subchapter shall not apply to matters regulated by the Arkansas Insurance Code or the Trade Practices Act of the Arkansas Insurance Code, § 23- 66-201 et seq.

§ 16-123-104. Construction

Nothing in this subchapter shall be construed to waive the sovereign immunity of the State of Arkansas.

§ 16-123-105. Civil rights offenses

(a) Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress.

(b) In the discretion of the court, a party held liable under this section shall also pay the injured party's cost of litigation and a reasonable attorney's fee in an amount to be fixed by the court.
(c) When construing this section, a court may look for guidance to state and federal decisions interpreting the federal Civil Rights Act of 1871, as amended and codified in 42 U.S.C. § 1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only.

§ 16-123-106. Hate offenses
(a) An action for injunctive relief or civil damages, or both, shall lie for any person who is subjected to acts of:
(1) Intimidation or harassment; or
(2) Violence directed against his person; or
(3) Vandalism directed against his real or personal property,
where such acts are motivated by racial, religious, or ethnic animosity.
(b) Any aggrieved party who initiates and prevails in an action authorized by this section shall be entitled to damages, including punitive damages, and in the discretion of the court to an award of the cost of the litigation, and a reasonable attorney's fee in an amount to be fixed by the court.
(c) This section shall not apply to speech or conduct protected by the First Amendment of the United States Constitution or Article 2, § 6, of the Arkansas Constitution.

§ 16-123-107. Discrimination offenses
(a) The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:
(1) The right to obtain and hold employment without discrimination;
(2) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
(3) The right to engage in property transactions without discrimination;
(4) The right to engage in credit and other contractual transactions without discrimination; and
(5) The right to vote and participate fully in the political process.
(b) Any person who is injured by an intentional act of discrimination in violation of subdivisions (a)(2)-(5) of this section shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover compensatory and punitive damages, and, in the discretion of the court, to recover the cost of litigation and a reasonable attorney's fee.
(c) (1) (A) Any individual who is injured by employment discrimination by an employer in violation of subdivision (a)(1) of this section shall have a civil action in a court of competent jurisdiction, which may issue an order prohibiting the discriminatory practices and provide affirmative relief from the effects of the practices, and award back pay, interest on back pay, and, in the discretion of the court, the cost of litigation and a reasonable attorney's fee.

(B) No liability for back pay shall accrue from a date more than two (2) years prior to the filing of an action.
(2) (A) In addition to the remedies under subdivision (c)(1)(A) of this section, any individual who is injured by intentional discrimination by an employer in violation of subdivision (a)(1) of this section shall be entitled to recover compensatory damages and punitive damages. The total compensatory and punitive damages awarded under this subdivision (c)(2)(A) shall not exceed:

(i) The sum of fifteen thousand dollars ($ 15,000) in the case of an employer who employs fewer than fifteen (15) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

(ii) The sum of fifty thousand dollars ($ 50,000) in the case of an employer who employs more than fourteen (14) and fewer than one hundred one (101) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

(iii) The sum of one hundred thousand dollars ($ 100,000) in the case of an employer who employs more than one hundred (100) and fewer than two hundred one (201) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

(iv) The sum of two hundred thousand dollars ($ 200,000) in the case of an employer who employs more than two hundred (200) and fewer than five hundred one (501) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year; and

(v) The sum of three hundred thousand dollars ($ 300,000) in the case of an employer who employs more than five hundred (500) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year.

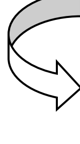
(3) Any action based on employment discrimination in violation of subdivision (a)(1) of this section shall be brought within one (1) year after the alleged employment discrimination occurred, or within ninety (90) days of receipt of a "Right to Sue" letter or a notice of "Determination" from the United States Equal Employment Opportunity Commission concerning the alleged unlawful employment practice, whichever is later.

§ 16-123-108. Retaliation -- Interference -- Remedies

(a) Retaliation. No person shall discriminate against any individual because such individual in good faith has opposed any act or practice made unlawful by this subchapter or because such individual in good faith made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
(b) Interference, Coercion, or Intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this subchapter.
(c) Remedies and Procedures. The remedies and procedures available in § 16-123-107(b) shall be available to aggrieved persons for violations of subsections (a) and (b) of this section.

Chapter 6 - Covered Entities

Chapter 6 - Cognitive Objectives



1. Identify and apply the basic rules regarding covered entities under Title VII, the ADA, and the ADEA.
2. Apply the concepts of a) an integrated enterprise and b) wrongful discharge to an employer exempt from federal civil rights coverage due to the lack of a requisite number of employees.
3. Identify and apply the rules regarding third-party interference with employment opportunities.
4. Identify and apply the rules regarding exempt entities as private membership clubs, as illustrated in *Jankey v. Twentieth Century Fox.*

Introduction to Covered Entities

As presented in Chapter 4, federal civil rights protections under the Civil Rights Act of 1964 (Title VII), the ADEA, and the ADA cover employees and agents, but protection is generally not extended to independent contractors.[1] In addition to this limitation, federal civil rights laws do not cover all business entities or employers.

Title VII, the ADEA, and the ADA apply to employers, employment agencies, and labor organizations that meet the definitions provided by the relevant civil rights statute. Title VII and the ADA apply to employers with 15 or more employees. That is, a firm with 14 or fewer employees is not an "employer" covered by Title VII or the ADA. The ADEA applies to employers with 20 or more employees. Beyond private employers, civil rights coverage may extend to the federal government, and to state and local government entities.[2]

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[1] Federal civil rights laws, to be presented in more detail in later chapters, are summarized in Chapter 5.

[2] Federal agencies are covered under 42 U.S.C. § 2000e-16(a) (Title VII); 29 U.S.C. § 633a(a) (ADEA); *id.* § 791 (Rehabilitation Act). State and local governments are covered under, *e.g.*, 29 U.S.C. § 630(b)(2) (defining "employer" as any "State or a political subdivision of a State."). The Supreme Court has ruled that under the ADEA and the ADA, private lawsuits against states are impermissible, unless the state waives its sovereign immunity. Regarding the ADEA, *see Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (finding that Congress did not have authority to abrogate state immunity under Eleventh Amendment regarding private suits alleging age discrimination under ADEA). Regarding the ADA, *see Bd. of Trustees of the University of Ala. et al., v. Patricia Garrett, et al.*; 121 S. Ct. 955 (2001). The right of private individuals to sue states under Title VII has been upheld by the Supreme Court. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Application of Civil Rights Laws to the Small Employer[3]

Congress exempted employers with fewer than 15 employees from complying with Title VII or the ADA. Firms with fewer than 20 employees are exempt from coverage by the ADEA. The exemptions were based on several factors, including a desire to protect small employers from the expense of mastering all the legal complexities involved in civil rights laws[4] and protecting the intimate and personal relationships existing in small businesses.[5]

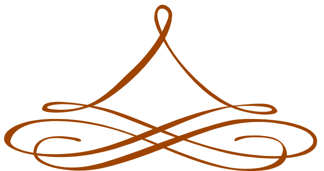
In practice, however, the statutory exemption from various federal civil rights laws does not automatically prevent lawsuits for the small employer. There are at least two legal theories plaintiffs use in bringing civil rights lawsuits against the small employer. First, plaintiffs attempt lawsuits against small employers affiliated with larger firms (the "integrated enterprise" approach). Second, plaintiffs attempt common law wrongful discharge tort lawsuits based on civil rights concepts (the "wrongful discharge" approach).

Integrated Enterprise

Larger firms own many smaller corporations, in part or completely. If a firm has less than the requisite number of employees to be covered by federal civil rights laws, does ownership of this firm by a larger, covered firm subject the smaller firm to civil rights liability? The civil rights statutes do not provide a direct answer to the small firm/parent firm question. The preferred approach emerging from various court opinions has been to determine whether the nominal (small) employer is part of an "integrated enterprise." Under this approach, the courts have attempted to determine whether the nominal employer is so integrated into the large parent firm that the small firm should be covered by the federal legislation.

The opinion of the EEOC regarding integrated enterprises is found in the following materials from the EEOC Compliance Manual:

[3] For additional analysis, *see* Jeffrey Pittman, *Application of Civil Rights Law to the Small Employer*, 10 S. BUS. L.J. 89 (2000), *available at* http://www.lexopolis.com/salsb/slj/index.html.
[4] *See, e.g.,* 110 Cong. Rec. § 13092 (1964) (Remarks of Sen. Cotton); 110 Cong. Rec. § 13088 (1964) (Remarks of Sen. Humphrey); 110 Cong. Rec. § 13092-3 (1964) (Remarks of Sen. Morse).
[5] *See, e.g.*, 110 Cong. Rec. § 7088 (1964) (Remarks of Sen. Stennis); 110 Cong. Rec. § 7207-17 (1964) (Remarks of Sen. Clark).



EEOC Compliance Manual - Integrated Enterprises[6]

If an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an "integrated enterprise" that, overall, meets the requirement. An integrated enterprise is one in which the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging party. The separate entities that form an integrated enterprise are treated as a single employer for purposes of both coverage and liability. If a charge is filed against one of the entities, relief can be obtained from any of the entities that form part of the integrated enterprise.

The factors to be considered in determining whether separate entities should be treated as an integrated enterprise are:

The degree of interrelation between the operations

- ✓ Sharing of management services such as check writing, preparation of mutual policy manuals, contract negotiations, and completion of business licenses
- ✓ Sharing of payroll and insurance programs
- ✓ Sharing of services of managers and personnel
- ✓ Sharing use of office space, equipment, and storage
- ✓ Operating the entities as a single unit

The degree to which the entities share common management

- ✓ Whether the same individuals manage or supervise the different entities
- ✓ Whether the entities have common officers and boards of directors

Centralized control of labor relations

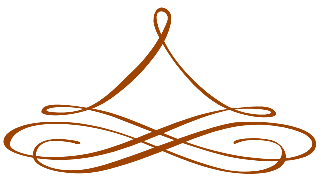
- ✓ Whether there is a centralized source of authority for development of personnel policy
- ✓ Whether one entity maintains personnel records and screens and tests applicants for employment
- ✓ Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common
- ✓ Whether the same persons make the employment decisions for both entities

[6] The U.S. Equal Employment Opportunity Commission, COMPLIANCE MANUAL, VOLUME II, SECTION 2, THRESHOLD ISSUES, COVERED ENTITIES, May 2000, *available at* http://www.eeoc.gov/docs/threshold.html.

The degree of common ownership or financial control over the entities

- ✓ Whether the same person or persons own or control the different entities
- ✓ Whether the same persons serve as officers and/or directors of the different entities
- ✓ Whether one company owns the majority or all of the shares of the other company[7]

The purpose of these factors is to establish the degree of control exercised by one entity over the operation of another entity. All of the factors should be considered in assessing whether separate entities constitute an integrated enterprise, but it is not necessary that all factors be present, nor is the presence of any single factor dispositive. The primary focus should be on centralized control of labor relations. It should be noted that while this issue often arises where there is a parent-subsidiary relationship, a parent-subsidiary relationship is not required for two companies to be considered an integrated enterprise.



Wrongful Discharge

As presented in Chapter 2, the common law doctrine of employment at will allows employers the right to discharge employees at the employer's discretion. In its traditional form, the doctrine allows an employer to discharge an employee "for good cause, for no cause, or even for cause morally wrong."[8] Over time, courts in many states (Arkansas included) recognized an exception to employment at will where a discharge is in violation of state public policy. Examples of violations of public policy include discharging employees for refusals to commit perjury,[9] serving on juries,[10] or refusals to

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[7] *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977), was the first case to apply the four-factor test to the EEO statutes. The test has subsequently been widely adopted. *E.g.*, *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999) (en banc); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069 (10th Cir. 1998); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-41 (2d Cir. 1995); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 450 (5th Cir. 1994). In *Papa v. Katy Industries, Inc.*, however, the Seventh Circuit rejected the four-factor test and determined that the standard for applying the integrated enterprise theory should focus on the purpose of sparing small employers the "potentially crushing expense" of compliance with antidiscrimination laws. 166 F.3d 937, 940 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 526 (1999). The court identified three situations where covering small employers would not be inconsistent with this purpose: where the traditional conditions are present for "piercing the veil"; where a company splits itself up to avoid liability under the EEO laws; or where the parent corporation directed the allegedly discriminatory action of the subsidiary. . . .

[8] Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 837 (Wis. 1983).

[9] Page v. Columbia Natural Resources, Inc., 480 S.E.2d 817 (W. Va. 1996); DeRose v. Putnam Management Co., Inc., 496 N.E.2d 428 (Mass. 1986).

[10] U.S. v. Sara Lee, 839 F. Supp. 393 (W.D. Va. 1993); Jeffreys v. My Friend's Place, Inc., 719 F. Supp. 639 (M.D. Tenn. 1989).

commit crimes.[11] An interesting question has been raised regarding public policy cases. Can a state's civil rights statutes identify a public policy applicable to a small employer exempt from the same state statutes?[12] Though Arkansas courts have not yet spoken on this issue, other courts have addressed the question.

In *Kerrigan v. Magnum Entertainment*,[13] a Maryland District Court was asked whether Maryland recognizes a common law wrongful discharge action for the alleged gender-motivated discharge of a pregnant woman. The plaintiff, Fara Kerrigan, claimed she was discharged by Magnum Enterprises two weeks after she informed Magnum that she was pregnant. The plaintiff maintained that her discharge, allegedly based on her gender and pregnancy, violated Maryland public policy. The source of Maryland public policy was, the plaintiff believed, Maryland's civil rights laws. The plaintiff could not use Maryland civil rights laws directly against Magnum as it did not have the required fifteen employees.

In reaching its decision in favor of the plaintiff, the court in *Kerrigan* found that public policy was articulated in the state civil rights statute. The court held that the exemption for small employers was only an exemption from the administrative requirements of the law, not an exemption for the law's anti-discrimination requirements.[14] The court ruled for the plaintiff while also recognizing that its holding means that cases involving small employers will be litigated in court without the administrative conciliation required by federal and state civil rights statutes. The Maryland Court of Appeals later affirmed the *Kerrigan* analysis regarding public policy in a similar case.[15]

Other state courts have recognized public policy in civil rights cases. In *Williamson v. Greene*,[16] the plaintiff, Sharon Williamson, alleged that she was the victim of sexual harassment. Ms. Williamson worked for the Coalition for the Homeless of Jefferson County, West Virginia (Coalition). After working for the Coalition for six months, the plaintiff was dismissed. Although she felt she was dismissed in retaliation for her opposition to unlawful sexual harassment and discrimination, Ms. Williamson could not sue under West Virginia's Human Rights Act.[17] Her employer did not have twelve employees as required by the West Virginia code. She amended her complaint to allege that her dismissal also violated West Virginia's public policy. In ruling for the plaintiff, the court found that West Virginia law clearly established public policy against sex discrimination. The court felt small employers were on notice regarding illegal discrimination although the Human Rights Act specifically exempted these smaller firms.

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[11] Lins v. Children's Discovery Ctrs. Of Am., Inc., 976 P.2d 168 (Wash. Ct. App. 1999); Guthrie v. Tifco Indrus., 941 F.2d 374 (5th Cir. 1991), cert. denied, 112 S.Ct. 1267 (1992).

[12] For employers covered by federal civil rights laws, most courts hold that federal law preempts state common law suits regarding the same facts. The court opinions here do vary based on the particular state tort alleged. *See generally*, Kimberly Simmons, Annotation, Pre-Emption of Wrongful Discharge Cause of Action by Civil Rights Laws, 21 A.L.R. 5th 1 (1994).

[13] 804 F.Supp. 733 (D. Md. 1992).

[14] *Id.* at 736.

[15] Linda Molesworth v. Randall Brandon et al., 672 A.2d. 608 (Md. Ct. App. 1996).

[16] 490 S.E.2d 23 (W. Va. 1997).

[17] W. Va. Code, §§ 5-11-1, et seq.

In *Roberts v. Dudley*,[18] the Washington Supreme Court addressed the public policy question. Following the reasoning of the preceding cases, the court held that the common law tort of wrongful discharge in violation of public policy against sex discrimination applies to small employers employing fewer than the eight employees required for direct application of the Washington civil rights law. In dissent, Judge Madsen stated:

> The majority has the noblest of intentions. It is clearly desirable to hold all employers accountable for gender discrimination, regardless of their size. Unfortunately, the Legislature has yet to do so. Instead, the majority has presumed the role of the Legislature and has created a common law cause of action using a statute that specifically prohibits it. It is the function of this court to apply the intent of the Legislature as expressed through its laws. The court exceeds its legitimate powers when it substitutes its own intent for that of the Legislature.[19]

In Virginia in 1994, the Supreme Court recognized a cause of action for wrongful discharge in violation of public policy where the employee alleged racial discrimination.[20] The state legislature responded in 1995 by amending the Virginia Human Rights Act to add, in part, the following language: "Causes of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statues or local ordinances."[21] Subsequent Virginia court opinions have held that common law tort causes of action are prohibited where based upon public policy found in civil rights statutes.[22]

Applying state common law tort doctrines avoids the damage recovery limitations found in federal and many state civil rights laws.[23] Further, required mediation/conciliation, a feature of many civil rights laws, is absent in a wrongful discharge tort case.

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[18] 2000 WL 177486 (Wash. 2000).

[19] *Id*. at 11.

[20] Lockhart v. Commonwealth Educ. Sys. Corp., 439 S.E.2d 328 (Va. 1994).

[21] V. Code § 2.1-725(D).

[22] *See, e.g*., Doss v. Jamco, Inc., 492 S.E.2d 441 (Va. 1997).

[23] *See, e.g*., 42 U.S.C. § 1981a(b)(3), providing in part:

> (3) Limitations
> The sum of the amount of compensatory damages awarded under this section. . .and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 50,000;
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 100,000;
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 200,000;
> (D) in the case of a respondent who has more than 500 employees in each of 20 or

Third-Party Interference with Employment Opportunities

In addition to prohibiting employers from discriminating against their own employees, Title VII, the ADEA, and the ADA may prohibit a covered third-party employer from discriminatorily interfering with an individual's employment opportunities with another employer. This type of liability is commonly known as "third-party interference." The ADA specifically prohibits interference with rights protected under the statute. Many courts apply the interference concept to Title VII and ADEA cases, though these laws do not specifically identify the interference concept.[24]

Generally, federal civil rights laws apply only to agents or employees, not to independent contractors. The following statutory language is from the Civil Rights Act of 1964, Title VII:

Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer-

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of **employment**, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his **employees or applicants** for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[25] (Emphasis added)

Regarding the above language, employers are prohibited from illegal discrimination regarding employees. The language does not expressly cover independent contractors. This interpretation is supported by *Adcock v. Chrysler*, below. However, a minority of courts believe that federal civil rights laws may be applied to situations where independent contractors are involved. For this view, review *Moland v. Bil-Mar Foods*, below. The United States Supreme Court has not directly spoken on this issue.

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more calendar weeks in the current or preceding calendar year, $ 300,000.

[24] *See Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (noting that "nowhere are there words of limitation that restrict references in the Act to 'any individual' as comprehending only an employee of an employer"); *EEOC v. Foster Wheeler Constructors, Inc.*, No. 98 C 1601, 1999 WL 515524 (N.D. Ill. July 14, 1999) (general contractor can be liable to employees of subcontractor subjected to discriminatory work environment if it controlled working conditions at job site). *But see*, *Bloom v. Bexar County*, 130 F.3d 722, 724-25 (5th Cir. 1997) (ADA requires employment relationship between plaintiff and defendant); *EEOC v. State of Ill.*, 69 F.3d 167, 169 (7th Cir. 1995) (third party must at least be indirect employer in order to be liable under ADEA).

[25] 42 USCS §2000e-2.

Adcock
v.
Chrysler Corporation

166 F.3d 1290
United States Court of Appeals, 9th Circuit, 1999

Wardlaw, J. - This appeal presents the question whether the contemplated car dealer franchise agreement at issue created an employment relationship so as to trigger the protections of Title VII of the Civil Rights Act of 1964. . . .

Sherrie Ann Adcock brought suit against Chrysler under Title VII, alleging that Chrysler's refusal to award her a dealership in Taft, California, was the result of sex discrimination. The district court granted summary judgment for Chrysler, concluding that Title VII protections did not apply to this case because the contemplated dealer franchise agreement would have constituted a "continuing contract, not an employment relationship" subject to the statute. . . .

Title VII provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire ... any individual ... because of such individual's race, color, religion, sex, or national origin. . . . One of Congress' objectives in enacting Title VII was “to achieve equality of employment opportunities.” . . . Consequently, there must be some connection with an employment relationship for Title VII protections to apply. . . . Title VII protects employees, but does not protect independent contractors. . . .

Moland
v.
Bil-Mar Foods,

994 F.Supp. 1061
United States District Court, Northern District of Iowa, 1998

Terri Moland filed this sex discrimination lawsuit . . . against Bil-Mar Foods . . .. Moland, an employee of IBP Corporation ("IBP"), had been assigned to work at Bil-Mar's scale house at its turkey processing plant in Storm Lake, Iowa. Moland worked at the scale house until February 22, 1995, when IBP complied with a request from Bil-Mar that IBP no longer assign her to Bil-Mar's scale house. Moland's complaint alleges that she was subjected to sexual harassment in violation of Title VII of the Civil Rights Act of 1964 . . ..

[Interference with the Employee-Employer Relationship] - A few courts have deemed a defendant an "employer" if the defendant has a sufficient degree of control over plaintiff's access to the job market, i.e., sufficient control over plaintiff's employment opportunities. . . . . [T]he court … finds that the rights created under Title VII extend beyond the immediate employer-employee relationship and apply to discrimination claims . . . where the defendant is in a position to interfere with the plaintiff's employment opportunities even though the plaintiff is not an employee of the defendant. . . . .

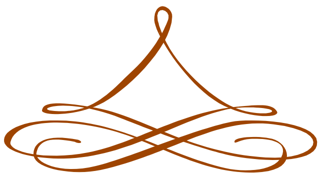
Case Questions:
Why did the two above court decision point to different conclusions? Where did the court analysis differ?

Exempt Entities

Recently, the Masters golf tournament received negative publicity due to the membership policies of the sponsor, the Augusta National Golf Club. The Masters golf tournament, held annually in Augusta, Georgia, is generally recognized as the leading golf tournament in the United States. Women are not allowed as members into the Augusta National Golf Club. Protests have been held against the all-male membership of the club. Legally, the Augusta National Golf Club is free to prohibit women from membership as Title VII and

the ADA do not apply to a bona fide private membership club. Private membership clubs are not exempt under the ADEA.

According to the EEOC, the following requirements must be established to receive treatment as a private club:



***Bona Fide Private Membership Club Requirements*[26]**

To fall under the Title VII/ADA exemption, an organization must show both that it is tax-exempt and that it is a bona fide private membership club. An organization is deemed a bona fide private membership club if it meets each of the following requirements

- The organization is a club in the ordinary sense of the word;
- The organization is private; and
- There are meaningful conditions of limited membership.

(a) Definition of "Club"

A "club" is defined as an association of persons for social and recreational purposes or for the promotion of some common object (as literature, science, political activity) usually jointly supported and meeting periodically, membership in social clubs usually being conferred by ballot and carrying the privilege of use of the club property.

(b) Is the Club Private?

In determining whether a club is private, the Commission considers the following:

- The extent to which it limits its facilities and services to club members and their guests
- The extent to which and/or the manner in which it is controlled or owned by its membership
- Whether and, if so, to what extent and in what manner it publicly advertises to solicit members or to promote the use of its facilities or services by the general public

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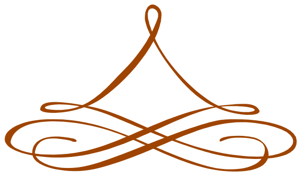
[26] The U.S. Equal Employment Opportunity Commission, COMPLIANCE MANUAL, VOLUME II, SECTION 2, THRESHOLD ISSUES, BONA FIDE PRIVATE MEMBERSHIP CLUB, May 2000, *available at* http://www.eeoc.gov/docs/threshold.html.

The presence or absence of any one of these factors is not determinative, however, and the question as to whether an organization is private must be addressed on a case-by-case basis.

(c) Meaningful Conditions of Limited Membership

Finally, in determining whether the requirement of meaningful conditions of limited membership is met, the Commission will consider both the size of the membership, including the existence of any limitations on its size, and membership eligibility requirements.



Additional Cases

Jankey
v.
Twentieth Century Fox Film Corporation

212 F.3d 1159
United States Court of Appeals, 9th Circuit, 2000

Schwarzer, J. - Les Jankey appeals from the district court's summary judgment in favor of Twentieth Century Fox Film Corporation (Fox) on his claim of disability discrimination under the public accommodations provisions of Title III of the Americans with Disabilities Act (the Act). We must decide whether facilities that fall within one of the categories of public accommodations specified in the Act are exempt if they are not in fact open to the public.

Factual Background - The relevant facts are not in dispute. Fox operates a film and production facility (the Lot) in Los Angeles. Daytime access to the Lot is restricted to Fox employees and their authorized business guests. Fox security personnel posted at the entrance to the Lot maintain a list of authorized visitors, and admit only employees and persons on the list.

Jankey, who is confined to a wheelchair, is disabled within the meaning of the Act. He has frequently visited the Lot for business purposes over the past twenty years, almost always on a visitor's pass. He contends that while there he was unable to access the Commissary, the Studio Store, and an Automatic Teller Machine (ATM) (collectively, the Facilities), all located on the Lot, because they were not equipped to accommodate wheelchairs.

Jankey filed a complaint in district court alleging violations of Title III of the Act prohibiting "public accommodations" from discriminating on the basis of a disability. The complaint also alleged various state law violations. The district court granted summary judgment, holding that because the Facilities were not places of public accommodation they were not covered by the Act. . . .

Discussion - Section 302 of the Act prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who ... operates a place of public accommodation." The Act lists twelve categories of private entities that are "public accommodations," including:

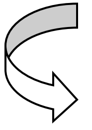
(B) a restaurant, bar or other establishment serving food or drink; . . .
(E) a ... clothing store ... or other sales or rental establishment; . . .
(F) a ... bank ... or other service establishment. . . .

The district court found that the Facilities-the Commissary, the Studio Store and the ATM-were not places of public accommodation subject to the Act. On this appeal, Jankey contends that because the Facilities fall within the descriptive language of the categories specified in §12181(7)(B), (E) and (F), they are public accommodations subject to the Act. With respect to these Facilities, he contends, Fox is therefore subject to Title III because it operates places of public accommodation.

Jankey's argument is premised on the assumption that if a facility falls within a §12181 category, the Act applies regardless of whether it is open to the public. This argument, for which we have found no support, ignores the plain language of §12187, which states: "The provisions of [Title III] shall not apply to private clubs or establishments exempted from coverage under Title II of the Civil Rights Act." 42 U.S.C. § 12187. Title II of the Civil Rights Act, in turn, exempts from coverage any "private club *or other establishment not in fact open to the public*." 42 U.S.C. § 2000a(e) (emphasis added). . . . Given the plain language of §12187, we reject Jankey's contention that Title III applies to a facility described in 42 U.S.C. §12181(7) regardless of whether it is open to the public.

Chapter 7 -
Disparate Treatment & Disparate Impact

Chapter 7 - Cognitive Objectives

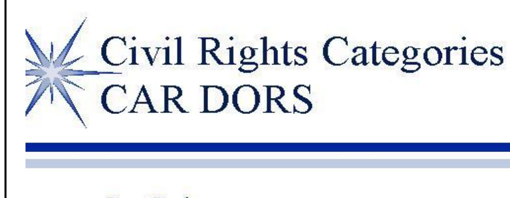


1. Distinguish legal from illegal discrimination.
2. Explain and apply the civil rights rules of disparate treatment.
3. Explain and apply the civil rights rules of disparate impact.
4. Apply the BFOQ exception regarding illegal discrimination.
5. Explain and interpret all the cases in this chapter and apply the legal principles to hypothetical employment problems.

Overview – Illegal Discrimination

A key starting point in civil rights analysis is to distinguish legal discrimination from illegal discrimination. Discrimination at work is simply a process of differentiating among employees or applicants. Every manager, good or bad, must discriminate regularly. Hiring one individual among a group of applicants involves discriminating based on, for example, experience, education, or abilities. Promoting an employee involves discriminating among a group of employees based on perceived qualities for success in the new position.

As summarized in Chapter 5, illegal discrimination involves an employment decision that is based, in whole or part, on a protected civil rights characteristic. The major protected characteristics are race, color, religion, national origin, sex, age, or disability. For simplicity, the protected civil rights characteristics may be summarized by the acronym CAR DORS.



- C - Color
- A - Age
- R - Race

- D - Disability
- O - National Origin
- R - Religion
- S - Sex (gender)

Disparate Treatment

The simplest form of illegal discrimination is disparate treatment. A basic question to test for disparate treatment is this: *Would the employment decision in question change if the employee's race, color, religion, national origin, sex, age, or disability were different*? For example, assume a white male employee, age 35, is promoted. Would this employee have been promoted if the employee were a woman? Hispanic? Fifty-seven years old? If the answer to any of the preceding questions is no, then we may have illegal discrimination.

Proving disparate treatment is, at times, difficult. Employers are aware of civil rights laws and most managers will not openly admit illegal discrimination. Individuals who believe they have been the victims of illegal discrimination often have little proof of discrimination to offer to the court. The evidence of discrimination, if any exists, is found in internal company records or within the recollection of company employees. A plaintiff wishing to sue for illegal discrimination needs access to this internal evidence. However, our basic rules of litigation require that a plaintiff produce some evidence to support his or her claims early in the lawsuit process. Otherwise, the court will grant a defendant's motion of summary judgment.

Recognizing the inherent difficulty of proving employment discrimination, the courts created the concept of *prima facie* discrimination. This concept, briefly, assumes whenever logically possible that a plaintiff is correct in the initial claim of illegal discrimination. Discrimination is logically possible except where the person claiming to be the victim of illegal discrimination has the same characteristics as the person benefiting from the company action. For example, if a black woman applied for a position and was denied, she has a claim of *prima facie* discrimination unless the party hired is a black woman. The same would hold true if a white male applied for a position and was denied in favor of another candidate. If the other candidate is anyone besides a white male, a *prima facie* case exists for the candidate denied the job.

The *prima facie* assumption of illegal discrimination survives until the plaintiff has had ample opportunity, through the court discovery process, to acquire all relevant evidence in the possession of the defendant. The discovery process includes allowing the plaintiff to question, under oath, company employees involved in the case. After discovery is complete, the *prima facie* assumption disappears and the plaintiff must prove his or her case, as in other civil lawsuits, with a majority of the evidence, called a preponderance of the evidence.

The process of proving disparate treatment is summarized in the following chart. Next, *Dunlap v. TVA* illustrates application of the disparate treatment rules.

Proving Discrimination
Disparate Treatment

Direct Evidence

- **Employee** proves evidence of discrimination based on CAR DORS, or employee loses
- If **Employee** is successful, **Employer** must prove discrimination is a BFOQ, or employer loses
- **Employee** may prove **Employer's** argument is a pretext

Prima Facie

- **Employee** establishes prima facie evidence of discrimination based on CAR DORS
- **Employer** counters with a legitimate reason for the action taken
- After discovery, case proceeds following "direct evidence" column, left

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DAVID DUNLAP
V.
TENNESSEE VALLEY AUTHORITY
519 F.3d 626; (6th Cir. 2008)

BOYCE F. MARTIN, JR., Circuit Judge. David Dunlap brought suit under Title VII of the Civil Rights Act of 1964, alleging racial discrimination by the Tennessee Valley Authority. The district court found that Dunlap had been subjected to discrimination under both disparate treatment and disparate impact analyses, concluding that the TVA's subjective hiring processes permitted racial bias against both Dunlap and other black job applicants. The TVA now appeals, arguing that the district court erred in each of these analyses. We find that although the district court was correct in finding disparate treatment, the proof was insufficient for a finding of disparate impact. We therefore AFFIRM on the disparate treatment claim, REVERSE on the disparate impact claim, and AFFIRM the court's award of damages and fees.

[**Facts**] - David Dunlap is a fifty-two year-old black man who has worked as a boilermaker for twenty years, including nearly fifteen years' experience as a boilermaker foreman responsible for a crew of boilermakers. Most of Dunlap's experience has been with Tennessee

Valley Authority (TVA) facilities located across Tennessee through contract or temporary work with his union. Dunlap asserts that he has tried to gain employment with the TVA since the 1970s, but had never been offered a job, or even an interview. For the boilermaker position at issue, Dunlap submitted his resume and application before the application deadline. His materials specified his work with TVA facilities, his boilermaker training (through the TVA's own training program), his supervisory experience, and his 27,000 hours of experience in the field.

Of the twenty-one people interviewed for the ten positions available, all were referred by the local boilermaker union as being qualified for the job, including Dunlap. The selection committee at the Cumberland facility, where the job openings were located, was comprised of five white officials and one black official. Participants were asked a combination of technical questions, developed by committee members with boilermaker experience, and non-technical questions, developed by other management and human resources employees. Sometime before the interviews began, the selection committee determined that the interview would account for seventy percent of an applicant's final score and technical expertise would account for thirty percent. After each interview, the committee reviewed the individual score sheets as a group in an effort to even out the scores. This "score-balancing" caused the final scores to vary widely from the initial scores, even on basic, objective questions such as an applicant's safety record or attendance history. For example, when Dunlap reported that his attendance record was excellent with only a few days off for family illness, he received a score of 3.7. In contrast, when two white applicants gave essentially the same answer, they received a 4.2 and a 5.5. For Dunlap's perfect safety record, he received a 4, while another applicant who had had two accidents in eleven years received a score of 6. Dunlap alleges that although these are the most egregious examples of bias, the entire interview was similarly infected.

After the interviews, the twenty-one applicants were ranked in order of most to least qualified. The selection committee then divided the applicants into three groups: outstanding, well-qualified, and qualified. The ten applicants in the "outstanding" category were all chosen for jobs. Dunlap's scores placed him in fourteenth place. Of the ten people chosen, one was William Parchman, an African-American veteran with thirty years of experience as a boilermaker. Parchman provided testimony that he too had a history of being rejected for jobs at the TVA, and received the boilermaker position at issue after filing a complaint with the Equal Employment Opportunity Commission (EEOC).

Dunlap alleges that the combined weight of his more than twenty years of technical and supervisory experience made him a more qualified applicant

than some of the other applicants who were hired, some of whom had only minimal supervisory experience or poorer safety records. Dunlap's score on the technical part of the application equaled that of five of the selected candidates, yet he scored much lower on the interview and was thus not selected. He alleges that the interview process was biased from the beginning to select less qualified candidates, some with family affiliations to the committee members, by hiding racial preferences. After a bench trial, the district court found that the TVA's interview matrix process had been manipulated to exclude black applicants who were better qualified than the white applicants selected for full-time jobs at the plant, and that Dunlap himself was subjected to disparate treatment in his interview. The district court awarded Dunlap back pay, transportation expenses, compensatory damages, and attorney's fees. Defendant TVA now appeals, arguing that the district court's findings of disparate impact and disparate treatment discrimination were clearly erroneous. **[The disparate impact portion of the opinion is omitted.]**

. . .

Disparate treatment - The disparate treatment doctrine, articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, . . . (1973), requires a plaintiff to demonstrate that an employer has treated some people less favorably than others because of their race, color, religion, sex or national origin. On appeal from a bench trial, we consider whether the plaintiff has met his burden of proving the ultimate "factual inquiry" in a Title VII case: "whether the defendant intentionally discriminated against the plaintiff." . . . In doing so, we may take into account the evidence that the parties presented to meet their burdens of production under the *McDonnell Douglas* framework. Under that framework, (1) the plaintiff must establish a prima facie case of racial discrimination; (2) the employer must articulate some legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff must prove that the stated reason was in fact pretextual. . . . Under a disparate treatment theory, "proof of discriminatory motive is critical. However, in some cases it may be inferred from the mere fact of differences in treatment." . . . Proof of discriminatory motive may also be inferred from the falsity of the employer's explanation for the treatment. . . .

