

**TITLE VII AND SECTION 1981:**

*A Guide for Appointed Attorneys  
in the Northern District of Illinois*

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for Civil Rights Under Law  
February 2004

## **Foreword**

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. has prepared this manual for use by attorneys appointed by judges in the Northern District of Illinois to represent indigent clients in employment discrimination cases. The manual contains a summary of Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991, including important Supreme Court and Seventh Circuit cases decided through the January, 2004.

The Chicago Lawyers' Committee has agreed to assist appointed counsel by producing this manual, conferring with appointed counsel as to strategy, reviewing pleadings, conducting seminars, and providing other assistance that appointed counsel may need. For assistance, appointed counsel may contact Michael Fridkin at the Chicago Lawyers' Committee for Civil Rights Under Law, 100 N. LaSalle, Suite 600, Chicago, IL 60602, (312) 630-9744, [mfridkin@clccrul.org](mailto:mfridkin@clccrul.org).

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## I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- A. Introduction:** Title VII, 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination in hiring, promotion, termination, compensation, and other terms and conditions of employment because of race, color, sex (including pregnancy), national origin, or religion.
- B. Covered Employers:** Title VII applies to federal, state, and local governments and to private employers, labor unions, and employment agencies. Congress validly waived states' immunity under the Eleventh Amendment in enacting Title VII. *Nanda v. Board of Trustees*, 303 F.3d 817 (7th Cir. 2002). A covered employer must be a "person" (including a corporation, partnership, or any other legal entity) who has 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). The following types of employers are exempted from Title VII's coverage: bona fide membership clubs, Indian tribes, and religious organizations (a partial exemption). *Id.* The Seventh Circuit follows the "economic realities" test for determining who the actual employer is. *Heinemeier v. Chemetco, Inc.*, 246 F.3d 1078 (7th Cir. 2001). Title VII does not give remedies to employers who may be victimized by union discrimination. *Smart v. IBEW*, 315 F.3d 721 (7th Cir. 2002).
- C. Protected Classes:** Title VII prohibits discrimination on account of
- 1. Race or Color:** This category includes blacks, whites, persons of Latino or Asian origin or descent, and indigenous Americans (Eskimos, Native Hawaiians, Native Americans). The prohibition on discrimination based on "color" also has been interpreted by some courts to mean that a light-skinned black worker could pursue a discrimination case based on the actions of her darker-skinned supervisor. *See, e.g., Walker v. Secretary of Treasury, IRS*, 742 F. Supp. 670 (N.D. Ga. 1990), *aff'd*, 953 F.2d 650 (11th Cir.), *cert. denied*, 506 U.S. 853 (1992).
  - 2. National Origin:** The Supreme Court has interpreted national origin as referring to "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973). The term does not include discrimination based solely on a person's citizenship. *Id.*; *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991).

The courts have generally upheld requirements that an employee be able to communicate in English, where the requirement is job-related. *See, e.g., Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 660 F.2d 1217, 1222 (7th Cir. 1981). The EEOC's position is that a rule requiring bi-lingual

employees to only speak English at work is a "burdensome term and condition of employment" that presumably violates Title VII and should be closely scrutinized. 29 C.F.R. § 1606.7(a). Courts that have considered the issue, however, have generally upheld English-only rules. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

Discrimination based on national origin violates Title VII unless national origin is a bona fide occupational qualification (BFOQ) for the job in question. The employer must show that the discriminatory practice is "reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). The courts and the EEOC interpret the BFOQ exception very narrowly. *See* 29 C.F.R. § 1604.2(a).

- 3. Sex:** This provision prohibits discrimination based on gender, and applies to both men and women. Employer rules or policies that apply only to one gender violate Title VII. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (rule prohibiting having children applied only to women). Employers also may not provide different benefits to women than to men. *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). Title VII also prohibits sexual harassment, as described more fully below.

In 1978, Congress amended Title VII to make it clear that the statute prohibited discrimination because of pregnancy. 42 U.S.C. § 2000e-(k). Employers may not consider an employee's pregnancy in making employment decisions. Employers must treat pregnancy-related disabilities in a similar fashion to other disabilities that similarly affect an employee's ability to work. However, an employer may permissibly wait until after a pregnancy is finished before hiring without violating Title VII. *Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592 (7th Cir. 2003).

Discrimination based on sex violates Title VII unless sex is a bona fide occupational qualification (BFOQ) for the job in question.

**Sexual Orientation v. Sex Stereotyping:** Title VII does not prohibit discrimination against someone because of his/her sexual orientation. However, it does prohibit discrimination based on "sex stereotyping," that is, the failure to conform to established sexual stereotypes. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058 (7th Cir. 2003).

- 4. Religion:** The term "religion" includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e-(j). The EEOC Guidelines state that protected religious practices "include moral or ethical

beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. Sincerity of religious belief is an issue for the trier of fact. *E.E.O.C. v. Ilona of Hungary, Inc.*, 97 F.3d 204 (7th Cir. 1997). The statute imposes a duty to "reasonably accommodate to an employee's or prospective employee's religious observance or practice" unless doing so would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e-(j). Under this standard, Title VII does not require that "public service" officers be allowed to opt out of job assignments viewed as religiously offensive (such as guarding gaming establishments or abortion clinics). *Endres v. U.S.*, 349 F.3d 922 (7th Cir. 2003). However, employers may be required to accommodate religious headwear (except for public employers, as to whom Eleventh Amendment immunity trumps Title VII). *Holmes v. Marion County Office of Family and Children* 349 F.3d 914 (7th Cir. 2003). The protection against religious discrimination does not cover jobs where the job function is "ministerial" in nature. *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d. 698 (7th Cir. 2003).

Title VII exempts from coverage 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." 42 U.S.C. § 2000e-1(a). Religious discrimination is also not unlawful under Title VII where religion is a BFOQ for the job in question. 42 U.S.C. § 2000e-2(e)(1).

#### **D. Theories of Discrimination**

- 1. Disparate Treatment:** Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class. The central issue is whether the employer's actions were motivated by discriminatory intent, which may be proved by either direct or circumstantial evidence.
  - a. Direct Method:** Under the direct method, a plaintiff attempts to establish that membership in the protected class was a motivating factor in the adverse job action. Plaintiff may offer direct evidence, such as that the defendant admitted that it was motivated by discriminatory intent or that it acted pursuant to a policy that is discriminatory on its face. In most cases, direct evidence of discrimination is not available, given that most employers do not openly admit that they discriminate. Facially discriminatory policies are only permissible if gender, national origin, or religion is a BFOQ

for the position in question, as discussed above. Race or color may never be a BFOQ.

A plaintiff may also proceed under the direct method by offering circumstantial evidence of which there are three types. The first, most common type consists of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn." *Troupe v. May Department Stores*, 20 F.3d 734, 736 (7th Cir. 1994); *see also Marshall v. American Hospital Assoc.*, 157 F.3d 520 (7th Cir. 1998). The other two types, *see Troupe* 20 F.3d at 36, are similar to the evidence used in the indirect method and are discussed below. Recently the Court has warned that direct evidence should "prove the particular fact in question *without reliance upon inference or presumption.*" *Markel v. Bd. of Regents of the Univ. of Wisconsin*, 276 F.3d 906, 910 (7th Cir. 2002) (emphasis in original). Nonetheless, the Court has also held intent can be permissibly inferred from the different office equipment, office features and travel opportunities provided to the plaintiff. *Markel v. Board of Regents*, 276 F.3d 906 (7th Cir. 2002).

Although direct evidence of discrimination can be very powerful, courts often give little weight to discriminatory remarks made by persons other than decision makers, "stray" remarks not pertaining directly to the plaintiffs, or remarks that are distant in time to the disputed employment decision. *Gorence v. Eagle Food Centers, Inc.* 242 F.3d 759 (7th Cir. 2001). *See also Cerutti v. BASF Corp.* 349 F.3d 1055 (7th Cir. 2003) (biased members of decisionmaking panel must be shown to have influenced panel's decision) *Schreiner v. Caterpillar, Inc.* 250 F.3d 1096 (7th Cir. 2001) (when a non-decisionmaker's bias is evident, it must be shown that s/he influenced the decisionmaker); *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 687 (7th Cir. 1991) (discriminatory remarks by a fellow employee are not evidence of discriminatory discharge because they were not made by a decision maker and the remarks occurred two years before the discharge); *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605 (7th Cir. 2001) (remarks occurring four years before termination too remote); *Cowan v. Glenbrook Security Services, Inc.*, 123 F.3d 438, 444 (7th Cir. 1997) ("[S]tray remarks . . . cannot justify requiring the employer to prove that its hiring or firing or promotion decisions were based on legitimate criteria. Such remarks . . . when unrelated to the decisional issue process, are insufficient to

demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision maker").