The burden of establishing a prima facie case of disparate treatment is not onerous. . . .. A plaintiff may establish a prima facie case of discrimination by showing (1) that he is a member of a protected group, (2) that he was qualified for the position at issue, and (3) that he was treated differently than comparable employees outside of the protected class. . . . The district court found that Dunlap established each of these factors by showing that (1) Dunlap is African-American, (2) he was qualified for the job, and (3) white applicants with less experience were hired for the boilermaker

positions. The district court did not clearly err in this determination. To rebut a prima facie case, a defendant must articulate a legitimate nondiscriminatory reason for the plaintiff's rejection. . . . In this case, TVA presented the selection matrix used during Dunlap's interview, and showed that his interview scores did not place his final scores into the top ten.

The burden then shifted back to Dunlap to prove that the matrix process was pretext for discrimination. . . . The district court found that Dunlap successfully showed pretext by demonstrating that his matrix score was manipulated to keep him out of the top ten applicants. Evidence before the district court showed that the assigned weight given to the interview was changed by the questioners to favor a more subjective process, interview questions were not objectively evaluated, and scores were altered to produce a racially biased result. The district court was therefore not clearly erroneous in finding that Dunlap's matrix score was used in a pretextual way.

First, the selection committee determined that the interview would account for seventy percent of an applicant's final score, and technical expertise would account for thirty percent, therefore transferring the bulk of the final score from an objective measurement (merit and experience) towards a subjective measurement (communication skills). The TVA's "Principles and Practices" on filling vacant positions, however, mandate that "merit and efficiency form the basis for selection of job candidates," stating that "education, training, experience, ability and previous work performance serve as a basis for appraisal of merit and efficiency." . . . .

During the interview, the scores varied widely even on seemingly objective questions. Dunlap reported that his attendance record was excellent with only a few days off for family illness and received a score of 3.7. In contrast, when two white applicants gave essentially the same answer, they received a 4.2 and a 5.5. For Dunlap's perfect safety record, he received a 4, while another applicant who had had two accidents in eleven years received a score of 6. Points were also awarded for politeness in answering the first interview question, with an extra half-point awarded for answering "yes, ma'am."

After the interview, the "score balancing" process seems to have been manipulated, again in contravention of TVA policy. The district court found that some of the score sheets were changed as many as seventy times, and there is no evidence of legitimate reasons to support such revisions. . . .

> Once a proffered reason is found to be pretextual, a court may infer the ultimate fact of intentional discrimination. . . . Here, there was ample evidence supporting the district court's finding of pretext, including the contravention of TVA rules on conducting interviews and measuring candidate merit, and the ultimate manipulation of the matrix scores. Considering all of the evidence, the district court found that TVA used the selection process "to mask [TVA's] preferential hiring process" and "to select one black applicant that would satisfy the TVA central management." . . . . Therefore the district court's finding of intentional discrimination was not clearly erroneous.

Case Questions:
The court opinion referred to a "protected class." How is every employee a member of a protected class?

Disparate Impact

Disparate treatment is sometimes called intentional discrimination. This label is applied as disparate treatment involves a conscious decision to treat employees differently based on a protected characteristic. This is distinguished from the second major form of illegal discrimination, disparate impact. Occasionally labeled unintentional discrimination, disparate impact violations of the law may come about through accidental error by the employer.[1] The basic ingredient of disparate impact is proof that some employment practice, policy, or decision affects one class of employee more harshly than it affects another class.

A prima facie case of disparate impact is usually established by statistical evidence showing that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of all applicants. If this is successfully showed, the employer must either change the employment practice causing the adverse impact or prove the practice is necessary for the business. An example of adverse impact would be an employer that requires all employees to be, at a minimum, 6 feet tall. On average, men are taller than women. Therefore, under this employment practice more men than women would be hired. Height is not a protected civil rights class. However, the employer's use of height in a manner that benefits men over women may violate the prohibition against gender discrimination.

How much of a negative impact is needed to invoke Title VII protection? The law itself is silent on the issue and the courts have not agreed on the exact impact necessary to

[1] Disparate impact cases may involve intentional violations of civil rights laws. For example, an employer may adopt an employment practice having a disparate impact due to the employer's desire to restrict employment of, for example, racial or ethic minorities. However, establishing disparate impact does not require proof of intentional employer misconduct.

make up an adverse impact. The EEOC and the U.S. Departments of Labor and Justice have adopted a set of uniform guidelines applying to employee selection. The Uniform Guidelines on Employee Selection Procedures take the position the selection rates for any sex, race, or ethnic group must be at least 80% of the selection rate for the highest scoring group.[2] This is known as the **four-fifths rule**. A selection rate below 80% will be challenged by the EEOC, requiring the employer to prove the selection procedures used are a business necessity, a defense presented in the next section of this chapter.

The following chart summarizes the rules of disparate impact. After the chart, disparate impact is the focus of an EEOC court challenge against Domino's Pizza.

Proving Discrimination
Disparate Impact

- **Employee** proves a "neutral" employment practice has an adverse impact on a protected class, or employee loses. If successful,
- **Employer** proves employment practice is job-related and a business necessity, or employer loses. If successful,
- **Employee** counters that there is a less restrictive alternate employment practice

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[2] 29 C.F.R. §1607.4(D) (2001).

Bradley
v.
Pizzaco of Nebraska, Inc.

939 F.2d 610
United Stated Court of Appeals, 8th Circuit, 1991

Fagg, J. **[Litigation & Factual Background]** - Langston Bradley brought this disparate impact case against Domino's Pizza, Inc. and Pizzaco of Nebraska, Inc. (collectively Domino's) claiming his discharge for failure to comply with Domino's no-beard policy violates Title VII because the policy discriminates against black males. The Equal Employment Opportunity Commission (EEOC) intervened on behalf of Bradley and other black males adversely affected by Domino's no-beard policy. The EEOC seeks an injunction requiring Domino's to recognize an exception to the policy for black men who medically are unable to shave, but does not dispute that Domino's is otherwise free to enforce its policy. The district court concluded "the EEOC ... failed to establish [Domino's policy has] a disparate impact on black males" and dismissed its complaint. The district court also found Bradley could comply with Domino's no-beard policy and dismissed his complaint. The EEOC and Bradley appeal. We reverse in part, affirm in part, and remand for further proceedings.

The controlling facts are not complicated. Domino's grooming policy prohibits company employees from wearing beards. Pizzaco, a Domino's franchisee, hired Bradley to deliver pizzas, but fired him within two weeks because he would not remove his beard. Bradley is a black man who suffers from pseudofolliculitis barbae (PFB), a skin disorder affecting almost half of all black males. The symptoms of PFB--skin irritation and scarring--are brought on by shaving, and in severe cases PFB sufferers must abstain from shaving altogether. Domino's policy, however, provides for no exceptions. As Pizzaco's owner explained, "you must be clean-shaven to work for Domino's." Although Bradley contended otherwise, the district court found he could shave without complications.

[Disparate Impact] This case, then, is about a facially neutral employment policy that discriminates against black males when applied. Title VII forbids employment policies with a disparate impact unless the policy is justified by legitimate employment goals. **[The legal standard used by the court, " legitimate employment goals," has been changed by the Civil Rights Act of 1991. Now an employer must defend a**

showing of disparate impact by showing that the challenged practice is job related and a business necessity.] . . . The EEOC contends the district court committed error in holding the EEOC failed to satisfy these requirements. We agree**.** Through expert medical testimony and studies, the EEOC demonstrated Domino's policy necessarily excludes black males from the company's work force at a substantially higher rate than white males. In so doing, the EEOC has shown Domino's facially neutral grooming requirement operates as a "built-in headwind" for black males. . . . .

The record shows PFB almost exclusively affects black males and white males rarely suffer from PFB or comparable skin disorders that may prevent a man from appearing clean-shaven. Dermatologists for both sides testified that as many as forty-five percent of black males have PFB. The EEOC's dermatologist offered his opinion that approximately twenty-five percent of all black males cannot shave because of PFB. The district court, however, rejected the offer of this opinion on the ground the dermatologist was not qualified to testify about PFB's impact on the black male population's ability to shave. The district court committed error. When the disparity under attack has its roots in a medical condition peculiar to a protected racial group, the disqualifying racial condition and its prevalence may be established by expert medical testimony. The record and the dermatologist's resume show he has extensive experience in the field of dermatology, and has conducted studies, written articles, and lectured on the topic of PFB. By holding this medical expert could not testify about the prevalence of a medical condition within his area of expertise, despite his wealth of relevant training, study, and experience, the district court clearly abused its discretion. . . . Thus, this expert's opinion must be considered as part of the EEOC's prima facie case. . . .

The EEOC's evidence makes clear that Domino's strictly-enforced no-beard policy has a discriminatory impact on black males. PFB prevents a sizable segment of the black male population from appearing clean-shaven, but does not similarly affect white males. Domino's policy--which makes no exceptions for black males who medically are unable to shave because of a skin disorder peculiar to their race--effectively operates to exclude these black males from employment with Domino's. Thus, having concluded the EEOC has shown Domino's grooming policy falls more harshly on blacks than it does on whites, we must reverse the district court's holding that the EEOC failed to make a prima facie showing of disparate impact.

Employer Defenses

Federal civil rights laws and the courts recognize exceptions to prohibiting discrimination based on protected categories. A valid affirmative action plan is a defense to discrimination claims. In addition, in response to a claim of disparate treatment, an employer may assert the defense that discrimination is a **bona fide occupational qualification** (BFOQ).[3] (Of course, another "defense" is trying to prove that discrimination did not take place.) A BFOQ is a workplace decision, which although discriminatory, is reasonably necessary to the normal operation of that particular business. An example allowed by the courts is a Chinese restaurant hiring only Chinese table servers. This discrimination by race or national origin is viewed as necessary for the authenticity of the restaurant.

The courts narrowly construe the BFOQ defense. It is available only for those cases where discrimination is necessary, not simply preferred. For example, customer preference is not a valid basis for the BFOQ defense. It is not relevant if customers of a business will not accept a salesclerk that is Hispanic, Muslim, or female. The business cannot use customer resistance to an employee because of the employee's protected characteristics as a basis for the BFOQ defense. *Breiner v. Nevada Dept. of Corrections*, below, presents the BFOQ defense in a gender setting.

A defense available for disparate impact cases is **business necessity**. Disparate impact involves a claim that an employment practice has an adverse impact on one protected class of employees versus another class of employees. If adverse impact is proved, the employer must defend the use of the challenged employment practice by proving the practice is a necessary business practice.

BREINER
V.
NEVADA DEPT. OF CORRECTIONS
Court of Appeals, Ninth Circuit - 2010

OPINION BY: Marsha S. Berzon
The Nevada Department of Corrections (NDOC) hires only female correctional lieutenants at a women's prison. The district court granted summary judgment upholding NDOC's discriminatory employment policy, concluding that the policy imposed only a "de minimis" restriction on male prison employees' promotional opportunities and, alternatively,

[3] 42 U.S.C. §2000e-2(e).

that the policy falls within Title VII's exception permitting sex discrimination in jobs for which sex is a bona fide occupational qualification, 42 U.S.C. § 2000e-2(e)(1). We reverse as to both holdings.

FACTUAL & PROCEDURAL BACKGROUND

In September 2003, NDOC's Inspector General learned that a female inmate at the Southern Nevada Women's Correctional Facility (SNWCF) had been impregnated by a male guard. At the time, SNWCF was operated by a private company, Corrections Corporation of America (CCA). The pregnant inmate alleged that her relationship with the guard stemmed from CCA's refusal to provide the psychotropic medications she had long been prescribed to treat her schizophrenia. NDOC Director Jackie Crawford acknowledged that her office had received a number of complaints concerning medical issues at SNWCF. At Crawford's direction, the Inspector General interviewed approximately 200 inmates about "their personal experiences with the medical function at [SNWCF]." Nearly all the inmates reported receiving substandard medical treatment.

In the course of the investigation, the Inspector General also discovered that SNWCF had become "an uninhibited sexual environment." He noted "frequent instances of inappropriate staff/inmate interaction," "flirtatious activities between staff and inmates," and "widespread knowledge" of "long-term inmate/inmate sexual relationships." In exchange for sex, prison staff "routinely introduce[d] . . . contraband into the institution, including alcohol, narcotics, cosmetics, [and] jewelry." The inmates' sexual behavior--which they freely admitted was designed to "compromise staff and enhance inmate privileges"--was, in the Inspector General's view, "predictable." The Inspector General attributed the guards' misconduct to "a lack of effective supervisory management oversight and control. . . . There is no evidence that supervisors or managers recognize this risky behavior or do anything to stop it." To address this "leadership void," the Inspector General recommended that "line supervisors undergo leadership training" and that "subordinate staff undergo re-training with emphasis on inmate con games and ethical behavior."

In the wake of the Inspector General's report, which ignited "very high profile" media coverage, CCA announced that it was terminating its contract to operate SNWCF. NDOC resumed control of the facility and, according to Crawford, faced intense political pressure to "mitigate the number of newspaper articles" and to "assure the State of Nevada that we would not be embarrassed like this again." To achieve this goal, Crawford decided to restaff the facility so that seventy percent of the front line staff at SNWCF would be women.

Crawford also decided to hire only women in SNWCF's three correctional lieutenant positions. The correctional lieutenants are shift supervisors and

are the senior employees on duty seventy-five percent of the time. Correctional lieutenants report to wardens or deputy wardens and are responsible for supervising the prison's day-to-day operations, including directing the work of subordinate staff, inspecting the facility and reporting infractions, and monitoring inmates' activities and movement through the facility. There is one correctional lieutenant assigned to SWNCF per shift. Although the correctional lieutenant posting specified that "only female applicants will be accepted for these positions," several males applied for the positions, which were eventually filled by three women.

Edward Breiner, Loren Chapulin, Jimmie McNeal and Randy Stout, the present plaintiffs, all male Nevada correctional officers, were not among the men who applied for the SNWCF correctional lieutenant positions. They nonetheless filed charges with the Equal Employment Opportunity Commission, received notice of their right to sue, and filed suit alleging that the state's decision to limit the correctional lieutenant positions to women violated Title VII's prohibition on sex discrimination in employment.[4] . . . [**An interesting question is why did the EEOC refuse to take this case, one that appears to be a strong case for the plaintiffs? – J. Pittman**]

TITLE VII CLAIM
It is unlawful, with narrow exceptions, "to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Failure to promote is actionable under Title VII. *See, e.g., McGinest v. GTE Serv. Corp*., 360 F.3d 1103, 1121-22 (9th Cir. 2004). NDOC concedes that its refusal to consider men for the correctional lieutenant positions at SNWCF is facially discriminatory.

The district court granted summary judgment to NDOC on two alternative grounds. First, the district court concluded that NDOC's refusal to hire male correctional lieutenants at SNWCF had a negligible impact on the plaintiffs' promotional opportunities in light of the correctional lieutenant positions available statewide to employees of both sexes. The district court held that this "de minimis" discrimination was not actionable under Title VII. Second, the district court held that, even if actionable, the gender restriction on correctional lieutenant positions at SNWCF fell within Title VII's BFOQ exception for "those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal

[4] The only claim before us is a Title VII claim against NDOC with regard to the correctional lieutenant positions. The seventy-percent-female restriction on front line guards is not at issue in this litigation.

operation of [a] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). We . . . reverse as to both grounds. . . .

Gender as a Bona Fide Occupational Qualification

Title VII's BFOQ exception provides:
[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [ ] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e)(1). As its language indicates, *see Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 201, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991), the BFOQ is an "extremely narrow exception to the general prohibition of discrimination on the basis of sex" that may be invoked "only when the *essence* of the business operation would be undermined" by hiring individuals of both sexes. *Dothard v. Rawlinson*, 433 U.S. 321, 333-34, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977) (citing *Diaz v. Pan Am. World Airways, Inc*., 442 F.2d 385, 388 (5th Cir. 1971)). To justify discrimination under the BFOQ exception, an employer must prove by a preponderance of the evidence: 1) that the job qualification justifying the discrimination is reasonably necessary to the essence of its business; and 2) that [sex] is a legitimate proxy for the qualification because (a) it has a substantial basis for believing that all or nearly all [men] lack the qualification, or . . . (b) it is impossible or highly impractical . . . to insure by individual testing that its employees will have the necessary qualifications for the job. . . .

NDOC has not explicitly articulated the "job qualification" for correctional lieutenants for which it claims sex is a legitimate proxy. We are left to try to adduce what that "qualification" might be from the declarations by NDOC officials on which the defendants rely in their briefs as justification for the facially discriminatory policy.. . .

From [their briefs], it appears that NDOC administrators sought to "reduce the number of male correctional employees being compromised by female inmates," and that they believed the gender restriction on shift supervisors would accomplish this because (1) male correctional lieutenants are likely to condone sexual abuse by their male subordinates; (2) male correctional lieutenants are themselves likely to sexually abuse female inmates; and (3) female correctional lieutenants possess an "instinct" that renders them less susceptible to manipulation by inmates and therefore better equipped to fill the correctional lieutenant role.[5]

[5] NDOC also suggests that privacy and rehabilitation were among the "factors . . . considered important" in implementing the gender restriction. Neither in its briefs nor at oral argument, however, was NDOC able to direct the court to any evidence that Crawford or

The first theory fails because NDOC has not shown that "all or nearly all" men would tolerate sexual abuse by male guards, or that it is "impossible or highly impractical" to assess applicants individually for this qualification. . . . . As to the second theory, there is no "basis in fact," *Dothard*, 433 U.S. at 335, for believing that individuals in the correctional lieutenant role are particularly likely to sexually abuse inmates. The third theory--and, to a significant degree, the first two--relies on the kind of unproven and invidious stereotype that Congress sought to eliminate from employment decisions when it enacted Title VII. . . .

. . . [I]n suggesting that all men are inherently apt to sexually abuse, or condone sexual abuse of, female inmates, NDOC relies on entirely specious gender stereotypes that have no place in a workplace governed by Title VII. NDOC's third theory, that women are "maternal," "patient," and understand other women, fails for the same reason. To credit NDOC's unsupported generalization that women "have an instinct and an innate ability to discern . . . what's real and what isn't" and so are immune to manipulation by female inmates would violate "the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the . . . ability of women to do particular work." *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *see also Diaz*, 442 F.2d at 386 (rejecting an air-line's contention that "the special psychological needs of its passengers . . . are better attended to by females"). "The harmful effects of occupational cliches," *Gerdom v. Continental Airlines*, 692 F.2d 602, 607 (9th Cir. 1982), are felt no less strongly when invoked as a basis for one gender's unique suit-ability for a particular job than when relied on to exclude members of that sex from employment. Simply put, "we are beyond the day when an employer [**35] could . . . insist[ ] that [employees] matched the stereotype associated with their group." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

A BFOQ can be established only by "objective, verifiable requirements [that] concern job-related skills and aptitudes." . . . . NDOC has not met its burden of showing "a basis in fact," *Dothard*, 433 U.S. at 335, for concluding that all male correctional lieutenants would tolerate sexual abuse by their subordinates; that all men in the correctional lieutenant role would themselves sexually abuse inmates; or that women, by virtue of their gender, can better understand the behavior of female inmates. Nor has it refuted the viability of alternatives that would achieve that goal without impeding male employees' promotional opportunities.
. . .

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other administrators actually considered privacy or rehabilitation in developing the policy. This void is not surprising, as it is the guards who have direct daily contact with the inmates, not the correctional lieutenants. As noted, NDOC, in a separate policy not here challenged, restricts the number of front line guards in female prisons. As there is no evidence in this record to indicate that concern about privacy or rehabilitation was a basis for the decision to preclude men from serving in the supervisory positions, we do not consider those rationales in our BFOQ analysis.

The "Bottom-Line" Defense

Statistics play a central role in disparate impact cases. Plaintiffs attempting to challenge a particular "neutral" employment practice as having an adverse impact must generally establish the impact through statistics. For example, assume a transportation company requires employment applicants to be physically able to lift 70 pounds to be eligible for employment. In order to establish an adverse impact, female applicants would be required to prove that statistically more men than women are able to lift 70 pounds. If the statistics were equal, that is, if the same percentage of women and men can lift 70 pounds, this bottom-line equality would stop the plaintiffs' claim of disparate impact. (If the statistics are not equal, the employer may defend the strength requirement by establishing that the required strength is a business necessity for the position in question.)

The notion of bottom-line equality, relevant for disparate impact, is not relevant for disparate treatment cases. That is, if an African-American employee proves he was denied a promotion based on his race, the employer can not defend by proving that the percentage of African-American managers at the firm is equal to the general population percentage of African-Americans. This use of the bottom-line defense was rejected in the following Supreme Court case.

Connecticut
v.
Teal

457 U.S. 440
Supreme Court of the United States, 1982

Brennan, J. - We consider here whether an employer sued for violation of Title VII of the Civil Rights Act of 1964 may assert a "bottom-line" theory of defense. Under that theory, as asserted in this case, an employer's acts of racial discrimination in promotions - effected by an examination having disparate impact - would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the "bottom-line" result of the promotional process was an appropriate racial balance. We hold that the "bottom line" does not preclude respondent employees from establishing a prima facie case, nor does it provide petitioner employer with a defense to such a case. . . .

[Title VII of the Civil Rights Act of 1964] prohibits practices that would deprive or tend to deprive "*any individual* of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. . . . In suggesting that the "bottom line" may be a defense to a claim of discrimination against an individual employee, petitioners . . . appear to confuse unlawful discrimination with discriminatory intent. The Court has stated that a nondiscriminatory "bottom line" and an employer's good-faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that particular action had been intentionally discriminatory: . . . But resolution of the factual question of intent is not what is at issue in this case. Rather, petitioners seek simply to justify discrimination against respondents on the basis of their favorable treatment of other members of respondents' racial group. Under Title VII, "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." . . . It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.

Additional Cases

Ali v. Mount Sinai is an interesting presentation of the evidence needed by a plaintiff. The *prima facie* presumption of discrimination is a device allowing the plaintiff adequate time to develop evidence. Ali did not develop her case beyond the mere allegation stage. That, according to the court, is not sufficient.

Ali
v.
Mount Sinai Hospital

1996 WL 325585
United States District Court, Southern District of New York, 1996

Gershon, J. - , United States Magistrate Judge: Pursuant to the Civil Rights Act of 1964, . . . (Title VII), plaintiff claims that her employer, Mount Sinai Hospital, and the supervisor of her unit, Dr. Elizabeth Shields, engaged in discriminatory enforcement of the Hospital's dress code and that they retaliated against her for bringing union grievances which claimed racial discrimination. . . . Plaintiff claims that the discrimination was based upon her race and color and describes herself as a black female of African descent.

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff can offer (1) no evidence that the dress code was enforced against her in a racially discriminatory manner and (2) no evidence that various allegedly retaliatory actions taken against her actually occurred or, if they occurred, that they were causally related to her having filed union grievances claiming racial discrimination.

[Factual Background] . . . According to Ms. Ali, she began her employment at Mount Sinai Hospital on March 16, 1975 as a food service worker and, seeking advancement, obtained a transfer, in 1981, to the position of unit clerk in the Cardiothoracic Surgical Intensive Care Unit ("CSICU") of the Hospital. Until 1985, Ms. Ali's immediate supervisor in the CSICU was Edith Diasis; then, Eva Mondejar became her immediate supervisor. Ms. Ali's immediate supervisor reported to defendant, Dr. Elizabeth Shields, the Assistant Director of the CSICU. Ms. Diasis and Ms. Mondejar are described by plaintiff as of Asian descent and defendant Shields as of European descent.

Ms. Ali received favorable personnel evaluations while at the CSICU. . . . On her 1986 evaluation, while rated overall as "above average," and rated favorably in various individual categories, including her relationships to peers and nursing staff, she was found to have "difficulty in accepting directions and counseling from leadership (Clinical Supervisor) on several occasions;" a problem with lateness and attendance was also noted. . . .

[Dress Code] - It is undisputed that, at all relevant times, the Hospital had a detailed three-page dress code for all of its nursing department staff, including unit clerks. . . . It expressly provided that "[t]he style chosen be conservative and in keeping with the professional image in nursing" and that the "Unit clerks wear the blue smock provided by the Hospital with conservative street clothes." . . . The wearing of boots, among other items of dress, was expressly prohibited. With regard to hair, the dress code provided that "it should be clean and neatly groomed to prevent interference with patient care" and only "plain" hair barrettes and hairpins should be worn. As plaintiff acknowledges, "The hallmark of said code was that the staff had to dress and groom themselves in a conservative manner." . . .

It is also undisputed that Ms. Ali violated the dress code. In December 1985, Ms. Ali reported to work at the CSICU wearing a red, three-quarter length, cowl-necked dress and red boots made of lycra fabric which went over her knees. . . . Over her dress, Ms. Ali wore the regulation smock provided by the Hospital. She wore her hair in what she says she then called a "punk" style. . . . According to Dr. Shields, Ms. Ali's hair was not conservative because it "was so high" and "you noticed it right away because it was high and back behind the ears and down. It certainly caused you to look at her. It caused attention." . . . Dr. Shields testified: "I told her about the whole outfit. She had red boots, red dress, in the unit. This is the post open heart unit. People come out of here after just having cracked their chest. We were expected to be conservative." . . .

Plaintiff, while not disputing that she violated the dress code, claims that other, white personnel also violated the code, but it was not enforced against them. The evidence which Ms. Ali offers to support this claim is her own testimony regarding the non-compliance of four Hospital employees. Ms. Ali testified that Ms. Sansky wore her hair in a "punk" style with one side approximately one inch long and the other side down to her neck; that Meredith Rojoff wore red fingernail polish and excessive make-up; that Josephine Sollano wore a gold fingernail and long hair; and that Vicki Goldstein wore long hair that was not in compliance with the dress code. . . . Ms. Ali testified that all four women were Caucasian. . . . Plaintiff offered no evidence as to whether the dress code was enforced against these individuals. When asked at her deposition, she denied any knowledge as to whether Dr. Shields or Ms. Mondejar had ever advised them that they were in violation of the code. . . .

Dr. Shields testified, without contradiction, that she had had occasion to speak to "some of the nursing personnel in CSICU" regarding their dress or hair. . . . In particular, she remembered that "we had to write up" Vicki Goldstein because "[s]he had hair that she refused to put back from her face. It was totally unacceptable." . . .. When spoken to, Ms. Goldstein corrected the problem. . . .

[Legal Analysis] - *Summary Judgment Standards.* Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment may be granted where "there is no genuine issue as to any material fact" and a party is "entitled to judgment as a matter of law." . . . Here, reviewing the evidence with the awareness that a discriminatory intent is often hidden and difficult to ascertain, I am nonetheless convinced that plaintiff's evidence is

insufficient to create an issue of fact as to the existence of either discrimination or retaliation. . . . To establish a prima facie case of individualized disparate treatment from an alleged discriminatory enforcement of the dress code, plaintiff must show that she is a member of a protected class and that, at the time of the alleged discriminatory treatment, she was satisfactorily performing the duties of her position. This she has done. However, her prima facie showing must also include a showing that Mount Sinai Hospital had a dress code and that it was applied to her under circumstances giving rise to an inference of discrimination. . . . That is, "a Title VII plaintiff initially must bear the burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." . . . Although the level of proof required for a prima facie case is low, . . . where a plaintiff cannot meet that burden, there is no duty to proceed further. . . .

[R]eviewing all of the evidence submitted on the motion, plaintiff does not raise an issue of fact as to whether the enforcement of the code against her was discriminatory. There is no dispute that plaintiff was in violation of the dress code. Her claim is that the dress code was enforced against her but not against others, who also violated its requirements, but were not black. The problem is the utter lack of evidence supporting this position.

Plaintiff offers no evidence that the dress code was not enforced against other Hospital employees as it was against her. Dr. Shields' testimony that the dress code had been enforced against other nurses, including Vicki Goldstein, was not disputed. Although Ms. Ali identified certain Caucasian women whom she believed were in violation of the code, she failed to set forth any evidence to show a lack of enforcement. . . . Plaintiff, at her deposition, testified as follows:

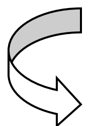
> Q. Now you have described four people that you think violated the dress code. Do you know if Dr. Shields or Ms. Mondejar ever informed any of those four people that they had in fact violated the dress code?
> A. No....
> Q. Did you ever ask Ms. Sansky, Ms. Rojoff, Ms. Sollano or Ms. Goldstein whether they had been spoken to about the dress code?
> A. I believe I asked a few of them, but I can't recall the names.
> Q. Do you remember what any of them told you?
> A. I said no. . . .

All that plaintiff's testimony establishes is that she was unaware of the enforcement of the dress code against others. Following a full opportunity for discovery, plaintiff has not proffered any additional evidence to support her claim of disparate treatment. On this record, there is no reason to believe that plaintiff will be able to offer at trial evidence from which a jury could reasonably conclude that there was racially discriminatory enforcement of the dress code. . . . It is not enough that Ms. Ali sincerely believes that she was the subject of discrimination; "[a] plaintiff is not entitled to a trial based on pure speculation, no matter how earnestly held." . . . Summary judgment is appropriate here because plaintiff has failed to raise an issue of fact as to whether the dress code was enforced against her under circumstances giving rise to an inference of discrimination. . . .

Chapter 8 -
Race Discrimination

Chapter 8 - Cognitive Objectives

1. Identify and apply the statutory bases for protection against discrimination based on race.
2. Analyze race discrimination cases under disparate treatment and disparate impact theories.



3. Explain and apply the discrimination principles explained in *McDonald v. Santa Fe Trail Transportation*.
4. Explain the Census Bureau race and Hispanic statistics.
5. Identify the racially discriminatory behavior found in *Vaughn v. Edel*. Apply similar analysis to hypothetical problems.
6. Identify and apply the principles of racial harassment, including the liability principles. Explain *Little v. NBC* and apply the case analysis to hypothetical problems.
7. Explain and apply the Supreme Court's decisions in *Vance v. Ball State University* and *Ricci v. DeStefano*

Statutory Bases – Race Discrimination

The Civil Rights Act of 1964, Title VII

42 U.S.C. §2000e-2:
(a) It shall be an unlawful employment practice for an employer --
(1) to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's **race**, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's **race**, color, religion, sex, or national origin. . . .
(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. §2000e-2(a):
(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community . . ..

The Civil Rights Act of 1866

42 U.S.C. §1981:
"All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . .. "

Overview – Race Discrimination

Discrimination based on race has a well-known, infamous place in the legal history of the United States. We have grappled with issues of race and society throughout the history of our country. The issues of race, racial discrimination, and legal rights were debated at the Philadelphia convention in 1787 where our Constitution was formed. However, the Constitution did not set up racial equality. Slavery continued to be lawful until changes were brought through the Civil War. Though the Civil War ended slavery, racial discrimination did not abate. In response, Congress passed the first civil rights act, in 1866. Racial discrimination continued to be a problem through the intervening years, leading to the passage of the law felt to be the most powerful protective legislation, the 1964 Civil Rights Act.

After passage of the 1964 Civil Rights Act, some were confused with legal versus illegal discrimination. Was it legal to discriminate in favor of a racial minority employee? Were Caucasian employees protected? Were men protected? The answer to these questions is that everyone is protected by the 1964 Civil Rights Act. Protection flows to men and women, African-American, Caucasians, and Hispanics, and Catholics and Protestants. The following Supreme Court case answered this point in the context of racial discrimination. The author of the opinion is Thurgood Marshall, the first African-American Supreme Court justice. The employees discriminated against were white.

McDonald
v.
Santa Fe Transportation

427 U.S. 273
Supreme Court of the United States, 1976

Marshall. J. - Petitioners, L. N. McDonald and Raymond L. Laird, brought this action in the United States District Court for the Southern District of Texas seeking relief against Santa Fe Trail Transportation Co. (Santa Fe) . . . for alleged violations of the Civil Rights Act of 1866, 42 U.S.C. §1981, and of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., in connection with their discharge from Santa Fe's employment. The District Court dismissed the complaint on the pleadings. The Court of Appeals for the Fifth Circuit affirmed. In determining whether the decisions of these courts were correct, we must decide, first, whether a complaint alleging that white employees charged with misappropriating property from their employer were dismissed from employment, while a black employee similarly charged was not dismissed, states a claim under Title VII. Second, we must decide whether §1981, which provides that "(a)ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . " affords protection from racial discrimination in private employment to white persons as well as nonwhites. . . . We reverse.

Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race." . . . Its terms are not limited to discrimination against members of any particular race. Thus, although we were not there confronted with racial discrimination against whites, we described the Act in Griggs v. Duke Power Co. . . as prohibiting "(d)iscriminatory preference for any (racial) group, Minority or Majority" (emphasis added). . . .

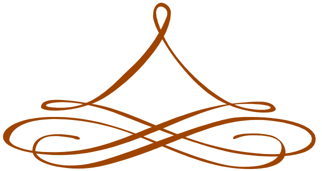
This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover white men and white women and all Americans." . . . We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white. . . . Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted. . . .

Respondents contend that, even though generally applicable to white persons, Title VII affords petitioners no protection in this case, because their dismissal was based upon their commission of a serious criminal offense against their employer. We think this argument is foreclosed by our decision in McDonnell Douglas Corp. v. Green. . . .

In McDonnell Douglas, a laid-off employee took part in an illegal "stall-in" designed to block traffic into his former employer's plant, and was arrested, convicted, and fined for obstructing traffic. At a later date, the former employee applied for an open position with the company, for which he was apparently otherwise qualified, but the employer turned down the application, assertedly because of the former employee's illegal activities against it. Charging that he was denied reemployment because he was a Negro, a claim the company denied, the former employee sued under Title VII. Reviewing the case on certiorari, we concluded that the rejected employee had adequately stated a claim under Title VII. . . . Although agreeing with the employer that "(n)othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it," . . . we also recognized:

"(T)he inquiry must not end here. While Title VII does not, without more, compel rehiring of (the former employee), neither does it permit (the employer) to use (the former employee's) conduct as a pretext for the sort of discrimination prohibited by (the Act). On remand, (the former employee) must . . . be afforded a fair opportunity to show that (the employer's) stated reason for (the former employee's) rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against (the employer) of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. (The employer) may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." . . .

We find this case indistinguishable from McDonnell Douglas. Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white. . . . While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be "applied, alike to members of all races," and Title VII is violated if, as petitioners alleged, it was not. . . .



America is a racially diverse country. The civil rights prohibition on discrimination based on race or color highlight our diversity. Every decade the United States Census Bureau conducts a census to identify where we are, as a country, on a wide variety of demographic categories. The latest census data identifies what American citizens reported in response to the census questions on race and Hispanic origin.

Population by Race and Hispanic Origin for the United States
Source: U.S. Census Bureau, Census 2010

Total U.S. population: 308,745,538	**Percent of total Population**
Race	**100%**
One Race	97.1%
White	72.4%
Black or African American	12.6%
American Indian and Alaska Native	0.9%
Asian persons	4.8%
Native Hawaiian and Other Pacific Islander	0.2%
Some other race	6.2%
Two or more races	2.9%
Hispanic or Latino	
Not Hispanic or Latino	83.7%
Persons of Hispanic or Latino origin	16.3%

The above data is based on census survey responses. That is, the data is self-reported. Category selections are as determined by each individual on his or her census form. The federal government considers race and Hispanic origin to be two separate concepts. On the census survey, every individual is asked to identify his or her race. In addition, every individual is asked if they are Spanish, Hispanic, or Latino. Under this reporting method, Hispanics may be of any race. From the Census 2010 results, the leading Hispanic race was “white” (53.0%), closely followed by “some other race” (36.7%).

Race, as defined by the United States Census Bureau

White. A person having origins in any of the original peoples of Europe, the Middle East, or North Africa. It includes people who indicate their race as "White" or report entries such as Irish, German, Italian, Lebanese, Near Easterner, Arab, or Polish.