The power of “stray remarks” was given some new life after the Supreme Court ruled in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 631 (2000), that a lower court of appeals erred by discounting evidence of decision maker's age-related comments (“you must have come over on the Mayflower”), merely because not made “in the direct context of termination.” Thus, remarks that show the decisionmaker's propensity to rely on illegal criteria are direct evidence of discrimination. *Sanghavi v. St. Catherine's Hospital, Inc.*, 258 F.3d 570 (7th Cir. 2001); *But see Cerutti v. BASF Corp.* 349 F.3d 1055 (7th Cir. 2003 (“out with old, in with new” remark not age-hostile; biased stray remarks must be connected to adverse employment decision); *Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569 (7th Cir. 2003) (stray remarks 5 months before and 1 month after adverse employment decision too far removed in time). Likewise, where a racially hostile co-worker can be shown to have had some influence on the decisionmaker, the co-worker's bias can be imputed to the employer. *Russell v. Board of Trustees*, 243 F.3d 336 (7th Cir. 2002); *Maarouf v. Walker Mfg Co.*, 210 F.3d 750 (7th Cir. 2000). Where a committee is ostensibly the decisionmaker, a bigoted supervisor's stray remarks can be imputed to the committee if the committee is a rubber stamp for the supervisor. *Mateu-Anderegg, v. School Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002).

- b. *McDonnell Douglas Burden-Shifting Method:*** In the majority of cases, the plaintiff lacks direct evidence of discrimination and must prove discriminatory intent indirectly by inference. The Supreme Court has created one structure for analyzing these types of cases, commonly known as the *McDonnell Douglas* burden-shifting formula, which it first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The analysis is as follows: (1) the plaintiff must establish a prima facie case of discrimination; (2) the employer must then articulate, through admissible evidence, a legitimate, nondiscriminatory reason for its actions; and (3) in order to prevail, the plaintiff must prove that the employer's stated reason is a pretext to hide discrimination. *McDonnell Douglas*, 411 U. S. at 802-04; *Burdine*, 450 U.S. at 252-56. It is not necessary that the alleged discriminator's race be

different from the race of the victim. *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524 (7th Cir. 2003).

- (1) **Prima facie case:** The elements of the prima facie case vary from context to context. In a discriminatory hiring case, they are: (i) the plaintiff is a member of a protected class; (ii) the plaintiff applied and was qualified for the job; (iii) the application was rejected; and (iv) the position remained open after the rejection. *Hicks*, 509 U.S. at 505-507. In a termination case, the second element is whether the plaintiff was performing up to the employer's "legitimate expectations" and the fourth element is whether similarly situated employees (not in plaintiff's protected group) were treated better. *Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001); *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1178 (7th Cir. 1997). "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. Establishment of a prima facie case creates an inference that the employer acted with discriminatory intent. *Id.* at 254. It is the role of the judge, not the jury, to determine whether the plaintiff has stated a prima facie case. *Achor v. Riverside Golf Club*, 117 F.3d 339, 340 (7th Cir. 1997).

Although establishing a prima facie case used to be fairly routine, courts began scrutinizing the second element of the test more rigorously. *See, e.g. Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001) (if the second element not met, it is irrelevant whether similarly situated employees were treated better). *Cengr v. Fusibond Piping Systems, Inc.*, 135 F.3d 445 (7th Cir. 1998); *Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137 (7th Cir. 1998). In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 631 (2000), the Supreme Court implied that the "legitimate expectations" formulation of the second element in the termination context may not be a correct application of *McDonnell Douglas*. Even the Seventh Circuit has recognized that this formulation is not relevant if those who evaluated the plaintiff's performance are accused of invidious discrimination, *Peele v. Country Mutual Ins. Co.*, 288 F.3d 319 (7th Cir. 2002); *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605 (7th Cir. 2001), if the plaintiff claims she was singled out (i.e., for discipline) based on a prohibited factor, *Curry v. Menard, Inc.*, 270 F.3d 473 (7th

Cir. 2001); *Grayson v. O'Neill*, 308 F.3d 808 (7th Cir. 2002), or if the employer's "expectations" are shown to be pretextual, *Brummett v. Lee Enterprises, Inc.*, 284 F.3d 742 (7th Cir. 2002).

**Statistics:** Statistics alone can be used to establish a prima facie case of disparate treatment in an appropriate case. *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001). Furthermore, the conventional 5% level of significance (or two standard deviation level) typically used to establish aberrant decisionmaking is not a legal requirement. *Id.* The statistics must focus on employees from the same division of the employer where the plaintiff worked, include only similarly qualified employees with a common supervisor during a similar time period. *Balderston v. Fairbanks Morse Engine Division*, 328 F.3d 309 (7th Cir. 2003).

- (2) **Employer's burden of production:** In order to rebut the inference of discrimination, the employer must articulate, through admissible evidence, a legitimate, non-discriminatory reason for its actions. It is legitimate for an employer to deem someone overqualified for a job. *Lesch v. Crown Cork & Seal Co.*, 282 F.3d 467 (7th Cir. 2002). The employer's burden is one of production, not persuasion; the ultimate burden of persuasion always remains with the plaintiff. *Hicks*, 509 U.S. at 511.
- (3) **Plaintiff's proof of pretext:** Proof that the defendant's asserted reason is untrue permits, but does not require, a finding of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 511; *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994). The Seventh Circuit, in its most demanding formulation, requires a showing that the employer did not (or could not have) sincerely believe its proffered reason. *Wade v. Lerner New York, Inc.*, 243 F.3d 319 (7th Cir. 2001); *Stewart v. Henderson*, 207 F.3d 374 (7th Cir. 2000); *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922 (7th Cir. 2000) (discharge based on disproportionately harsh evaluations not pretextual absent evidence that the evaluations were not genuinely believed); *Kulumani v. Blue Cross Blue Shield Association*, 224 F.3d 681 (7th Cir. 2000) (pretext requires evidence of deceit).

Pretext may require evidence that the proffered reason for employment action is a lie, not merely that the employer has lied in general. *Clay v. Holy Cross Hospital*, 253 F.3d 1000 (7th Cir. 2001). A plaintiff's self-serving rebuttal of negative performance evaluations, and co-workers assertion of employers' motives, will not establish pretext (unless co-workers influenced the decisionmakers). *Hall v. Gary Comm. School Corp.*, 298 F.3d 672 (2002).

**Multiple Reasons For Adverse Action.** Where the defendant asserts several reasons for its decision, the plaintiff may not normally survive summary judgment by refuting only one of the reasons. *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1178 (7th Cir. 1997). However *Monroe v. Children's Home Ass'n*, 128 F.3d 591, 593 (7th Cir. 1997) held that a plaintiff who proves a prohibited factor motivated the adverse action need not rebut all asserted reasons. Furthermore, pretext can be shown where the employer gives one reason at termination for the adverse action but then offers another one later (and that one lacks documentation). *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002).

**Circumstantial Evidence of Pretext.** The plaintiff may offer evidence that the employer's belief was incorrect (i.e., it did not hire the most qualified candidate) as proof that the employer's reason for action was insincere. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000). However, the plaintiff must provide evidence that she was "clearly superior" to rebut the employer's assertion that it hired the most qualified candidate. *Millbrook v. IBP, Inc.*, 280 F.3d 1169 (7th Cir. 2002). The "clearly superior" requirement is attenuated somewhat if the plaintiff can show that the employer's rationale for its employment decision is inconsistent or if there is other, direct evidence. *David v. Caterpillar, Inc.* 338 F.3d 730 (7th Cir. 2003). More generally, pretext may be shown indirectly with evidence that the employer's reason was (a) incorrect, (b) not the "real" reason, or (c) insufficient to warrant the adverse action. *Logan v. Caterpillar, Inc.*, 246 F.3d 912 (7th Cir. 2001).

The Seventh Circuit has set forth a set of factors which can establish circumstantial evidence of pretext: the employer's grounds for its adverse action are poorly defined, the grounds

are inconsistently applied, the employee has denied the existence of the grounds, and no manager owns responsibility for the employment decision. *Gordon v. United Airlines, Inc.*, 246 F.3d 878 (7th Cir. 2002); *Zaccagnini v. Chas. Levy Circulation Co.*, 338 F.3d 672 (7th Cir. 2003) (shifting rationales for adverse action is evidence of pretext that can defeat summary judgment); *Johnson v. Nordstrom, Inc.*, 260 F.3d 727 (7th Cir. 2001) (shifting, retracting and conflicting explanations establish pretext). In addition, the sincerity of the employer's belief is undercut by the unreasonableness of the belief; thus employer's need not be taken at their word. *Gordon v. United Airlines, Inc.*, 246 F.3d 878 (7th Cir. 2002).

**Additional Methods of Proof of Pretext.** The plaintiff may also attempt to prove pretext using: (i) comparative evidence; (2) statistics; or (3) direct evidence of discrimination. *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 558 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987); BARBARA LINDEMANN AND PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 27 (3d ed. 1996).