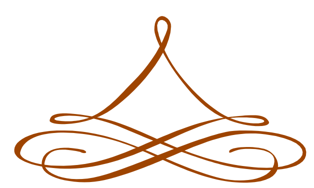
Black or African American. A person having origins in any of the Black racial groups of Africa. It includes people who indicate their race as "Black, African Am., or Negro," or provide written entries such as African American, Afro American, Kenyan, Nigerian, or Haitian.

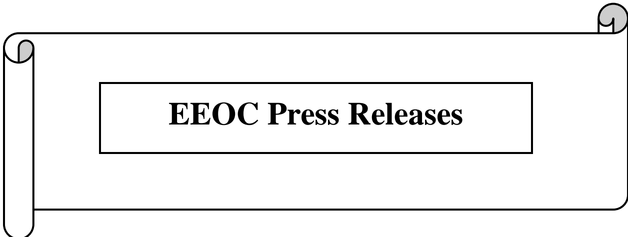
American Indian and Alaska Native. A person having origins in any of the original peoples of North and South America (including Central America) and who maintain tribal affiliation or community attachment.

Asian. A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam. It includes "Asian Indian," "Chinese," "Filipino," "Korean," "Japanese," "Vietnamese," and "Other Asian."

Native Hawaiian and Other Pacific Islander. A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands. It includes people who indicate their race as "Native Hawaiian," "Guamanian or Chamorro," "Samoan," and "Other Pacific Islander."

Some other race. Includes all other responses not included in the "White", "Black or African American", "American Indian and Alaska Native", "Asian" and "Native Hawaiian and Other Pacific Islander" race categories described above. Respondents providing write-in entries such as Moroccan, South African, Belizean, or a Hispanic/Latino group (for example, Mexican, Puerto Rican, or Cuban) in the "Some other race" category are included here.





The following press release is an example from the hundreds of similar announcements from the Equal Employment Opportunity Commission.

February 28, 2012

EEOC SUES SPARX RESTAURANT FOR RACE DISCRIMINATION AND RETALIATION

Menomonie 'Family Restaurant' Fired Employee for Objecting to Noose, KKK Imagery, Federal Agency Charged

MILWAUKEE – The owners of Sparx, a Menomonie, Wis., restaurant, violated the law when managers posted racist imagery and then fired an African-American employee after he complained, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit filed on March 27, 2012.

According to EEOC's lawsuit, Dion Miller arrived for his regularly scheduled shift at the restaurant to find taped to the cooler a picture of African-American actor Gary Coleman and a dollar bill which had been defaced such that a noose was around the neck of George Washington, whose face had been blackened. Also on the dollar bill were swastikas and the image of a man in a Ku Klux Klan hood. Sparx managers told Miller that they had posted the images the evening before but, when Miller complained, insisted that it was "a joke." Miller was terminated within weeks of complaining about the racist imagery, for allegedly having "a bad attitude." The EEOC charged that Sparx in fact terminated Miller in retaliation for opposing race discrimination.

Such alleged conduct violates Title VII of the Civil Rights Act of 1964. The EEOC filed suit against the restaurant's owners, Northern Star Hospitality, Inc., in U.S. District Court for the Western District of Wisconsin (Civil Action No. 12-cv-214) after first attempting to reach a pre-litigation settlement through its conciliation process. The EEOC is seeking injunctive relief to prevent future discrimination, as well as back pay, reinstatement, and compensatory and punitive damages.

"Sparx bills itself as a 'family restaurant' even as its managers posted imagery which evokes shameful memories of racially motivated physical attacks and lynchings," said

John Hendrickson, regional attorney for the Chicago district of the EEOC. "Sparx then made a bad situation worse by firing the man who had the guts to stand up to it. The EEOC will stand up for people like Dion Miller."

The EEOC's Chicago District Office is responsible for processing discrimination charges, administrative enforcement, and the conduct of agency litigation in Illinois, Wisconsin, Minnesota, Iowa and North and South Dakota, with Area Offices in Milwaukee and Minneapolis.

Proving Race Discrimination

The 1964 Civil Rights Act, Title VII prohibits employment discrimination based on race or color. That is, an employer may not make employment decisions based even partially on an employee's race or color. The prohibition on discrimination extends to the following issues:

- **Discrimination by a Member of the Same Protected Class:** Title VII prohibits a member of a protected class from discriminating against another member of the same protected class. For example, an African-American supervisor may not discriminate against African-American subordinates.
- **Discrimination Against a Subclass:** Title VII prohibits discrimination against a subclass of a particular protected group. For example, an employer cannot refuse to hire African-American women with preschool age children if it hires white women with preschool age children.
- **Multi-Class Discrimination:** Title VII prohibits discrimination against an individual based on his/her membership in two or more protected classes. For example, an employer may not discriminate against African-American males even if an employer does not discriminate against white males or African-American females.[1]
- **Color Discrimination:** Title VII prohibitions on race and color discrimination make it illegal for an employer to discriminate against light or dark-skinned African-Americans in favor of the other color.[2]
- **Association Discrimination:** Last, it is illegal to discriminate against an individual because of his/her association with another individual, based on the other individual's race or color. For example, it is unlawful to take an adverse employment action against a white employee because she is married to an individual who is African-American or because she has a mixed-race child.

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[1] *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987).
[2] *Walker v. Secretary of the Treasury*, 713 F. Supp. 403, 405-08 (N.D. Ga. 1989).

The following case, *Vaughn v. Edel*, presents an employer that discriminated based on race with, possibly, good intentions. The intentions were not relevant. The dispute highlights what is involved in the process of discrimination. As you analyze Vaughn, you should be able to identify the legal theory used by the plaintiff as disparate treatment, not disparate impact.

Vaughn
v.
Edel

918 F.2d 517
United States Court of Appeals, 5th Circuit, 1990

Wiener, J. – Plaintiff-Appellant Emma S. Vaughn contests the judgment rendered in favor of defendant Texaco, Inc., dismissing with prejudice Vaughn's race and sex discrimination suit filed pursuant to Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq. Because the magistrate clearly erred in finding no racial discrimination, we reverse. . . .

[Background Facts] In August 1979, Vaughn, a black female attorney, became an associate contract analyst in Texaco's Land Department. Her supervisors were Edel and Alvin Earl Hatton, assistant chief contract analyst. In Vaughn's early years with Texaco she was promoted first to contract analyst and then to petroleum contract analyst. During this period she was the "highest ranked contract analyst" in the department.

The events leading to this dispute began on April 16, 1985, the day after Vaughn had returned from a second maternity leave. On that day, Edel complained to Vaughn about the low volume of her prior work and the excessive number of people who had visited her office. Vaughn later spoke to Keller about Edel's criticism. In a memorandum concerning this discussion, Keller wrote that he had told Vaughn that he had been told that Vaughn's productivity "was very low"; that he "had become aware for

some time of the excessive visiting by predominantly blacks in her office behind closed doors"; and that "the visiting had a direct bearing on her productivity." Keller then told Vaughn, as he noted in his memo, that "she was allowing herself to become a black matriarch within Texaco" and "that this role was preventing her from doing her primary work for the Company and that it must stop."

Keller's remarks offended Vaughn, so she sought the advice of a friend who was an attorney in Texaco's Legal Department. Keller learned of this meeting and of Vaughn's belief that he was prejudiced. To avoid charges of race discrimination, Keller, as he later testified, told Edel "not [to] have any confrontations with Ms. Vaughn about her work." Keller added that "[i]f he [Edel] was dissatisfied, let it ride. If it got serious, then see [Keller]."

Between April 1985 and April 1987 when Vaughn was fired, neither Edel nor Hatton expressed criticism of Vaughn's work to her. During this period all annual written evaluations of Vaughn's performance (which, incidentally, Vaughn never saw) were "satisfactory." Vaughn also received a merit salary increase, albeit the minimum, for 1986. Keller testified that for several years he had intentionally overstated on Vaughn's annual evaluations his satisfaction with her performance because he did not have the time to spend going through the procedures which would result from a lower "rating" and which could lead to termination.

In 1985-86 Texaco undertook a study to identify activities it could eliminate to save costs. To meet the cost-reduction goal set by that study, the Land Department fired its two "poorest performers," one of whom was Vaughn, as the "lowest ranked" contract analyst; the other was a white male. . . .

[Legal Analysis] Vaughn presented direct evidence of discrimination. Keller testified that to avoid provoking a discrimination suit he had told Vaughn's supervisors not to confront her about her work. His "black matriarch" memorandum details the events that led Keller to initiate this policy. Keller also testified that he had deliberately overstated Vaughn's evaluations in order not to start the process that might eventually lead to termination. This direct evidence clearly shows that Keller acted as he did solely because Vaughn is black. Texaco has never offered any evidence to show that in neither confronting Vaughn about her poor performance nor counseling her it would have acted as it did without

> regard to her race. Vaughn has, consequently, established that Texaco discriminated against her. . . .
>
> Although Vaughn's race may not have directly motivated the 1987 decision to fire her, race did play a part, as the magistrate found, in Vaughn's employment relationship with Texaco from 1985 to 1987. Texaco's treatment of Vaughn was not color-blind during that period. In neither criticizing Vaughn when her work was unsatisfactory nor counseling her how to improve, Texaco treated Vaughn differently than it did its other contract analysts because, as the magistrate found, she was black. As a result, Texaco did not afford Vaughn the same opportunity to improve her performance, and perhaps her relative ranking, as it did its white employees. One of those employees was placed on an improvement program. As for the others, Texaco does not deny that they received, at least, informal counseling. The evidence indicates that Vaughn had the ability to improve. As Texaco acknowledges, she was once its "highest ranked contract analyst." . . .

Case Questions:
1. Does it matter legally if Keller's "black matriarch" comment was motivated by racial animus as opposed to a legitimate workplace consideration?
2. What would be a proper employer response to the concerns about Vaughn's productivity?

Racial Harassment

One variation of racial discrimination is racial harassment. The legal theory for racial harassment is identical with that for sexual harassment, covered later in the textbook. Racial harassment is found where unwelcome verbal or physical conduct, of a racial nature, either has the purpose or the effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. For example, a supervisor who belittles or intimidates his black employees more than his white employees may be engaged in racial harassment. Racial harassment violates Title VII in the same manner as the more generic charge of racial discrimination.

The definition of racial harassment may be broken down into the following parts, all of which must be present for a finding of harassment:

1. Unwelcome verbal or physical workplace conduct;
2. Conduct that has a racial component, that is, conduct that would be different if the affected employee's race were different; and

3. Conduct that is sufficiently severe that it both interferes with the employee's ability to perform the job functions and would interfere with a reasonable person's ability to perform the job functions.

Title VII is not viewed by the courts as a general civility code. Therefore, the courts require the third element above, severity. The courts gauge severity by examining a) the intensity of what happened at work, b) the frequency of the offending conduct, and c) the proximity of the conduct to the affected employee, placing the event in the context of the larger workplace.

Racial harassment is the focus of the following case, *Little v. National Broadcasting Company*.

Little
v.
National Broadcasting Company, Inc.
210 F.Supp.2d 330
United States District Court, 2002

Scheindlin, J. - Plaintiffs have filed five individual complaints against their employer, the National Broadcasting Company, Inc. ("NBC"), alleging numerous acts of racial and sexual discrimination throughout their fifteen to twenty-year careers at the company. . . . These cases were consolidated for purposes of pretrial proceedings, and NBC now moves . . . for summary judgment against all plaintiffs. NBC characterizes plaintiffs as "disgruntled employees" who threaten to "exploit and dilute" the discrimination statutes. . . . I disagree. Although some of plaintiffs' claims must be dismissed on procedural grounds or for lack of proof, there is sufficient evidence in each of these cases to present triable issues that must be decided by a jury. It is the province of the jury, rather than the Court, to define the limits of appropriate conduct in the workplace. . . . But the plaintiffs' evidence, *if true,* does tend to suggest that "something is rotten in the [offices of NBC]." William Shakespeare, *Hamlet, Prince of Denmark,* Act I, Scene IV.

[Factual Background] NBC is a diversified media company that produces and distributes various forms of entertainment, news and sports programming via broadcast television, cable television, the Internet and

other distribution channels. . . . These shows are staffed with either NBC employees, freelance personnel or other employees who are hired on a per diem basis without any job security. . . . Plaintiffs are all current employees of NBC who have been employed there for the last fifteen to twenty years. . .

[Legal Standard, Racial Harassment – Hostile Environment] . . . The Supreme Court has emphasized that the standard for judging whether a work environment is objectively hostile must be sufficiently demanding so as to prevent Title VII from becoming a "general civility code." . . . Courts "must distinguish between 'merely offensive and boorish conduct' and conduct that is sufficiently severe or pervasive as to alter the conditions of employment." . . .

In determining whether a workplace is objectively hostile, a court should look at the "totality of the circumstances." . . . In particular, courts should examine "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." . . . When evaluating the "quantity, frequency, and severity" of the incidents, the court must look at the incidents "cumulatively in order to obtain a realistic view of the work environment." . . . "[I]solated remarks or occasional episodes of harassment will not merit relief under Title VII; in order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive." . . .

[Analysis of Plaintiff Muro] NBC argues that Muro has failed to produce sufficient evidence to support his claim of a racially hostile work environment. The evidence establishes three timely allegations of racially offensive comments or incidents of racial harassment: (1) in 1998 and 1999 McCourt [an NBC supervisor] used a "weird Spanish accent" when talking to Hispanic people and, when filming an outdoor concert, Muro overheard McCourt say "it's going to be greasy out there. There is going to be lots of beans and rice and chicken all over the street. Those people are very greasy;" (2) in June 2000, Muro saw Klu Klux Klan robes outside the door to the "Conan" control room; and (3) in June 2001, Muro saw a noose hanging inside NBC with an African-American co-worker's name attached to the rope. These incidents are different in kind and occurred in different locations; there is no evidence that they are attributable to the same offender. Nonetheless, when viewed collectively, they could establish that Muro's work environment was "permeated" by racial

hostility that was so "severe or pervasive" as to "alter the conditions of [his] employment." . . .

McCourt's comments, standing alone, were not so severe that they could alter the conditions of Muro's employment. . . . However, when combined with the display of Klu Klux Klan robes and/or the noose, these incidents may constitute an objectively hostile environment. Like the swastika, "the Klansman's hood [and] the noose ... [are] intended to arouse fear." . . . Indeed, the noose may be "among the most repugnant of all racist symbols, because it is *itself* an instrument of violence." . . .

[Analysis of Plaintiff Little] Little has produced sufficient evidence of a racially hostile work environment to survive NBC's motion for summary judgment. Little alleges the following timely incidents of racial harassment: (1) harsh treatment of African-American employees, including an incident in which he was allegedly removed from NBC premises due to his race; (2) vulgar comments made about or directed at female employees at NBC; (3) Scott's instructing him to monitor Italian co-workers; (4) his sighting of a Ku Klux Klan robe hanging on a wardrobe rack in an exterior hallway on June 21, 2000; and (5) his June, 2001 sighting of a noose hanging inside NBC with the name of an African-American co-worker attached to it. As noted above, the Klu Klux Klan robes and/or the noose may constitute the type of "intimidating conduct" that would support a hostile work environment claim. . . .

Employer Liability for Racial Discrimination/Harassment

Racial discrimination or harassment may be directed at an employee by supervisors, co-workers, or even customers. Should the employer be liable for all incidents of harassment? Does it matter if the employer has aggressively tried to prevent discrimination?

The Supreme Court has established that employers are not necessarily liable for all incidents of illegal discrimination. The first point of analysis is to identify the harassing party. The liability principles differ depending on whether the harassment comes from co-workers or customers versus supervisors. Next, the company response after being told of the discrimination is important.

Employer liability for racial harassment by co-employees or customers. Employers are liable for racial harassment directed at an employee from co-employees or customers

where the employer's agents or supervisory employees know or should know about the harassment, and fail to take immediate and appropriate corrective action.

Employer liability for racial harassment by supervisory employees (agents of the employer). An employer has automatic liability for racial harassment directed at an employee if the harassment comes from a supervisor with immediate (or higher) authority over the victimized employee. The employer may be released from this automatic liability only if the employer can prove all three elements of the following affirmative defense:

Affirmative Defense

1. No tangible employment actions were taken against the victimized employee (tangible actions include changes such as discharge, demotion, or undesirable work reassignment), **and**

2. The employer exercised reasonable care to prevent and correct quickly any harassing behavior, **and**

3. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The above liability principles are developed in more detail in the following Supreme Court decision.

VANCE
V.
BALL STATE UNIVERSITY

SUPREME COURT OF THE UNITED STATES
2013 U.S. LEXIS 4703

June 24, 2013, Decided
JUSTICE ALITO delivered the opinion of the Court.
In this case, we decide a question left open in [prior opinions], namely, who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment?

Under Title VII, an employer's liability for such harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take ad-vantage of the preventive or corrective opportunities that the employer provided. . . . . Under this

framework, therefore, it matters whether a harasser is a "supervisor" or simply a co-worker.
We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim, and we therefore affirm the judgment of the Seventh Circuit.

I

Maetta Vance, an African-American woman, began working for Ball State University (BSU) in 1989 as a substitute server in the University Banquet and Catering division of Dining Services. In 1991, BSU promoted Vance to a part-time catering assistant position, and in 2007 she applied and was selected for a position as a full-time catering assistant. Over the course of her employment with BSU, Vance lodged numerous complaints of racial discrimination and retaliation, but most of those incidents are not at issue here. For present purposes, the only relevant incidents concern Vance's interactions with a fellow BSU employee, Saundra Davis.

During the time in question, Davis, a white woman, was employed as a catering specialist in the Banquet and Catering division. The parties vigorously dispute the precise nature and scope of Davis' duties, but they agree that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. . . .

In late 2005 and early 2006, Vance filed internal complaints with BSU and charges with the Equal Employment Opportunity Commission (EEOC), alleging racial harassment and discrimination, and many of these complaints and charges pertained to Davis. . . . Vance complained that Davis "gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her." . . . . She alleged that she was "left alone in the kitchen with Davis, who smiled at her"; that Davis "blocked" her on an elevator and "stood there with her cart smiling"; and that Davis often gave her "weird" looks. . . .

Both parties moved for summary judgment, and the District Court entered summary judgment in favor of BSU. . . . The court explained that BSU could not be held vicariously liable for Davis' alleged racial harassment because Davis could not "'hire, fire, demote, promote, transfer, or discipline'" Vance and, as a result, was not Vance's supervisor under the Seventh Circuit's interpretation of that concept. . . . The court further held that BSU could not be liable in negligence because it responded reasonably to the incidents of which it was aware.

The Seventh Circuit affirmed. . . .

III

We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." . . .. We reject the nebulous definition of a "supervisor" advocated in the EEOC Guidance and substantially adopted by several courts of appeals. . . . [In its Enforcement Guidance, the EEOC takes the position that an employee, in order to be classified as a supervisor, must wield authority "'of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.'" . . . But any authority over the work of another employee provides at least some assistance . . .. We read the EEOC Guidance as saying that the number (and perhaps the importance) of the tasks in question is a factor to be considered in determining whether an employee qualifies as a supervisor. And if this is a correct interpretation of the EEOC's position, what we are left with is a proposed standard of remarkable ambiguity.]

***

We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. Because there is no evidence that BSU empowered Davis to take any tangible employment actions against Vance, the judgment of the Seventh Circuit is affirmed.
It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

. . .

The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions. The limitation the Court . . . ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces. I would follow the EEOC's Guidance and hold that the authority to direct an employee's daily activities establishes supervisory status under Title VII. . . .

Race Discrimination Charges

The data in the following chart summarizes the resolution of charges of race-based discrimination charges filed with the EEOC.

	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Receipts	27,238	30,510	33,937	33,579	35,890	35,395	33,512
Resolutions By Type							
Administrative Closures	13.2%	15.2%	14.0%	15.4%	13.4%	14.1%	11.9%
No Reasonable Cause	66.7%	64.8%	66.4%	66.0%	70.1%	70.6%	73.2%
Merit Resolutions	20.1%	20.0%	19.6%	18.6%	16.6%	15.3%	14.9%
Monetary Benefits (Millions)*	$61.4	$67.7	$79.3	$82.4	$84.4	$83.3	$100.9

** Does not include monetary benefits obtained through litigation.*

Definitions of Terms:

Administrative Closure

Charge closed for administrative reasons, which include: failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

No Reasonable Cause

EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.

Merit Resolutions

Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.

Additional Cases

The following case presents a complicated, emotional battle for job promotions in the fire department of New Haven, Connecticut. The full Supreme Court opinion - decided 5-4 - runs in excess of 50 pages. The following brief excerpt presents some of the main points involved in the litigation.

RICCI
V.
DESTEFANO

SUPREME COURT OF THE UNITED STATES

557 U.S. 557 (2009)

Justice Kennedy delivered the opinion of the Court.

In the fire department of New Haven, Connecticut--as in emergency-service agencies throughout the Nation--firefighters prize their promotion to and within the officer ranks. An agency's officers command respect within the department and in the whole community; and, of course, added responsibilities command increased salary and benefits. Aware of the intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best qualified candidates.

In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. Promotion examinations in New Haven (or City) were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost.

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title

VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed.

We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. Respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII. In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause.

I

This litigation comes to us after the parties' cross-motions for summary judgment, so we set out the facts in some detail. As the District Court noted, although "the parties strenuously dispute the relevance and legal import of, and inferences to be drawn from, many aspects of this case, the underlying facts are largely undisputed." 554 F. Supp. 2d 142, 145 (Conn. 2006).

A

When the City of New Haven undertook to fill vacant lieutenant and captain positions in its fire department (Department), the promotion and hiring process was governed by the City charter, in addition to federal and state law. The charter establishes a merit system. That system requires the City to fill vacancies in the classified civil-service ranks with the most qualified individuals, as determined by job-related examinations. After each examination, the New Haven Civil Service Board (CSB) certifies a ranked list of applicants who passed the test. Under the charter's "rule of three," the relevant hiring authority must fill each vacancy by choosing one candidate from the top three scorers on the list. Certified promotional lists remain valid for two years.

The City's contract with the New Haven firefighters' union specifies additional requirements for the promotion process. Under the contract, applicants for lieutenant and captain positions were to be screened using written and oral examinations, with the written exam accounting for 60 percent and the oral exam 40 percent of an applicant's total score. To sit for the examinations, candidates for lieutenant needed 30 months' experience in the Department, a high-school diploma, and certain vocational training courses. Candidates for captain needed one year's service as a lieutenant in the Department, a high-school diploma, and certain vocational training courses.

After reviewing bids from various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS), to develop and administer the examinations, at a cost to the City of $ 100,000. IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments. In order to fit the examinations to the New Haven Department, IOS began the test-design process by

performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions. IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department. At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results--which IOS would use to develop the examinations--would not unintentionally favor white candidates.

With the job-analysis information in hand, IOS developed the written examinations to measure the candidates' job-related knowledge. For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions. IOS presented the proposed sources to the New Haven fire chief and assistant fire chief for their approval. Then, using the approved sources, IOS drafted a multiple-choice test for each position. Each test had 100 questions, as required by CSB rules, and was written below a 10th-grade reading level. After IOS prepared the tests, the City opened a 3-month study period. It gave candidates a list that identified the source material for the questions, including the specific chapters from which the questions were taken.

IOS developed the oral examinations as well. These concentrated on job skills and abilities. Using the job-analysis information, IOS wrote hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Candidates would be presented with these hypotheticals and asked to respond before a panel of three assessors.

IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. At the City's insistence (because of controversy surrounding previous examinations), all the assessors came from outside Connecticut. IOS submitted the assessors' resumes to City officials for approval. They were battalion chiefs, assistant chiefs, and chiefs from departments of similar sizes to New Haven's throughout the country. Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained two minority members. IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria.

Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination--43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed--25 whites, 6 blacks, and 3 Hispanics. 554 F. Supp. 2d, at 145. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. *Ibid.* Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.

Forty-one candidates completed the captain examination--25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed--16 whites, 3 blacks, and 3 Hispanics. *Ibid.* Seven captain positions were vacant at the time of the examination. Under the rule of

three, 9 candidates were eligible for an immediate promotion to captain--7 whites and 2 Hispanics. *Ibid.*

. . .

Petitioners allege that when the CSB refused to certify the captain and lieutenant exam results based on the race of the successful candidates, it discriminated against them in violation of Title VII's disparate-treatment provision. The City counters that its decision was permissible because the tests "appear[ed] to violate Title VII's disparate-impact provisions." . . .

Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race--*i.e.*, how minority candidates had performed when compared to white candidates. . . . Without some other justification, this express, race-based decision making violates Title VII's command that employers cannot take adverse employment actions because of an individual's race. See § 2000e-2(a)(1).

. . .

The City argues that, even under the strong-basis-in-evidence standard, its decision to discard the examination results was permissible under Title VII. That is incorrect. Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.

. . .

On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results. In other words, there is no evidence --let alone the required strong basis in evidence--that the tests were flawed because they were not job related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. The City's discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim.

* * *

DISSENT BY: GINSBURG

Justice Ginsburg, with whom Justice Stevens, Justice Souter, and Justice Breyer join, dissenting.

In assessing claims of race discrimination, "[c]ontext matters." . . . In 1972, Congress extended Title VII of the Civil Rights Act of 1964 to cover public employment. At that time, municipal fire departments across the country, including New Haven's, pervasively discriminated against minorities. The extension of Title VII to cover jobs in firefighting

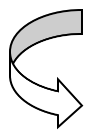
effected no overnight change. It took decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities.

The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy. But they had no vested right to promotion. Nor have other persons received promotions in preference to them. New Haven maintains that it refused to certify the test results because it believed, for good cause, that it would be vulnerable to a Title VII disparate-impact suit if it relied on those results. The Court today holds that New Haven has not demonstrated "a strong basis in evidence" for its plea. . . . In so holding, the Court pretends that "[t]he City rejected the test results solely because the higher scoring candidates were white." . . . That pretension, essential to the Court's disposition, ignores substantial evidence of multiple flaws in the tests New Haven used. The Court similarly fails to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes.

. . .

Chapter 9 - Gender Discrimination

Chapter 9 - Cognitive Objectives



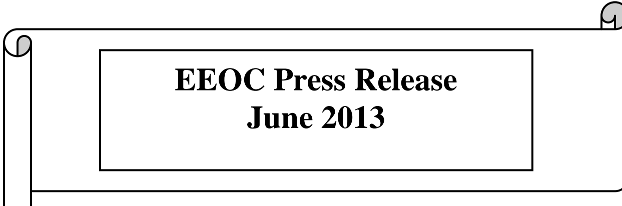
1. Identify and apply the statutory basis for protection against discrimination based on gender.
2. Analyze gender discrimination cases under disparate treatment and disparate impact theories.
3. Explain and apply the discrimination principles explained in *Lynch v. Freeman*.
4. Explain and apply the EEOC regulations on gender discrimination and the BFOQ defense.
5. Compare gender discrimination to gender stereotyping, as in *Price Waterhouse v. Hopkins*.
6. Apply the law on grooming codes, as in *Harper v. Blockbuster Entertainment Corp.* and *Willingham v. Macon Telegraph Publishing Company*.
7. Apply the BFOQ defense to gender discrimination claims, as in *Healey v. Southwood Psychiatric Hospital.* Explain how customer preference relates to the BFOQ defense.
8. Analyze claims of sexual orientation discrimination under federal and state laws.

Statutory Basis – Gender Discrimination

The Civil Rights Act of 1964, Title VII

42 U.S.C. §2000e-2:
(a) It shall be an unlawful employment practice for an employer --
(1) to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, **sex**, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, **sex**, or national origin.
(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. §2000e-2(a):
(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, **sex**, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community . . ..



JURY AWARDS $500,000 IN EEOC SEX DISCRIMINATION SUIT AGAINST EXEL, INC.

ATLANTA - An Atlanta jury has awarded $500,000 against a Westerville, Ohio-based warehouse and distribution company for failing to promote a female to a supervisory position, the U.S. Equal Employment Opportunity Commission (EEOC) announced today.

According to the EEOC's suit (Case No. 1:10-CV-03132), filed in U.S. District Court for the Northern District of Georgia, Exel, Inc. violated Title VII of the Civil Rights Act of 1964 by refusing to promote Contrice Travis to an inventory supervisor position in 2008.

At the four-day trial, the EEOC presented evidence that male employees were routinely promoted after verbally requesting consideration for open positions, while Travis, who the EEOC said was indisputably recognized as the most knowledgeable in inventory control, was denied the inventory supervisor position recently vacated by her supervisor. Travis's former supervisor testified that when he recommended Travis for the position, the general manager informed him that he would never put a woman in that position.

The jury also heard evidence of the company's duplicity towards Travis -- for example, that while Travis was told the inventory supervisor position would not be filled, the male selected for the position was told by a management and human resources official that the position would be filled, but that he would be selected only if he kept it a secret. The selectee, Michel Pooler, testified that Travis was later required to train him because he had no inventory experience whatsoever.

The jury awarded Travis $25,000 in compensatory damages and $475,000 in punitive damages for Exel's conduct in this matter. The court will also award back pay to Travis.

"This verdict is a blow against sex discrimination and reaffirms that women should be

allowed the full opportunity to advance in an organization based on merit," said EEOC General Counsel David Lopez. "The EEOC will explore every opportunity to resolve a matter informally, but, as we have demonstrated repeatedly, we will try a case to verdict if necessary."

Overview – Gender Discrimination

Gender diversity in the workplace has created various interesting, sometimes controversial employment issues. What hiring practices are acceptable? Which workplace rules violate the law? Gender discrimination at work has been banned since the Civil Rights Act of 1964.

Concerns about gender discrimination exist beyond the employment arena. Title VII, however, only focuses on discrimination in employment. The materials in this chapter present several aspects of the gender issue in employment. Following this chapter, Chapter 10 presents pregnancy discrimination, and Chapter 11 focuses on a specific form of gender discrimination, sexual harassment.

In interpreting what Congress meant with prohibiting discrimination based on sex, the courts have found an unusual situation. Generally, Congress debates a proposed statute for a significant time before passage. The recorded debate provides courts with guidance on the intent of Congress in choosing the statutory language. Regarding sex discrimination, however, there is meager legislative history. The amendment adding 'sex' in Sec. 703(a) was passed one day before the House of Representatives approved Title VII of the Civil Rights Act. Nothing of importance on the meaning of sex as a civil rights category emerged from the limited floor discussion. Representative Howard Smith of Virginia, who had opposed the Civil Rights Act, and was accused of wishing to sabotage its passage by his proposal, introduced the ‘sex’ amendment. The belief may have existed that, by adding sex as a protected category, support for the civil rights act would lessen.[1]

In its simplest form, gender discrimination involves treating women and men in a different fashion at work, based on their gender. For example, assume that a manager makes derogatory comments about women and refers to his female employees as “girls”, while not offering derogatory comment about his male employees. This would be discrimination based on gender. Conversely, the manager would not commit gender discrimination by make derogatory comments about both male and female employees. In the latter case, there would be no differentiation based on gender.

In the following case, *Lynch v. Freeman* , the court examines claims of disparate treatment and disparate impact, based on gender. The plaintiff won a victory on the impact claim.

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[1] *See generally*, Willingham v. Macon Telegraph Pub. Co., 507 F.2d 1084, 1090 (5th Cir.1975).

Lynch
v.
Freeman

817 F.2d 380
United States Court of Appeals, 6th Circuit, 1987

Lively, J. - . . . **[Factual Background]** The plaintiff was hired by the Construction Service Branch (CSB) of the Tennessee Valley Authority (TVA) as a carpenter apprentice. She began working in November 1979 at an electrical generating plant at Cumberland City, Tennessee where TVA was making major modifications. Most of this work was carried on in an open area adjacent to the main building of the plant, referred to as the "powerhouse." The construction site covered three acres and contained two portable toilets for women, one at each end of the work area. There were also 21 other portable toilets on the site, not designated by sex, but primarily used by men.

The portable toilets were dirty, often had no toilet paper or paper that was soiled, and were not equipped with running water or sanitary napkins. In addition, those designated for women had no locks or bolts on the doors and one of them had a hole punched in the side. To avoid using the toilets, Ms. Lynch began holding her urine until she left work. Within three days after starting work she experienced pain and was advised that the practice she had adopted, as well as using contaminated toilet paper, frequently caused bladder infections.

The powerhouse was off limits to construction workers. It had large, clean, fully equipped restrooms and the plaintiff testified that some of the men she worked with used them regularly and were not disciplined. In late December 1979 or early January 1980 Ms. Lynch began using the powerhouse restrooms occasionally after her doctor diagnosed her condition as cystitis, a type of urinary tract infection. When the infection returned in February, the plaintiff began using a restroom in the powerhouse regularly and she had no further urinary tract infections. She admitted at trial that she knew use of the indoor restrooms by CSB

personnel was prohibited.

In early January 1980 the carpenters' union business agent told Ms. Lynch that he had received complaints that she was loafing on the job and performing her work unsatisfactorily. He identified the complainant as James Fogg, the general foreman under whom the plaintiff worked. The plaintiff denied loafing on the job and requested more formal evaluations of her work. In these evaluations she was generally rated good or fair. On April 16, 1980, Mr. Fogg saw Ms. Lynch at the powerhouse and issued a warning letter which stated that the plaintiff had violated job Rule No. 7, entitled "Loafing, Wasting of Time, or Eating During Work Hours." The warning letter stated "this is an unauthorized area for Construction Service Branch personnel.... [Y]ou may be discharged if you again violate this rule within six (6) months of the above violation." The plaintiff protested the warning letter, stating that it did not reflect the true nature of the incident. She also wrote to the manager of construction for TVA complaining that Mr. Fogg had singled her out for reprimands and stating that she used the powerhouse restroom because it was common knowledge that the portable toilets were not hygienically acceptable for women. A few days later she wrote the equal employment opportunity office of TVA, claiming that she was being subjected to discrimination and that it was inevitable that she would be discharged for using the powerhouse restrooms.

On May 1 James Fogg saw Ms. Lynch enter the powerhouse and called the construction superintendent, George Riddle, to meet him where the plaintiff came out of the powerhouse and returned to her work area. Mr. Riddle told her she was fired and directed her to collect her belongings and leave. TVA issued a notice of termination which gave the reason for discharge as "Unsatisfactory Conduct in Work Area." Ms. Lynch filed a charge with the Equal Employment Opportunity Commission (EEOC) and received a right to sue letter. **[The EEOC, in issuing a right to sue letter, decided it would not pursue legal recourse against TVA on behalf of Ms. Lynch.]** This action followed.

[Disparate Treatment and Disparate Impact Theories] Title VII of the Civil Rights Act of 1964 . . . permits a plaintiff to base a claim of employment discrimination on two separate theories-disparate treatment and disparate impact. A plaintiff may proceed on either or both theories; no election is required. . . . To prevail on a claim of disparate treatment a plaintiff must show that her employer intentionally discriminated against her. Direct evidence of intent is not required; the plaintiff can establish intent by proof of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the

Act.' " . . .

A claimant proceeding under the disparate impact theory is not required to prove an intent to discriminate. In such a case, the trial court is concerned with "the *consequences* of employment practices, not simply the motivation." . . . Disparate impact cases typically are concerned with facially neutral practices or standards that in fact work to place a disproportionate burden on a discrete group of employees who are protected under Title VII.

A plaintiff has the ultimate burden of persuasion regardless of the theory under which she proceeds. If a plaintiff makes a prima facie case under the disparate treatment theory, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory explanation for its actions. If a defendant carries this burden, the plaintiff may still prevail by showing that the legitimate reasons offered by the employer were pretexts for discrimination and were not the real reasons for the action complained of. . . . A similar shifting of burdens occurs in a disparate impact case. Once a prima facie case is established, the employer may rebut it by showing that the practice complained of is required by "business necessity," or has "a manifest relationship to the employment in question." If the employer makes this showing, the plaintiff may still prevail by showing that the employer relied on the practice as a pretext for discrimination. . . .

[**Disparate Treatment Analysis by the District Court**] The [district] court found no evidence, either direct or circumstantial, from which it could conclude that TVA intentionally discriminated against the plaintiff. Its ultimate finding was that Ms. Lynch was fired for violation of Rule 7 and insubordination, both legitimate, nondiscriminatory reasons. The court rejected as not credible the testimony of male co-workers that they had entered the powerhouse openly and had not been disciplined, and noted that 23 other construction workers had received warning letters for Rule 7 violations related to use of the powerhouse. These workers were not discharged, the court found, because they heeded the warnings. While the court found some evidence that on occasion the plaintiff was treated more harshly than other employees in the application of Rule 7, there was no proof that this treatment occurred because the plaintiff is a woman. . . .

[**Disparate Impact Analysis by the District Court**] The district court proceeded somewhat differently in treating the disparate impact claim. It made extensive findings with respect to the conditions of the portable toilets, the effect of these conditions on the plaintiff, and their effect on women generally. In the end, however, the court concluded that these

conditions "do not impose a 'substantial burden' on women that men need not suffer." . . . On the basis of this determination the district court concluded that the plaintiff had failed to establish a prima facie case of discrimination under Title VII. Although there was a full trial, TVA offered no evidence of business necessity, relying throughout on its position that Ms. Lynch proved no discrimination.
The principal findings of the district court with respect to disparate impact follow:

TVA had a contract with Modern Portable Buildings to provide the toilets and to maintain them in a sanitary condition complete with toilet tissue and paper seat covers. The evidence reveals that the service was sometimes poor. The toilets were cleaned twice weekly, a frequency which is generally sufficient for such toilets. The cleaning was accomplished by pumping out the sewage. This process often left the toilets messy, with human feces on the floors, walls, and even on the seats. The contractors were to scrub down the toilets afterward, but it appears that they often failed to do so. Paper covers were not provided, and the toilet paper, if any, was sometimes wet and/or soiled with urine. Furthermore, no running water for washing one's hands was available near the toilets, although a chemical hand cleaner could be checked- out from the "gang-boxes." . . . Plaintiff introduced credible medical expert testimony to demonstrate that women are more vulnerable to urinary tract infections than are men. . . . On the basis of the medical evidence, the Court concludes that an increased danger of urinary tract infections may be linked to the practice of females holding their urine and to the use of toilets under the circumstances where the female's bacteria-contaminated hands came into contact with her external genitalia . . ..

[Court of Appeals Analysis]. . .We believe the district court erred as a matter of law in holding that the plaintiff failed to make a prima facie case because the acknowledged uneven burden on women was not substantial. The evidentiary requirements of a prima facie case of discrimination are not onerous. . . . The purpose of §703(a)(2) is to achieve equality of employment opportunities for women and members of minority groups by prohibiting practices that operate as "built in headwinds" for such people and have no relationship to job performance. . . . TVA argues that portable toilets have been approved by the commission established under the Occupational Health & Safety Act (OSHA) and that female employees must accept them as part of construction work. This misses the point. The issue is not the decision to use portable toilets-it is the failure to furnish adequate and sanitary facilities to female workers who have been shown to suffer identifiable health risks from using portable toilets in the deplorable conditions of those furnished by TVA at the Cumberland City construction site.

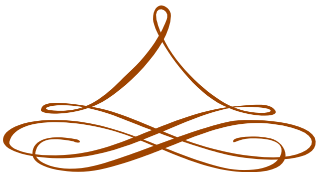
. . . Few concerns are more pressing to anyone than those related to personal health. A prima facie case is established when a plaintiff shows "that the facially neutral practice has a significantly discriminatory impact." . . . Any employment practice that adversely affects the health of female employees while leaving male employees unaffected has a significantly discriminatory impact. The district court erred as a matter of law in concluding that Ms. Lynch failed to make out a prima facie case. . . . The burden then shifted to TVA to justify the practice which resulted in this discriminatory impact by showing "business necessity," that is, that the practice of furnishing unsanitary toilet facilities at the work site "substantially promote [s] the proficient operation of the business." . . .

Title VII is remedial legislation which must be construed liberally to achieve its purpose of eliminating discrimination from the workplace. . . . Anatomical differences between men and women are "immutable characteristics," just as race, color and national origin are immutable characteristics. When it is shown that employment practices place a heavier burden on minority employees than on members of the majority, and this burden relates to characteristics which identify them as members of the protected group, the requirements of a Title VII disparate impact case are satisfied.

[Court of Appeals Holding] The plaintiff was entitled to judgment on her disparate impact claim. She established a prima facie case, and TVA made no attempt to prove business necessity, the "touchstone" in a disparate impact case. . . . The district court conducted a full trial on all issues, and TVA chose to defend solely on its assertion that there was no discrimination. Under these circumstances the court may "assume no justification exists." . . .

***Case Questions, Lynch v. Freeman*:**

1. Is it relevant regarding the Court of Appeals legal analysis whether the portable toilets were left dirty intentionally or unintentionally?
2. The TVA had evidence that Lynch disobeyed orders on use of the powerhouse bathrooms. Why wasn't this reason decisive for TVA regarding Lynch's dismissal?
3. On disparate impact, what was the employment practice challenged by Lynch? What would TVA's business necessity defense entail?
4. What is an immutable characteristic?



The Equal Employment Opportunity Commission has issued regulations on gender discrimination. These regulations, though not binding, are given deference by the courts. Some of the relevant EEOC regulations follow.

***EEOC Guidelines on Discrimination Because of Sex*[2]**

Sec. 1604.3 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A Seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

Sec. 1604.4 Discrimination against married women.

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex. . . .

Sec. 1604.6 Employment agencies.

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

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[2] 29 C.F.R. Part 1604, Title 29--Labor

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

Sec. 1604.*9* ***Fringe benefits.***
(a) “Fringe benefits,” as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.
(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.
(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the “head of the household” or “principal wage earner” in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that “head of household” or “principal wage earner” status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the act.
(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.
(e) It shall not be a defense under title VIII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.
(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. . . .

Questions About the EEOC Regulations

1. Could an employer charge female employees more for health care coverage because of the extra cost of maternity care?
2. Could an employer charge male employees more for life insurance, because of the extra costs associated with life insurance for men versus women?
3. Could an employer require married employees to pay more for health care than do single employees?

Sex Discrimination Charges

The data in the following chart summarizes the resolution of charges of sex (gender)-based discrimination charges filed with the EEOC.

	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Receipts	23,247	24,826	28,372	28,028	29,029	28,534	30,356
Resolutions By Type							
Administrative Closures	18.9%	19.6%	19.0%	21.4%	18.5%	17.5%	16.9%
No Reasonable Cause	56.5%	54.8%	56.9%	56.9%	60.5%	63.0%	63.6%
Merit Resolutions	24.7%	25.7%	24.1%	21.7%	21.0%	19.5%	19.5%
Monetary Benefits (Millions)*	$99.1	$135.4	$109.3	$121.5	$129.3	$145.7	$138.7

** Does not include monetary benefits obtained through litigation.*

Definitions of Terms:

Administrative Closure

Charge closed for administrative reasons, which include: failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

No Reasonable Cause

EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.

Merit Resolutions

Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.

Gender Stereotyping

In an important gender discrimination case, *Price Waterhouse v. Hopkins*, the Supreme Court recognized gender discrimination based on gender stereotyping. This type of gender discrimination is potentially more subtle and difficult to recognize than more overt gender discrimination. Gender stereotyping involves an employer acting on stereotyped notions of how men and women should behave.

Price Waterhouse
v.
Hopkins

490 U.S. 228
United States Supreme Court, 1989

Brennan, J. - **[Background Facts]** Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964 . . . charging that the firm had discriminated against her on the

basis of sex in its decisions regarding partnership. . . .

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate--either on a "long" or a "short" form, depending on the partner's degree of exposure to the candidate. Not every partner in the firm submits comments on every candidate. After reviewing the comments and interviewing the partners who submitted them, the firm's Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on "hold," or deny her the promotion outright. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to "hold" her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments from partners will not guarantee a candidate's admission to the partnership, nor will a specific quantity of negative comments necessarily defeat her application. Price Waterhouse places no limit on the number of persons whom it will admit to the partnership in any given year.

Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D.C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1-Hopkins-was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20-including Hopkins-were "held" for reconsideration the following year. . . . Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

In a jointly prepared statement supporting her candidacy, the partners in Hopkins' office showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it "an outstanding performance" and one that Hopkins carried out "virtually at the partner level." . . .

The partners in Hopkins' office praised her character as well as her accomplishments, describing her in their joint statement as "an outstanding professional" who had a "deft touch," a "strong character, independence and integrity." . . . Clients appear to have agreed with these

assessments. At trial, one official from the State Department described her as "extremely competent, intelligent," "strong and forthright, very productive, energetic and creative.". . . Another high-ranking official praised Hopkins' decisiveness, broadmindedness, and "intellectual clarity"; she was, in his words, "a stimulating conversationalist." . . . Evaluations such as these led [District Court] Judge Gesell to conclude that Hopkins "had no difficulty dealing with clients and her clients appear to have been very pleased with her work" and that she "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked." . . .

On too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins' brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins' perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners' negative remarks about Hopkins-- even those of partners supporting her--had to do with her "interpersonal skills." Both "[s]upporters and opponents of her candidacy," stressed Judge Gesell, "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." . . .

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" . . ; another suggested that she "overcompensated for being a woman" . . .; a third advised her to take "a course at charm school" . . .. Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Another supporter explained that Hopkins "ha[d] matured from a tough- talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." . . . But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace:* in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." . . .

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly

sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was "universally disliked" by staff, and another described her as "consistently annoying and irritating"; yet these were people who had had very little contact with Hopkins. According to Fiske, Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping--although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion on a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of conclusion without having met any of the people involved in the decision making process. . . .

[Legal Analysis] The central point is this: while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability . . .only by proving that it would have made the same decision even if it had not allowed gender to play such a role. . . .

In deciding as we do today, we do not traverse new ground. We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer's burden to justify decisions resulting from that practice. When an employer has asserted that gender is a BFOQ within the meaning of § 703(e), for example, we have assumed that it is the employer who must show why it must use gender as a criterion in employment. . . .

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, "discrimination in the air"; rather, it is, as Hopkins puts it, "discrimination brought to ground and visited upon" an employee. . . .

> We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Because the courts below erred by deciding that the defendant must make this proof by clear and convincing evidence, we reverse the Court of Appeals' judgment against Price Waterhouse on liability and remand the case to that court for further proceedings. . . .

***Case Questions, Price Waterhouse*:**
1. How does the procedure for becoming a partner (local office to admission committee to policy board to entire partnership) with the corresponding decisions made in this case strengthen Hopkins' arguments on gender stereotyping?
2. How does the lack of fixed partnership admission guidelines strengthen Hopkins' arguments on gender stereotyping?
3. How could the numbers of female versus male partners at Price Waterhouse be circumstantial evidence of either disparate treatment or disparate impact?
4. Could Price Waterhouse demand good interpersonal skills for admission to partnership?
5. How could the mistakes made by Price Waterhouse be prevented?

Grooming Codes & Sex Plus Discrimination

Courts have upheld an employer's right to fix grooming codes that directly recognize that society follows different grooming standards for women and men. It does not violate Title VII, for example, to allow women but not men to wear dresses at work. As long as an employer follows customary societal standards for men and women, the employer is in compliance with Title VII. An employer may violate Title VII, however, if the employer places one gender at a disadvantage. This could happen where an employer requires its male employees to dress in professional clothes while requiring its female employees to dress in casual clothes. The differences in clothes could adversely affect female employees in their desire to gain promotions to more responsible positions.

Also, an employer may violate Title VII with "sex plus" discrimination. Sex plus discrimination involves discrimination based on sex and another nonprotected characteristic. For example, an employer that refuses to hire women with preschool-age children but hires men with preschool-age children violates Title VII. The employer is free under federal civil rights laws to refuse to hire men or women with children, but the employer may not discriminate between male and female parents on the issue. Grooming codes and sex plus discrimination are the focus of the following case and *Jespersen v. Harrah's Operating Company*, found at the end of the chapter.

Harper
v.
Blockbuster Entertainment Corporation

139 F.3d 1385
United States Court of Appeals, 11th Circuit, 1998

Carnes, J. - **[Background Facts]** The plaintiffs in this case are four males formerly employed by Blockbuster Entertainment Corp. ("Blockbuster"). They brought this suit against Blockbuster under Title VII and the Florida Civil Rights Act alleging that Blockbuster's grooming policy discriminated against them on the basis of their sex and that they were wrongfully terminated in retaliation for protesting that policy. After the district court granted Blockbuster's motion to dismiss the plaintiffs' complaint, the plaintiffs appealed. For the reasons discussed below, we affirm the district court's order dismissing plaintiffs' complaint.

. . . In May of 1994, Blockbuster implemented a new grooming policy that prohibited men, but not women, from wearing long hair. The plaintiffs, all men with long hair, refused to comply with the policy. They protested the policy as discriminatory and communicated their protest to supervisory officials of Blockbuster. Two of the plaintiffs were the subject of media stories concerning their protest of the policy. All of the plaintiffs were subsequently terminated by Blockbuster because they had refused to cut their hair and because they had protested the grooming policy. . . .

[Legal Analysis] The plaintiffs allege that Blockbuster's grooming policy discriminates on the basis of sex in violation of Title VII. In *Willingham v. Macon Telegraph Pub. Co.,* 507 F.2d 1084, 1092 (5th Cir.1975) (en banc), our predecessor Court held that differing hair length standards for men and women do not violate Title VII, a holding which squarely forecloses the plaintiffs' discrimination claim . . .

The reasonableness of the plaintiffs' belief in this case is belied by the unanimity with which the courts have declared grooming policies like Blockbuster's non-discriminatory. Every circuit to have considered the issue has reached the same conclusion reached by this Court in the *Willingham* decision. . . . The EEOC initially took a contrary position, but in the face of the unanimous position of the courts of appeal that have addressed the issue, it finally "concluded that successful litigation of male hair length cases would be virtually impossible." . . . Accordingly, the EEOC ran up a white flag on the issue, advising its field offices to administratively close all sex discrimination charges dealing with male hair length. . . .

Grooming Code Questions:
1. Could an employer allow women, but not men, to wear earrings at work?
2. Could an employer ban multiple piercing per ear for female employees?
3. Could an employer ban “short” shorts for female employees at work?
4. Could an employer ban tattoos for only one sex? Both sexes?

Gender and the BFOQ Defense

The Title VII prohibition on gender discrimination is not absolute. The 1964 Civil Rights Act explicitly recognizes a lawful form of gender discrimination, the BFOQ defense. A BFOQ (bona fide occupational qualification) is a qualification that is reasonably necessary to the normal operation or essence of an employer's business.[3] The BFOQ argument on gender, then, is the business in question must discriminate between male and female employees or applicants as a necessary part of running the business. The Supreme Court has stated the BFOQ defense is an "extremely narrow exception to the general prohibition of discrimination on the basis of sex."[4]

A few employment situations present obvious BFOQ arguments. For example, movie studios and other theater production companies often discriminate based on gender to ensure the authenticity of the play or movie produced. A man would not suitably fill the role of Juliet in Shakespeare’s play, Romeo and Juliet. Other disputes are not as clear on the BFOQ defense. A prominent example involves the Hooters restaurant chain.

As of 2012, Hooters of America, Inc., is the operator and franchiser of over 430 Hooters restaurant locations in 27 countries around the world. Hooters employees a casual beach-theme restaurant atmosphere and features '50s & '60s jukebox music and sports on television. The central element of the company marketing plan, and an area of legal controversy, is the use of female-only table servers, “Hooters Girls.” Described by the company as all-American cheerleaders, the gender specific hiring is defended by Hooters as a BFOQ, similar to hiring women as Dallas Cowboy cheerleaders, Sports Illustrated swimsuit models, or Radio City Rockettes. Hooters of America does hire men and women to work in management and host, staff, service bar, and kitchen positions.[5]

[3] *See* 42 U.S.C. § 2000e-2.
[4] Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).
[5] 2012. “About Hooters.” Retrieved 26 June 2012 from <www.hooters.com/about.aspx>.

After early decisions to challenge the female-only practice, the EEOC decided not to pursue legal action against Hooters. The initial EEOC position was the job in question was that of table server, a job men could perform. As identified above, the Hooters Restaurant position is the job in question is female entertainer. With no contrary court ruling, the BFOQ claim by Hooter's is still valid.[6]

Breiner v. Neveda Department of Correction, found in Chapter 7, presented the BFOQ defense regarding gender. The following case, *Healey v. Southwood Psychiatric Hospital*, also involves gender and BFOQ analysis.

Healey
v.
Southwood Psychiatric Hospital
78 F.3d 128
United States Court of Appeals, 3rd Circuit (1996)

Cowen, C.J. - Brenda L. Healey appeals the order of the district court granting Southwood Psychiatric Hospital's motion for summary judgment on her sex discrimination claim brought under Title VII of the Civil Rights Act of 1964 . . . Because we find that Southwood has established a bona-fide occupational qualification defense to Healey's Title VII claim, we will affirm the order of the district court.

I.

The following facts are not substantially disputed. Healey was hired as a child care specialist at Southwood in October 1987. In this capacity, she was responsible for developing and maintaining a therapeutic environment for the children and adolescents hospitalized at Southwood. Southwood's patients are emotionally disturbed, and some have been sexually abused. In November 1992, Healey was assigned to the night shift at Southwood as a result of a staff reorganization. The reorganization was necessitated by reason of a decline in the patient population. The night shift is a less desirable shift, requiring more housekeeping chores and less patient interaction and responsibility.

Southwood has a policy of scheduling both males and females to all shifts, and considers sex in making its assignments. In November 1992, Southwood assigned Healey to the night shift because it needed a female child care specialist on that shift. Southwood maintains that its gender-based policy is necessary to meet the therapeutic needs and privacy concerns of its mixed-sex patient population. Healey counters that gender should not play any role in the hiring and scheduling of employees, and

[6] *Ibid*.

Southwood's actions towards her constitute sex discrimination in violation of Title VII. The district court granted Southwood's motion for summary judgment from which Healey appeals. . . .

III.

. . . Title VII expressly states that "[it] shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's ... sex. . . Thus, Title VII sets forth a sweeping prohibition against overt gender-based discrimination in the workplace. . . . When open and explicit use of gender is employed, as is the case here, the systematic discrimination is in effect "admitted" by the employer, and the case will turn on whether such overt disparate treatment is for some reason justified under Title VII. . . . A justification for overt discrimination may exist if the disparate treatment is part of a legally permissible affirmative action program, or based on a BFOQ. . . .

Southwood asserts that its gender-based staffing policy is justified as a bona fide occupational qualification, and therefore is exempt under Title VII. Under the BFOQ defense, overt gender-based discrimination can be countenanced if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise [.]" . . . The BFOQ defense is written narrowly, and the Supreme Court has read it narrowly. . . .The Supreme Court has interpreted this provision to mean that discrimination is permissible only if those aspects of a job that allegedly require discrimination fall within the " 'essence' of the particular business. . . . Alternatively, the Supreme Court has stated that sex discrimination "is valid only when the essence of the business operation would be undermined" if the business eliminated its discriminatory policy. . .

The employer has the burden of establishing the BFOQ defense. . . . The employer must have a "basis in fact" for its belief that no members of one sex could perform the job in question. . . . However, appraisals need not be based on objective, empirical evidence, and common sense and deference to experts in the field may be used. . . .

B.

With these precepts in mind, we may now turn to the facts of this case. The "essence" of Southwood's business is to treat emotionally disturbed and sexually abused adolescents and children. Southwood has presented expert testimony that staffing both males and females on all shifts is necessary to provide therapeutic care. "Role modeling," including parental role modeling, is an important element of the staff's job, and a male is better able to serve as a male role model than a female and vice versa. A

balanced staff is also necessary because children who have been sexually abused will disclose their problems more easily to a member of a certain sex, depending on their sex and the sex of the abuser. If members of both sexes are not on a shift, Southwood's inability to provide basic therapeutic care would hinder the "normal operation" of its "particular business." Therefore, it is reasonably necessary to the normal operation of Southwood to have at least one member of each sex available to the patients at all times.

There is authority for the proposition that a business that has as its "essence" a therapeutic mission requires the consideration of gender in making employment decisions. In *City of Philadelphia v. Pennsylvania Human Relations Commission,* . . . 300 A.2d 97 (1973), the court determined that gender may be considered in order to treat and supervise children with emotional and social problems, and approved the youth center's gender-based staffing policy under the BFOQ defense. The *City of Philadelphia* court stated that "[i]t is common sense that a young girl with a sexual or emotional problem will usually approach someone of her own sex, possibly her mother, seeking comfort and answers." . . .

In addition to therapeutic goals, privacy concerns justify Southwood's discriminatory staffing policy. Southwood established that adolescent patients have hygiene, menstrual, and sexuality concerns which are discussed more freely with a staff member of the same sex. Child patients often must be accompanied to the bathroom, and sometimes must be bathed. The Supreme Court has explicitly left open the question whether sex constitutes a BFOQ when privacy interests are implicated, . . . and the issue has been raised but not yet decided by our court. . . . We note that other circuits have discussed privacy concerns as the basis of a BFOQ defense. However, those cases involve an inmate's right to privacy which is balanced against the state's legitimate penological interest. . . .

In the non-prison context, other courts have held that privacy concerns may justify a discriminatory employment policy. . . . We conclude that due to both therapeutic and privacy concerns, Southwood is an institution in which the sexual characteristics of the employee are crucial to the successful performance of the job of child care specialist. Southwood cannot rearrange job responsibilities in order to spare Healey or another female from working the night shift because at least one female and male should be available at all times in order for Southwood to conduct its business. Accordingly, we hold that the essence of Southwood's business would be impaired if it could not staff at least one male and female child care specialist on each shift.

EEOC Guidelines on Discrimination Because of Sex[7]

Sec. 1604.2 **Sex as a bona fide occupational qualification.**
(a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label--``Men's jobs'' and ``Women's jobs''--tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment: that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(**2**) of this section.

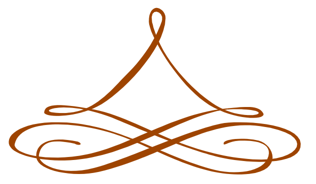
(**2**) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.
. . .

[7] 29 C.F.R. Part 1604, Title 29-Labor.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.



Questions on Healey v. Southwood Psychiatric Hospital, the EEOC Regulations and the BFOQ Defense:

1. Is it legally permissible for an employer to demand proof of daycare arrangements for employees with preschool-age children?
2. An employer wishes to hire aggressive sales staff and is worried that women are not as aggressive as are men. What approach is legally permissible for the employer to follow?
3. May an employer require its employees to keep a certain weight? How would a company draft a legal weight policy?

Customer Preference and the BFOQ Defense

As a general rule, application of Title VII principles does not allow customer preference to prove a BFOQ. However, *Healey v. Southwood Psychiatric Hospital* is a case where customer preference justified gender discrimination. Theoretically, the issue with Hooters Restaurant is **not** that its customers prefer women waiting tables. That reason probably would not satisfy Title VII analysis. Rather, Hooters argues the job in question, female entertainers, requires women versus men. The issue of customer preference is difficult as the following quote illustrates:

> Sex discrimination in employment is illegal - usually. Airlines cannot discriminate on the basis of sex when hiring flight attendants, and restaurants cannot discriminate on the basis of sex when hiring food servers. This is true even if the restaurant or airline explicitly seeks to sell sexual titillation along with food or air travel. Strip clubs, however, can discriminate when hiring strippers, and the Playboy Clubs, before they went out of business, were permitted to discriminate based on sex in hiring Playboy Bunnies. In addition, hospitals can discriminate in hiring nurses to work in labor and delivery rooms, and retirement homes can discriminate in hiring personal care givers for their elderly patients. Even janitorial services can sometimes discriminate in hiring custodians to clean single-sex bathhouses or restrooms.[8]

[8] Kimberly A. Yuracko, Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination, 92 Calif. L. Rev. 147, 149 (2004).

Gender Discrimination and Sexual Orientation

Title VII's prohibition of sex discrimination does not extend to sexual orientation or sexual practices. That is, federal civil rights laws do not extend protection to sexual activities, either heterosexual or homosexual. Employment-at-will controls, allowing for employer discretion on sexual practices issues. Employers that are not careful, however, may still violate either federal or state laws.

One manner of Title VII violation regarding sexual orientation is "orientation plus" discrimination. For example, employers that fire gay men but not gay women would be engaged in gender discrimination. The same would hold true for race discrimination if gay white and black employees were treated differently. Beyond federal civil rights protections, various states and cities have passed legislation extending civil rights protections to sexual orientation issues.[9]

Besides federal and state civil rights laws, the U.S. Constitutional protections of privacy, due process, equal protection, and free speech may be applicable to some sexual orientation issues. As identified in Chapter Three, however, the U.S. Constitution only protects against government action. Therefore, the Constitution is applicable to government employers, but not applicable to private employers. Last, employment disputes involving sexual orientation issues may afford plaintiffs opportunities to bring wrongful discharge lawsuits based on state laws. Such suits could allege breach of contract issues, or tort arguments such as outrage or defamation.[10]

Issues of sexual orientation, gender identity orientation, and grooming codes are presented in *Creed v. Family Express*, following. The issues presented in Creed are complicated and at least one other court[11] has held that under similar facts, illegal gender stereotyping was present.

[9] For example, state legislation prohibiting sexual orientation discrimination has been passed in states such as California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Nevada, Rhode Island, Vermont, and Wisconsin. Cities with similar laws include Berkeley, CA, Minneapolis, MN, and, San Francisco, CA.
[10] *See, generally*, Chapter Two, Wrongful Discharge.
[11] Schroer v. Billington , 2009 U.S. Dist. LEXIS 43903 (2009).

Amber Creed a/k/a/ Christopher Creed
v.
Family Express Corporation

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA,

2009 U.S. Dist. LEXIS 237;

January 5, 2009, Decided

OPINION BY: Robert L. Miller, Jr. -- This cause is before the court on the motion of Family Express Corporation for summary judgment on Amber Creed's claims against it. Ms. Creed claims that while she was employed by Family Express, she was discriminated against based on her sex when Family Express terminated her for failing to conform with male stereotypes in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq* and Indiana Code § 22-9-1-3. For the reasons that follow, the court grants Family Express's summary judgment motion.

FACTUAL BACKGROUND
. . . Ms. Creed suffers from gender identity disorder, a condition in which one exhibits a strong and persistent cross-gender identification (either the desire to be or insistence that one is of the other sex) and a persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision* (DSM-IV-TR) 576 (4th ed. 2000). At birth, Ms. Creed's sex was classified as male. Over time though, she determined that her gender designation didn't correspond with her gender identity, which is female.

Before being hired by Family Express, Ms. Creed started her gender transition. In researching gender identity disorder, Ms. Creed learned that the standards of care for the treatment of the disorder include a therapeutic protocol called the real-life experience, which involves living full time as a member of the sex with which the person identifies. . . .. After real-life experience in the desired role, the next phases of treatment include hormones of the desired gender and, finally, surgery to change the genitalia and other characteristics. . . .. On April 26, 2005, Ms. Creed sought counseling relating to her gender transition and was diagnosed with gender identity disorder. Ms. Creed continued counseling for three sessions or so but stopped going because she couldn't afford the cost.

Employment History

Ms. Creed began working as a sales associate at Family Express Store # 51 in LaPorte, Indiana on February 14, 2005. When she applied for the position, Ms. Creed had a masculine demeanor and appearance and presented herself as Christopher Creed. Over the course of her employment, Ms. Creed continued to come to terms with her gender identity and gradually changed her appearance to look more feminine. Ms. Creed began wearing clear nail polish, trimming her eyebrows, and sometimes wore black mascara. In the fall of 2005, Ms. Creed started growing her hair out and began wearing it in a more feminine style. During this time, Ms. Creed also increasingly used the name "Amber." At all times during her employment, Ms. Creed wore Family Express's required unisex uniform consisting of a polo shirt and slacks.
Ms. Creed says her store manager, Dan Arthur, knew she identified as a female, and he spoke with her on several occasions about her gender transition. Ms. Creed says Mr. Arthur was supportive and urged her to continue her employment as a female. . . .

Ms. Creed says that she met or exceeded Family Express's legitimate performance expectations and received positive feedback about her job performance throughout her employment. . . . Family Express agrees that Ms. Creed performed her duties in a satisfactory manner, but maintains that she didn't fulfill the conditions of her employment adequately because she refused to follow the company's sex-specific dress code and grooming policy. Family Express requires all of its employees to "maintain a conservative, socially acceptable general appearance, conceal all tattoos, take out all body piercing[s], and wear uniforms neatly, with shirts tucked in and belts worn." The policy's sex-specific portion requires males to maintain neat and conservative hair that is kept above the collar and prohibits earrings or any other jewelry that accompanies body piercing. Females also must maintain neat and conservative hair, which needn't be above the collar, and may wear makeup and jewelry so long as it is conservative and business-like. The Human Resources Department oversees all final decisions about whether an employee's appearance conforms with the policy. . . .

Customer Complaints About Ms. Creed's Appearance

Ms. Creed never received any complaints from customers about her feminine appearance. Indeed, many customers were extremely supportive of her gender transition and pleased with her performance. . . . Director of Operations Mike Berrier testified that Family Express received a customer complaint about Ms. Creed's appearance on December 13, 2005. Mr. Berrier said the customer told him that she thought Ms. Creed was a wonderful employee, but that she felt uncomfortable with Ms. Creed's

wearing makeup, nail polish, and a more feminine hairstyle. Mr. Berrier claimed that he received another complaint through the company website on either December 12 or 13, which stated that a store employee was dressing in a way that was a "male person, but female in appearance." . . .

On December 14, Ms. Creed met with Mr. Berrier and Ms. Carlson. Mr. Berrier and Ms. Carlson told her that they had received a complaint about her feminine appearance and that she could no longer present herself in a feminine manner at work. Ms. Creed told them that she was transgender and going through the process of gender transition. . . . Mr. Berrier and Ms. Carlson told her that if she didn't report to work "as a male" she would be terminated and that she had twenty-four hours to decide if she would present herself in a more masculine manner. When Ms. Creed told them she couldn't do so, they terminated her employment. . . .

Family Express's Dress Code and Grooming Policy
Family Express maintains that it didn't discriminate against Ms. Creed based on her gender because it relied on a uniformly applied, sex-specific dress code and grooming policy. In support, Family Express cites a line of cases finding that gender-specific dress and grooming codes don't violate Title VII so long as the codes don't disparately impact one sex or impose an unequal burden. *See e.g.*, Jespersen v. Harrah's Operating Co., Inc., 392 F.3d 1076 (9th Cir. 2004); Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998) . . .

Ms. Creed doesn't challenge Family Express's right to maintain a fair and reasonable appearance code, but rather, she claims that Family Express terminated her because she failed to conform to stereotypes about how a man should appear. . . .

. . . Family Express presented evidence that it applies its dress code and grooming policy uniformly to all employees; in fact, Family Express terminated several other employees for policy violations. Ms. Creed might argue that real-life experience as a member of the female gender is an inherent part of her non-conforming gender behavior, such that Family Express's dress code and grooming policy discriminates on the basis of her transgender status, but rightly or wrongly, Title VII's prohibition on sex discrimination doesn't extend so far. . . . As already explained, Ms. Creed's Title VII claim must rest entirely on the theory of protection as a man who fails to conform to sex stereotypes. While the court may disagree with Family Express that a male-to-female transsexual's intent to present herself according to her gender identity should be considered a violation

> of its dress code and grooming policy, that is not the issue the law places before the court. . . .
>
> Ms. Creed hasn't presented sufficient evidence of discriminatory motivation which would allow a jury to reasonably infer that Family Express terminated her for failing to meet its masculine stereotypes. Ms. Creed hasn't carried her burden on her sex discrimination claim, and Family Express is entitled to summary judgment.

Additional Cases

Jespersen *v.* *Harrah's Operating Company, Inc.*

--- F.Supp.2d ---
United States District Court, D. Nevada, 2002

Reed, District J. This action arises out of plaintiff Darlene Jespersen's ("Plaintiff") termination from employment with defendant Harrah's Operating Company ("Defendant"). Plaintiff filed this lawsuit, asserting that Defendant discriminated against her in violation of Title VII, 42 U.S.C. § 2000e- 2(a)(1), and alleging related state tort claims. . . .

BACKGROUND

Plaintiff worked at Harrah's from 1979 until 2000. She was initially hired as a dishwasher, but was soon promoted. She worked as a bartender for the majority of her time at Harrah's. Defendant introduced a program in early 2000 to universally improve the performance of its beverage employees. As part of that program, Defendant issued its "Personal Appearance Standards" to govern how its employees should look. In March 2000, Plaintiff received the Personal Appearance Standards and committed to meeting those standards. In April 2000, Defendant revised the Personal Appearance Standards. One of the revisions was the addition of a makeup requirement. The standard differed for males and females. Specifically, the policy for females said: "[m]akeup ... must be worn and applied neatly in complimentary colors. Lip color must be worn at all times."

On May 5, 2000, Plaintiff refused to sign-off on the standards because of the makeup requirement. She had worn makeup in the past and it had made her feel extremely uncomfortable, ill and violated. Defendant told her that compliance was mandatory. When Plaintiff still refused to comply, she was given the opportunity to view job openings, but did not apply for any of them. Defendant thereafter terminated Plaintiff's employment. After exhausting her administrative remedies, Plaintiff filed this action. . . .

ANALYSIS

. . . Title VII makes it unlawful to discriminate against any individual on account of protected traits, including one's sex. . . . To prove one's case under Title VII, a plaintiff may proceed on one of two recognized theories: disparate treatment or disparate impact. . . .

The facts in this case are largely undisputed. Defendant terminated Plaintiff because she refused to comply with Defendant's "Personal Appearance Standards" because they required her to wear makeup. The question we must answer is whether that policy, which required women to makeup, but prohibited men from doing the same, is discriminatory under Title VII on a theory of disparate treatment.

It is well established that grooming and appearance standards that have different but equal requirements for men and women are not violative of Title VII. . . . Underlying these holdings is the premise that employer's sex- differentiated regulation of dress, cosmetic or grooming practices, which do not discriminate on the basis of immutable characteristics or intrude upon a person's fundamental rights, do not fall within the purview of Title VII. . . .

The key consideration to determine whether a sex-differentiated appearance standard is discriminatory is whether it is applied evenhandedly to both sexes. . . Although we have yet to encounter a decision that deals directly with a policy that requires one sex to wear makeup and forbids the other from doing so, the Ninth Circuit's analysis . . . is instructive. That is, given that Defendant's Personal Appearance Standards prescribed different requirements for men and women, the question is whether the sex-differentiated, standards imposed unequal burdens. Defendant argues that while its standards are not identical for each sex, one is not more burdensome than the other. Upon careful consideration, we agree.

The policy at issue required women to wear makeup, but prohibited men from doing the same. . . . It allowed women to wear their hair up or down without a restriction on length, but prohibited men from having their hair reach below the tops of their shirt collars. . . . Men could not wear nail polish; women could wear nail polish, but only in certain colors. . . . Finally, each had to wear solid black leather shoes. . . .

Plaintiff argues that imposing a requirement that female employees wear makeup and not imposing such a requirement on males demonstrates discrimination. . . . As stated, to resolve this issue we must look at whether the burdens imposed are equal, not merely whether one sex is burdened. While we agree that some women may consider the requirement to wear makeup burdensome, we also think that some men may feel the same way with regard to the male makeup policy. Women must wear makeup. Men cannot. As Plaintiff states "in modern society, both men and women wear makeup." . . . Thus, prohibiting men from wearing makeup may be just as objectionable to some men as forcing women to wear makeup is to Plaintiff.

In addition to the makeup provision, the policy forbids men from having the length of their hair fall below the tops of their shirt collars. . . . There is no restriction on the length of women's hair. As Defendant points out, this requirement surely constitutes a burden on men that is not imposed on women. The other requirements are equally restrictive to both males and females.