- (i) **Comparative evidence:** Plaintiff may prove pretext by offering evidence that similarly situated employees who are not in the plaintiff's protected group were treated more favorably or did not receive the same adverse treatment. The Seventh Circuit has issued differing opinions on whether the plaintiff's testimony about the comparative employees is sufficient to raise a factual issue and survive summary judgment. For example, in *Collier v. Budd Co.*, 66 F.3d 886 (7th Cir. 1995), the employer offered evidence that the younger employees who were retained were better qualified than the plaintiff. In his deposition, the plaintiff disputed that these employees were better qualified. The court said that the resulting credibility decision was best left for the trier of fact, and reversed a summary judgment ruling for the employer. *Collier* at 893. On the other hand, in *Russell v. Acme-Evans Co.*, 51 F.3d 64 (7th Cir. 1995), the court held that the plaintiff's testimony regarding the qualifications of the workers who were given the positions that plaintiff wanted was insufficient to create a factual issue and

survive summary judgment given that the employer had stated that they were more qualified. In any event, the Seventh Circuit has held that to be “similarly situated,” the employees must be subject to the same decisionmaker. *Radue v. Kimberly Clark Corporation*, 219 F.3d 612 (7th Cir. 2000).

- (ii) **Statistics:** Statistics are admissible in individual disparate treatment cases, but their usefulness depends on their relevance to the specific decision affecting the individual plaintiff. LINDEMANN AND GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 34. Statistics may be used as part of pretext evidence where it encompasses all employment decisions made by the employer in the relevant market. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000). However, statistics alone will likely not prove pretext. *Rummery v. Illinois Bell Tel. Co.*, 250 F.3d.553 (7th Cir. 2001). Evidence that employer hires many workers within the protected class, while relevant, is not dispositive of nondiscrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 631 (2000).
  
- (iii) **Direct evidence:** Just a direct evidence may be used to establish direct proof of discrimination, it may be pertinent to pretext where the plaintiff proceeds under *McDonnell-Douglas*. See the discussion about direct evidence above.
  
- (4) **Sufficiency of Evidence.** In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 631 (2000), the Supreme Court unanimously held that a plaintiff’s prima facie case, combined with evidence sufficient to rebut employer’s nondiscriminatory explanation for discharge, ordinarily meets plaintiff’s burden of persuasion. Proof of pretext generally permits (but does not require) a fact finder to infer discrimination because showing an employer has falsely stated its reasons for discharge is probative of plaintiff’s claim.. However, in very limited circumstances, even proving pretext may not be sufficient sustain a finding of discrimination. (For example, defendant gives a false explanation to conceal something other than discrimination).

In determining the sufficiency of evidence, a court must review “the record as a whole,” not just “evidence favorable” to plaintiff, and draw all reasonable inferences in favor of plaintiff. Same as the Rule 56 standard.

**(5) Instructing the jury:** If the case goes to a jury, the elaborate *McDonnell Douglas* formula should not be part of the jury instructions. *See Achor v. Riverside Golf Club*, 117 F.3d 339, 340 (7th Cir. 1997). The ultimate question for the jury is whether the defendant took the actions at issue because of the plaintiff's membership in a protected class. *Id.* at 341. The Seventh Circuit is not reluctant to reverse district court judges who grant employer's motions for judgment as a matter of law where there was sufficient evidence to get to the jury. *Mathur v. Bd. of Trustees*, 207 F.3d 938 (7th Cir. 2000).

**c. Mixed Motives:** The plaintiff in a disparate treatment case need only prove that membership in a protected class was a motivating factor in the employment decision, not that it was the sole factor. If the employer proves that it had another reason for its actions and it would have made the same decision without the discriminatory factor, it may avoid liability for monetary damages, reinstatement or promotion. *Desert Palace Inc. v. Costa*, 589 U.S. 90 (2003). The court may still grant the plaintiff declaratory relief, injunctive relief, and attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (overruling in part *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

The Seventh Circuit recently held that in a mixed motives retaliation case, the plaintiff is not entitled to declaratory relief, injunctive relief, or attorneys fees because retaliation is not listed in the mixed motives provision of the 1991 Civil Rights Act. *McNutt v. Board of Trustees of the University of Illinois*, 141 F.3d 706, (7th Cir. 1998). The Seventh Circuit continues to adhere to this view. *Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001).

**d. After-Acquired Evidence:** If an employer takes an adverse employment action against an employee for a discriminatory reason and later discovers a legitimate reason which it can prove would have led it to take the same action, the employer is still liable for the discrimination, but the relief that the employee can recover may be limited. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002) (after-acquired evidence of misrepresentation on resume or job application does not bar claim). In general, the employee is not

entitled to reinstatement or front pay, and the back pay liability period is limited to the time between the occurrence of the discriminatory act and the date the misconduct justifying the job action is discovered. *McKennon*, 513 U.S. at 361-62.

- e. **Pattern or Practice Discrimination:** In class actions or other cases alleging a widespread practice of intentional discrimination, plaintiffs may establish a prima facie case using statistical evidence instead of comparative evidence pertaining to each class member. *Teamsters v. United States*, 431 U.S. 324 (1977). Plaintiffs often combine the statistical evidence with anecdotal or other evidence of discriminatory treatment. See, e.g., *Adams v. Ameritech Services, Inc.*, 231 F.3d 414 (7th Cir. 2000) (statistics eliminate innocent variables and anecdotal evidence supports discriminatory animus); *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 874-75 (7th Cir. 1994) (plaintiff's statistical evidence was corroborated by anecdotal evidence and hiring records). The statistical evidence needs to control for potentially neutral explanations for the employment disparities. *Radue v. Kimberly Clark Corporation*, 219 F.3d 612 (7th Cir. 2000). The employer can rebut the prima facie case by introducing alternative statistics or by demonstrating that plaintiff's proof is either inaccurate or insignificant. *Teamsters*, 431 U.S. at 339-41. The plaintiff then bears the burden of proving that the employer's information is biased, inaccurate, or otherwise unworthy of credence. *Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985).

- 2. **Disparate Impact:** Even where an employer is not motivated by discriminatory intent, Title VII prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class.

- a. **Supreme Court Cases:** The Supreme Court first described the disparate impact theory in 1971, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-2 (1971): Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

In 1989, the Supreme Court reduced the defendant's burden of proving business necessity to a burden of producing evidence of

business justification. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989). The Civil Rights Act of 1991 overturned that portion of the *Wards Cove* decision.

**b. Examples:** Examples of practices that may be subject to a disparate impact challenge include written tests, height and weight requirements, educational requirements, and subjective procedures, such as interviews. The Seventh Circuit has recently held that the failure to provide female employees with a separate restroom facility at an outdoor job site, while not actionable sexual harassment, may be subject to a disparate impact challenge. *DeClue v. Central Illinois Light Co.*, 223 F.3d 434 (7th Cir. 2000).

**c. Allocation of proof:**

(1) **Prima facie case:** The plaintiff must prove, generally through statistical comparisons, that the challenged practice or selection device has a substantial adverse impact on a protected group. See 42 U.S.C. § 2000e-2(k)(1)(A)(i). The defendant can criticize the statistical analysis or offer different statistics.

(2) **Business necessity:** If the plaintiff establishes disparate impact, the employer must prove that the challenged practice is "job-related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(3) **Alternative practice with lesser impact:** Even if the employer proves business necessity, the plaintiff may still prevail by showing that the employer has refused to adopt an alternative employment practice which would satisfy the employer's legitimate interests without having a disparate impact on a protected class. 42 U.S.C. § 2000e-2(k)(1)(A)(ii). See generally *Allen v. Chicago*, 351 F.3d 306 (7th Cir. 2003).

**d. Selection Criteria**

(1) **Scored tests:** There are several methods of measuring adverse impact. One method is the EEOC's Uniform Guidelines on Employee Selection Criteria, which finds an adverse impact if members of a protected class are selected at a rates less than four fifths (80 percent) of that of another group. For example, if 50 percent of white applicants receive

a passing score on a test, but only 30 percent of African-Americans pass, the relevant ratio would be 30/50, or 60 percent, which would violate the 80 percent rule. 29 C.F.R. §§ 1607.4 (D) and 1607.16 (R). The 80 percent rule is more of a rule of thumb for administrative convenience, and has been criticized by courts. 1 LINDEMANN AND GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, at 92-94. The courts more often find an adverse impact if the difference between the number of members of the protected class selected and the number that would be anticipated in a random selection system is more than two or three standard deviations. 1 LINDEMANN AND GROSSMAN, at 90-91. The defendant may then rebut the prima facie case by demonstrating that the scored test is job related and consistent with business necessity by showing that the test is "validated", although a formal validation study is not necessarily required. 29 CFR § 1607.5(B); see *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 998 (1988); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The Seventh Circuit has held, in the context of using a particular cut-off score for hiring decision, that such scoring satisfies business necessity if the score is based on a "logical 'break-point' in the distribution of scores." *Bew v. Chicago*, 252 F.3d 891 (7th Cir. 2001).