Because a fair reading of the policy indicates that it is applied "evenhandedly to employees of both sexes," . . . we conclude that this situation is more like the sex-differentiated standards that impose equal but different burdens on both sexes, than that [which imposes] a different and heavier burden on women. . . . Moreover, the makeup requirement involves a mutable characteristic, which does not infringe on equal employment opportunities due to one's sex. . . . Therefore, it does not violate Title VII under a disparate treatment theory. . . .

III. State Claims
A. Intentional Infliction of Emotional Distress
To establish a cause of action for intentional infliction of emotional distress, Plaintiff must establish the following: (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation. . . .

As to the first element, Plaintiff claims that "being fired for refusing to wear makeup is extreme and outrageous." . . . We do not agree. "Termination of employees, even in the context of a discriminatory policy, does not in itself amount to extreme and outrageous conduct." . . . Moreover, as discussed, we do not find Defendant's policy discriminatory. Plaintiff has failed to establish a factual dispute as to the first element.

In addition, a showing of severe or extreme emotional distress under the second element requires proof of physical injury or serious emotional distress causing physical injury. . . . Plaintiff does not dispute this requirement, but claims that such issues are a question for the jury. Although she testified that she felt extremely uncomfortable, ill and violated when she had worn makeup at work in the past, the only physical manifestation of the distress Plaintiff alleges is that she "felt ill." . . .We note that Plaintiff attested to feeling this way when she had worn makeup years before Defendant instituted the makeup requirement at issue. When Defendant implemented its Personal Appearance Standards, Plaintiff only felt "extremely uncomfortable." . . . There is no evidence of emotional distress causing her physical injury due to either Defendant's conduct regarding its implementation of the standards, or her refusal to comply with them.

Even if we do consider this as evidence of Plaintiff's severe emotional distress, it is insufficient. As Defendant notes, we have previously held that evidence of feelings of "inferiority, headaches [and] irritability" are not enough to amount to severe emotional distress. . . .Therefore, Plaintiff's failure to present evidence to show either extreme or outrageous conduct or that she suffered physical injury or distress causing physical injury requires that we dismiss this claim as a matter of law.

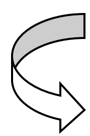
B. Negligent Supervision and Training
A claim of negligent training or supervision requires a breach of a duty of care in training or supervising an employee. . . .Such claims have been discussed in Nevada law where a third party is harmed by an employee and it is charged that, had an employer exercised reasonable care in training or supervising an employee, the injury would not have occurred. . . .
Plaintiff has neither averred, nor demonstrated through evidence, that such a breach occurred. Instead, the evidence shows that Defendant implemented its policy of requiring makeup and Plaintiff chose not to follow it. As discussed, the policy is not discriminatory.

In response to Defendant's contention, Plaintiff asserts that the policy was ambiguous and that Plaintiff thought as long as she was feeling and looking her best without makeup, she was complying with it. . . . Therefore, she asserts she "has presented evidence that Defendant failed to properly train it's [sic] employees in dealing with this situation" and "that Defendant was negligent in supervising its employees ...." . . .Unfortunately, even if this were a valid argument, Plaintiff presents no evidence to support it. Pleadings alone are insufficient to raise an issue of disputed fact to defeat summary judgment. . . .

Plaintiff has not put forth any evidence that Defendant was negligent in the way in which it trained or supervised its employees' implementation of the Personal Appearance Standards. As there is no evidence that Defendant breached any duty owed to Plaintiff, this claim must also fail. . . .

Chapter 10 - Pregnancy Discrimination

Chapter 10 - Cognitive Objectives



1. Identify and apply the federal statutory bases for protection against discrimination based on pregnancy.
2. Analyze pregnancy discrimination cases under disparate treatment and disparate impact theories, including BFOQ analysis, as in *Boyd v. Harding Academy of Memphis, Inc.*, *Cumpiano v. Banco Santander Puerto Rico*, *UAW v. Johnson Controls, and Dias v. Archdiocese of Cincinnati*.
3. Explain and apply the EEOC regulations found in 29 C.F.R. Part 1604.10.
4. Apply the FMLA to employment disputes, as in *Chaney v. Providence Health Care*

Statutory Bases – Pregnancy Discrimination

The Civil Rights Act of 1964, Title VII

42 U.S.C. §2000e-2:
(a) It shall be an unlawful employment practice for an employer --
(1) to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, **sex**, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. §2000e-2(a):
(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, **sex**, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer,

. . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community . . ..

The ***Pregnancy Discrimination Act***

42 U.S.C. § 2000e(k)
The terms 'because of sex' or 'on the basis of sex' [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work. . .

Overview - Pregnancy Discrimination

After passage of the 1964 Civil Rights Act, courts were divided on the issue of application of gender discrimination principles to pregnant women. Was discrimination based on pregnancy status tantamount to gender discrimination? In *General Electric Co. v. Gilbert*, the Supreme Court ruled that discrimination based on pregnancy was not gender discrimination under Title VII.[1] That decision prompted congressional intervention, resulting in passage of the Pregnancy discrimination Act (PDA),[2] adopted in 1978. The PDA amends Title VII's definition of gender discrimination to include pregnancy discrimination.

The basic principle of the PDA is that, in the employment arena, pregnant women must be treated the same as other employees or applicants. Employment decisions must be made based on an employee's ability or inability to work, not on the employee's pregnancy. In a similar vein, a female employee or applicant may not be discriminated against because she had an abortion.

The PDA also does not allow or require discrimination in favor of pregnant women. For example, an employer does not need to provide special disability benefits or health insurance for pregnant women. However, an employer would violate the PDA if it provides short-term disability coverage for employees but denies the coverage to pregnant women. A woman unable to work for pregnancy-related reasons is entitled to disability benefits in the same fashion as other employees unable to work for other medical reasons.

If a pregnant employee is unable to perform the functions of her job, the employer is not required to change the job duties or provide an alternate job the pregnant employee could perform. However, if employees suffering short-term disabilities other than pregnancy

[1] 429 U.S. 125 (1976).
[2] Pub. L. 95-955.

are provided accommodations or alternate jobs, than pregnant employees must be similarly accommodated.

Some common ways an employer could violate the PDA include:

- ✓ Refusing to hire an applicant because she is pregnant;
- ✓ Firing an employee after learning of her pregnancy;
- ✓ Forcing a pregnant employee against her wishes to transfer to light work; and
- ✓ Refusing a request to grant light work to a pregnant employee, where the employer has provided such accommodations to other employees with short-term disabilities.

In the following case, *Boyd v. Harding Academy*, the court examines the difference between pregnancy discrimination and discrimination on another related basis, out-of-wedlock sexual activity.

Boyd
v.
Harding Academy of Memphis, Inc.

88 F.3d 410
United States Court of Appeals, 6th Circuit, 1996

Contie, C.J. - Plaintiff-appellant Andrea E. Boyd appeals the district court's judgment for defendant-appellee Harding Academy of Memphis, Inc. ("Harding") in this action alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964 . . .. On appeal, the issue is whether the district court erred in holding that defendant's articulated legitimate, non-discriminatory reason was not a pretext for illegal discrimination. For the following reasons, we affirm the judgment of the district court.

[Background Facts] Defendant Harding is a religious school affiliated with the Church of Christ and located in Memphis, Tennessee. It is made up of eight campuses and staffed by approximately 130 teachers. All faculty members are required to be Christians, and a preference is given to Church of Christ members. **[As presented in Chapter 12, this type of religious discrimination is permissible under Title VII.]** Dr. Harold Bowie serves as its President and CEO. One of the eight campuses contains the preschool facility known as Little Harding, and Brenda Rubio serves as Little Harding's director. Rubio's duties as director include taking applications, interviewing applicants, and recommending those who are to be hired or terminated. However, Dr. Bowie is the only person with the authority to terminate the employment of teachers at Harding.

Plaintiff Boyd was hired for a preschool teaching position at Little Harding in January 1992. Plaintiff knew that Harding was a church-related school and indicated on her application for employment that she had a Christian background and believed in God. The faculty handbook given to plaintiff after she was hired to work at Harding read: "Christian character, as well as professional ability, is the basis for hiring teachers at Harding Academy. Each teacher at Harding is expected in all actions to be a Christian example for the students...." Plaintiff was not married at any time during her employment by Harding, and she testified at trial that she was never told that she would be terminated if she engaged in sex outside of marriage. She further testified that she did not think that sex outside of marriage was against the tenets of all faiths, but she could not name a religious entity that teaches that sexual activity among unmarried persons is appropriate.

In May 1992, plaintiff had a miscarriage with some minor complications. She told Rubio about her condition, and pursuant to her doctor's request, she asked Rubio for a few days off. Rubio agreed and told plaintiff that she would pray for her. Rubio testified that she thought to herself at the time that if Boyd had been pregnant, she would have had to terminate her. Rubio did not report this incident to Dr. Bowie.

In February 1993, Sharon Cooper, Rubio's assistant, told her that plaintiff Boyd might be pregnant. Rubio reported this information to Pat Bowie, her superior and Dr. Bowie's wife. After checking with Dr. Bowie, Ms. Bowie told Rubio to determine whether Boyd was pregnant in a direct conversation with her and to terminate her if she was pregnant because it would establish that she had engaged in extramarital sexual intercourse.[3]

On February 10, 1993, Rubio called Boyd into her office for a meeting. Cooper was also present and was taking notes. At the meeting, Rubio asked Boyd if she was pregnant, and Boyd answered affirmatively. Rubio then told plaintiff that because she was pregnant and unwed,[4] she set a bad example for the students and parents and would therefore have to be terminated. However, Rubio informed plaintiff that if she were to marry the father of the child, she would be eligible for re-employment. During the course of the meeting, Rubio also told plaintiff Boyd about Toni Climer, another teacher at Little Harding who had become pregnant while unwed. Climer was terminated, but was rehired when she married the father of her child.

[3] Although hypothetically plaintiff could have become pregnant by means of artificial insemination, during her conversations she gave no indication that this was so.
[4] Rubio testified that she was trying to be "as gentle as [she] could" with Boyd and that by saying that plaintiff was pregnant and unwed, she actually meant that plaintiff had engaged in sex outside of marriage.

At trial, Dr. Bowie described several occasions during his tenure when he terminated employees for violating Harding's prohibition against sex outside of marriage. The district court summarized Bowie's testimony on this subject as follows:
In 1961, James Rogers was terminated for living with a woman who was not his wife. Approximately ten (10) years ago, another male, Bob Alley, who was then the principal or academic dean and who had worked at Harding Academy approximately twenty (20) years, was terminated for sexual immorality. In terms of female employees terminated for engaging in sex outside of marriage, Dr. Bowie testified that Betty Madewell Dover, an elementary school teacher, was involved with a man to whom she was not married and was terminated based on this conduct. (No pregnancy resulted in Ms. Dover's case.) Another female, Wanda Watson, was also terminated based on her involvement in an extramarital relationship, in which no pregnancy resulted.

There were no situations described at trial in which Dr. Bowie was aware of an employee's sexual activity outside of marriage and failed to take action. Finally, defendant presented evidence at trial to show that at least six married women who became pregnant while working at Harding remained employed there during and after their pregnancies.

On February 16, 1993, plaintiff Boyd filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that defendant's termination of her was on the basis of her pregnancy and constituted sex discrimination under Title VII. On June 30, 1993, the EEOC completed its investigation and issued a right to sue letter. On September 29, 1993, plaintiff filed a complaint in federal district court. . . .

[Legal Analysis] . . . A plaintiff claiming disparate treatment under Title VII must first establish a prima facie case of unlawful discrimination. . . . In order to make out a prima facie case of pregnancy discrimination, a plaintiff must initially show: (1) that she was pregnant; (2) that she was qualified for her job; (3) that she was subjected to an adverse employment decision; and (4) that there is a nexus between her pregnancy and the adverse employment decision. . . . If the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. . . . If the defendant satisfies this burden, the . . . presumption of intentional discrimination "drops out of the picture." . . . The employee must then prove by a preponderance of the evidence that the defendant intentionally discriminated against her. She may satisfy this burden by showing that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for intentional discrimination.

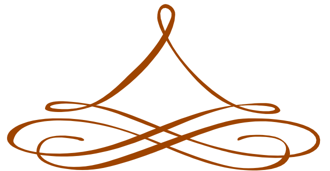
. . .
Plaintiff Boyd claims that the district court's judgment in favor of defendant Harding was improper. The district court found that plaintiff failed to meet her burden of proof in establishing a Title VII gender discrimination claim. The court determined that defendant Harding articulated a legitimate, non-discriminatory reason for plaintiff's termination when it stated that plaintiff was fired not for being pregnant, but for having sex outside of marriage in violation of Harding's code of conduct. The court held that plaintiff failed to show that defendant's proffered non-discriminatory reason for plaintiff's termination was a pretext for illegal discrimination and entered judgment for defendant.

. . . [P]laintiff argues that the district court's judgment for defendant was erroneous because Rubio applied Harding's policy against extramarital sex in a discriminatory manner. Plaintiff asserts that Rubio reported to Dr. Bowie only when she became pregnant as a result of sex outside of marriage and not when she previously had a miscarriage. However, plaintiff did not show that Rubio knew of and failed to report any other incidences of proscribed sexual conduct by other Little Harding employees. Although there were single mothers teaching at Little Harding who had children out of wedlock, plaintiff presented no proof that established that Rubio was actually aware that any employees were engaging in sex outside of marriage during the time they were employees of Little Harding. There is no proof that Dr. Bowie, in whom the authority to hire and fire resided, applied the policy in a discriminatory manner. Therefore, we agree with the district court that Rubio's "isolated inconsistent application of ... defendant's policy" was not sufficient to show that defendant's articulated nondiscriminatory reason was not the real reason for plaintiff's termination. . . .

[P]laintiff [also] argues that the district court erred in holding that defendant's reason was not a pretext based on the fact that Rubio and Dr. Bowie used the phrase "pregnant and unwed" in conversations with plaintiff Boyd and each other. However, Rubio explained at trial that when she said "pregnant and unwed," she actually meant "had engaged in sex outside of marriage," and the district court found this explanation to be credible. . . . Although Title VII requires that this code of conduct be applied equally to both sexes, . . . defendant presented uncontroverted evidence at trial that Dr. Bowie had terminated at least four individuals, both male and female, who had engaged in extramarital sexual relationships that did not result in pregnancy. . . .In its brief, defendant alternatively argues that plaintiff served as a role model for the students at the school; therefore, "non-pregnant out of wedlock" status was a bona fide occupational qualification (BFOQ). *See Vigars v. Valley Christian Center of Dublin, California,* 805 F.Supp. 802 (N.D.Cal.1992). However, our holding here makes it unnecessary for us to address this argument. . . .

Case Questions, Boyd v. Harding Academy:
1. How did the court distinguish between discrimination based on sexual activity and discrimination based on the result of the sexual activity, pregnancy?
2. How would the court analyze a claim by the plaintiff of disparate impact, as well as disparate treatment?

The opinion of the EEOC on pregnancy discrimination is found in the following EEOC regulations:



Guidelines on Discrimination because of Sex[5]

Sec. 1604.10 Employment policies relating to pregnancy and childbirth.
(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of title VII.
(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.
(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity. . . .

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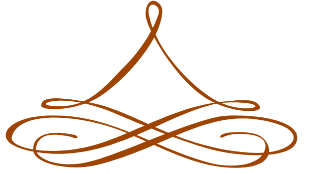
[5] 29 C.F.R. Part 1604 – Title 29—Labor.



Pregnancy Discrimination Questions:

1. A manufacturing company has two workers that are pregnant. As the workers' pregnancy progresses, they become uncomfortable standing and are unable to work continuously through their normal shifts. The employer's response is to grant the two workers an extra break in the morning and in the afternoon. Is this policy acceptable? What choices are available to the employer?
2. May an employer legally require a pregnant employee to perform hard, physical labor at work?
3. What is the meaning of Section 1604.10(c), above?

Pregnancy Discrimination Charges

The following chart summarizes the resolution of recent pregnancy-based discrimination charges filed with the EEOC and the state and local Fair Employment Practices Agencies around the country that have a work sharing agreement with the commission. Beginning in 2012, the data reflects only charges filed with the EEOC.

	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Receipts	4,901	5,587	6,285	6,196	6,119	5,797	3,745
Resolutions By Type							
Administrative Closures	17.1%	17.7%	16.0%	18.3%	16.3%	15.7%	14.7%
No Reasonable Cause	55.6%	51.6%	53.9%	54.3%	58.3%	58.9%	63.9%
Merit Resolutions	27.3%	30.7%	30.1%	27.4%	25.4%	25.4%	21.5%
Monetary Benefits (Millions)*	$10.4	$30.0	$12.2	$16.8	$18.0	$17.2	$14.3

** Does not include monetary benefits obtained through litigation.*

Definitions of Terms:

Administrative Closure

Charge closed for administrative reasons, which include: failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

No Reasonable Cause

EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.

Merit Resolutions

Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.

Parental Leave Policies & The Family and Medical Leave Act

Congress passed the Family and Medical Leave Act (FMLA) in1993. The FMLA is designed to provide job security for families experiencing serious health conditions or the birth or adoption of children. The main feature of the FMLA is the guarantee for eligible employees of up to 12 weeks of unpaid leave for named family conditions (listed below in the Section (a)(1)), with the promise of the same or equivalent job on return from the leave. The FMLA applies only to employers with 50 or more employees within a 75-mile radius of the workplace. To be eligible for protection under the law, employees must have worked at least 1,250 hours for the employer in the preceding 12 months. The Wage and Hour Division of the Department of Labor administers the FMLA.

In summary, the FMLA has the following features:

- ✓ Covers only certain employers (those with 50 or more employees), exempting smaller employers from coverage;
- ✓ Protects only employees that have experience with the employer (at least 1,250 hours of work during the preceding year);
- ✓ Provides entitlement to leave under named conditions, but does not require the leave to be paid leave;
- ✓ Preserves health benefits during leave;
- ✓ Restores an employee's job, or equivalent, after leave;
- ✓ Provides for protection of pregnancy-related disabilities before birth of a child;

- ✓ Sets requirements for notice and certification from the employee to the employer of leave needs; and
- ✓ Includes certain employer record keeping requirements.

***The Family and Medical Leave Act*[6]**

(a)(1) Entitlement to leave - . . . an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces . . .

(c) Unpaid leave permitted. Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. . . .

(d) Relationship to paid leave. . . . Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection. . . .

Regarding the above code sections, “parent” does not include parents-in-law. “Son” or “daughter” does not include children age 18 or older, unless they are disabled. “Spouse” does not include individuals cohabitating without benefit of marriage.

In an important decision issued June 2013 - United States v. Windsor[7] - the Supreme Court decided (5-4) that § 3 of the federal Defense of Marriage Act (DOMA) is unconstitutional. DOMA defines “marriage” and “spouse” as excluding same-sex partners. In finding DOMA unconstitutional, the Supreme Court affirms that the regulation of marriage is an area that is the virtually exclusive province of the States. Depending on future court decisions and new legislation by Congress, the Family and Medical Leave Act definition of “spouse” will include same-sex married partners in those states recognizing such.

[6] 29 USCS §2612.
[7] 2013 U.S. LEXIS 4921.

Extensive regulations on the FMLA are found in 29 CFR (Code of Federal Regulations), Part 825. For more information, see The U.S. Department of Labor's Wage and Hour Division, available online at http://www.dol.gov/whd/fmla/. The FMLA is the focus of the following case, *Chaney v. Providence Health Care*.

CHANEY
V.
PROVIDENCE HEALTH CARE

SUPREME COURT OF WASHINGTON
295 P.3d 728 (2013)

February 21, 2013, Filed

OPINION BY: Tom Chambers
Robert Chaney was fired from his position and argues his termination violated the federal Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654, as a matter of law. The employer, Providence Health Care d/b/a Sacred Heart Medical Center & Children's Hospital (Providence), claims no violation of the FMLA occurred. The trial court denied motions for a directed verdict on the issue by both Chaney and Providence. Based upon undisputed facts, we hold the trial court erred in failing to grant Chaney's motion for a directed verdict that as a matter of law the hospital violated the FMLA. . . . .

FACTS

Chaney worked as a radiologic technician at Providence. In 2005, his wife fell ill after giving birth, Chaney himself suffered a back injury, and he relied heavily on FMLA leave over the next two years. By June 2007, Chaney had used up most of his FMLA leave and had been donated leave from other employees. The record indicates the Providence administration and other staff were growing resentful that Chaney had taken so much time off. On June 25, 2007, an employee reported that Chaney appeared fatigued and incoherent. Although no claim was made that his work was compromised, Chaney was ordered to report for drug testing. The drug test was positive for methadone. Chaney had a prescription for methadone to treat back pain, but the doctor who gave the drug test noted that Chaney "[m]ay need fitness for duty evaluation or visit to his Dr. to fine tune his medication." . . .
Providence told Chaney that he had to submit to an evaluation and chose a third party physician, Dr. Royce Van Gerpen, to do the evaluation. Before the evaluation, Chaney went to his own physician, Dr. Jeffrey Jamison, whose office issued a letter on July 5, 2007, stating that Chaney was fit for

duty. On July 16, 2007, Chaney visited Dr. Van Gerpen who said Chaney was not fit for duty due to his prescription medications. On July 31, 2007, the hospital sent a letter to Chaney stating, "Given that we have no other information, but the work release form that restricts you from working in your position, the Medical Center has concluded that your absence from work is due to a health condition.". . . Chaney was informed by letter that Providence was unilaterally placing him on FMLA leave as of July 16, 2007 (two weeks earlier), that his leave expired on August 27, 2007, and if he was not released to return to work by that point he would be terminated. The hospital directed Chaney to fill out the FMLA paperwork it sent along with the letter and to have Dr. Van Gerpen fill out the required FMLA medical certification authorizing the leave.

On August 7, 2007, Dr. Van Gerpen correctly informed the hospital that under the FMLA the medical certification authorizing leave had to be filled out by "the employee's health care provider." . . . Dr. Van Gerpen explained that Dr. Jamison was Chaney's health care provider, not Dr. Van Gerpen. The hospital then directed Chaney to have Dr. Jamison fill out the certification. Dr. Jamison filled out the certification on August 10, 2007. Dr. Jamison wrote on the certification that Chaney needed two to four weeks of leave and also wrote on the form that Chaney "is ok to work as soon as Employer allows." . . . Since Providence had unilaterally placed Chaney on FMLA leave on July 16, and the purpose of the certification was to authorize that leave, Dr. Jamison's note was written three days prior to the maximum length of the recommended two to four week period of leave.

On August 16, 2007, Chaney indicated he was prepared to return to work. It is not clear what Providence told him at this point, but it appears Chaney was erroneously informed he needed Dr. Van Gerpen's permission to return to work. This violated the FMLA, under which Chaney could only be required to get authorization from his own health care provider, Dr. Jamison. Chaney went to Dr. Van Gerpen on August 23, 2007, and told him the hospital would not allow him to return to work unless Dr. Van Gerpen changed his recommended restriction. Dr. Van Gerpen refused to change his recommendation.

On August 27, 2007, Chaney was fired. Providence claimed the termination was proper because Chaney failed to provide a valid fitness for work certification as required under the FMLA. Chaney claimed sufficient certification was provided when his doctor wrote on his medical leave certification form that Chaney was "ok" to return to work. . . .

[HOLDING]

. . .The facts are undisputed and as a matter of law Providence violated the FMLA. The trial court erred in failing to grant Chaney's motion at the conclusion of the case. . . . When an employee is placed on FMLA leave, the FMLA permits employers to require a note from the employee's doctor stating that the employee is fit to work before reinstating the employee. The note need be only a simple statement that the employee is able to return to work. The only other requirement is that the statement must be made at the same time the employee is able to return to work. Under the FMLA, if these requirements are met, an employer must reinstate the employee. If the employer is concerned about the adequacy of the fitness for work statement, it may seek a clarification from the employee's health care provider but may not delay returning the employee to work.

Despite some complicated facts, this case is fundamentally simple. We need not reach whether there was any factual question regarding ambiguity in Dr. Jamison's certification because, assuming there was an ambiguity, the FMLA required the hospital to return Chaney to work and seek clarification, not to fire him. Chaney was entitled to a verdict as a matter of law that Providence violated the FMLA. We affirm the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

Pregnancy Plus Discrimination

In the following case, two bank employees, Mr. Rodriguez and Ms. Cumpiano, were involved in an adulterous affair for several years. The affair was not hidden at work and Ms. Cumpiano had two children with Mr. Rodriguez. After the first child, Ms. Cumpiano was promoted to a management position. When it was discovered that Ms. Cumpiano was again pregnant by Mr. Rodriguez, the bank fired both employees claiming a violation of the bank's morality policy. Ms. Cumpiano sued for discrimination under the PDA.

The bank defended by asserting that since both the man and the woman involved in the affair were fired, there was no gender discrimination. Further, the bank argued that as it employed various other women in lower level positions who were pregnant outside marriage, this evidence proved the bank did not discriminate based on pregnancy. The district court ruled in favor of the plaintiff and the bank appealed. The court of appeals affirmed the ruling against the bank. In essence, the court of appeals ruled the district court finding was not clearly erroneous, the standard used on appellate review of a lower court ruling.

Cumpiano v.Banco Santander Puerto Rico shows that an employer may violate the PDA by engaging in "pregnancy plus" discrimination, that is, discrimination based on pregnancy combined with other reasons. The PDA is violated if pregnancy is used in decision making, regardless of whether pregnancy is used alone or is used in combination with other reasons. According to the district court, the bank seemingly did not have a problem with pregnant employees in lower-level positions. However, pregnant managerial employees presented a different situation.

Cumpiano
v.
Banco Santander Puerto Rico

902 F.2d 148
United States Court of Appeals, 1st Circuit, 1990

Selya, C.J. – **[Background Facts]** . . . The Bank hired Cumpiano in 1978. In due time, she came in contact with, and worked under the supervision of, Humberto Rodriguez Calderon (Rodriguez), the Bank's assistant comptroller. In 1980, Cumpiano and Rodriguez became enmeshed in an amorous relationship. Although Rodriguez was married, the record reflects that the affair was conducted in a public and notorious fashion. In 1982, a child was born to the couple out of wedlock. The Bank clearly knew of the affair and of its consequences; indeed, Rodriguez presented a copy of the infant's birth certificate to appellant's human resources director, Arturo Thurin, and secured coverage for his offspring under an employer-paid health insurance policy. The lovers stayed on the payroll after the baby was born. Plaintiff was not reprimanded, admonished, or cautioned in any way. And the affair continued "openly."

Cumpiano had various assignments over the years. After 1982, she and Rodriguez worked in different departments. They still spent time together out of the office. Parturiency again resulted. In December 1986, following a brief vacation, Cumpiano returned to work dressed in maternity clothes and visibly pregnant. She was handed a letter promoting her, on an interim basis, to operations officer (a position in which she directly supervised 7 to 9 employees at the Bank's San Juan branch). Weeks later, the axe fell. Thurin fired both Rodriguez and Cumpiano on January 29, 1987. Cumpiano received no notice, but Thurin offered her $5,000 in exchange for a letter of resignation and a general release. When Cumpiano asked for an explanation of her dismissal, Thurin refused to give her any reason, saying only that he did not wish to discuss things she already knew.

At trial, appellant claimed that Cumpiano was dismissed because her conduct violated the Bank's internal regulations. Specifically, appellant protested that plaintiff's affair with a married man made her guilty of the crime of adultery under Puerto Rico law and was therefore violative of Norm 14 of the Bank's Manual of General Norms of Work and Conduct. Plaintiff asserted that the stated reason was pretextual. After evaluating the evidence the district court found in Cumpiano's favor, reinstating her and awarding backpay, compensatory damages, counsel fees, and costs. . . .

[Legal Analysis] . . . There is copious evidence in the record tending to prove that Cumpiano, prior to her dismissal, was considered to be a first-rate employee. For nine years, her performance was generally lauded by the employer. She had been romantically involved with Rodriguez for the last seven of those years. Throughout that period, the Bank implicitly condoned the affair, giving Cumpiano no indication that she was in violation of an internal regulation or that her liaison impeded her effectiveness in the workplace. Immediately before the Bank learned of her 1986 pregnancy, she received an important promotion. The Bank concedes that her handling of enhanced responsibility as an operations officer during the ensuing five or six weeks was commendable. Nothing happened during that interval to make her a less desirable or efficient employee.

Appellant . . . accuses the district court of committing reversible error in "refusing to consider" evidence that other employees who became pregnant in 1986-1987 were not dismissed. . . . To a large extent, statistics signify what the factfinder reasonably believes that they signify. "The probative worth of statistical testimony must be evaluated in light of the methodology employed, the data available, and the factual mosaic unique to the case at hand." The data which appellant produced was far from compelling. The [data] showed that, during a two year period, approximately 19 female employees took maternity leave and subsequently returned to work at the Bank. For purposes of the instant case, the information might be suggestive or it might be meaningless; the weight to be given to the statistics was for the factfinder. The district court was in the best position to assess the data's bearing, if any, on the Bank's treatment of Cumpiano. While the judge, if he saw fit, might have relied on the [data], he elected to treat it as unmeaningful. We refuse to second- guess the trier's "choice of which competing inferences to draw" from the facts of record. The court's failure to place decisive weight on the evidence cannot be characterized as clearly erroneous. . . .

Case Questions, Cumpiano v. Banco Santander Puerto Rico

1. Why was the fact that the bank fired both employees involved in the affair not a sufficient defense against the claim of pregnancy discrimination?
2. Consider the following hypothetical company policy: "All bank employees observed to be involved in adulterous affairs will be discharged." How might this policy have a disparate impact possibly violating Title VII and the PDA?

NonPregnancy as a BFOQ

An employer may claim that pregnant employees are not able to perform their jobs for the employer, in essence asserting nonpregnancy as a BFOQ. The courts have not been sympathetic to this claim. An interesting lawsuit based on pregnancy discrimination was brought by an actress, Hunter Tylo, against Spelling Entertainment.

In early 1996, Hunter Tylo entered a contract with Spelling Entertainment Group and to perform on the television series "Melrose Place." The contract provided Ms. Tylo would present services in a recurring role for the 1996/97 series for eight episodes, with an added three-year option available to Spelling. The role, though not clearly defined, was to involve portraying a seductive, sensuous woman. The contract gave Spelling Entertainment the right to fire Tylo if she suffered any material change in her appearance.

In mid March 1996, petitioner learned that she was pregnant. She told Spelling Entertainment of the pregnancy. In April, Spelling told Ms. Tylo that her contract was terminated because a pregnant woman could not portray her character. Spelling Entertainment was, in essence, claiming that nonpregnancy was a required BFOQ to portray convincingly a seductress. At trial, a jury of 10 women and 2 men awarded Tylo nearly $5 million, twice what Tylo had requested in damages.[8] The jury obviously did not agree with the BFOQ defense in the case.

Another case involving gender, pregnancy, and a BFOQ defense is *UAW v. Johnson Controls*. There, the U.S. Supreme Court analyzed a fetal protection policy, that is, an employer policy designed to protect the health of pregnant employees' unborn children. The court ruled the policy in question violated Title VII and the PDA.

[8] Tylo v. Spelling Entertainment, Inc., No. BC 149-844, Los Angeles Superior Court (1998).

UAW
v.
Johnson Controls, Inc.

499 U.S. 187
The United States Supreme Court, 1991

Blackmum, J. - In this case we are concerned with an employer's gender-based fetal-protection policy. May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?

[Factual Background] . . . Johnson Controls, Inc., manufactures batteries. In the manufacturing process, the element lead is a primary ingredient. Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee.

Before the Civil Rights Act of 1964 . . . became law, Johnson Controls did not employ any woman in a battery-manufacturing job. In June 1977, however, it announced its first official policy concerning its employment of women in lead-exposure work:

"[P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons. . . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant." . . .

Five years later, in 1982, Johnson Controls shifted from a policy of warning to a policy of exclusion. Between 1979 and 1983, eight employees became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter. . . . This appeared to be the critical level noted by the Occupational Safety and Health Administration (OSHA) for a worker who was planning to have a family. . . . The company responded by announcing a broad exclusion of women from jobs that exposed them to lead:

"... [I]t is [Johnson Control's] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." . . .

The policy defined “women ... capable of bearing children” as “[a]ll women except those whose inability to bear children is medically documented.” . . . It further stated that an unacceptable work station was one where, “over the past year, an employee had recorded a blood lead level of more than 30 micrograms per deciliter or the work site had yielded an air sample containing a lead level in excess of 30 micrograms per cubic meter. . . .”.

[Disparate Treatment] . . . The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. Section 703(a) of the Civil Rights Act of 1964 . . . prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status. . . . Respondent's fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender. . . . Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees. . . .

[The BFOQ Defense] . . . [A]n employer may discriminate on the basis of “religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” . . . We therefore turn to the question whether Johnson Controls' fetal-protection policy is one of those “certain instances” that come within the BFOQ exception.

The BFOQ defense is written narrowly, and this Court has read it narrowly. . . . The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits the situations in which discrimination is permissible to “certain instances” where sex discrimination is “reasonably necessary” to the “normal operation” of the “particular” business. Each one of these terms-certain, normal, particular-prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is “occupational”; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes. . . .

Johnson Controls argues that its fetal-protection policy falls within the so-called safety exception to the BFOQ. Our cases have stressed that discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances. In *Dothard v. Rawlinson,* this Court indicated that danger to a woman herself does not justify discrimination. . . . We there allowed the employer to hire only male guards in contact areas of maximum-security male penitentiaries only because more was at stake than the "individual woman's decision to weigh and accept the risks of employment." . . . We found sex to be a BFOQ inasmuch as the employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman. Sex discrimination was tolerated because sex was related to the guard's ability to do the job-maintaining prison security. We also required in *Dothard* a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength although it might be a fairly accurate one. . . .

Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job. . . . We have no difficulty concluding that Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the PDA. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization. . . .

[Dicta] A word about tort liability and the increased cost of fertile women in the workplace is perhaps necessary. One of the dissenting judges in this case expressed concern about an employer's tort liability and concluded that liability for a potential injury to a fetus is a social cost that Title VII does not require a company to ignore. . . . More than 40 States currently recognize a right to recover for a prenatal injury based either on negligence or on wrongful death. . . . Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best. . . .

Additional Cases

The following decision was a preliminary holding allowing a trial to proceed. In June 2013 a jury returned a verdict for the plaintiff, Christa Dias. This jury decision will probably be appealed by the Archdiocese of Cincinnati. The case involves legal issues regarding freedom of religion, contract law, as well as Title VII.

DIAS
V.
ARCHDIOCESE OF CINCINNATI

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

2012 U.S. Dist. LEXIS 43240
March 29, 2012, Decided

JUDGES: S. Arthur Spiegel, United States Senior District Judge.

OPINION AND ORDER
This matter is before the Court on Defendants' Motion to Dismiss. . . . For the reasons indicated herein, the Court . . . DENIES Defendants' Motion to Dismiss.

I. Background
These are the facts as alleged in Plaintiff's Complaint. Plaintiff Christa Dias ("Dias") began her employment with Defendants Holy Family School in August 2008 and St. Lawrence School in August 2009, two private Catholic schools. Plaintiff worked as the Technology Coordinator, which meant she oversaw the computer systems at the schools and instructed students on computer usage.

Plaintiff is not a Catholic, and Defendants employed her and other non-Catholics. However, Defendants did not permit non-Catholic teachers to teach religion classes. As such, Plaintiff had no responsibility for religious instruction at the schools.

On Friday, October 15, 2010, Plaintiff notified Jennifer O'Brien ("O'Brien"), the principal of Holy Family School, that she was five and a half months pregnant, and that she would need maternity leave beginning in February 2011. Plain-tiff is not married. O'Brien informed Plaintiff that she did not consider Plaintiff's pregnancy to be a problem and congratulated her. However, O'Brien indicated that she would have to raise the matter with the pastor of Holy Family Church, Reverend James Kiffmeyer. Later that day, O'Brien called Plaintiff to inform her that she had spoken with a colleague from another school about Plaintiff's pregnancy, and that Plaintiff would likely be terminated

immediately because she was pregnant and unmarried. O'Brien agreed to delay speaking with Rev. Kiffmeyer until the end of the following week.

On Monday, October 18, 2010, after being told she would likely be terminated for being pregnant and unmarried, Dias informed O'Brien that she was pregnant as a result of artificial insemination, and not as a result of premarital sexual intercourse. . . . O'Brien informed Plaintiff that Rev. Kiffmeyer had instructed her to contact the human resources department at the Archdiocese for direction. Sometime later the Director of human resources, Bill Hancock, instructed the schools that they had to terminate Plaintiff's employment. The schools did so, on October 21 and 22, 2010, informing Plaintiff her termination was for "failure to comply and act consistently in accordance with the stated philosophy and teachings of the Roman Catholic Church". Defendants initially stated that Dias was discharged for "becoming pregnant outside of marriage," but then changed their reason for terminating Dias to her use of artificial insemination to become pregnant, which they state is also a violation of the philosophy and teachings of the Roman Catholic Church.

Plaintiff filed her Complaint on April 21, 2011, alleging that Defendants' actions amounted to pregnancy discrimination under federal and state law, and that Defendants breached her employment contracts without good cause. Defendants filed the instant motion to dismiss, contending Plaintiff's role at the school was religious such that the "ministerial exception" to Title VII should apply, thus permitting their action. Defendants further contend Plaintiff violated a clause in her employment contract that she would "comply with and act consistently in accordance with the stated philosophy and teachings of the Roman Catholic Church".
. . .

III. Discussion
At the March 22, 2012 hearing it became clear to the Court that there are three basic issues before it: First, whether the ministerial exception applies to this case in light of the Supreme Court's recent ruling in Hosanna-Tabor; second whether Plaintiff has raised legally sufficient claims for breach of contract and pregnancy discrimination; and third, whether this case raises issues of entanglement between church and state and/or violates the Free Exercise Clause, such that Plaintiff has no recourse. The Court will consider these issues seriatim.

A. The Ministerial Exception
. . . When the Supreme Court weighed in on the ministerial exception with its recent opinion in Hosanna-Tabor, it unanimously upheld the right of religious institutions "to select and control who will minister to the faithful," and thus barred "suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws." [**Hosanna-Tabor will be presented later in the textbook, Chapter 12**.] However, the high court refrained from addressing ministerial exception jurisprudence as a whole and from articulating a test or standard for determining who qualifies as a ministerial employee.
. . .

Having reviewed this matter, the Court concludes that Plaintiff is correct that her duties while employed by Defendants show that she was not a minister for purposes of the ministerial exception. Clearly, Plaintiff performed duties as a computer teacher and overseeing computer systems. The Court finds dispositive that as a non-Catholic, Plaintiff was not even permitted to teach Catholic doctrine. Plaintiff had received no religious training or title and had no religious duties . . .. Plaintiff's claims are not barred by the ministerial exception.

B. The Contract
Defendants further argue that Plaintiff's case should be dismissed based on a clause in her employment contract stating that she would "comply with and act consistently in accordance with the stated philosophy and teachings of the Ro-man Catholic Church". Defendants proffer evidence, a Catechism of the Catholic Church, that states the technique of artificial insemination is considered gravely immoral. As such, they argue they were completely justified in terminating Plaintiff's employment based on the fact that Plaintiff admitted undergoing such procedure. Defendants further argue that Sixth Circuit authority has consistently upheld the sort of "morals clause" that they are invoking in this case, . . . [for example, see] Boyd v. Harding Academy of Memphis, 88 F.3d 410 (6th Cir. 1996)(morals clause upheld prohibiting employees from engaging in premarital sex)).
. . .
Plaintiff . . . responds that as the contracts she signed made no reference to artificial insemination, Defendants' contention that she engaged in bad faith by signing such contracts is contingent upon proof that she knew that such conduct was against the teachings and philosophy of the church. Such question, she contends, is a question of fact that cannot be resolved in a motion to dismiss . . ..

The Court finds the determination regarding Plaintiff's view of the contract a close call. However, in the context of [a motion to dismiss] it is the Court's obligation here to construe all well-pleaded facts liberally in favor of the Plaintiff. [The court is applying the legal standard for motions to dismiss, that is, a defendant is not entitled to circumvent the trail process and win a case on a motion to dismiss if there is a chance the plaintiff could prevail in a trial on the merits – Pittman.] The Court finds facts alleged in the Complaint allow it to question the applicability of the morals clause in this matter. . . .. Simply put, . . . Plaintiff's claim for breach of contract "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." . . .

C. Pregnancy Discrimination
In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA"), which amended Title VII to specify that sex discrimination under Title VII includes discrimination on the basis of pregnancy. . . .By incorporating the PDA into Title VII, Congress manifested its belief that discrimination based on pregnancy constitutes discrimination based upon sex.

The Sixth Circuit has provided guidance in the context of religious institutional reaction to pregnant employee teachers in two cases in which defendants did not invoke the ministerial exception. Its decision in Boyd, 88 F.3d 410, 414 (6th Cir. 1996), shows that it views as a legitimate nondiscriminatory justification for termination the violation of a prohibition against employees engaging in extra-marital sex. In Boyd, the court found valid the defendant's argument that it fired the plaintiff not for being pregnant but for engaging in sex outside marriage. However, the court also noted the defendant in Boyd proffered evidence that it applied the policy equally to both male and female employees. Of particular import to the case at bar, the Sixth Circuit suggested that had the plaintiff in Boyd become pregnant by artificial insemination, her situation would have been different from that of an employee who engaged in extra-marital sexual intercourse.

In Cline, 206 F.3d 651 (6th Cir. 1999), the Sixth Circuit confronted a situation nearly identical to that of this case. A Catholic teacher's contract was not renewed for violating a provision in the employee handbook to "uphold, by word and example . . . teachings of the Roman Catholic Church," when plaintiff acknowledged she became pregnant before her marriage. The Sixth Circuit reversed the district court's grant of summary judgment to the Defendant Catholic Church, finding that it too hastily sided with the church. The court found evidence showing the defendant focused more on the fact of her pregnancy than her sexual activity and that the policy was not applied equally among men and women. The court further found the defendant acknowledged it was plaintiff's pregnancy alone that signaled to them that plaintiff had engaged in sex, and that it did not otherwise inquire as to whether male teachers engaged in premarital sex. According to the Sixth Circuit, such evidence raised a genuine issue of material fact as to whether the defendant enforced its policy solely by observing the pregnancy of its female teachers, which would constitute a form of pregnancy discrimination.

This case is at an earlier procedural stage than those in Boyd and Cline. The Court only need to determine whether Plaintiff has alleged a plausible complaint of pregnancy discrimination. As the allegations in the Complaint show Defendants made the decision to terminate Plaintiff initially for being pregnant, and then later for being artificially inseminated, the Court finds she has a plausible claim. Under the precedent, it appears Defendants' justification for their actions could ultimately have merit should it be proven to have been based on a prohibition of extramarital sexual activity. The allegations do not indicate this to be the case. Moreover, Boyd suggests that artificial insemination should be viewed differently, and in any event, that any policy must be applied equally to both genders. These questions are premature to address without further discovery. As such, under the circumstances of this case, the Court finds it inappropriate to grant Defendant's motion to dismiss.

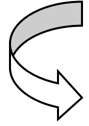
D. Entanglement and Free Exercise
Defendant raises further arguments that court intervention in this matter would run afoul of the First Amendment. Plaintiff contends the proper analysis is completed after consideration of the applicability of the ministerial exception. The Court agrees with Plaintiff. Precedent shows, as indicated herein, that religious institutions are, and have been, subject to court review of Title VII employment discrimination claims made by non-ministerial employees all across the country.

IV. Conclusion
Having reviewed this matter, the Court concludes Plaintiff was a non-ministerial employee of Defendants. The Court further concludes she has raised plausible claims of pregnancy discrimination and breach of contract. Accordingly, the Court . . . DENIES Defendants' Motion to Dismiss . . ..

Chapter 11 - Sexual Harassment

Chapter 11 - Cognitive Objectives

1. Explain the general idea of sexual harassment and connect sexual harassment to Title VII of the Civil Rights Act of 1964. Identify legal claims other than Title VII that are potentially involved in sexual harassment incidents.



2. Compare and contrast hostile environment sexual harassment to quid pro quo sexual harassment. Solve problems and explain cases under the required elements of either theory of sexual discrimination, as in *Jones v. Clinton.*

3. Analyze sexual harassment claims between individuals of the same gender, as in *Oncale v. Sundowner Offshore Services, Inc*.

4. Distinguish voluntary sexual activity from unwelcome sexual activity, as in *Meritor Savings Bank v. Vinson*. Analyze the evidence needed to prove this distinction.

5. Analyze the severity and pervasiveness of alleged harassment, as in *Jones v. Clinton.*

6. Apply the rules of employer liability for sexual harassment, distinguishing harassment from supervisory employees from harassment from co-employees or customers, as in *EEOC v. AutoZone*.

7. Explain management duties regarding the accuracy of a sexual harassment investigation, and the appropriateness of the resulting sanctions imposed on the individuals involved. Identify suitable tactics to reduce incidents of sexual harassment.

Statutory Bases – Sexual Harassment

The Civil Rights Act of 1964, Title VII

42 U.S.C. §2000e-2:

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, **sex**, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against

an individual in violation of this section.

42 U.S.C. §2000e-2(a):
(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, **sex**, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community . . ..

EEOC Regulations

29 C.F.R. §1604.11 Sexual harassment.
(a) Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Overview – Sexual Harassment

"The relation of the sexes . . . is really the invisible central point of all action and conduct. It is the cause of war and the end of peace; the basis of what is serious, and the aim of the jest; the inexhaustible source of wit, the key to all illusions, and the meaning of all mysterious hints." -- Arthur Schopenhauer (German philosopher, 1788-1860)

Schopenhauer's quotation may involve hyperbole, but the relationship between men and women is powerful. One aspect of this relationship involves men and women working together. In that regard, sexual harassment has come to the forefront as a legal cause of concern for employers and employees. The 1964 Civil Rights Act, Title VII, prohibits employment discrimination based on gender (sex). According to the courts, sex discrimination also includes sexual harassment - harassment directed toward an employee because of that employee's sex.

Sexual Harassment History

In 1986, twenty-two years after Congress passed the 1964 Civil Rights Act, the Supreme Court recognized for the first time a special form of discrimination based on sex, sexual

harassment. In that decision, *Meritor Savings Bank, FSB v. Vinson,*[1] the court definitively established that sexual harassment violates Title VII. Between *Meritor* in 1986 and 1998, the Supreme Court issued only one other Title VII sexual harassment decision, *Harris v. Forklift Systems.*[2] With just two Supreme Court opinions, employers were left with various lingering questions about liability for sexual harassment. Some of the ambiguity was removed when the Supreme Court issued three Title VII sexual harassment decisions in 1998.

Sexual Harassment Definition

The courts have identified two major forms of sexual harassment. The first, **quid pro quo**, occurs when a supervisor makes an unwelcome sexual advance to an employee under his or her supervisory authority, and conditions job benefits on agreeing to the advance. (Normally co-workers cannot commit this harassment because they do not have the power to control job benefits for colleague employees.) The classic example of quid pro quo harassment is a supervisor's threat to a subordinate employee to "sleep with me or you are fired."

The other major variety of sexual harassment, **hostile environment**, is created by unwelcome verbal or physical conduct where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Harassment does not need to be of a sexual nature to create a hostile environment. It is enough the harassment be directed at an employee because of his or her sex. For example, a supervisor yelling louder and longer at female versus male employees could create a sexually hostile environment. In *Oncale v. Sundower Offshore Services, Incorporated*,[3] the Supreme Court extended hostile environment theory to include same-sex harassment. Title VII is thus violated by female supervisors (or co-employees) creating a hostile environment for other female employees, or male supervisors creating a hostile environment for other male employees.

For a victimized employee to prevail under the hostile environment theory, the environment the employee is subjected to must be "sufficiently" hostile. This involves looking at all the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[4] Employers sometimes overreact to the harassment issue, adopting policies that try to remove interaction between men and women at work. Normal male and female interaction does not violate the law. From *Oncale*, above, the Supreme Court has the following observations:

> [T]he statute [Title VII] does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex

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[1] 477 U.S. 57, 67 (1986).
[2] 510 U.S. 17 (1993).
[3] 118 S.CT. 998 (1998).
[4] *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 23 (1993).

> and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview."[5]

In summary:

- ✓ Harassment does not violate federal civil rights laws unless it involves discrimination based on race, color, sex, religion, national origin, age of 40 or older, disability, or a protected activity under the anti-discrimination statutes.
- ✓ The anti-discrimination statutes are not a general civility code. Thus federal law does not forbid simple teasing, offhand comments, or isolated incidents that are not serious.
- ✓ The harassing conduct must be so offensive as to alter the conditions of the victim's employment. The conditions of employment are altered only if the harassment resulted in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment. Severity is judged both at a subjective level (was the plaintiff personally bothered to a sufficient degree) and at an objective level (would a reasonable person have been bothered to a sufficient degree). Both perspectives must be satisfied to have actionable sexual harassment.

Claims beyond Title VII Harassment

Besides Title VII, victims of sexual harassment may have other civil claims to bring against an alleged harasser. These additional claims depend on the facts of the harassment. Additional civil claims include:

Assault – intentionally creating fear in the harassed person of an imminent unlawful touching;

Battery – an unlawful touching of the harassed person, without justification of legal excuse;

Intentional infliction of emotional distress – intentional extreme and outrageous behavior that causes the harassed person severe emotional distress;

False imprisonment – intentionally confining the harassed person for an appreciable time; and

Tortious interference with a contract – intentionally causing the harassed person to be unable to perform his or her employment contract.

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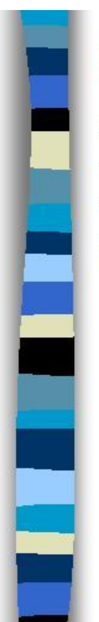
[5] 118 S.Ct. 998, 1002 (1998).



Sexual Harassment Theories

Sexual harassment involves unwelcome sexual advances or other harassing conduct directed toward an employee because of that employee's gender, and:

Quid Pro Quo

- A supervisor explicitly or implicitly conditions a term of employment upon agreeing to sexual advances.

Hostile Environment

- The harassing conduct is sufficiently severe or pervasive as to 1) create an intimidating or offensive working environment or 2) unreasonably interfere with job performance.

Proving Sexual Harassment

In the following trial court opinion, Judge Wright analyzes a lawsuit brought by Paula Jones against (then) United States President William Clinton. Ms. Jones alleges both quid pro quo and hostile environment sexual harassment. In this opinion, the court grants President Clinton's request for summary judgment. Ms. Jones appealed the court decision to the Eighth Circuit Court of Appeals. Before a ruling on the merits of the appeal, Ms. Jones agreed to withdraw her appeal in exchange for a settlement offer from President Clinton, reportedly for $850,000.

Jones
v.
Clinton

990 F.Supp. 657
United States District Court (E.D. Ark. W. Div.) 1998

[Citations and footnotes omitted]
Wright, D.J. - The plaintiff in this lawsuit, Paula Corbin Jones, seeks civil damages from William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, for alleged actions beginning with an incident in a hotel suite in Little Rock,

Arkansas. . . . The matter is now before the Court on motion of both the President and Ferguson for summary judgment. . . .

[Background Facts] This lawsuit is based on an incident that is said to have taken place on the afternoon of May 8, 1991, in a suite at the Excelsior Hotel in Little Rock, Arkansas. President Clinton was Governor of the State of Arkansas at the time, and plaintiff was a State employee with the Arkansas Industrial Development Commission ("AIDC"), having begun her State employment on March 11, 1991. Ferguson was an Arkansas State Police officer assigned to the Governor's security detail.

According to the record, then-Governor Clinton was at the Excelsior Hotel on the day in question delivering a speech at an official conference being sponsored by the AIDC. Plaintiff states that she and another AIDC employee, Pamela Blackard, were working at a registration desk for the AIDC when a man approached the desk and informed her and Blackard that he was Trooper Danny Ferguson, the Governor's bodyguard. . . . She states that Ferguson made small talk with her and Blackard. . . .

Upon leaving [Jones and Blackard], Ferguson apparently had a conversation with the Governor about the possibility of meeting with [Jones], during which Ferguson states the Governor remarked that plaintiff had "that come-hither look," *i.e.* "a sort of [sexually] suggestive appearance from the look or dress." He states that "some time later" the Governor asked him to "get him a room, that he was expecting a call from the White House and had several phone calls that he needed to make," and asked him to go to the car and get his briefcase containing the phone messages. Ferguson states that upon obtaining the room, the Governor told him that if [Jones] wanted to meet him, she could "come up." . . .

Plaintiff states that Ferguson later reappeared at the registration desk, delivered a piece of paper to her with a four-digit number written on it, and said that the Governor would like to meet with her in this suite number. She states that she, Blackard, and Ferguson talked about what the Governor could want and that Ferguson stated, among other things, "We do this all the time." Thinking that it was an honor to be asked to meet the Governor and that it might lead to an enhanced employment opportunity, plaintiff states that she agreed to the meeting and that Ferguson escorted her to the floor of the hotel upon which the Governor's suite was located.

Plaintiff states that upon arriving at the suite and announcing herself, the Governor shook her hand, invited her in, and closed the door. She states that a few minutes of small talk ensued, which included the Governor asking her about her job and him mentioning that Dave Harrington, plaintiff's ultimate superior within the AIDC and a Clinton appointee, was his "good friend." Plaintiff states that the Governor then "unexpectedly

reached over to [her], took her hand, and pulled her toward him, so that their bodies were close to each other." She states she removed her hand from his and retreated several feet, but that the Governor approached her again and, while saying, "I love the way your hair flows down your back" and "I love your curves," put his hand on her leg, started sliding it toward her pelvic area, and bent down to attempt to kiss her on the neck, all without her consent Plaintiff states that she exclaimed, "What are you doing?," told the Governor that she was "not that kind of girl," and "escaped" from the Governor's reach "by walking away from him." She states she was extremely upset and confused and, not knowing what to do, attempted to distract the Governor by chatting about his wife. Plaintiff states that she sat down at the end of the sofa nearest the door, but that the Governor approached the sofa where she had taken a seat and, as he sat down, "lowered his trousers and underwear, [and exposed himself]." She states that she was "horrified" by this and that she "jumped up from the couch" and told the Governor that she had to go, saying something to the effect that she had to get back to the registration desk. Plaintiff states that the Governor . . . said, "Well, I don't want to make you do anything you don't want to do," and then pulled up his pants and said, "If you get in trouble for leaving work, have Dave call me immediately and I'll take care of it." She states that as she left the room . . ., the Governor "detained" her momentarily, "looked sternly" at her, and said, "You are smart. Let's keep this between ourselves."

Plaintiff states that the Governor's advances to her were unwelcome, that she never said or did anything to suggest to the Governor that she was willing to have sex with him, and that during the time they were together in the hotel suite, she resisted his advances although she was "stunned by them and intimidated by who he was." She states that when the Governor referred to Dave Harrington, she "understood that he was telling her that he had control over Mr. Harrington and over her job, and that he was willing to use that power." She states that from that point on, she was "very fearful" that her refusal to submit to the Governor's advances could damage her career and even jeopardize her employment. . . .

Plaintiff states she returned to the registration desk and told Blackard some of what had happened. Blackard states that plaintiff was shaking and embarrassed. Following the Conference, plaintiff states she went to the workplace of a friend, Debra Ballentine, and told her of the incident as well. Ballentine states that plaintiff was upset and crying. . . .

Plaintiff continued to work at AIDC following the alleged incident in the hotel suite. One of her duties was to deliver documents to and from the Office of the Governor, as well as other offices around the Arkansas State Capitol. She states that in June 1991, while performing these duties for the AIDC, she encountered Ferguson who told her that Mrs. Clinton was

out of town often and that the Governor wanted her phone number and wanted to see her. Plaintiff states she refused to provide her phone number to Ferguson. She states that Ferguson also asked her how her fiance, Steve, was doing, even though she had never told Ferguson or the Governor his name, and that this "frightened" her. Plaintiff states that she again encountered Ferguson following her return to work from maternity leave and that he said he had "told Bill how good looking you are since you've had the baby." She also states that she was "accosted" by the Governor in the Rotunda of the Arkansas State Capitol when he "draped his arm over her, pulled her close to him and held her tightly to his body," and said to his bodyguard, "Don't we make a beautiful couple: Beauty and the Beast?" Plaintiff additionally states that on an unspecified date, she was waiting in the Governor's outer office on a delivery run when the Governor entered the office, patted her on the shoulder, and in a "friendly fashion" said, "How are you doing, Paula?" . . .

[Quid Pro Quo Sexual Harassment] . . .To make a *prima facie* case of *quid pro quo* sexual harassment, this plaintiff must show, among other things, that her refusal to submit to unwelcome sexual advances or requests for sexual favors resulted in a tangible job detriment. **[The courts do not agree on this point. The U.S. Court of Appeals, Seventh Circuit, has held that a clear, unambiguous threat that conditions job benefits on compliance with sexual demands may violate Title VII even if the threats remain unfulfilled.[6] This court disagrees with that position.]** . . .

Based on the foregoing, the Court finds that a showing of a tangible job detriment is an essential element of plaintiff's *quid pro quo* sexual harassment claim. It is that issue to which the Court now turns.

As evidence of tangible job detriments . . ., plaintiff claims the following occurred after she resisted Governor Clinton's alleged advances on May 8, 1991: (1) she was discouraged from applying for more attractive jobs and seeking reclassification at a higher pay grade within the AIDC; (2) her job was changed to one with fewer responsibilities, less attractive duties and less potential for advancement-and the reason given for the change proved to be untrue; (3) she was effectively denied access to grievance procedures that would otherwise have been available to victims of sexual harassment; and (4) she was mistreated in ways having tangible manifestations, such as isolating her physically, making her sit in a location from which she was constantly watched, making her sit at her workstation with no work to do, and singling her out as the only female employee not to be given flowers on Secretary's Day. The Court has carefully reviewed the record in this case and finds nothing in plaintiff's

[6] *Jansen v. Packaging Corp. of America,* 123 F.3d 490, 499 (7th Cir. 1997).

employment records, her own testimony, or the testimony of her supervisors showing that plaintiff's reaction to Governor Clinton's alleged advances affected tangible aspects of her compensation, terms, conditions, or privileges of employment.

Plaintiff's claim that she was discouraged from applying for more attractive jobs and seeking reclassification at a higher pay grade within the AIDC does not demonstrate any "tangible" job detriment as she has not identified a single specific job which she desired or applied for at AIDC but which she had been discouraged from seeking. . . .Indeed, it is undisputed that plaintiff received every merit increase and cost-of-living allowance for which she was eligible during her nearly two-year tenure with the AIDC and consistently received satisfactory job evaluations. Specifically, on July 1, 1991, less than two months after the alleged incident that is the subject of this lawsuit, plaintiff received a cost-of-living increase and her position was reclassified from Grade 9 to Grade 11; on August 28, 1991, plaintiff received a satisfactory job evaluation from her supervisor, Clydine Pennington; and on March 11, 1992, the one-year anniversary of her hire date with AIDC, plaintiff received another satisfactory evaluation from Pennington and Cherry Duckett, Deputy Director of AIDC, which entitled her to a merit raise. In addition, plaintiff was given a satisfactory job review in an evaluation covering the period of March 1992 until her voluntary departure from the AIDC in February 1993. . . .

In sum, the Court finds that a showing of a tangible job detriment or adverse employment action is an essential element of plaintiff's . . . *quid pro quo* sexual harassment claim and that plaintiff has not demonstrated any tangible job detriment or adverse employment action for her refusal to submit to the Governor's alleged advances. The President is therefore entitled to summary judgment on plaintiff's claim of *quid pro quo* sexual harassment.

[**Hostile Environment Sexual Harassment**] . . .The Court now turns to plaintiff's hostile work environment claim. Unlike *quid pro quo* sexual harassment, hostile work environment harassment arises when "sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. To prevail on a hostile work environment cause of action, a plaintiff must establish, among other things, that she was subjected to unwelcome sexual harassment based upon her sex that affected a term, condition, or privilege of employment. The behavior creating the hostile working environment need not be overtly sexual in nature, but it must be " 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive." The harassment must also be sufficiently severe or

pervasive "to alter the conditions of employment and create an abusive working environment."

The President essentially argues that aside from the alleged incident at the Excelsior Hotel, plaintiff alleges only two other contacts with him, alleges only a few additional contacts with Ferguson, and contains conclusory claims that plaintiff's supervisors were rude. He argues that taken individually or as a whole, these contacts do not in any way constitute the kind of pervasive, intimidating, abusive conduct that courts require to establish a hostile work environment claim. The Court agrees.

In assessing the hostility of an environment, a court must look to the totality of the circumstances. Circumstances to be considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." No single factor is determinative, and the court "should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode." . . .

Plaintiff certainly has not shown under the totality of the circumstances that the alleged incident in the hotel and her additional encounters with Ferguson and the Governor were so severe or pervasive that it created an abusive working environment. She admits that she never missed a day of work following the alleged incident in the hotel, she continued to work at AIDC another nineteen months (leaving only because of her husband's job transfer), she continued to go on a daily basis to the Governor's Office to deliver items and never asked to be relieved of that duty, she never filed a formal complaint or told her supervisors of the incident while at AIDC, and she never consulted a psychiatrist, psychologist, or incurred medical bills as a result of the alleged incident. In addition, plaintiff has not shown how Ferguson's alleged comments, whether considered alone or in conjunction with the other alleged conduct in this case, interfered with her work, and she acknowledges that the Governor's statement about him and her looking like "beauty and the beast" was made "in a light vein" and that his patting her on the shoulder and asking her how she was doing was done in a "friendly fashion."

While the alleged incident in the hotel, if true, was certainly boorish and offensive, the Court has already found that the Governor's alleged conduct does not constitute sexual assault. This is thus not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state a claim of hostile work environment sexual harassment..

Considering the totality of the circumstances, it simply cannot be said that

> the conduct to which plaintiff was allegedly subjected was frequent, severe, or physically threatening, and the Court finds that defendants' actions as shown by the record do not constitute the kind of sustained and nontrivial conduct necessary for a claim of hostile work environment. . . . In sum, the Court finds that the record does not demonstrate conduct that was so severe or pervasive that it can be said to have altered the conditions of plaintiff's employment and created an abusive working environment. Accordingly, the President is entitled to summary judgment on plaintiff's claim of hostile work environment sexual harassment. . . .

Sexual Harassment Questions:

1. Does a manager violate the 1964 CRA by telling a subordinate that she "looks nice," "is pretty," or that she "is wearing a very attractive dress"? Does a manager violate the 1964 CRA by hugging a subordinate, on occasion?

2. What were the quid pro quo aspects of *Jones v. Clinton*? How did the court rule on this area?

3. What were the hostile environment aspects of *Jones v. Clinton*? How did the court rule on this area?

Whirlpool Settles EEOC Race and Sexual Harassment Lawsuit for One Million Dollars

June 13, 2012

Company Drops Appeal of Lower Court's Judgment, Ends Six Years of Litigation

NASHVILLE – Whirlpool Corporation agreed to drop its appeal of a race and sex harassment judgment for over one million dollars and resolve the case with the U.S. Equal Employment Opportunity Commission (EEOC) and the Plaintiff-Intervenor, the federal agency announced today. The settlement comes almost six years to the day after the EEOC's Memphis District Office first filed suit on June 9, 2006.

The EEOC's lawsuit (Civil Action No. 3:06-0593 filed in U.S. District Court for the Middle District of Tennessee) had charged that Whirlpool violated Title VII of the Civil Rights Act of 1964 when it did nothing to stop a white male co-worker at a Whirlpool plant in LaVergne, Tenn., from harassing an African-American female employee because of her race and sex. The abuse lasted for two months and escalated when the co-worker physically assaulted the black employee and inflicted serious permanent injuries.

During a four-day bench trial, the court heard evidence that the employee repeatedly reported offensive verbal conduct and gestures by the co-worker to Whirlpool management before she was violently assaulted, without any corrective action by the company. The trial also established that the employee suffered devastating permanent mental injuries that will prevent her from working again as a result of the assault.

At the conclusion of the bench trial, Judge John T. Nixon entered a final judgment and awarded the employee a total of $1,073,261 in back pay, front pay and compensatory damages on December 21, 2009. Whirlpool filed a motion to alter or amend the judgment on January 15, 2010 which the district court denied on March 31, 2011.

On April 26, 2011, Whirlpool appealed the judgment to the U.S. Court of Appeals for the Sixth Circuit. The company withdrew its appeal on June 11, 2012 and agreed settle the case with the EEOC and plaintiff-intervener for $1 million and court costs. The plant where the discrimination occurred had closed during the litigation period.

“Employers have a responsibility to address and remedy race and sex harassment in the workplace,” said P. David Lopez, EEOC General Counsel. “The EEOC stands ready to vigorously prosecute violations of the law through trial if necessary. We are pleased that the parties were finally able to bring this litigation to a close.”

Sonic Drive-In Settles EEOC Sexual Harassment And Retaliation Suit For $2 Million

June 15, 2011

Manager Harassed Numerous Female Workers, Including Teens, and Retaliated Against Victims Who Complained

ALBUQUERQUE -- Sonic Drive-In of Los Lunas, Ltd. and B&B Consultants, owners of a Sonic restaurant in Los Lunas, N.M., have agreed to settle a sex discrimination and retaliation lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) for $2 million, the agency announced today.

The EEOC’s lawsuit, EEOC v. Sonic Drive-In of Los Lunas Ltd and B&B Consultants Inc., 09-CV-953 WPJ/ACT, charged that Robert Gomez, then a manager of and limited partner in the Los Lunas Sonic, subjected a class of women, including teenagers, to sexual harassment, including sexual comments and innuendo as well as unwanted touching. The EEOC’s suit also alleged that women who asked Gomez to stop harassing them or complained about their work environment were subjected to retaliation in the terms and conditions of their employment, primarily by reducing their hours. The EEOC’s suit further alleged that employees were also forced to quit their jobs because of the sexual harassment, retaliation, and/or the employer’s failure to provide preventive or remedial relief.

Sex discrimination, including sexual harassment, and retaliation against persons who oppose it violate Title VII of the Civil Rights Act of 1964. The EEOC filed suit in U.S. District Court for the District of New Mexico after first attempting to reach a pre-litigation settlement through its conciliation process.

The case is the largest litigation settlement ever by the EEOC's Albuquerque Area Office. Over 70 women are expected to receive relief through the decree. In addition to the substantial monetary relief, the decree prohibits Sonic from further discriminating or retaliating against its employees and requires Sonic to have policies and practices that will provide its employees a work environment free of sex discrimination and retaliation. Sonic must also provide its employees in Los Lunas and other area stores anti-discrimination training and notice of the settlement and report other complaints to the EEOC for the duration of the decree.

"Managers must constantly be reminded of their obligation to maintain workplaces where employees are not subjected to illegal harassment or retaliation," said Regional Attorney Mary Jo O'Neill of the EEOC's Phoenix District Office. "Where managers fail to satisfy these obligations, it is the employer's responsibility to correct the violations and prevent other violations from occurring. These women and all women deserve to work without being harassed because of their sex. Also, women who have the courage to complain must not suffer retaliation for their efforts to prevent further harassment."

Acting EEOC Albuquerque Area Director Elizabeth Cadle added, "We are pleased that this employer is taking appropriate steps to assure that no further harassment occurs in its workplaces. Federal law protects a woman's right to work without harassment because of their sex. Violations of the law will be met with rigorous enforcement by our agency."

Same-Sex Sexual Harassment

Sexual harassment generally involves harassment directed toward a member of the opposite sex. The most common harassment complaint filed with the EEOC is male harassment of females, although the percentage of men filing as victims is rising. The Supreme Court has addressed the question of same-sex sexual harassment, that is, harassment directed toward a member of the same sex as the harasser. The opinion, *Oncale v. Sundowner Offshore Services, Inc.*, provides sexual harassment analysis helpful beyond the specific issue involved in the case, same-sex harassment.

Oncale
v.
Sundowner Offshore Services, Inc.

523 U.S. 75
United States Supreme Court, 1998

Scalia, J. - This case presents the question whether workplace harassment can violate Title VII's prohibition against "discriminat[ion] ... because of ... sex," 42 U.S.C. § 2000e-2(a)(1), when the harasser and the harassed employee are of the same sex.

[Background Facts] . . . In late October 1991, Oncale was working for respondent Sundowner Offshore Services, Inc., on a Chevron U.S. A., Inc., oil platform in the Gulf of Mexico. He was employed as a roustabout on an eight-man crew which included respondents John Lyons, Danny Pippen, and Brandon Johnson. Lyons, the crane operator, and Pippen, the driller, had supervisory authority. On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by Lyons, Pippen, and Johnson in the presence of the rest of the crew. Pippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape.

Oncale's complaints to supervisory personnel produced no remedial action; in fact, the company's Safety Compliance Clerk, Valent Hohen, told Oncale that Lyons and Pippen "picked [on] him all the time too," and called him a name suggesting homosexuality. . . . Oncale eventually quit-asking that his pink slip reflect that he "voluntarily left due to sexual harassment and verbal abuse." . . . When asked at his deposition why he left Sundowner, Oncale stated: "I felt that if I didn't leave my job, that I would be raped or forced to have sex." . . . .

[Legal Analysis] . . .If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination "because of ... sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex. . . .

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal

concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] ... because of ... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements. . . ."The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." . . .

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "*discrimina[tion]* ... because of ... sex."

. . .We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." . . . In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. . . .

Application of the principles announced in the *Oncale* opinion involves specific emphasis on the motives of the harasser. Did the harasser select the individual to be harassed because of the individual's gender? Would the harasser behave differently of the victim's gender were changed? Though these questions are present in all cases of harassment under Title VII, the questions may be more difficult to assess in cases of same-sex harassment.

In the following case, the plaintiff did not present sufficient evidence to prove gender was a motivating factor in the behavior inflicted on the plaintiff. Title VII was therefore not violated despite the obviously egregious behavior of the plaintiff's supervisor, Lloyd Soller.

McCown
v.
St. John's Health System, Inc.

United States Court of Appeals, Eighth Circuit
2003 U.S. App. LEXIS 23079 (2003)

Melloy, C.J. - James Christopher McCown ("McCown") appeals the district court's . . . entry of summary judgment in favor of St. John's Regional Health Center ("St. John's") on sexual harassment claims under Title VII of the Civil Rights Act of 1964 . . ..We affirm.

[Factual Background] - McCown was employed by St. John's as a general construction worker from October 1994 until April 2001. Until October 2000, McCown worked in the projects shop, under the direct supervision of Lloyd Soller . . . ("Soller"). During this time period, Soller subjected McCown to inappropriate conduct on multiple occasions including: grabbing McCown by the waist, chest and buttocks; grinding his genitals against McCown's buttocks in simulated intercourse; telling McCown to "squeal like a pig, or a woman," and making other lewd comments; attempting to stick the handle of a shovel and a tape measure in McCown's anus; and kicking McCown in the buttocks. Initially, McCown thought that Soller was kidding. Although McCown did not understand what motivated Soller's behavior, he speculated that Soller was trying to "irritate" him because "that's just how Lloyd was." McCown repeatedly asked Soller to stop, but Soller continued to engage in this offensive behavior.

While both male and female employees worked in the projects shop with McCown and Soller, the women primarily worked in the office while the men performed physical labor in various other locations. Soller, however,

only supervised the men. There is no evidence in the record that Soller ever sexually harassed any of the women in the projects shop.

McCown reported Soller's inappropriate behavior to Soller's supervisors on three different occasions. Dissatisfied with their response, McCown formally filed a complaint with the EEOC and the Missouri Commission on Human Rights. Eventually, Soller's supervisors conducted an internal investigation and removed McCown from Soller's supervision while giving Soller a disciplinary warning. McCown worked in seclusion from the other employees in the projects shop and was placed under the supervision of two managers. As a result, McCown often received contradictory job orders. Frustrated by his new working conditions, McCown resigned from St. John's in April 2001.