- (2) **Nonscored objective criteria:** The Uniform Guidelines are applicable to other measures of employee qualifications, such as educational, experience, and licensing requirements. In cases involving clerical or some blue collar work, the courts have generally found unlawful educational requirements that have a disparate impact. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (invalidating high school diploma requirement for certain blue collar positions, where 34 percent of white males in state had completed high school while only 12 percent of African American males had done so, and defendant did not demonstrate link between high school diploma and job performance.) The higher the professional position or the greater the consequence of hiring unskilled applicants, the lower the burden upon the employer of proving job relatedness. See, e.g., *Briggs v. Anderson*, 796 F.2d 1009, 1023 (8th Cir. 1986) (college degree in psychology is a valid requirement for counselor position); *Aguilera v. Cook County Police & Corrections Merit Board*, 760 F.2d 844, 848 (7th Cir.), cert. denied, 474 U.S. 907 (1985) (high school diploma

requirement for police officers and corrections officers is valid).

- (3) **Subjective criteria:** The use of subjective decision making is subject to challenge under a disparate impact theory, particularly when used to make employment decisions regarding blue collar jobs. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

- e. **Perpetuation of past effects of discrimination.** Compensation systems which use facially neutral criteria but have the effect of perpetuating past (and time-barred) discriminatory effects are not necessarily discriminatory or illegal. *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000).

- 3. **Harassment:** Although racial, religious, ethnic or sexual harassment are all forms of disparate treatment, a different legal analysis is used for harassment claims.

- a. **Sexual Harassment:** Traditionally, there are two types of sexual harassment, quid pro quo and hostile environment. These labels are not dispositive of liability, *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), although the terms continue to be used. For employer liability, the focus is on who the harasser is, what the harasser did, and how the victim responded. See *Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998).

- (1) **Quid pro quo:** "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, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . . ." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(1) and (2). See *Bryson v. Chicago State University*, 96 F.3d 912, 915 (7th Cir. 1996) (quid pro quo

harassment occurs where "submission to sexual demands is made a condition of tangible employment benefits").

- (2) **Hostile 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." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3). For a prima facie case, the plaintiff must demonstrate that (1) she was subjected to unwelcome sexual harassment; (2) the harassment was based on sex; (3) the harassment unreasonably interfered with the plaintiff's work performance and environment and (4) there is a basis for employer liability (more on this element below). *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). The courts generally require that the offensive behavior be fairly extreme in order to constitute a hostile environment. Factors that the courts consider 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." *Harris v. Forklift Systems*, 510 U.S. 17, 23 (1993).

**Additional guidelines:** Harassment need not be both pervasive and severe. *Haugerud v. Amery School District*, 259 F.3d 678 (7th Cir. 2001); *Russell v. Board of Trustees*, 243 F.3d 336 (7th Cir. 2001) (frequent or severe). Direct contact with intimate body parts is the most severe type of harassment. *Worth v. Tyer II*, 276 F.3d 249 (7th Cir. 2001) (two touchings of breast actionable). Comments need not be of a sexual nature as long as they create different terms and conditions of employment. *Id.* Thus, a thinly-veiled murder threat can be sufficient. *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). The harassment must be both objectively and subjectively offensive; however, for the subjective inquiry it is sufficient that the plaintiff declare she felt harassed. *Worth v. Tyer II*, 276 F.3d 249 (7th Cir. 2001). A victim's own use of racist or sexist remarks does not necessarily mean that the victim's receipt of them is welcome or subjectively inoffensive. *Hrobowski v. Worthington Steel*

Co., \_\_\_ F.3d \_\_\_ (7th Cir. 2004). Sexual harassment can exist when a man treats a woman in a way he would not treat a man. *Frazier v. Delco Electronics Co.*, 263 F.3d 663 (7th Cir. 2001).

**Application of guidelines.** Even given these general guidelines, it is often difficult to predict whether a given set of facts will be sufficiently severe to be considered a hostile environment. *See, e.g. Worth v. Tyer II*, 276 F.3d 249 (7th Cir. 2001) (direct contact with intimate body parts is the most severe type of harassment; two touchings of breasts is actionable); *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (touching plus solicitation plus crude pictures shown by supervisor is actionable); *Hostetler v. Quality Dining, Inc.* 218 F.3d 798 (7th Cir. 2000) (two attempted kisses, an attempted bra removal and a lewd comment may create hostile environment); *Hrobowski v. Worthington Steel Co.*, \_\_\_ F.3d \_\_\_ (7th Cir. 2004) (repeated use of word “nigger” creates racial hostility”); *Patt v. Family Health Systems, Inc.*, 280 F.3d 749 (7th Cir. 2002) (8 offensive comments (only 2 said to plaintiff) not pervasive or hostile) *Quantock v. Shared Marketing Services, Inc.*, 312 F.3d 899 (7th Cir. 2002) (boss propositioning employee sexually and explicitly at one single meeting actionable); *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 533-35 (7th Cir. 1993) (co-worker on different occasions rubbing leg, kissing, and leaping out at plaintiff from behind a bush not sufficiently severe or pervasive); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1353-54 (7th Cir. 1995) (co-worker taking victim to striptease bar, shouting for her to get up and perform, comparing her breasts to those of the dancers, and propositioning her would not have been enough for a claim); *Hilt-Dyson v. Chicago*, 282 F.3d 456 (7th Cir. 2002) (occasional backrubbing and inspecting clothes not objectively unreasonable); *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535 (7th Cir. 2002) (witnessing harassment of others is a weak harassment claim); *Wolf v. Northwest Indiana Symphony Soc’y.* 250 F.3d 1136 (7th Cir. 2001) (collecting cases).

**Proof of Harm.** The plaintiff is not required to prove psychological harm or tangible effects on job performance. *Harris v. Forklift Systems*, 510 U.S. 17 (1993). “Objective severity of harassment should be judged from the perspective

of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998). The sexual harassment need not occur in front of other witnesses to be actionable. *Cooke v. Stefani Mgt. Services, Inc.*, 250 F.3d 564 (7th Cir. 2001). Furthermore, an employee's willingness to encounter her harasser does not negate the existence of the harassment. *Id.*

### (3) Employer liability

- (i) **The Meritor Decision:** In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 70-73 (1986), the Supreme Court held that an employer is not automatically liable for harassment by a supervisor in a hostile environment case, and that courts should look to traditional agency principles to determine liability.
- (ii) **Harassment by a co-worker:** When the harasser is a co-worker, the employer is liable only if it was negligent, that is, only if it knew or should have known of the harassment and failed to take reasonable corrective action. *Mason v. Southern Illinois University*, 233 F.3d 1036 (7th Cir. 2000) (co-worker harassment needs to be pervasive); *McKenzie v. IDOT*, 92 F.3d 473, 480 (7th Cir. 1996); *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013-4 (7th Cir. 1998) (where plaintiff did not complain to anyone about harassment and no one else complained on her behalf, her only chance at prevailing would be if the employer had reason to know of the harassment on its own); *Hrobowski v. Worthington Steel Co.*, \_\_\_ F.3d \_\_\_ (7th Cir. 2004) (no employer liability where victim made only vague complaints to managers).
- (iii) **Harassment by a supervisor:** The Supreme Court recently held that an employer is liable for actionable hostile environment sexual harassment by a supervisor with immediate (or higher) authority over the harassed employee. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or

undesirable reassignment, the employer is liable and has no affirmative defense (described below). Even a negative evaluation or a denial of work supplies can constitute adverse action rendering the affirmative defense unavailable. *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000). The harasser must be the one who imposes the adverse job action, unless there is evidence of a conspiracy between the decisionmaker and the harasser. *Murray v. Chicago Transit Authority*, 252 F.3d 880 (7th Cir. 2001). The supervisor must supervise the victim, not just any co-workers. *Hrobowski v. Worthington Steel Co.*, \_\_\_ F.3d \_\_\_ (7th Cir. 2004).

Harassment by high level supervisors is automatically imputed to the employer as a matter of vicarious liability. *Haugerud v. Amery School District*, 259 F.3d 678 (7th Cir. 2001). This includes those who have disciplinary authority over workers, even if they do not have the power to hire and fire them. *Gawley v. Indiana University*, 276 F.3d 301 (7th Cir. 2001). Supervisory authority requires the authority to directly affect the terms and conditions of employment; mere control over operations, training and input into evaluations may not be enough. *Hall v. Bodine Electric Co.*, 276 F.3d 345 (7th Cir. 2002). Low level supervisors are treated the same as co-workers for purposes of determining employer liability (negligence standard). *Haugerud v. Amery School District*, 259 F.3d 678 (7th Cir. 2001).

**(4) Affirmative Defenses:**

When no tangible employment action is taken, the defending employer may raise an affirmative defense to liability or damages. The defense has two elements: "(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with a 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 an 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." *Farragher*, 118 S. Ct. at 2270; *see also Burlington Industries*, 118 S. Ct. at 2292-93. An employer has taken adequate remedial measures where it conducts a prompt investigation into the harassment complaint, reprimands the harasser, produces a letter of apology, and separates the victim from the harasser. *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044 (7th Cir. 2000). An employee need not use the phrase "sexual harassment" when making her complaint. *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001). The employer generally will not be liable to the targeted employee for conducting an aggressive investigation. *Flanagan v. Ashcroft*, 316 F.3d 728 (7th Cir. 2003).