McCown filed suit against St. John's alleging same-sex sexual harassment, disparate treatment because of gender, retaliation, and constructive discharge in violation of Title VII . . .. The district court granted summary judgment on each claim. Presently, McCown appeals solely on the sexual harassment claim and argues that the district court erred in determining that he failed to state an actionable claim because he could not demonstrate that Soller's conduct was based on sex.

[Legal Analysis] - . . . A party is entitled to judgment as a matter of law only if it can show that no genuine issue of material fact exists. . . . Summary judgment is to be granted where the evidence is such that no reasonable jury could return a verdict for the non-moving party. . . . The evidence must be viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. . . .

"Title VII prohibits 'an employer' from discriminating 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex.'" . . . Discrimination based on sex which creates a hostile or abusive working environment violates Title VII. . . . To state a claim for sexual discrimination based on a hostile work environment under Title VII, a plaintiff must show: (1) he belongs to a protected group; (2) he was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) his employer knew or should have known of the harassment and failed to take proper remedial action. Id. (citations omitted). The third element, whether Soller's harassment was based on sex, is the single issue on appeal.

Same-sex harassment claims differ from those between males and females because the latter "typically involve[] explicit or implicit proposals of sexual activity," which create a presumption that the underlying conduct was based on sex. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S.

75, 80 . . . (1998). However, this presumption is applicable only if there is credible evidence to show that the alleged harasser is sexually attracted to the plaintiff. . . . Consequently, without this presumption, a same-sex harassment plaintiff needs other methods to prove that the conduct was based on sex. . . .

Oncale, the leading Supreme Court case on same-sex harassment claims, sets forth three evidentiary routes by which a same-sex plaintiff can show that the conduct was based on sex. . . . First, a plaintiff can show that the conduct was motivated by sexual desire . . . . Second, a plaintiff can show that the harasser was motivated by a general hostility to the presence of the same gender in the workplace. . . . And third, a plaintiff may offer direct comparative evidence about how the harasser treated both males and females in a mixed-sex workplace. . . . Oncale also emphasizes that "whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina*[*tion*] . . . because of . . . sex.'" . . .

There is no evidence in the record to demonstrate that Soller was homosexual and motivated by sexual desire toward McCown. Nor is there evidence that Soller was motivated by a general hostility to the presence of males in the workplace. Instead, according to McCown, it appears that Soller was just trying to "irritate" him because "that's just how Lloyd was." Additionally, we have previously found that crude gender-specific vulgarity is not, by itself, probative of gender discrimination. . . . Thus, we must consider whether McCown can offer direct comparative evidence of how Soller treated males and females in a mixed-sex workplace to determine if Soller's conduct was based on sex.

The key inquiry under Title VII is "'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" . . . In other words, Title VII does not prohibit workplace harassment unless it is based on sex. In this case, there is no evidence to demonstrate that the area of the projects shop in which McCown worked was a mixed-sex workplace. The only evidence before us is an affidavit by McCown stating that the "workplace consisted of both men and women, although women worked primarily in the offices." The record indicates that Soller only supervised the men who worked outside the office area of the projects shop in which the women worked. The record is silent as to the amount of interaction that Soller had with the women in the office area of the projects shop.

Even if the projects shop did qualify as a mixed-sex workplace, the only evidence of Soller's treatment towards women is found in McCown's

affidavit which states McCown never knew of Soller sexually harassing female employees in the workplace. McCown's express absence of knowledge is not sufficient to generate a jury question as to whether Soller's conduct constituted "discrimination . . . because of . . . sex." . . . Although Soller's conduct was inappropriate and vulgar, there is insufficient evidence to demonstrate that Soller's conduct towards McCown was based on sex. Accordingly, we affirm.

Welcome versus Unwelcome Harassment

One element of a sexual harassment claim is the plaintiff was subjected to unwelcome harassment. Title VII is not violated – sexual harassment does not legally exist – where harassment directed toward a plaintiff is welcomed by that individual. The question of welcome versus unwelcome behavior may involve troublesome issues of evidence and proof. An individual may succumb to pressure and comply with a sexual advance by a supervisor and be engaged in consensual but unwelcome sexual activity. That is, an employee may have agreed to a demanded sexual advance because of a fear about the loss of a job or other damaging employment decisions.

The issue of unwelcome sexual harassment is analyzed in both the following case and in *Meritor Savings Bank v. Vinson*, found at the end of this chapter.

McLean
v.
Satellite Technology Services, Inc.

673 F.Supp. 1458
United States District Court, E.D. Missouri (1987)

Gunn, J. - . . . On November 12, 1985, plaintiff, a female, was employed by defendant and assigned as an assistant sales person to work in the St. Louis office under the supervision of Michael Manning. Her work responsibilities required telephone contact with customers and distributors of defendant's products. The incident giving rise to plaintiff's complaint occurred on December 13, 1985 at a business seminar meeting in Orlando, Florida. Manning was present to make a presentation. Plaintiff was to observe so that she would ultimately be able to conduct a seminar. After one day's work, plaintiff, Manning and another of defendant's employees had dinner and a period of refreshment in the hotel's hot tub. Manning suggested to plaintiff that he would like for her to review his presentation with him. They then went to plaintiff's room and sat together on a couch. Plaintiff was clad in a swimming suit and towel; Manning was wearing shorts and a shirt. According to plaintiff, while Manning was discussing the talk he was to give the next day, he placed his arm around her back,

touched her leg and made an effort to kiss her once--an effort that plaintiff testified was easily rebuffed. Manning then left the room. Manning categorically denies making any type of advance to plaintiff and insists that any type of dealings with plaintiff were strictly within the bounds of propriety as a supervisor and co-worker. Based on facts which follow, the Court is inclined to believe Manning.

Following the Orlando trip, plaintiff complains that Manning was cool to her, and she attributes his attitude and her ultimate termination from employment as stemming from her rejection of Manning's advance. The Court finds that there was a multitude of legitimate business reasons for terminating plaintiff's employment and that her discharge was not based on any sexual harassment brought about by any purported romantic advance by Manning.

It is undisputed that plaintiff was anything but demure, that she possessed a lusty libido and was no paragon of virtue. From the beginning of her short term of employment with the defendant in November 1985 to its end in February 1986, plaintiff displayed a remarkable lust for those of the opposite sex. She displayed her body through semi-nude photographs or by lifting her skirt to show to her supervisor an absence of undergarments. Also, during working hours, she made offers of sexual gratification or highly salacious comments to employees, customers and competitors alike, though warned by Manning not to do so. There was uncontroverted evidence of acceptance of her offers.

. . . It was plaintiff's activities at a trade show in Las Vegas, Nevada on February 22-23, 1986 that finally led to her discharge. At the trade show, plaintiff missed meetings she was expected to attend, was not at her job station a large percentage of the time and continued her libidinous behavior, acknowledging that she was "intimate" with an employee of a customer at least two or three times, entertaining him in her hotel room during the period of the trade show. This was despite orders from her supervisor to abstain from promiscuity with customers or dealers.

On her return from Las Vegas, plaintiff was summarily discharged from her employment by the defendant's president. His basis for the termination was plaintiff's performance at the Las Vegas trade show as related by James Uyeda, defendant's chief operating officer, who had attended the trade show and observed plaintiff's actions. Specifically, plaintiff was terminated because she had missed work and meetings at the Las Vegas trade show. The Court specifically finds that there was no sexual harassment of plaintiff by her supervisor Manning. From plaintiff's character, it is apparent that plaintiff would have welcomed rather than rejected Manning's advance, if he did indeed do so. But the Court finds that Manning made no sexual advance. . . .

Employer Liability for Sexual Discrimination/Harassment

As identified in Chapter 8 regarding racial harassment, gender discrimination or harassment may be directed at an employee by supervisors, co-workers, or even customers. The Supreme Court has established that employers are not necessarily liable for all incidents of illegal discrimination. The first point of analysis is to identify the harassing party. The liability principles differ depending on whether the harassment comes from co-workers or customers versus supervisors. Next, the company response after being told of the discrimination is important.

Employer liability for gender harassment by co-employees or customers. Employers are liable for gender harassment directed at an employee from co-employees or customers where the employer's agents or supervisory employees know or should know about the harassment, and fail to take immediate and appropriate corrective action.

Employer liability for gender harassment by supervisory employees (agents of the employer). An employer has automatic liability for gender harassment directed at an employee if the harassment comes from a supervisor with immediate (or higher) authority over the victimized employee. The employer may be released from this automatic liability only if the employer can prove all three elements of the following affirmative defense:

Affirmative Defense

1. No tangible employment actions were taken against the victimized employee (tangible actions include changes such as discharge, demotion, or undesirable work reassignment), **and**
2. The employer exercised reasonable care to prevent and correct promptly any harassing behavior, **and**
3. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Besides creating the above affirmative defense, the Supreme Court gave the following guidance on how the defense would be applied:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[7]

[7] Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257, 2270 (1998).

Employer liability is discussed in the following case excerpt.

EEOC
v.
AutoZone, Inc.

2008 U.S. Dist. LEXIS 69472
(United States District Court Arizona, 2008)

Stephen M. McNamee, J. -

Pending before the Court is Defendant AutoZone, Inc.'s ("AutoZone") Motion for Summary Judgement. Plaintiff Equal Employment Opportunity Commission ("EEOC") opposes Defendant's motion on grounds that genuine questions of material fact remain. After careful consideration, the Court finds the following.

BACKGROUND
A. Statement of Facts

Stacy Wing ("Wing") was hired to work at AutoZone Store 2737 ("2737") in the first half of 2003. . . . At the time Wing was hired, Jose Contreras ("Contreras") was the store manager of 2737. . . . Contreras resigned as store manager in December 2003. . . . Within the first month of being employed, Wing reported by phone to the Regional Human Resources Manager in charge of 2737 that she had been sexually harassed by Contreras. . . . At the time, Scott Anderson ("Anderson") was the Regional Human Resources Manager responsible for 2737. . . . Several days thereafter, Anderson went to 2737 to investigate the report. . . . While there, Anderson spoke with Wing, Contreras, and allegedly spoke with several other employees of 2737. . . . AutoZone could not corroborate Wing's reports of harassment based on this investigation. . . . Anderson did remind Contreras of AutoZone's policies regarding harassment and retaliation. . . . No other action was taken by Anderson at this time. . . . Wing alleges that physical and verbal sexual harassment continued during the remainder of the year. . . .

In December 2003, Joe Acuna ("Acuna"), who also worked at 2737, witnessed Contreras sexually harassing Wing in a physical nature. . . . Acuna reported his observations to Anderson. . . . Anderson confirmed Acuna's report by watching a surveillance video of the incident. . . . Consequently, Anderson was able to identify Contreras engaging in the sexual harassment. . . . Anderson met with and informed Contreras that AutoZone possessed a video of him sexually harassing Wing. . . .

Anderson told Contreras "he could either: (1) be suspended during the completion of the investigation and then be fired; or (2) resign immediately." . . . Contreras immediately resigned. . . .

Wing claims that after Contreras resigned, she was denied a requested day off and was scheduled for four consecutive 12-hour shifts. . . . Wing further claims that she was denied a promotion for the position of Parts Service Manager ("PSM") in retaliation for reporting the sexual harassment. . . .

B. Procedural History

Wing filed a complaint against AutoZone with the EEOC on January 29, 2004. On March 30, 2006, the EEOC filed suit, on behalf of Stacy Wing, under Title VII of the Civil Rights Act of 1964, as amended, and Title I of the Civil Rights Act of 1991. . . .

STANDARD OF REVIEW
A. Summary judgment

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." . . . A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." . . .

DISCUSSION
A. Sexual Harassment

Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual's . . . sex." . . . This anti-discrimination principle "is violated when sexual harassment is sufficiently severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working environment." . . . Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. . . . To be actionable under Title VII, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." . . . As AutoZone has "assumed" the EEOC can establish a claim for *prima facie* sexual harassment, no further analysis of this issue is necessary for the purpose of this motion. . . .

B. Vicarious Liability for Sexual Harassment

"[A]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." . . . "Notice of the sexually harassing conduct triggers an employer's duty to take prompt corrective action that is reasonably calculated to end the harassment." . . . However, the Supreme Court provides a defense against vicarious liability:

"[A] defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action."

Faragher, 542 U.S. at 807-808; *Ellerth,* 542 U.S. at 765. The Court will analyze each element individually.

1. Employer Exercised Reasonable Care

The Ninth Circuit has held that the first element of the *Faragher/Ellerth* affirmative defense includes both preventive and remedial measures. . . . "The legal standard for evaluating an employer's efforts to prevent and correct harassment . . . is not whether any additional steps or measures would have been reasonable if employed, but whether the employer's actions as a whole established a reasonable mechanism for prevention and correction." . . . .

a. Preventive Measures

An employer's adoption and dissemination of an anti-harassment policy can establish that the employer exercised reasonable care to prevent sexual harassment in the workplace. . . . The reasonableness of an employer's efforts can depend on the extent of the dissemination. *Faragher,* 524 U.S. at 808. In *Faragher,* the City of Boca Raton had a policy, but failed to adequately disseminate it. . . . . This resulted in the Court holding "as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct." . . . .

AutoZone contends that its efforts to adopt and disseminate a sexual harassment policy are sufficient to meet the preventive element of the *Faragher/Ellerth* affirmative defense. As support, AutoZone has

submitted sections of its 2002 and 2004 Employee Handbooks, each of which contain substantially identical language regarding sexual harassment and reporting procedures therefor. . . . According to Wing, at some point during her employment, she received *an* Employee Handbook. . . . AutoZone cites Wing's deposition, which shows evidence that when Wing was hired, she was aware that AutoZone had a policy prohibiting sexual harassment. . . . Wing knew that a procedure existed to report sexual harassment; however, she could not recall exactly what that procedure entailed. . . .

The EEOC argues that there is no evidence Wing or Contreras received the handbook prior to, or during the time Wing was being sexually harassed by Contreras. . . . The EEOC further contends there is no evidence Contreras himself ever received training on AutoZone's sexual harassment policy. . . . Furthermore, the EEOC maintains that there is no evidence that AutoZone trained anyone at the store manager level or below with regard to sexual harassment beyond an initial issuance of the handbook containing the policy. . . .

According to the record, the Court agrees that there is no evidence that Contreras knew a sexual harassment policy existed at the time the initial harassment occurred. As to Wing, there is evidence only as to her knowledge of "a policy" and that at some point during her employment, she received the 2004 handbook. Therefore, although a sexual harassment policy may have existed and may have been reasonable on its face, similar to the policy in *Kohler,* there is no evidence in the instant case of adequate dissemination. As in *Faragher,* a failure to disseminate can render a policy, reasonable on its face, insufficient to raise an affirmative defense. Therefore, the Court finds that a legitimate question exists as to whether AutoZone's preventive measures were reasonable for the purpose of asserting a *Faragher/Ellerth* affirmative defense, and . . . consequently denies AutoZone's motion for summary judgment.

b. Remedial Measures

Assuming AutoZone established the first prong of the *Faragher/Ellerth* affirmative defense, AutoZone must still establish that it took remedial measures to end the sexual harassment.

The reasonableness of a remedy for sexual harassment depends on its ability to: (1) stop harassment by the person who engaged therein and (2) persuade potential harassers to refrain from sexually harassing conduct. . . . The reasonableness of the remedial measure must track the nature and/or severity of the alleged conduct. . . . When the employer fails to undertake any remedial measure, or where the remedial measure undertaken does not put an end to the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment. . . .

Strategies to Reduce Sexual Harassment Liability

An effective sexual harassment policy has become the major employer strategy for minimizing harassment liability and identifying appropriate actions to take in response to harassment claims. As decided by the Supreme Court, a harassment policy is a key element in proving the employer has exercised reasonable care to prevent and correct sexual harassing behavior. However, as illustrated by *Little v. NBC*, above, a harassment policy not followed is legally ineffective. Senior management staff for an employer must sincerely believe in and apply the company harassment policy to ensure a proper working environment and proper employer legal protection.

A harassment policy places responsibility on a victimized employee to not suffer in silence; the responsibility is to tell the employer of harassing behavior. Each employer should individually craft a harassment policy to best suit its needs. While there is no one best harassment policy, the following materials identify basic characteristics of an effective sexual harassment policy. In distributing the policy to employees, the employer should have a signed statement from each employee evidencing the employee has received a copy of the policy.

Though an effective sexual harassment policy is essential, the policy is not a static idea. There should be an annual review, focusing on the effectiveness of all preventive and corrective measures. Employers should consider continuing sexual harassment education.

At the end of this chapter is an example of a company policy on sexual harassment. The harassment policy was ordered by the court in the case, *Robinson v. Jacksonville Shipyards, Inc*.[8]

Harassment Policy Elements:

No Tolerance. The employer should make a clear, serious statement that sexual harassment will not be tolerated. This statement (and the employer enforcement of same) should remove any argument the employer has given even tacit approval for sexual harassment.

Harassment Identification. The employer's harassment policy should include a definition of sexual harassment and identification of inappropriate behavior.

Reporting claims. A harassment policy must identify the individuals allowed to receive claims of harassment. It is important that employees be allowed choice in selecting the recipient of harassment claims, including at least one supervisor outside the employee's work unit. If employees have no choice except to report harassment claims

[8] 760 F.Supp. 1486 (1991).

to their immediate supervisor, a problem exists when their supervisor is the person creating the hostile environment.

Investigation. The employer should build a harassment investigation that is prompt, thorough, and as confidential as possible. It is legally damaging when evidence exists of workplace harassment claims that were not investigated by the employer in a timely and serious fashion.

No Retaliation. There should be a clear statement that filing a sexual harassment claim will not subject an employee to any employment retaliation.

Education. As part of a thorough attack on sexual harassment, employers should present harassment education seminars for supervisors and employees. Initially, some employers were concerned that harassment education seminars might prompt more employee claims of workplace harassment. That fear has not proven true. Education efforts are viewed favorably by both the courts and the EEOC.

Sanctions. The harassment policy should identify possible sanctions for employees determined to be guilty of sexually harassment. The employer should not wait for the first incident of harassment to decide proper sanctions.

Inappropriate Relationships. The employer should consider a company policy that all sexual relations between supervisors and their subordinates are conflicts of interest and against company policy. A prohibition on dating and sexual relations between supervisors and subordinates would be legal in most states, though care must be taken to check relevant state law before implementation. Dating and sexual relations between supervisors and subordinates present two major concerns. First, other subordinates not dating the supervisor could sue for employment damages because of favoritism allegedly shown to the subordinates that are involved with the supervisor. Second, dating and intimate relationships can “sour," turning welcome sexual attention from a supervisor into unwelcome sexual harassment.

Sexual Harassment Charges

The following chart summarizes the resolution of sexual harassment charges filed with the EEOC and the state and local Fair Employment Practices Agencies around the country that have a work sharing agreement with the commission. Beginning in 2012, the data reflects only charges filed with the EEOC.

	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Receipts	12,025	12,510	13,867	12,696	11,717	11,364	7,571
% of Charges Filed by Males	15.4%	16.0%	15.9%	16.0%	16.4%	16.3%	17.8%
Resolutions By Type							
Administrative Closures	23.8%	24.2%	22.3%	23.7%	22.8%	21.0%	21.2%
No Reasonable Cause	47.5%	45.5%	48.7%	47.7%	50.1%	53.0%	54.3%
Merit Resolutions	28.7%	30.3%	28.9%	28.6%	27.2%	26.1%	24.5%
Monetary Benefits (Millions)*	$48.8	$49.9	$47.4	$51.5	$48.4	$52.3	$43.0

** Does not include monetary benefits obtained through litigation.*

Definitions of Terms:

Administrative Closure

Charge closed for administrative reasons, which include: failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

Merit Resolutions

Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.

No Reasonable Cause

EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.

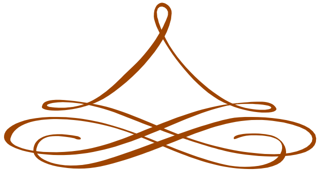
Investigating Sexual Harassment

Investigating harassment claims presents difficult fact-finding issues. Who does an employer believe? How certain must the employer be in its determinations? These questions present difficult issues for employers, especially considering fact-finding investigations are not a core business activity.

As a rule, an employer mistake in determination of the facts in a harassment case is **not** a basis for a successful lawsuit by the aggrieved employee. That is, an employer firing a suspected harasser is not liable to the alleged harasser simply because the employer may be mistaken in its assessment. The doctrine of employment-at-will generally protects employers. Under employment-at-will, an employer may fire or discipline an employee for no reason or for a wrong reason, with no liability for decisions made.

Federal civil rights laws do override employment-at-will. Under civil rights concepts, an employer could violate Title VII if, for example, it fired men suspected of sexual harassment but did not aggressively investigate women so suspected. The basis for a lawsuit by the fired men would not be the employer mistakenly decided the men were guilty of harassment. Rather, the men would claim gender discrimination in the investigation.

The EEOC has prepared the following material to aid employers in investigating claims of sexual harassment.



Enforcement Guidance[9]

Questions to Ask Parties and Witnesses
When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?

[9] The U.S. Equal Employment Opportunity Commission, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, June 1999, *available at* www.eeoc.gov/docs/harassment.html.

- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

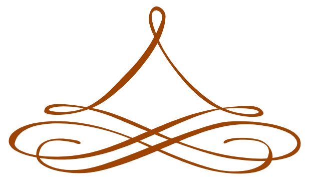
None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.



Additional Cases

Meritor Savings Bank, FSB
v.
Vinson

106 S.Ct. 2399
United States Supreme Court, 1986

Rehnquist, J. – This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964 . . ..

[Background Facts] In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller- trainee, and thereafter was promoted to teller, head teller, and assistant branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII. . . . Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal,

suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend. . . .

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval. . . .

[Sexual Harassment Legal Analysis] Since the [EEOC] Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in Henson v. Dundee . . ., "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." . . .

Of course, as the courts in both Rogers and Henson recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See Rogers v. EEOC . . ., ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII). . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." . . . [Vinson's] allegations in this case -- which include not only pervasive harassment but also criminal conduct of the most serious nature -- are plainly sufficient to state a claim for "hostile environment" sexual harassment. . . .

The question remains, however, whether the District Court's ultimate finding that respondent [Vinson] "was not the victim of sexual harassment," . . . effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie absent an *economic* effect on the complainant's employment. . . . Since it appears that the District Court made its findings without ever considering the "hostile environment"

theory of sexual harassment, the Court of Appeals' decision to remand was correct. **[That is, the Supreme Court agrees with the Court of Appeal's decision to reverse the District Court decision for the bank and return the case to that court for additional analysis consistent with the Supreme Court's analysis.]**

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[if] [respondent] and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one." . . . But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." . . . While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Petitioner [the bank] contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," . . . which the District Court apparently admitted into evidence, "had no place in this litigation." . . . The apparent ground for this conclusion was that respondent's voluntariness . . . in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." . . .

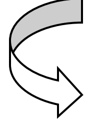
In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Case Questions:

How does *Meritor Savings Bank v. Vinson* illustrate the difference between unwelcome sexual activity and involuntary sexual activity?

Chapter 12 - Religious Discrimination

Chapter 12 - Cognitive Objectives



1. Explain the general idea of religious discrimination under the Civil Rights Act of 1964.
2. Distinguish application of the U.S. Constitution, First Amendment, versus the 1964 Civil Rights Act, on religious discrimination.
3. Identity those beliefs qualifying as religious beliefs protected under the law.
4. Distinguish discrimination based on religion from discrimination based on religious practices.
5. Explain and apply the main rule on religious discrimination under Title VII, that is, the employer's duty to reasonably accommodate employee's religious beliefs and practices unless such accommodation causes an undue hardship.
6. Explain and apply the elements of prima facie religious discrimination, as presented in *Miguel Sanchez-Rodriguez v. AT&T.*
7. Apply the undue hardship concept, as in *TWA v. Hardison*.
8. Identify and apply the Title VII BFOQ exemption for religious organizations. Explain *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.
9. Explain and apply the EEOC regulations found in 29 C.F.R. Part 1605.2.
10. Explain *Cruzan v. Special School District, #1*

Statutory Bases – Religious Discrimination

First Amendment to the U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Civil Rights Act of 1964, Title VII

42 U.S.C. §2000e-2:
(a) It shall be an unlawful employment practice for an employer --
(1) to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, **religion**, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .
(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. §2000e-2(a):
(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, **religion**, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community . . ..

42 U.S.C. § 2000e-1:
[Title VII of the Civil Rights Act of 1964] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Overview – Religious Discrimination

Religion has played a central role in the life of the United States, beginning with the country's founding by immigrants fleeing religious persecution and seeking religious freedom. The central role of religion was formalized with the 1791 passage of the First Amendment to the Constitution. The First Amendment has two central parts on religion. First, the language states, "Congress shall make no law respecting an establishment of religion." This portion of the First Amendment is the **Establishment Clause**. This clause prohibits excessive government entanglement with religion. Next, the First Amendment states, "Congress shall make no law … restricting the free exercise [of religion]." This clause, the **Free Exercise Clause**, protects our right to be free to worship as we wish without government interference.

Regarding employment questions, the First Amendment will be an issue only if government action is involved. As presented in Chapter 3, the Constitution, and the Bill of Rights in particular, does not apply to non-government individuals or companies. For the private sector, then, the First Amendment is not relevant.[1]

Title VII does cover private sector employers though the protection provided is not absolute (nor as powerful as the First Amendment). That is, an employer does not have a complete duty to avoid religious discrimination. Rather, Title VII requires that employers provide **reasonable accommodation** of employee religious beliefs. An employer is not required to suffer an **undue hardship** in accommodating an employee's religious beliefs. Reasonable accommodation and undue hardship are covered in more detail later in the chapter.

Most employment disputes under Title VII do not involve religious discrimination directly. Instead, the dispute involves some aspect of a religious practice that conflicts with an employment requirement. For example, unless a BFOQ is present, it is illegal to refuse to hire a Muslim based on the belief in Islam. However, the Muslim employee's religious practices such as praying, suitable dress and facial hair, and attendance at worship services do not receive complete protection. An employer must only provide reasonable accommodation of these practices. If reasonable accommodation is not possible without imposing an undue hardship, the employer is free to fire or discipline the involved employee. The firing would not be based on the religious belief, but on the practices involved in following the belief.

An interesting question facing employers is this: what, exactly, is religion or religious beliefs? The courts have been inclusive in defining religion and have included any belief that involves a Deity or other source of principles of right and wrong. The fact that no religious group espouses such beliefs is not relevant. There can be a religion with one follower. In addition, the fact the religious group to which an individual claims to belong may not accept the individual's belief will not settle whether the belief is a religious belief. For example, an employee may have a religious belief that working on the Sabbath is forbidden, even if the employee's church body does not hold this belief.

Religious discrimination includes discrimination against an individual who is an atheist.[2] Belief in no God is a religious belief under Title VII. Also, Title VII forbids discrimination against an individual because of their association with another person of a particular religion. An example would be discrimination against a Christian because of her marriage to a Muslim.

An often-asked question is this: "Must an employer accommodate an employee's religious beliefs that did not exist when the employee was hired?" For example, if an

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[1] The First Amendment will be applicable to questions involving government employers. Examples of government employers include state universities, and federal or state government agencies.

[2] *See, e.g.* Shapolia v. Los Alamos Nat'l Lab., 773 F.Supp 304, 305 (D.N.M. 1991).

employee was told when she was hired that she would be required to work Sunday mornings, can the employee later claim a religious problem with her Sunday work schedule? The answer clearly is yes, the employee can invoke her Title VII rights whenever a problem arises. Individuals are allowed to change their religious beliefs. Prior acceptance of a work practice does not prevent a later change in beliefs by the employee.

Selected Major World Religions[3]	***Members Estimate***
Christianity	2 to 2.2 billion
Islam	1.3 to 1.65 billion
No religion	1.1 billion
Hinduism	8.28 to 1 billion
Buddhism	400 to 500 million
Judaism	14 to 18 million

WHAT IS RELIGION?

According to Black's Law Dictionary, religion involves "man's relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In its broadest sense includes all forms of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments."

The EEOC defines religion to include moral or ethical beliefs as to right or wrong that are sincerely held with the strength of traditional religious views (29 C.F.R. §1605.1).

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[3] Source: Wikipedia, "Major Religious Groups." Retrieved 27 June 2012 from <http://en.wikipedia.org/wiki/World_religions>. (Lists of membership totals by religion are rough estimates as, aside from Christianity, most religions do not collect and report membership data. Within Christianity, reporting requirements vary between the Catholic and Protestant churches.

Church Bodies in the United States with Membership Exceeding 2,000,000[4]	Number
The Roman Catholic Church	63,683,000
Southern Baptist Convention	15,960,000
The United Methodist Church	8,341,000
Jewish	6,150,000
The Church of God in Christ	5,500,000
The Church of Jesus Christ of Latter-day Saints (Mormons)	5,209,000
Evangelical Lutheran Church in America	5,126,000
National Baptist Convention of America, Inc.	3,500,000
Presbyterian Church (U.S.A.)	3,485,000
Assemblies of God	2,578,000
The Lutheran Church – Missouri Synod (LCMS)	2,554,000
National Missionary Baptist Convention of America	2,500,000
Progressive National Baptist Convention, Inc.	2,500,000
African Methodist Episcopal Church	2,500,000
Episcopal Church	2,311,000

Questions – Defining Religious Beliefs:
How would a court analyze the case of an employee who believed there was a sun god, and the employee needed to “worship” the sun god by sitting outside on sunny days for at least 30 minutes during work hours?

[4] Source: U.S. Census Bureau, Statistical Abstract of the United States: 2002, Section 1, Population, No. 63, Religious Bodies-Selected Data, *available at* http://www.census.gov/prod/www/statistical-abstract-02.html.

Proving Religious Discrimination

To bring a case of religious discrimination, a plaintiff must establish a prima facie case of discrimination. The prima facie case has three elements:

(1) The employee holds a sincere religious belief that conflicts with an employment requirement,

(2) The employee has told the employer about the conflict, and

(3) The employee was fired or disciplined for failing to comply with the conflicting employment requirement.

If the plaintiff is successful, the employer must then prove that it could not reasonably accommodate the religious beliefs without suffering an undue hardship. If the plaintiff cannot prove prima facie religious discrimination, the employer wins the dispute. The following case presents analysis of these religious discrimination concepts.

Miguel Sanchez-Rodriguez
v.
AT&T
673 F.3d 1 (9th Cir 2012)

TORRUELLA, Circuit Judge. Plaintiff-Appellant Miguel Sánchez-Rodríguez ("Sánchez") appeals the district court's award of summary judgment to his employer, AT&T Mobility Puerto Rico, Inc. ("AT&T"), on his claims of religious discrimination and retaliation under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000a-2000e ("Title VII"). Although we disagree with some aspects of the district court's decision, we conclude that the grant of summary judgment for AT&T was correct. . . .

Facts - . . . Sánchez was hired by AT&T1 in March of 2000 as an Installation Technician. . . . His yearly salary be-tween 2003 and 2006 ranged from $23,129.59 to $26,425.47. Sánchez also earned yearly commissions ranging from $10,653.03 to $18,938.17. . . .

In September of 2006, Sánchez informed his supervisors and AT&T's Human Resources ("HR") department that he had become a Seventh Day Adventist. As a Seventh Day Adventist, Sánchez had a religious obligation to abstain from work on Saturdays and attend Sabbath services. Therefore, he requested an accommodation in his work schedule by being allowed to take Saturdays off. In October of 2006, Sánchez presented a letter from his

church confirming and explaining his religious observance of the Sabbath. . . . AT&T's HR department sent Sánchez a letter stating that his position necessitated that he work on rotating Saturday shifts and that it would be a hardship on AT&T to grant Sánchez his requested accommodation.

In lieu of a change in his schedule, AT&T offered Sánchez two different positions that would not require him to work on Saturdays: Representative 1 for Customer Service ("Rep 1") and Business Sales Specialist. The Rep 1 position typically required Saturday hours, but AT&T determined that it would not be a hardship to allow Sánchez to take Saturdays off. The Business Sales Specialist position did not require work on Saturdays or Sundays. The annual wages for the Rep 1 and Business Sales Specialist positions were $23,088 and $22,970, respectively. However, neither position offered the opportunity to earn commissions. Thus, Sánchez declined both offers, since his income would significantly decrease. . . .

Procedural History - On December 26, 2007, Sánchez filed a Complaint against AT&T in the U.S. District Court for the District of Puerto Rico. Sánchez alleged religious discrimination in violation of Title VII. . . . On Sánchez's Title VII religious discrimination claim, the court held that even though Sánchez had demonstrated a prima facie case of discrimination, AT&T had shown either: (1) that it offered Sánchez a reasonable accommodation, or alternatively, (2) that accommodating Sánchez would have placed an undue burden on AT&T.

As stated by the district court, to establish a prima facie case of religious discrimination, the employee must show that: "(1) a bona fide religious practice conflicts with an employment requirement; (2) that he or she brought the practice to the [employer's] attention; and (3) that the religious practice was the basis for an adverse employment decision." . . . Once an employee has made out a prima facie case of discrimination, the employer must show that it offered a reasonable accommodation or that a reasonable accommodation would be an undue burden. . . . The district court held that the alternate positions that AT&T had offered to Sánchez were not reasonable accommodations "because [those] positions offered a steep decrease in earnings." . . . However, the court held that allowing Sánchez to arrange voluntary shift swaps with other employees was a reasonable accommodation. . . . .

Title VII Discrimination Claim - Title VII forbids an employer "to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . ." 42 U.S.C. § 2000e-2(c)(1). The statute defines "religion" to include: "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an

employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Id. § 2000e(j). "Thus, in general terms, Title VII requires employers . . . to accommodate, within reasonable limits, the bona fide religious beliefs and practices of employees." . . .

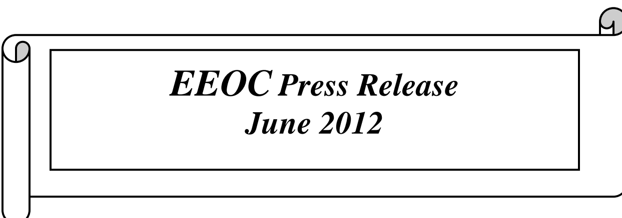
We apply a two-part framework in analyzing religious discrimination claims under Title VII. "First, the plaintiff must make [his] prima facie case that a bona fide religious practice conflicts with an employment requirement and was the reason for the adverse employment action." . . . "Once the plaintiff has established this prima facie case, the burden shifts to the [employer] to show that it made a reasonable accommodation of the religious practice or show that any accommodation would result in undue hardship." . . .

The district court found that Sánchez had established his prima facie case . . . and AT&T concedes this point for purposes of argument on appeal. Thus, we consider whether the facts, viewed in the light most favorable to Sánchez, demonstrate either that AT&T offered a reasonable accommodation or that accommodating Sánchez would have resulted in undue hardship. . . .

AT&T points to three ways in which it tried to accommodate Sánchez: (1) by offering him the Rep 1 and Business Sales Specialist positions as a substitute for his Retail Sales Consultant position; (2) by allowing him to swap shifts with his co-workers; and (3) by refraining from disciplining him for absenteeism prior to May of 2007. Sánchez contends that AT&T's offer of other positions was not reasonable because those positions offered lower compensation. He also contends that the offer of shift-swapping was not reasonable because AT&T did not provide the schedules of other employees, as it had promised. However, we need not decide whether either of these accommodations was reasonable in isolation, because they were not offered in isolation -- rather, they were offered as part of a series of attempts by AT&T to accommodate Sánchez. Many courts have found similar accommodations or combinations of accommodations to be reasonable under Title VII. . . . Taken together, we believe that the efforts made by AT&T constituted a reasonable accommodation of Sánchez's religious beliefs. Therefore, we affirm the judgment of the district court on the discrimination claim. We need not reach the question of whether accommodating Sánchez would have been an undue hardship for AT&T.