**Affirmative Defense Not Available:** "Tangible employment action" has occurred, thereby rendering this defense unavailable, when a supervisor harasses so severely that the employee is constructively discharged. *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). Furthermore, simply establishing an anti-harassment policy does not establish this affirmative defense; the employer must implement it and respond to complaints brought under it. *Haugerud v. Amery School District*, 259 F.3d 678 (7th Cir. 2001). The defense is not available when the employer fails to name to whom an employee may complain. *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001). If the employer shrugs off complaints of harassment, does not put its anti-harassment policy in writing and does not provide ready access to the policy, it has not acted in good faith. *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001). Employer who transfers a harassment victim into a materially worse position has not provided an effective remedy and may be liable for damages arising from the undesirable transfer (even if the harassment has stopped). *Hostetler v. Quality Dining, Inc.* 218 F.3d 798 (7th Cir. 2000) *Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001) (employer response that stops harassment not necessarily adequate).

Also, a plaintiff's failure to complain about harassment for a full year can, in some circumstances, be reasonable. *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000). Finally, the cost to the employer of achieving compliance with the laws prohibiting harassment is never a defense to liability and is not relevant to liability. Likewise, any constraints that a collective bargaining agreement imposes on an employer's ability to combat harassment is not a defense and is not relevant to liability. However, such constraints may be a defense to punitive damages. *EEOC v. Indiana Bell Telephone Co.*, 256 F.2d 516 (7th Cir. 2001).

**(6) Same sex harassment:** An employer may be liable for harassment by a supervisor or co-worker who is the same gender as the target of the harassment, provided that the harassment was motivated by the plaintiff's gender. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998) (holding sex discrimination consisting of same-sex sexual harassment is actionable under Title VII). However, harassment of worker because of her/his sexual alone is not actionable. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Hamner v. St. Vincent Hospital and Health Care Center, Inc.* 224 F.3d 701 (7th Cir. 2000).

**b. Racial or Ethnic Harassment:** Workers who are subjected to a higher level of criticism or who are subjected to racial or ethnic jokes, insults, graffiti, etc. may be able to establish a violation of Title VII. *See Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668 (7th Cir. 1993); *Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986); *see also Cerros v. Steel Technologies*, 288 F.3d 1040 (7th Cir. 2002) (ethnic (anti-Hispanic) harassment actionable). Racial epithets not directed to plaintiff or which do not interfere with the work environment are not particularly probative of a racial harassment claim. *McPhaul v. Bd. of Commissioners*, 226 F.3d 558 (7th Cir. 2000). In general, the legal standards for racial harassment have been the same as those for a sex-based hostile environment claim, as detailed above. It is likely that those standards will change to reflect the change in law regarding sexual harassment by supervisors announced recently by the Supreme Court in *Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998). *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998 (applying vicarious liability principles announced in *Ellerth*

to race discrimination termination case); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998).

- c. **“Equal Opportunity” Harassment.** The Seventh Circuit has held that when an employer harasses both sexes truly equally, Title VII is not violated. *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000).

#### 4. Retaliation

- a. **Retaliation for "Participation":** Title VII prohibits discrimination against a current or former employee or an applicant "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). The participation clause has been liberally construed, and it applies even if the employee is wrong on the merits of the original charge. *Berg v. LaCrosse Cooler Company*, 612 F.2d 1041, 1043 (7th Cir. 1980). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (the term "employees," as used in anti-retaliation provision of Title VII, includes former employees). However, for the employee's expression or conduct to be protected from retaliation, it must make reference to a claim of "discrimination," and not merely lost benefits. *Miller v. American Family Mutual Ins. Co.*, 203 F.3d 997 (7th Cir. 2000). Retaliation protections do not extend to employees whose participation involves assisting an employer by opposing another employee's charge of discrimination. *Twisdale v. Snow*, 325 F.3d 950 (7th Cir. 2003).
- b. **Retaliation for "Opposition":** Title VII also prohibits discrimination against a current or former employee or an applicant "because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The employee is protected if he or she had a reasonable and good faith belief that the practice opposed constituted a violation of Title VII, even if it turned out not to be a violation of Title VII. *Fine v. Ryan Inter'l Airlines*, 305 F.3d 746 (7th Cir. 2002); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994). Not all forms of opposition are protected, however, and action that unreasonably disrupts the work place may fall outside the statute's protection. *See Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984) (court should balance disruption of plaintiff's absences from work to attend protests against the protest's advancement of Title VII's policy of eliminating discrimination). Moreover, a company's failure to obey an anti-discrimination court order is not retaliation; it is just a violation of the order. *McGuire v. Springfield*, 280 F.3d 794 (7th Cir. 2002).

- c. **New EEOC Guidelines:** New EEOC guidelines state that retaliatory treatment can be challenged even if it is not an "ultimate employment action" or an action that "materially affects the terms or conditions of employment."
- d. **Contemporaneous requirement.** The adverse' employment action needs to be nearly contemporaneous with the statutorily protected activity (such as the filing of a charge); otherwise an inference of discrimination will not be supported. *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605 (7th Cir. 2001); *Fyfe v. City of Fort Wayne*, 241 F.3d 597 (7th Cir. 2001) (retaliatory comments must precede adverse action); *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003 (7th Cir. 2000). As an example, an employer's decision to discharge a victim of harassment because the victim slapped the harasser could be viewed as retaliatory where the events are in close conjunction and the harasser was treated less harshly. *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000). A three month time span between the protected activity and the alleged retaliation is not too long to support an inference of retaliation. *Sitar v. Indiana Dep't of Transp.*, 344 F.3d 720 (7th Cir. 2003). However, suspicious timing alone, without additional evidence and even as short as one week between protected activity and discharge, is insufficient. *Pugh v. City of Attica*, 259 F.3d 619 (7th Cir. 2001).
- e. **Application of McDonnell-Douglas.** Plaintiff's may use the McDonnell-Douglas burden-shifting formula in retaliation cases. If the plaintiff shows that after a filing a charge of discrimination, only she and no similarly-situated non-charge filing employees was fired, she is entitled to summary judgment unless the employer presents an explanation for the discharge. If the explanation is un rebutted, the employer gets summary judgment. Otherwise, there must be a trial. *Stone v. Indianapolis Public Utilities Div'n*, 281 F.3d 640 (7th Cir. 2002). Under this formulation, there is no separate requirement that the plaintiff prove a "causal link" between the protected activity and the adverse action. *Rogers v. Chicago*, 320 F.3d 748 (7th Cir. 2003). However, if an employer mentions a pending EEOC charge when issuing its adverse action, that can support an inference of retaliation. *Ajayi v. Aramark Business Services, Inc.*, 336 F.3d 520 (7th Cir. 2003)
- f. **Employment-Related Nature of Retaliation.** The retaliation need not always be employment related (i.e., a criminal assault on an employee due to an EEOC charge), but it must involved "real harm." *Johnson v. Cambridge Indus.*, 325 F.3d 892, 902 (7th Cir. 2003).

The denial of a consulting contract, while not strictly employment related, if in retaliation for a protected activity, is actionable retaliation. *Flannery v. Recording Industry Ass'n of America*, 354 F.3d 632 (7th Cir. 2004).

**g. Retaliatory Hostile Work Environment.** An employer who creates or tolerates a hostile work environment (intimidating threats, etc.) against a worker who has filed a charge of discrimination may be liable for retaliation. *Heuer v. Weil-McLain*, 203 F.3d 1021 (7th Cir. 2000).

**5. Other Adverse Action.** Besides discharge, demotion, lack of promotion, harassment and retaliation, other “adverse” conditions of employment can be actionable forms of discrimination, such as a less distinguished title, loss of benefits, diminished job responsibilities and even arbitrary drug testing. *Stockett v. Muncie Indiana Transit System*, 221 F.3d 997 (7th Cir. 2000).

**Adverse action present:** *Patt v. Family Health Systems, Inc.*, 280 F.3d 749 (7th Cir. 2002) (a change in responsibilities that prevents career advancement); *Russell v. Board of Trustees*, 243 F.3d 336 (7th Cir. 2001) (5-day suspension plus misconduct charge in personnel file is adverse); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.*, 254 F.3d 644 (7th Cir. 2001); *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000) (denial of raise and denial of temporary promotion are “adverse employment actions” but denial of a bonus usually is not); *Place v. Abbott Laboratories*, 215 F.3d 803 (7th Cir. 2000) (requiring a medical exam upon return from leave is an adverse work condition, but a transfer to a substantially equivalent position, even if lacking supervisory responsibilities, is not); *Malacara v. Madison*, 224 F.3d 727 (7th Cir. 2000) (failure to train an employee can be actionable); *Stutler v. Ill. Dept. of Corrections*, 263 F.3d 698 (7th Cir. 2001) (retaliatory harassment by co-workers or supervisors can be adverse if severe).

**Adverse action absent:** *McPhaul v. Bd. of Commissioners*, 226 F.3d 558 (7th Cir. 2000) (imposition of dress code not an adverse employment action). *Kersting v. Wal-Mart Stores, Inc.* 250 F.3d 1109 (7th Cir. 2001) (employer warning to employee not to discuss pending EEO charge at work was not adverse employment action). *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969 (7th Cir. 2001) (lateral transfer is not an adverse action even if new position lacks opportunities for promotion); *Stutler v. Ill. Dept. of Corrections*, 263 F.3d 698 (7th Cir. 2001) (lateral transfer without loss of benefits, negative evaluations, increased travel, change in title not adverse); *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605 (7th Cir. 2001) (negative evaluations are not adverse employment actions); *Fyfe v. City of Fort Wayne*, 241 F.3d 597 (7th Cir. 2001) (denial of reimbursement of travel expenses not

adverse action); *Grube v. Lau Industries, Inc.*, 257 F.3d 723 (7th Cir. 2001) (transfer to night shift); *Aviles v. Cornell Forge Co.*, 241 F.3d 589 (7th Cir. 2001) (a truthful, non-discriminatory police call regarding the actions of an employee is not adverse); *Grayson v. Chicago*, 317 F.3d 745 (7th Cir. 2003) (denial of promotion that merely affects title not actionable, unless there are future adverse effects to title loss, in which case there is a continuing violation or equitable estoppel to claim); *Ajayi v. Aramark Business Services, Inc.*, 336 F.3d 520 (7th Cir. 2003) (mere threat of demotion not adverse).

**Constructive discharges:** A constructive discharge may also be actionable, although courts require fairly intolerable conditions before crediting an employee with a constructive discharge. *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003); *Johnson v. Nordstrom, Inc.*, 260 F.3d 727 (7th Cir. 2001); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662 (7th Cir. 2001) (sexual harassment must be unbearable (living with “harasser” would undermine claim; while actually complaining about fondling breasts would support claim); *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432 (7th Cir. 2000) (constructive discharge exists where quitting is the only reasonable option). *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044 (7th Cir. 2000) (credible death threat from a co-worker justifies constructive discharge). *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000) (being told that you have “no future” with the employer creates a constructive discharge); *EEOC v. University of Chicago Hospitals*, 276 F.3d 326 (7th Cir. 2002) (same). By contrast, an employer who deliberately overrates an employee (to avoid future EEO charges) has not taken an adverse employment action, especially if the employee has been given informal, honest feedback of her performance. *Cullom v. Brown*, 209 F.3d 1035 (7th Cir. 2000); *Griffin v. Potter*, \_\_\_ F.3d \_\_\_ (7th Cir. 2004) (change in work location not materially adverse and does not justify constructive discharge).

## II. THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. § 1981

**A. Statutory Language:** Section 1981 states that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

### **B. Scope**

1. Section 1981 prohibits only "racial" discrimination, although "race" is defined quite broadly to mean identifiable classes of persons based on their ancestry or ethnic characteristics. Section 1981 applies to discrimination against groups such as blacks, Latinos, Jews, Iraqis, Arabs, and whites. *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

2. Section 1981 applies to all employers even if they do not have 15 employees.
3. The term "make and enforce contracts" in § 1981 "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (added by the Civil Rights Act of 1991 to overrule *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which held that § 1981 applied only to hiring and promotions that create a new and distinct relation between the employer and employee).
4. Recently, the Seventh Circuit, in dicta, indicated that plaintiff's employment at will situation would probably not suffice as a contract under a § 1981 claim. The court did not have to decide that issue, however, because plaintiff had no evidence of discrimination and her claim failed on that ground alone. *Gonzalez v. Ingersoll Milling Machine*, 133 F.3d 1025, 1034 (7th Cir. 1998).

**C. Differences from Title VII:**

1. Section 1981 applies to all employers regardless of size, unlike Title VII's restriction to employers with 15 or more employees.
2. Section 1981 claims are filed directly in federal court, not with the EEOC or any other agency.
3. Section 1981 does not prohibit practices that have a disparate impact; it only applies to disparate treatment caused by intentional discrimination. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982).
4. A successful plaintiff may receive unlimited compensatory and punitive damages; there are no caps on damages as there are under Title VII.
5. The statute of limitations for § 1981 is borrowed from the state statute of limitations for personal injury actions, and in Illinois, is two years. *Jones v. R.R. Donnelley & Sons Co.*, 305 F.3d 717 (7th Cir. 2002); *Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992); 735 I.L.C.S. 5/13/202.

**III. EEOC PROCEEDINGS**

- A. Scope of these materials:** This manual is intended for use by attorneys appointed to represent plaintiffs in employment discrimination cases in the Northern District of Illinois. At the time of such appointment, proceedings before the EEOC have

terminated. Therefore an extensive discussion of EEOC proceedings is beyond the scope of this manual.

## **B. Summary of Proceedings**

- 1. Title VII Prerequisite:** Title VII claims may not be brought in federal court until after they have been filed in writing with the EEOC, and the EEOC has issued a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1); *Vela v. Sauk Village*, 218 F.3d 661 (7th Cir. 2000). A dismissal for failure to exhaust the EEOC administrative process will not be on the merits (unless the plaintiff failed to cooperate with the EEOC). *Hill v. Potter*, 352 F.3d 1142 (7th Cir. 2003).
- 2. Time requirements for charges:** In general a charge must be filed with the EEOC within 180 days from when the discrimination occurs, except in states like Illinois, where the Illinois Department of Human Rights also has the power to investigate claims of discrimination. In Illinois, a charging party has 300 days from the date of the alleged discrimination to file a charge with the EEOC if the IDHR also has jurisdiction over the claim. *Marlowe v. Bottarelli*, 938 F.2d 807, 813 (7th Cir. 1991); *Sofferin v. American Airlines, Inc.*, 923 F.2d 552, 553 (7th Cir. 1991). This filing requirement is not a jurisdictional prerequisite, and is subject to laches, estoppel, and equitable tolling, *Zipes v. Trans World Airline, Inc.*, 455 U.S. 385, 393 (1982), and relation back principles, *Edelman v. Lynchburg College*, 122 U.S. 1145 (2002). In addition, the “discovery rule” or equitable tolling will delay the statute of limitation until such time as the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) her injury. *Clark v. Braidwood*, 318 F.3d 764 (7th Cir. 2003) Thus, if the plaintiff did not have reason to know that a series of acts were discriminatory, he can bring charges on all the acts after the 300 day limit if he brings the charges promptly after he knows or with the exercise of reasonable diligence would have known of their discriminatory nature. *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 281-82 (7th Cir. 1993); *Allen v. CTA*, 351 F.3d 306 (7th Cir. 2004) (tolling allowed for 5 years where plaintiff did not know that failure to promote was racially based). For “equitable estoppel” to apply (as opposed to equitable tolling), a plaintiff must show that the employer prevented the plaintiff from filing suit (concealing the claim or promising not to plead the statute of limitations). *Beckel v. Wal-Mart Associates, Inc.*, 301 F.3d 621 (7th Cir. 2002). However, telling the plaintiff not to talk to “anyone” about her charge does not create an estoppel. *Id.* Threatening to fire the plaintiff if she sues also does not create an estoppel. *Id.* However, such a threat would constitute a form of anticipatory retaliation, which would justify a separate charge. *Id.*

The period starts to run when the discriminatory act occurs, not when the last discriminatory effects are felt. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). When an employer adopts a facially neutral policy with discriminatory intent, the statute begins to run when the policy was adopted. *Castel v. Exec. Bd. of Local 703*, 272 F.3d 463 (7th Cir. 2001). A current refusal to reverse a previous discriminatory act does not revive an expired limitations period. *Sharp v. United Airlines, Inc.*, 236 F.3d 373 (7th Cir. 2001). However, in the context of unequal pay, each paycheck is a separate, discrete act subject to Title VII, even if the decision to pay the employee at a lower level occurred years earlier. *Reese v. Ice Cream Specialties, Inc.* 347 F.3d 1007 (7th Cir. 2003).

**Continuing Violations.** Plaintiff may also try to allege a continuing violation, linking a series of discriminatory acts with at least one occurring within the charge-filing period. The continuing violations doctrine has taken many different formulations. Most recently, the Seventh Circuit has held that the doctrine applies when (1) it is difficult to pinpoint the exact date of a violation; (2) the attacked policy is facially discriminatory, and openly and continuously espoused; or (3) the conduct is so covert and subtle it takes additional time to recognize it. *Place v. Abbott Laboratories*, 215 F.3d 803 (7th Cir. 2000). Also, the doctrine applies where a series of wrongs gives rise to a cumulation of non-discrete injuries (as with continuous pain). *Heard v. Sheahan*, 253 F.3d 316 (7th Cir. 2001). The Supreme Court has followed this reasoning and held in the sexual harassment context that so long as one act of sexual hostility occurs within the statutory time period, all prior acts that are part of the same harassment pattern are actionable. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Under *Morgan*, the continuing violations doctrine does not apply to unequal pay claims because, unlike sexual harassment acts, each unequal paycheck is a discrete injury. *Hildebrandt v. Ill. Dept. of Natural Resources*, 347 F.3d 1014 (7th Cir. 2003). Furthermore, in *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 281-82 (7th Cir. 1993), the court labeled the continuing violation theory a "rather vague concept" that is "of questionable utility when applied to a statute of limitations subject to equitable tolling." *Id.* at 281. Finally, even if events are not actionable because they are untimely, they may be relevant to actionable, timely events and therefore admissible. *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696 (7th Cir. 2001). *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605 (7th Cir. 2001).