Case Questions:

1. How did Rodriguez prove prima facie discrimination in his suit against AT&T?
2. Did AT&T's response appear to be reasonable under the circumstances?



EEOC Sues Voss Lighting for Religious Discrimination

Qualified Applicant Denied Job Because His Religious Beliefs Differed From the Company's, Federal Agency Charges

TULSA, Okla. – A Lincoln, Nebraska-based supplier of lighting products violated federal law by refusing to hire a qualified applicant at its Tulsa facility because of his religious beliefs, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit it filed today.

According to the EEOC's suit, Voss Electric Company, doing business as Voss Lighting, advertised a vacancy for an "operations supervisor" position through the website of the First Baptist Church of Broken Arrow, the church attended by the incumbent manager. Although he did not himself attend the church, Edward Wolfe, who had prior management experience, learned about the vacancy and applied for the position. The Voss manager met with Wolfe and recommended him to the branch manager for an interview. Throughout the application process, both managers made numerous inquiries, both subtle and overt, into Wolfe's religious activities and beliefs. They asked Wolfe to identify every church he has attended over the past several years; where and when he was "saved" and the circumstances that led up to it; and whether he "would have a problem" coming into work early to attend Bible study before clocking in.

At Wolfe's second job interview, the EEOC said, Voss's branch manager became upset over Wolfe's truthful responses to the religious questioning. Despite being considered qualified for the position, which involved no religious duties or responsibilities, Wolfe was denied employment on the basis of his religious beliefs.

Such alleged conduct violates the Civil Rights Act of 1964. The EEOC filed its lawsuit in U.S. District Court for the Northern District of Oklahoma (*EEOC v. Voss Electric Company d/b/a Voss Lighting*, Civil Case No.: 12-CV-330-JHP-FHM) after first attempting to reach a pre-litigation settlement through its conciliation process. The EEOC's suit seeks back pay, compensatory and punitive damages and reinstatement or front pay for Wolfe as well as injunctive relief, including a court order prohibiting Voss Lighting from any further discrimination against applicants on the basis of their religious beliefs or non-beliefs.

"Voss Lighting appears to have a corporate culture that requires employees adhere to certain religious beliefs that have absolutely no bearing on the business of selling lighting

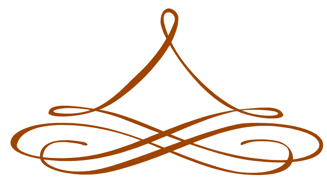
products," said EEOC trial attorney Patrick Holman. "This litigation, we hope, will serve to illuminate Voss Lighting as to Title VII's prohibitions against discrimination on the basis of religion."

Barbara A. Seely, regional attorney of the EEOC's St. Louis District Office, added, "Title VII of the Civil Rights Act of 1964 has long prohibited a private employer from discriminating against applicants or employees based on their religious beliefs or practices -- or lack thereof. The level of intolerance demonstrated by Voss Lighting is inconsistent with the values of the free and diverse society embodied in these laws."

According to company information, Voss Electric Company, doing business as Voss Lighting, is one of the nation's leading suppliers of specialized replacement lighting products, with offices in 16 cities across the United States.

Reasonable Accommodation versus Undue Hardship

It is often a difficult fact question whether an employer could accommodate a certain religious practice by its employees. Title VII requires an employer to provide reasonable accommodation of religious beliefs, if doing so does not present an undue hardship on the employer. The question of reasonable accommodation was presented above in *Rodriguez v. AT&T*. The following EEOC regulations present reasonable accommodation and undue hardship. The regulations may ask more of an employer than a court would ask. That is, the EEOC's regulations may not be correct regarding the reach of reasonable accommodation, especially as it relates to the Supreme Court's opinion in *TWA v Hardison*, an opinion presented following the regulations.



EEOC Guidelines on Discrimination Because of Religion[5]

. . .

(b) Duty to accommodate.

[Title VII] makes it an unlawful employment practice . . . for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.

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[5] 29 C.F.R. Part 1605.2

(c) Reasonable accommodation.
After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.
. . .
(d) Alternatives for accommodating religious practices.
(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. . . .

(i) Voluntary Substitutes and ``Swaps''. Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. . . .

(ii) Flexible Scheduling. One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation. The following list is an example of areas in which flexibility might be introduced:

flexible arrival and departure times;
floating or optional holidays;
flexible work breaks; use of lunch time in exchange for early departure;
staggered work hours;
and permitting an employee to make up time lost due to the observance of religious practices.
. . .

(e) Undue hardship.
(1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require ``more than a de minimis cost''. The Commission will determine what constitutes ``more than a de minimis cost'' with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the Hardison decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in Hardison, would constitute undue hardship. However,

the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. . . .

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. . . . Arrangements for voluntary substitutes and swaps do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system.

Cost as an Undue Hardship

In the following case the Supreme Court was asked to analyze whether an extra financial burden to the employer constituted an undue hardship under Title VII, religious discrimination. The Court's answer is still controlling law today.

Trans World Airlines, Inc.
v.
Hardison

432 U.S. 63
Supreme Court of the United States, 1977

White, J. . . .[T]he Civil Rights Act of 1964 . . . makes it an unlawful employment practice for an employer to discriminate against an employee or a prospective employee on the basis of his or her religion. . . . The issue in this case is the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays.

[Background Facts] Petitioner Trans World Airlines (TWA) operates a large maintenance and overhaul base in Kansas City, Mo. On June 5, 1967, respondent Larry G. Hardison was hired by TWA to work as a clerk in the Stores Department at its Kansas City base. Because of its essential role in the Kansas City operation, the Stores Department must operate 24 hours per day, 365 days per year, and whenever an employee's job in that department is not filled, an employee must be shifted from another department, or a supervisor must cover the job, even if the work in other areas may suffer.

Hardison, like other employees at the Kansas City base, was subject to a seniority system contained in a collective-bargaining agreement that TWA maintains with petitioner International Association of Machinists and Aerospace Workers (IAM). The seniority system is implemented by the union steward through a system of bidding by employees for particular shift assignments as they become available. The most senior employees have first choice for job and shift assignments, and the most junior employees are required to work when the union steward is unable to find enough people willing to work at a particular time or in a particular job to fill TWA's needs.

In the spring of 1968 Hardison began to study the religion known as the Worldwide Church of God. One of the tenets of that religion is that one must observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday. The religion also proscribes work on certain specified religious holidays.

When Hardison informed Everett Kussman, the manager of the Stores Department, of his religious conviction regarding observance of the Sabbath, Kussman agreed that the union steward should seek a job swap for Hardison or a change of days off; that Hardison would have his religious holidays off whenever possible if Hardison agreed to work the traditional holidays when asked; and that Kussman would try to find Hardison another job that would be more compatible with his religious beliefs. The problem was temporarily solved when Hardison transferred to the 11 p. m.-7 a. m. shift. Working this shift permitted Hardison to observe his Sabbath.

The problem soon reappeared when Hardison bid for and received a transfer from Building 1, where he had been employed, to Building 2, where he would work the day shift. The two buildings had entirely separate seniority lists; and while in Building 1 Hardison had sufficient seniority to observe the Sabbath regularly, he was second from the bottom on the Building 2 seniority list.

In Building 2 Hardison was asked to work Saturdays when a fellow employee went on vacation. TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set out in the collective-bargaining contract, and Hardison had insufficient seniority to bid for a shift having Saturdays off.

A proposal that Hardison work only four days a week was rejected by the company. Hardison's job was essential and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

When an accommodation was not reached, Hardison refused to report for work on Saturdays. A transfer to the twilight shift proved unavailing since that scheduled still required Hardison to work past sundown on Fridays. After a hearing, Hardison was discharged on grounds of insubordination for refusing to work during his designated shift. . . .

[Legal Analysis] It was essential to TWA's business to require Saturday and Sunday work from at least a few employees even though most employees preferred those days off. Allocating the burdens of weekend work was a matter for collective bargaining. In considering criteria to govern this allocation, TWA and the union had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts; or allocate days off in accordance with the religious needs of its employees. TWA would have had to adopt the latter in order to assure Hardison and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.

Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. Indeed, the foundation of Hardison's claim is that TWA and IAM engaged in religious discrimination in violation of s 703(a)(1) when they failed to arrange for him to have Saturdays off. It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. . . .

The Court of Appeals also suggested that TWA could have permitted Hardison to work a four-day week if necessary in order to avoid working on his Sabbath. Recognizing that this might have left TWA short-handed on the one shift each week that Hardison did not work, the court still concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages.

To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want

> would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarilys in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.
>
> As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath. . . .

Religion as a BFOQ

Title VII does not forbid religious discrimination in hiring and firing by a religious organization. Thus a religious organization may make an employee's religious beliefs a BFOQ for any position filled by the organization, clergy or non-clergy. This protection applies to an organization whose purpose and character are mainly religious. For formal church bodies, determining religious character is easy; for non-church organizations, determining religious character is more difficult.[6]

Although the religious exception – BFOQ - applies to all positions within a religious organization, discrimination is not allowed on any basis other than religion unless the position involved is a "ministerial" position. In addition, the exception only applies to hiring and firing and may not apply to other terms of employment, such as wages or benefits.

In the following case, the Supreme Court examines application of the ministerial exception to a Christian school teacher.

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[6] *See, e.g.,* EEOC v. Townley Eng. & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) (finding that the religious exemption did not apply to a manufacturer of mining equipment that operated for profit and was not affiliated with a church, even though the company enclosed Gospel tracts in its mailings, printed Bible verses on its commercial invoices, financially supported religious organizations, and conducted a weekly devotional service); *see also* Killinger v. Samford Univ., 113 F.3d 196, 199-200 (11th Cir. 1997) (religious exemption applied to an educational institution that was founded as a theological institution, received seven percent of its annual budget from the Baptist convention, and was recognized by Internal Revenue Service as a religious educational institution).

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL
V.
E.E.O.C.

SUPREME COURT OF THE UNITED STATES
132 S. Ct. 694 ; 181 L. Ed. 2d 650; 2012 U.S. LEXIS 578

January 11, 2012, Decided

JUDGES: ROBERTS, C.J., delivered the opinion for a unanimous Court.

Certain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's ministers.

I

A

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church-Missouri Synod, the second largest Lutheran denomination in America. Hosanna-Tabor operated a small school in Redford, Michigan, offering a "Christ- centered education" to students in kindergarten through eighth grade. . . .

The Synod classifies teachers into two categories: "called" and "lay." "Called" teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements. One way of doing so is by completing a "colloquy" program at a Lutheran college or university. The program requires candidates to take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee. A teacher who meets these requirements may be called by a congregation. Once called, a teacher receives the formal title "Minister of Religion, Commissioned." . . .

"Lay" or "contract" teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. At Hosanna-Tabor, they were appointed by the school board, without a vote of the congregation, to one-year renewable terms. Although teachers at the school generally performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable.

Respondent Cheryl Perich was first employed by Hosanna-Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna-Tabor asked her to become a called teacher. . . . Perich taught kindergarten during her first four years at Hosanna-Tabor and fourth grade during the 2003-2004 school year. She taught math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. . . .

Perich became ill in June 2004 with what was eventually diagnosed as narcolepsy. Symptoms included sudden and deep sleeps from which she could not be roused. Because of her illness, Perich began the 2004-2005 school year on disability leave. On January 27, 2005, however, Perich notified the school principal, Stacey Hoeft, that she would be able to report to work the following month. Hoeft responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year. Hoeft also expressed concern that Perich was not yet ready to return to the classroom.

On January 30, Hosanna-Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a "peaceful release" from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. . . . . Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, in-forming her that the school no longer had a position for her, but Perich stood by her decision not to resign.

On the morning of February 22--the first day she was medically cleared to return to work--Perich presented herself at the school. Hoeft asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, Hoeft called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.

Following a school board meeting that evening, board chairman Scott Salo sent Perich a letter stating that Hosanna-Tabor was reviewing the process for rescinding her call in light of her "regrettable" actions. . . . Salo subsequently followed up with a letter advising Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich's "insubordination and disruptive behavior" on February 22, as well as the

damage she had done to her "working relationship" with the school by "threatening to take legal action." . . . The congregation voted to rescind Perich's call on April 10, and Hosanna-Tabor sent her a letter of termination the next day.

B

Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act . . . . The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. . . . It also prohibits an employer from retaliating "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]." . . .

The EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. . . . The EEOC and Perich sought Perich's reinstatement to her former position (or frontpay in lieu thereof), along with backpay, compensatory and punitive damages, attorney's fees, and other injunctive relief.

Hosanna-Tabor moved for summary judgment. Invoking what is known as the "ministerial exception," the Church argued that the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason--namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally.

The District Court agreed that the suit was barred by the ministerial exception and granted summary judgment in Hosanna-Tabor's favor. . . . The Court of Appeals for the Sixth Circuit vacated and remanded, directing the District Court to proceed to the merits of Perich's retaliation claims. The Court of Appeals recognized the existence of a ministerial exception barring certain employment discrimination claims against religious institutions--an exception "rooted in the First Amendment's guarantees of religious freedom." . . . The court concluded, however, that Perich did not qualify as a "minister" under the exception, noting in particular that her duties as a called teacher were identical to her duties as a lay teacher. . . .

We granted certiorari. . . .

II

. . .

C

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The . . . EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. . . . According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association--a right "implicit" in the First Amendment. . . . The EEOC and Perich thus see no need--and no basis--for a special rule for ministers grounded in the Religion Clauses themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor un-ion, or a social club. . . .. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

. . .

III

Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case. We hold that it does.

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

. . .

The judgment of the Court of Appeals for the Sixth Circuit is reversed.
It is so ordered.

. . ..

Religious Discrimination Charges

The following chart summarizes the resolution of religion-based discrimination charges filed and resolved under Title VII with the EEOC.

	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Receipts	2,541	2,880	3,273	3,386	3,790	4,151	3,811
Resolutions By Type							
Administrative Closures	15.2%	16.6%	16.8%	19.8%	16.6%	22.0%	14.7%
No Reasonable Cause	63.8%	59.3%	62.5%	61.0%	61.1%	59.4%	66.4%
Merit Resolutions	20.9%	24.1%	20.6%	19.2%	22.4%	18.6%	18.9%
Monetary Benefits (Millions)*	$5.7	$6.4	$7.5	$7.6	$10.0	$12.6	$9.9

** Does not include monetary benefits obtained through litigation.*

Definitions of Terms:

Administrative Closure

Charge closed for administrative reasons, which include: failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

Merit Resolutions

Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.

No Reasonable Cause

EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.

Additional Cases

Cruzan
v.
Special School District, #1

294 F.3d 981 (8th Cir. 2002)

Per Curiam – **["Per curiam" is a phrase used by a court to designate an opinion of the whole court as opposed to an opinion written by one judge and agreed to by the other judges in the majority. Here, the case was heard by Hansen, Chief Judge, and Fagg and Bowman, Justices, Eighth Circuit.]**

[Background Facts] Carla Cruzan, a female teacher at Minneapolis Special School District, # 1, brought this action alleging the school district discriminated against her on the basis of her sex and her religion by allowing a transgendered coworker to use the women's faculty restroom. The district court granted summary judgment to the school district. . . . Cruzan appeals, and we affirm.

David Nielsen began working for the school district in 1969. Nearly thirty years later, in early 1998, Nielsen informed school administration that he was transgendered, that is, a person who identifies with and adopts the gender identity of a member of the other biological sex. Nielsen informed administration he would "transition from male to female" and be known as Debra Davis in the workplace. To plan for the transition, the school district collaborated with Davis, legal counsel, the parent teacher association, students' parents, and psychologists. Cruzan asked whether Davis would be allowed to use the school's women's restrooms, and administration informed her other arrangements would be made. Later, legal counsel informed the school that under the Minnesota Human Rights Act (MHRA), which prohibits discrimination on the basis of a person's "self-image or identity not traditionally associated with one's biological maleness or femaleness," Minn. Stat. § 363.01 subd. 45 (1998), Davis had the right to use the women's restroom. Thus, after Davis's transition in the spring of 1998, the school district permitted Davis to use the women's faculty restroom.

A few months later, in October 1998, Cruzan entered the women's faculty restroom and saw Davis exiting a privacy stall. Cruzan immediately left, found the principal in the hallway among students, and complained about encountering Davis in the restroom. The principal asked Cruzan to either wait in his office or to make an appointment to discuss the matter. Cruzan did not do so, and never approached the principal about her concerns again.

Instead, Cruzan filed a complaint with the Minnesota Department of Human Rights, which dismissed Cruzan's charge, concluding there was no probable cause to believe an unfair discriminatory practice had occurred. The Department stated the MHRA neither

requires nor prohibits restroom designation according to self-image of gender or according to biological sex. . . . After exhausting administrative remedies, Cruzan filed this action under Title VII and the MHRA asserting claims of religious discrimination and hostile work environment sex discrimination. Davis retired in 2001.

[Legal Analysis] We review the district court's grant of summary judgment de novo, and affirm if the evidence, viewed in the light most favorable to Cruzan, shows there is no genuine issue of material fact and the school district is entitled to judgment as a matter of law. . . . **["De novo" means the appellate court is reviewing the case fresh, as if it had not been decided before. The practical result is that the lower court legal determination is not granted a presumption of accuracy.]**

To establish a prima facie case of religious discrimination, Cruzan had to show she had a bona fide religious belief that conflicted with an employment requirement, she informed the school district of her belief, and she suffered an adverse employment action. . . . The district court concluded that assuming without deciding Cruzan had a bona fide religious belief that conflicted with the restroom policy, she failed to inform the school district of her belief and did not suffer an adverse employment action because of it. . . .

Although Cruzan expressed general disapproval of Davis's transition and the school district's decision to allow Davis to use the women's faculty restroom, Cruzan did not disclose or discuss the reason for her disapproval with her employer beyond asserting her personal privacy. Cruzan argues that she met the notice requirement by completing paperwork for her MDHR charge. We disagree. Even assuming such paperwork could satisfy the notice requirement, the school district did not receive the MDHR intake questionnaire until the discovery phase of this litigation, and Cruzan's MDHR charge of discrimination alleges sex discrimination, not religious discrimination.

To show she suffered an adverse employment action, Cruzan had to establish a "'tangible change in duties or working conditions that constitute a material employment disadvantage.'" . . . Mere inconvenience without any decrease in title, salary, or benefits is insufficient to show an adverse employment action. . . . Here, it is undisputed that Davis's use of the female staff restroom had no effect on Cruzan's title, salary, or benefits. Cruzan concedes that to avoid sharing a restroom with Davis, she used the female students' restroom, which is closer to her classroom and was never used by Davis. Single-stall, unisex bathrooms are also available. We thus agree with the district court that the school district's decision to allow Davis to use the women's faculty restroom does not rise to the level of an actionable adverse employment action. Because Cruzan failed to establish a prima facie case of religious discrimination, the district court properly granted summary judgment to the school district on this claim.

To establish a sexual harassment claim based on hostile work environment, Cruzan had to show, among other things, that the harassment affected a term, condition, or privilege of her employment. . . . The harassment must be so severe or pervasive that it alters the conditions of employment and creates an abusive working environment. . . . To make this showing, Cruzan had to establish the school was "permeated with discriminatory

intimidation, ridicule, and insult." . . . Courts examine the totality of the circumstances, and consider whether a reasonable person would have found the environment hostile or abusive. . . . We agree with the district court that Cruzan failed to show the school district's policy allowing Davis to use the women's faculty restroom created a working environment that rose to this level. . . . The school district's policy was not directed at Cruzan and Cruzan had convenient access to numerous restrooms other than the one Davis used. Cruzan does not assert Davis engaged in any inappropriate conduct other than merely being present in the women's faculty restroom. Given the totality of the circumstances, we conclude a reasonable person would not have found the work environment hostile or abusive.

Cruzan argues it is an abuse of the summary judgment procedure for a male judge to decide that reasonable women could not find their working environment is abusive or hostile when they must share bathroom facilities with a coworker who self-identifies as female, but who may be biologically male. No case law supports Cruzan's assertion, however. Judges routinely decide hostile environment sexual harassment cases involving plaintiffs of the opposite sex.

We thus affirm the district court.

Chapter 13 - The National Labor Relations Act

Employment Law Meets Labor Law – A Quiet Wedding

Employers in America today are generally aware of federal and state protections allowed workers regarding hiring, dismissals, and other employment decisions. Regardless of whether an employer is familiar with a specific employment law, there is a general familiarity with the notion that employment law restricts how an employer treats individual employees or job applicants. Managers realize, for example, that it is usually illegal to discriminate against a specific individual based on the individual's age, sex, or race. "Employment law" is the label used to identify the laws regulating individual employee rights.[1]

And the National Labor Relations Act (NLRA)? Ask most employers or employees about the Act and the answer is often the same. The NLRA does not apply unless the workers have organized a union or are organizing a union. "Labor law" is the label mainly used for issues involving labor and management relations under the NLRA.

The importance of the NLRA is often minimized. Union membership only covers around 13.5% of the U.S. workforce, including only nine percent of the private sector workforce.[2] While employment laws such as the Civil Rights Act of 1964 cover nearly all employees in the U.S. marketplace, union employees are small in number and are concentrated in certain sectors of the economy and in certain geographic regions.

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[1] A partial list of laws protecting individual employees/applicants includes the following: the Equal Pay Act, 29 U.S.C. 206(d) (2002); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e through 2000e-15 (2002); the Age Discrimination in Employment Act, 29 U.S.C. 621-633a (2002); the Occupational Safety and Health Act, 29 U.S.C. 651-678 (2002); the Employee Retirement Income Security Act, 29 U.S.C. 1001-1461 (2002); the Pregnancy Discrimination Act, 42 U.S.C. 2000e (k) (2002); the Americans with Disabilities Act of 1990, 42 U.S.C. 1201 et seq (2002); the Civil Rights Act of 1991, 42 U.S.C. 1981a and scattered sections of Title VII (2002); and the Family and Medical Leave Act of 1993, 29 U.S.C. 2601-2617, 2651, & 2652 (2002).

[2] Union Members Decline to 16.3 Million as Share of Employed Slips to 13.5%, Daily Lab. Rep. (BNA) No. 13 (Jan. 19, 2001).

The above labor law/employment law dichotomy may be the general perception in the marketplace, but the reality is different. The National Labor Relations Act is a law that protects both union and nonunion employees. That is, an employee is not required to belong to a union or to be engaged in union organizing to receive protection under the NLRA.[3] Under the NLRA, nonunion employees have the right to strike. Firing employees for "walking off the job" may constitute an unfair labor practice. Nonunion employees complaints about pay, employment benefits, supervisory personnel, or other working conditions may be protected "concerted activities" under Section 7 of the Act.

A COLD DAY

January 5, 1959, was an extraordinarily cold day for Baltimore. The winds were strong and biting on a day with a low temperature of 11 degrees. Machinists working at the Washington Aluminum Company fabrication plant in Baltimore were accustomed to working in cold conditions. The aluminum fabrication facility where they worked was not insulated and lacked proper heating equipment. The employees had previously complained about this problem, without success.

On the morning of January 5, however, it was abnormally cold at work. The primary source of heat at the fabrication facility, an oil furnace, had broken down during the previous night. As the machinists arrived for work on the 5th, they discovered bitterly-cold working conditions. One of the machinists, Mr. Caron, told his fellow workers, "I am going home; it is too damned cold to work." Caron asked the other machinists what they were going to do and, after some discussion among themselves, most decided to leave with him. The belief was that by acting together and leaving, the machinists would be able to exert pressure on Washington Aluminum Company to provide proper heat at the fabrication facility. The company's immediate response was to fire the seven employees that left work.

The discharged employees later brought suit against Washington Aluminum. The surprising legal result: The conduct of the workers was a "concerted activity" to protest the company's inadequate heating of the machine shop. Though the workers were not unionized, their conduct was protected under Section 7 of the National Labor Relations Act. The discharge of the seven workers by the company amounted to an unfair labor practice under Section 8(a)(1) of the Act. The National Labor Relations Board (NLRB) ordered the reinstatement of the workers, with restitution for all losses, and the Supreme Court upheld this action.[4]

A puzzling fact about the opinion in *Washington Aluminum* is that, though the decision is over forty years old, the result is not widely known in the business community. That anonymity may be changing. In a recent case, *Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board,*[5] a federal court of appeals affirmed application of the National Labor Relations Act in a nonunion setting. The court in *Epilepsy* upheld a

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[3] *See e.g*., Vencare Ancillary Services, Inc. v. N.L.R.B, 352 F.3d 318, 322 (6th Cir. 2003).
[4] NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).
[5] Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001), cert. denied, 122 S.Ct. 2356 (2002).

National Labor Relations Board decision allowing a nonunion employee request that a co-worker be present at an investigatory workplace interview that the employee reasonably believed could result in disciplinary action. This right to have a representative join an employee in attendance at an investigatory meeting with management personnel, commonly called the *Weingarten* rule, was established for union employees in a 1975 Supreme Court decision.[6] The Epilepsy decision extending the right to nonunion employees generates additional publicity and interest in application of the National Labor Relations Act in nonunion settings.[7]

The National Labor Relations Act

The National Labor Relations Act was passed and enacted into law in 1935.[8] The purpose of the NLRA is summarized in the following language from Section 1 of the Act:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[9]

Employee rights under Section 7 of the Act include the following rights:

- to self-organization, to form, join, or assist labor organizations,
- to bargain collectively through representatives of their own choosing, and
- to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ..[10]

Section 8 of the Act designates as an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[11]

THE NLRA & NONUNION EMPLOYEES

As illustrated by the preceding Supreme Court decision in *Washington Aluminum*, the NLRA applies to union and nonunion settings. Concerted activities, *for the purpose of collective bargaining or other mutual aid or protection*, are protected under Section 7 of the Act, even in the absence of nascent union organizing. Employer retaliation or discrimination against an employee engaging in protected concerted activity may subject the employer to liability under NLRA Section 8(a)(3) for an unfair labor practice.

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[6] NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).
[7] *See*, *e.g.,* William R. Corbett, Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again, 23 Berkeley J. Emp. & Lab. L. 259 (2002); G. Roger King, Who let the Weingarten Rights Out? The National Labor Relations Board compounds Earlier Error by the Supreme Court, 2002 L. Rev. Mich. St. U. Det. C.L. 149 (2002); Sarah C. Flannery, Extending Weingarten to the Nonunion Setting: A history of Oscillation, 49 Clev. St. L. Rev. 163 (2001).
[8] The Act is found in 29 U.S.C. §§151-169 (2003).
[9] 29 U.S.C. §151 (2003).
[10] *Id*. at §157.
[11] *Id*. at §158(a)(1).

CONCERTED ACTIVITY FOR MUTUAL AID

In *Washington Aluminum*, concerted activity for mutual aid was clearly evidenced as seven employees banded together to protest cold working conditions. This was true despite the fact that the employees involved were not unionized nor were they seeking to form a union. Generally, two or more employees acting together to address workplace concerns or improve workplace conditions are acting in a concerted manner. Even one employee acting alone, however, may satisfy the concerted requirement. When only one employee is involved in some manner of employment activity, the employee must establish that his behavior reflects more than a personal complaint. The employee must be acting beyond personal self-interest, attempting to improve other employees' working conditions.[12]

In the following case, Diane Baldessari worked as a computer programmer for Caval Tool Division, Chromalloy Gas Turbine Corporation (Caval). Caval was not unionized. During August 1998, Caval held a series of informational meetings for its employees, all of which were conducted by Caval's president, Paul Pace. At one meeting attended by Baldessari, Pace expressed his dissatisfaction with worker productivity, production downtime, and the fact that employees were often seen lingering around the company's vending machines. Baldessari then expressed her opinion that Caval promulgated unfair workplace policies. In response, Pace expressed his displeasure regarding the nature of Baldessari's statements. That afternoon, Baldessari was escorted out of work and was placed on suspension without pay for an indefinite period of time.

A key fact from the case is that Baldessari's criticism of company management about workplace conditions that affected Baldessari *and other employees* was concerted activity for mutual aid or protection under the NLRA. This criticism, then, changed Baldessari's status in the case from an unprotected employee-at-will to an employee engaged in protected behavior under the NLRA.

[12] Robert A. Gorman & Matthew W. Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U.Pa.L.Rev. 286, 290-93 (1981).

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. . . Caval held a series of informational meetings for its employees, all of which were conducted by Caval's president, Paul Pace. Each meeting included a period for questions and comments. Baldessari, a computer programmer, attended [a] meeting with other employees holding similar positions.

At that meeting, Pace expressed dissatisfaction with worker productivity and "scrap" rates at Caval. Specifically, Pace lamented the amount of production "downtime" and the fact that employees were often seen lingering around the company's vending machines. Pace also announced a change in the company's break schedule that was intended, at least in part, to address the concerns about worker productivity. Under the new break policy, employees would receive two ten-minute breaks, one in the morning and one in the afternoon, during which they were to take care of all of their personal business. Under the prior break policy, employees received one fifteen-minute break in the morning, but were free to leave their work areas throughout the day to get coffee from the company's vending machines or to attend to personal business.

After Pace announced the new break policy, Baldessari began to question Pace concerning the specifics of the policy. Baldessari first asked Pace if, under the new policy, employees would no longer be allowed to get coffee throughout the day outside of the designated break time, and if employees would be "written up" if they did so. Pace responded affirmatively to both questions. . . . Baldessari then asked if the new break policy would apply to office employees. Pace responded by asking Baldessari if she would like the policy to apply to office workers. Baldessari responded affirmatively and stated that "it would be nice if things were fair for a change." Pace then stated that the policy would indeed apply to office workers.

Baldessari next asked Pace if the new break policy was meant to punish workers for the high "scrap" rate and downtime. After Pace asked Baldessari what she meant, she explained that she felt management was taking a privilege away from the workers (i.e., the ability to get coffee and conduct personal business outside of the designated break times) despite the fact that they had no control over the amount and timing of the work given them. Baldessari blamed management for scheduling problems

leading to poor work flow. Pace responded to these comments by asking Baldessari if, to address her concerns, she would like him to fire all of the managers. Baldessari replied that that would be a start, except for one particular manager whom she considered to be a good manager. At that point, Pace expressed displeasure with Baldessari's continued complaints about management, and suggested a Human Resources employee "come up with a package so [Baldessari could] leave." Baldessari ceased her questioning, and the meeting continued.

That afternoon, Baldessari was escorted out of work and was placed on suspension for an indefinite period of time. . . .

[Section 7 and Concerted Activity]

Section 7 of the NLRA was enacted "generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." . . . To that end, Section 7 guarantees employees certain rights, including the right "to engage in ... concerted activities for ... mutual aid or protection." . . . That right is protected through Section 8(a)(1), which provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." . . .

The phrase "concerted activity" clearly "embraces the activities of employees who have joined together in order to achieve common goals." . . . "Although one could interpret the phrase, 'to engage in concerted activities,' to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning." . . . Rather, that phrase also includes the actions of a single employee, acting alone, who intends to initiate group activity. . . .

In this case, . . . Baldessari's statements during the August 14, 1998 meeting "had the objective of initiating ... or ... inducing group action" in response to the company's new break policy and therefore constituted concerted activity. . . .

Appropriate Employee Behavior

The courts have been consistent and clear. Nonunion employees are protected by the NLRA. Under the Act, however, not all employee conduct will be protected as concerted activities for mutual aid or protection. For example, behavior that is unlawful, too disloyal to the employer, or in breach of contract may not be protected.[13] However, when it has been established that the employer's conduct adversely affects employees' protected rights under the NLRA, the burden falls on the employer to demonstrate legitimate and substantial business justifications for its conduct.[14]

Case Example – National Labor Relations Board v. Main Street Terrace Care Center[15]

Main Street Terrace Care Center (Main Street) operates a nursing home for the elderly in Lancaster, Ohio. Main Street is not unionized. In 1996, Mary Catherine Craig was hired as a dietary aid. After she was hired, Craig was told "that [employees] were not allowed to discuss [their] paychecks with anyone" at Main Street.[16] On several occasions after she was hired, Craig did discuss wages and other workplace issues with several different Main Street employees. Craig was fired in December 1997.

Craig filed an unfair labor practice claim with the NLRB. After an investigation and hearing, the NLRB found that Main Street had violated the NLRA by discharging Craig based on Craig's discussion of employee wages. The Court of Appeals upheld the NLRB. The following factors were discussed by the court:

- An individual employee may be engaged in concerted activity when he acts alone, if the employee's actions were designed to benefit other employees, in addition to benefiting the employee involved in the contested activities.[17]
- It was not relevant that the prohibition against discussing wages was not written policy and was not uniformly applied. The employee involved could reasonably believe that the oral policy could be applied, thus presenting a coercive situation for the employee.[18]
- A rule prohibiting employees from communicating with one another regarding wages, a key objective of organizational activity, undoubtedly tends to interfere with the employees' right to engage in protected concerted activity under Section 7 of the NLRA, absent a substantial and legitimate business justification.[19]

Case Example – Arrow Electric Company, Inc., v. National Labor Relations Board[20]

Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider were fired by Arrow Electric Company on February 27, 1996. In the weeks preceding their termination, these four employees had significant problems with one of their immediate supervisors, Sonny

[13] *See, e.g.,* Corbett, *supra* note 7, at 279; Charles J. Morris, NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct, 137 U. PA. L. REV. 1673, 1707 (1989).
[14] *See, e.g.*, Jeannette Corp., *supra* note 20, at 918.
[15] NLRB v. Main St. Terrace Care Ctr., 218 f.3d 531 (6th Cir. 2000).
[16] *Id*. at 535.
[17] *Id*. at 539.
[18] *Id*. at 538, 539.
[19] *Id.* at 537-38. *See also* N.L.R.B. v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 378 (1967); Jeannette Corp. v. N.L.R.B., 532 F.2d 916, 918 (3rd Cir. 1976).
[20] Arrow Elec. Co., Inc. v. N.L.R.B., 155 F.3d 762 (6th Cir. 1998).

Collins. The problems centered on Collins' belligerent and disrespectful attitude toward his subordinates, and his lack of concern about employee safety issues. After complaints to Collins' supervisor, Donald Jeffries, Collins apologized for his conduct. Jeffries told the employees to come to him if there were any more problems with Collins.

The problems resurfaced the week following the apology. The employees decided to contact Jeffries based on his statement that they should come to him with future problems. After unsuccessful attempts to reach him by radio and phone, the employees left the work site and drove to the company shop. Ultimately, the four employees were fired for leaving "leaving the jobsite without notice."[21]

According to the court, the actions of the four employees in leaving the worksite were protected under §7 of the NLRA. The employee walkout was designed to remedy the negative impact of Collins' behavior on the working conditions and productivity of the employees. Arrow Electric could not establish that it would have discharged the employees had they not left the worksite. The employees were thus discharged due to their exercise of rights under the NLRA, violating §8(a)(1) of the Act.[22]

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[21] *Id*. at 764.

[22] For other court opinions holding walkouts by employees to protest job conditions to be protected activities, s*ee, e.g.,* Vic Tanny Int'l, Inc. v. NLRB*,* 622 F.2d 237 (6th Cir.1980) (unlawful discharge of health spa employees due in part to walkout over changed terms of employment); NLRB v. C.J. Krehbiel Co., 593 F.2d 262 (6th Cir.1979) (print shop employees unlawfully discharged due to walkout over unfair treatment in job assignments).

Appendix

Constitution of the United States
Article 1 – Section 8

Clause 1:
The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Clause 2:
To borrow Money on the credit of the United States;

Clause 3:
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Clause 4:
To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Clause 5:
To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

Clause 6:
To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Clause 7:
To establish Post Offices and post Roads;

Clause 8:
To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Clause 9:
To constitute Tribunals inferior to the supreme Court;

Clause 10:
To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Clause 11:
To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Clause 12:
To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Clause 13:
To provide and maintain a Navy;

Clause 14:
To make Rules for the Government and Regulation of the land and naval Forces;

Clause 15:
To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Clause 16:
To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Clause 17:
To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And

Clause 18:
To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.