**Sexual Harassment Context.** In a sexual harassment case, the cause of action does not accrue until after the company has had a reasonable time to rectify the harassment. Also, the cause of action will be tolled if the plaintiff is reasonably led to believe the situation will be addressed. *Frazier v. Declo Electronics Co.*, 263 F.3d 698 (7th Cir. 2001). Continuing violations exist

so long as the harassment is of ambiguous severity. *Id.* Continuing violations can include evidence beyond the 300 day limit because of the nature of the tort is often not discrete in time. *Russell v. Board of Trustees*, 243 F.3d 336 (7th Cir. 2001). *See also Hall v. Bodine Electric Co.*, 276 F.3d 345 (7th Cir. 2002).

3. **Investigation:** The EEOC's investigation may include gathering information regarding the respondent's position, interviewing witnesses, and reviewing key documents. The EEOC has the power to issue subpoenas in connection with an investigation. 42 U.S.C. § 2000e-9.
4. **Determination:** At the conclusion of the investigation, the EEOC issues a letter of determination as to whether "there is reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). Although trial in the district court is de novo, the EEOC's investigative determination is admissible in Title VII actions. *LaDolce v. Bank Administration Institute*, 585 F. Supp. 975, 977 (N.D. Ill. 1984); *Czarnowski v. DeSoto, Inc.*, 518 F. Supp. 1252, 1257 (N.D. Ill. 1981). If there is a reasonable cause finding, the EEOC must attempt to conciliate the claim. 28 C.F.R. § 42.609(a).
5. **Dismissal and Issuance of Right-to-Sue Letter:** The EEOC will issue a right-to-sue letter even if it finds there is no reasonable cause to believe that the charge is true. The EEOC may dismiss a charge and issue a right-to-sue letter in any of the following situations:
  - a. the EEOC determines it does not have jurisdiction over the charge, 29 C.F.R. § 1601.18(a);
  - b. the EEOC closes the file where the charging party does not cooperate or cannot be located, 29 C.F.R. § 1601.18(b), (c);
  - c. the charging party requests a right-to-sue letter before the EEOC completes its investigation (if less than 180 days after filing of charge, EEOC must determine that the investigation cannot be completed within 180 days);
  - d. the EEOC determines there is no reasonable cause, 29 C.F.R. 1601.19(a); or
  - e. the EEOC has found reasonable cause, conciliation has failed, and the EEOC (or the Department of Justice for governmental respondents) has decided not to litigate.

6. **State and local government employees:** While the EEOC investigates charges involving employees of state and local governments, it is the Justice Department, not the EEOC, that has the authority to litigate these cases. 42 U.S.C. § 2000e-5(f)(1). If the Justice Department declines to litigate the case, the EEOC issues a right to sue to the charging party.
7. **Federal employees:** Federal employees do not file original charges directly with the EEOC; they first go through an internal process. The regulations describing this process and related appeals are at 29 C.F.R. §§ 1614.105 and 1614.408. Federal agencies who fail to raise defenses to employment charges during the administrative exhaustion process have waived those defenses in subsequent lawsuits. *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001).

#### IV. THE COMPLAINT

- A. **Proper Defendants for a Title VII Action:** As a general rule, a party not named in an EEOC charge cannot be sued under Title VII. This requirement is, however, subject to waiver, estoppel and equitable tolling. *Simpson v. Borg-Warner Automotive*, 1997 WL 769358 \*1 (N.D.Ill. 1997).
  1. **Employers:** Title VII applies to employers. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar years, and any agent of such a person." 42 U.S.C. 2000e(b).
  2. **Labor organizations and employment agencies:** These entities are also covered by Title VII. 42 U.S.C. 2000e-2.
  3. **Supervisors:** A supervisor, in his or her individual capacity, does not fall within Title VII's definition of an employer. *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995).
- B. **Scope of the Title VII Suit:** A plaintiff may pursue a claim not explicitly included in an EEOC charge only if the claim falls within the scope of the charges contained in the EEOC charge. In determining whether the current allegations fall within the scope of the earlier charges, the court looks at whether they are like or reasonably related to those contained in the EEOC charge. If they are, the court then asks whether the current claim reasonably could have developed from the EEOC's investigation of the charges before it. *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 202 (7th Cir. 1996). A Title VII complaint need not track *McDonnell-Douglas* formula; like all civil complaints, it need only be a short and plain statement. *Swierkiewicz v. Sorema*, 122 S.Ct. 992 (2002).

- C. Timeliness in a Title VII Suit:** Complaint must be instituted within ninety days of the "receipt" of the right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1). A Title VII complaint can be filed before a right-to-sue is issued, but is subject to dismissal until its issuance. *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535 (7th Cir. 2002).
1. The ninety day limit begins to run on the date the notice was delivered to the most recent address plaintiff provided the EEOC. *St. Louis v. Alverno College*, 744 F.2d 1314, 1316 (7th Cir. 1984). The court considers "actual knowledge" when determining whether the time period in which a suit can be filed has commenced. If an attorney receives the right-to-sue letter for his client, this receipt suffices for actual knowledge. *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1313 (7th Cir. 1984).
  2. Compliance with the 90 day time limit is not a jurisdictional prerequisite. It is a condition precedent to filing suit and is subject to equitable modification. *Simmons v. Illinois Dept. of Mental Health and Developmental Disabilities*, 74 F.3d 1242 (7th Cir. 1996). Equitable tolling applies only in situations in which the claimant has made a good faith error (brought suit in the wrong court) or has been prevented in some extraordinary way from filing the complaint in time. *Newbold v. Wisc. State Public Defender*, 310 F.3d 1013 (7th Cir. 2002); *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1314 (7th Cir. 1984).
- D. Timeliness in a § 1981 Suit:** Courts apply the state personal injury statute of limitations in § 1981 cases. In Illinois, § 1981 cases are governed by the two-year statute of limitations for personal injury actions. *Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992); 735 I.L.C.S. 5/13/202. Filing a complaint with the EEOC does *not* toll the running of the state statute of limitations on a § 1981 claim.
- E. Right to a Jury Trial:** When legal and equitable claims are presented, both parties have a right to a jury trial on the legal claims. The right remains intact and cannot be dismissed as "incidental" to the equitable relief sought. *Curtis v. Loether*, 415 U.S. 189, 196 (1974). If the plaintiff seeks compensatory and punitive damages, any party may demand a jury trial. 42 U.S.C. § 1981a(c).
- F. Evidence.** The Illinois Personnel Record Review Act, 820 ILCS 40/1 et seq. establishes a statutory scheme under which employers are required to allow employees access to documents used to determine qualifications for employment or discharge, and sets forth sanctions for noncompliance. In *Park v. City of Chicago*, 297 F.3d 606 (7th Cir. 2002), the Seventh Circuit considered the implication of an employer's noncompliance with this Act in a Title VII case. The Court held as follows: (1) an employer's failure to produce documents to an employee in response

to a request under the Act does not render those documents inadmissible under the Federal Rules of Evidence; (2) there is no cause of action in federal court for violations of the Act where the only relief sought is barring the inadmissibility of the evidence; and (3) failure to keep records in accordance with the similar EEOC record-keeping requirements (absent bad faith) does not require an adverse inference instruction to the jury.

- G. Rule 68 Offers of Judgment.** A plaintiff who rejects an offer of judgment that turns out to be more than the amount the plaintiff recovers after trial cannot recover her attorneys' fees incurred after the date of the offer. *Marek v. Chesney*, 473 U.S. 1 (1985); *Payne v. Milwaukee County*, 288 F.3d 1021 (7th Cir. 2002). However, under those circumstances, the plaintiff is not liable for the defendant's own post-offer attorneys' fees. *Id.*

## V. Remedies

- A. Equitable Remedies for Disparate Treatment:** If the court finds that the defendant has intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may enjoin the defendant from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, including, but not limited to, reinstatement or hiring of employees, with or without back pay, or any other equitable relief the court deems appropriate. 42 U.S.C. § 2000e-5(g)(1). Reinstatement may not be denied merely because the employer is hostile to the employee as a result of the lawsuit. *Bruso v. United Airlines, Inc.* 239 F.3d 848 (7th Cir. 2001).

1. Back pay may be awarded as far back as two years prior to the filing of a charge with the EEOC. 42 U.S.C. § 2000e-5(g)(1).
2. A back pay award will be reduced by the amount of interim earnings or the amount earnable with reasonable diligence. 42 U.S.C. § 2000e-5(g)(1). It is defendant's burden to prove lack of reasonable diligence. *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989).
3. Back pay and/or reinstatement/order to hire will only be granted if the court determines that but for the discrimination, the plaintiff would have gotten the promotion/job or would not have been suspended or discharged. 42 U.S.C. § 2000e-5(g)(2)(A).
4. In a mixed motive case, the court may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment, but may grant declaratory relief, injunctive relief (as

long as it is not in conflict with the prohibited remedies) and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i).

5. A district court can order demotion of somebody whose promotion was the product of discrimination. *Adams v. City of Chicago*, 135 F.3d 1155 (7th Cir. 1998). Other injunctive relief includes expungement of an adverse personnel record, and injunction against future retaliation where plaintiff will continue working for the same (discriminatory) supervisors. *Bruso v. United Airlines, Inc.* 239 F.3d 848 (7th Cir. 2001).

**B. Compensatory and Punitive Damages:** Compensatory and punitive damages are available in disparate treatment cases, but not in disparate impact cases. 42 U.S.C. § 1981a. Punitive damages are not available from the government. *Baker v. Runyon*, 114 F.3d 668 (7th Cir. 1997).

1. Compensatory damages may be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 42 U.S.C. 1981a(b).
2. Punitive damages may be awarded when the defendant is found to have engaged in discriminatory practices with malice or with reckless indifference. 42 U.S.C. § 1981a(b)(1). *See, e.g., Gile v. United Airlines, Inc.* 213 F.3d 365 (7th Cir. 2000); *Slane v. Mariah Boats, Inc.*, 164 F.3d 1065 (7th Cir. 1999). The question of whether an employer has acted with malice or reckless indifference ultimately focuses on the actor's state of mind, not the actor's conduct. An employer's conduct need not be independently “egregious” to satisfy § 1981(a)'s requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an employee can show the “malice” or “reckless indifference” needed to qualify for such an award. *See Kolstad v. American Dental Association*, 119 S.Ct. 2118 (1999).

The employer's “malice” or “reckless indifference” necessary to impose punitive damages pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *See id.* An employer is not vicariously liable for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII. *See id.*

The Seventh Circuit has stated the test for punitive damages as: (1) the employer knows of the anti-discrimination laws (or lies to cover up discrimination; (2) the discriminators acted with managerial authority; and (3) the employer failed to adequately implement its own anti-discrimination policies (no good faith). *Bruso v. United Airlines, Inc.* 239 F.3d 848 (7th Cir. 2001); *Cooke v. Stefani Mgt. Services, Inc.*, 250 F.3d 564 (7th Cir. 2001). In the context of sexual harassment, there is no good faith if the employer shrugs off complaints of harassment, does not put its anti-harassment policy in writing and does not provide ready access to the policy. *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001); *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (punitive damages allowed when company knows that touchings are illegal and sees it happening) . In the context of retaliation, punitives have been awarded when the employer creates two documents explaining why it discharged plaintiff (one truthfully disclosing a retaliatory motive; one giving a pretextual motive). *Fine v. Ryan Inter'l Airlines*, 305 F.3d 746 (7th Cir. 2002). Punitive damages may be awarded even when back pay and compensatory damages are not. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

In determining the appropriateness of punitive damages, a court may examine the length of time the employer was on notice of its own unlawful conduct (as in the case of liability for harassment). *EEOC v. Indiana Bell Telephone Co., Inc.* 214 F.3d 813 (7th Cir. 2000). On the other hand, to oppose punitive damages, the employer is entitled to present to the fact-finder the terms of an applicable collective bargaining agreement that may explain its failure to rectify unlawful conduct. *Id.* Punitive damages are not available against state, local, or federal governmental employees. 42 U.S.C. § 1981a(b)(1).

3. Compensatory and punitive damages are added together and the sum is subject to caps in Title VII cases. The sum amount of compensatory and punitive damages awarded for each complaining party shall not exceed, (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; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or

preceding calendar year, \$300,000. 42 U.S.C. § 1981a(b)(3). Backpay and front pay do not count toward these caps. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000)

There are no caps on compensatory or punitive damages in § 1981 cases. 42 U.S.C. § 1981(b)(4).

4. The court shall not inform the jury of the cap on damages. 42 U.S.C. 1981a(c).

**C. Front Pay and Lost Future Earnings:** Both front pay and lost future earnings awards are Title VII remedies. Front pay is an equitable remedy and is a substitute for reinstatement when reinstatement is not possible. An award of lost future earnings compensates the victim for intangible nonpecuniary loss (an injury to professional standing or an injury to character and reputation). An award of lost future earnings is a common-law tort remedy and a plaintiff must show that his injuries have caused a diminution in his ability to earn a living. The two awards compensate the plaintiff for different injuries and are not duplicative. *Williams v. Pharmacia*, 137 F.3d 944 (7th Cir. 1998). In calculating front pay, the plaintiff must show the amount of the proposed award, the anticipated length of putative employment and apply an appropriate discount rate. *Bruso v. United Airlines, Inc.* 239 F.3d 848 (7th Cir. 2001). Front pay is not subject to the caps on Title VII compensatory damages. *Pollard v. E.I. Dupont de Nemours & Co.*, 532 U.S. 843 (2001).

**D. Attorney's Fees:** In Title VII cases, the court, in its discretion, may allow a prevailing party, other than the EEOC or the United States, a reasonable attorney's fee and reasonable expert witness fees. 42 U.S.C. § 2000e-5(k). In § 1981 cases, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and may include expert fees as part of the attorney's fee. 42 U.S.C. § 1988(b-c).

1. Although the language of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, in a Title VII case, attorney's fees are only awarded to prevailing defendants upon a finding that the plaintiff's action was "frivolous, unreasonable or groundless" or that the plaintiff continued to litigate after it clearly became so. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).
2. Although the language of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, in a § 1981 case, the prevailing defendant is only entitled to attorney's fees if the court finds that the plaintiff's action was "vexatious, frivolous, or brought

to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429, n.2 (1983).

3. "A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Cady v. City of Chicago*, 43 F.3d 326, 328 (7th Cir. 1994).
4. A rule of thumb is that a plaintiff should recover at least 10% of the plaintiff's claimed damages to obtain an award of attorneys' fees. *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585 (7th Cir. 2000). In computing fees, an attorney's personal market rate is used. *Mathur v. Bd. of Trustees*, 317 F.3d 738 (7th Cir. 2003).

## VI. Arbitration

- A. **The Gilmer Decision:** In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that an Age Discrimination in Employment Act claim could be subject to compulsory arbitration. This Supreme Court did not decide in *Gilmer* whether this rule applied generally to all employment relationships. However, the Court held that the employee retains the right to file a charge with the EEOC and obtain a federal government investigation of the charge. *Id.* at 28.
- B. **The Circuit City Decision.** In *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001), the Supreme Court resolved the questioned unanswered in *Gilmer* and held that any employment agreement containing an agreement to arbitrate an employment discrimination claim is subject to compulsory arbitration. The Seventh Circuit had previously held that Title VII claims are also subject to compulsory arbitration. *See, e.g., Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Kresock v. Bankers Trust Co.*, 21 F.3d 176 (7th Cir. 1994). However, in *EEOC v. Waffle House* 534 U.S. 279 (2002), the Supreme Court held that the EEOC may pursue a claim on behalf of a charging party notwithstanding the charging party's agreement to arbitrate her individual case with her employer.
- C. **Collective Bargaining Agreements:** In the Seventh Circuit, collective bargaining agreements cannot compel arbitration of statutory rights. *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997). However, in the limited context of railway and airline employees who work under collective bargaining agreements, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994), requires arbitration of employment disputes that involve interpretation of the applicable collective bargaining agreements. *Brown v. Illinois Central Railroad Co.*, 254 F.3d 943 (7th Cir. 2001). In that context, when the collective bargaining agreement is potentially

dispositive of a discrimination claim, the plaintiff must arbitrate before proceeding to court. *Tice v. American Airlines, Inc.*, 288 F.3d 313 (7th Cir. 2002).

- D. Fact-Specific Defenses to Arbitration.** Courts treat agreements to arbitrate like any other contract. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130-32 (7th Cir. 1997). For example, in *Gibson*, the court held that the arbitration agreement was unenforceable because the employer did not give the employee any consideration for her agreement to arbitrate. *Id.* at 1131. Possible consideration could have been an agreement by the employer to arbitrate all claims or a promise that it would continue employing plaintiff if she agreed to arbitrate all claims. *Id.* at 1131-32. Likewise, in *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001), an arbitration agreement was held invalid because the promisor (the provider of arbitration services) made no definite promise to the employee. In *McCaskill v. SCI Management Corp.*, 298 F.3d 677 (7th Cir. 2002), the arbitration agreement was unenforceable because it forced the employee to forfeit a substantive right – attorneys' fees. By contrast, in *Tinder v. Pinkerton Security*, 305 F.3d 728 (7th Cir. 2002), continued employment after the employer published notice of implementation of a mandatory arbitration policy was sufficient consideration to enforce the policy (even where the employee denied receiving notice).