TITLE VII AND SECTION 1981:

A Guide for Appointed Attorneys
in the Northern District of Illinois

Chicago Lawyers' Committee
for Civil Rights Under Law
June 2012

Foreword

The Chicago Lawyers' Committee for Civil Rights Under Law 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 Supreme Court, Seventh Circuit, and Northern District cases decided through April 2012. This manual is intended to be a starting point for research and should not be used as a substitute for original research tailored to the facts of a specific case.

The Chicago Lawyers' Committee has agreed to assist appointed counsel by producing this manual and by conferring with appointed counsel in evaluating settlement offers, drafting pleadings, determining case strategy, and providing other assistance that appointed counsel may need. For assistance, appointed counsel may contact Cunyon Gordon at the Chicago Lawyers' Committee for Civil Rights Under Law, 100 N. LaSalle, Suite 600, Chicago, IL 60602, (312) 630-9744, cgordon@clccrul.org.

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A. Introduction: Title VII, 42 U.S.C. §§ 2000e, prohibits discrimination in hiring, pay, promotion, termination, compensation, and other terms and conditions of employment because of race, color, sex (including pregnancy), national origin, or religion. "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to dsicriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." *Ricci v. DeStefano*, 557 U.S. 557 (2009). To be actionable, the employment decision must have been sufficiently adverse. *Minor v. Centocor, Inc*. 457 F.3d 632, 634 (7th Cir. 2006) (assignment of more work is sufficiently adverse). *Cf. Ellis v. CCA of Tennessee LLC*, 650 F.3d 640 (7th Cir. 2011) (a shift change policy that does not create an objective hardship is not sufficiently adverse); *Fane v. Locke Reynolds, LLP*, 480 F.3d 534 (7th Cir. 2007) (heavier work load not adverse); *Maclin v. SBC Ameritech*, 520 F.3d 781, 787 (7th Cir. 2008) (denial of discretionary bonus and change in title not adverse).

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) that 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). *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (question whether employer has 15 workers is not jurisdictional); *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006) (highly placed managers may be treated as employees for counting purposes).

1. Exempt Employers: The following types of employers are exempted from Title VII's coverage: bona fide membership clubs, Indian tribes, and religious organizations (a partial exemption). 42 U.S.C. § 2000e(b)(1)-(2).

2. Economic Realities Test: The Seventh Circuit follows the "economic realities" test for determining who the actual employer is. *Heinemeier v. Chemetco, Inc.*, 246 F.3d 1078, 1082 (7th Cir. 2001) (noting that a major factor that defendant was an employer of plaintiff was that it set the plaintiff's salary). The economic realities test requires the court to consider the following five factors: "(1) the extent of the employer's control and supervision over the worker, (2) the kind of occupation and nature of skill required, (3) which party has responsibility for the costs of operation, such as the provision of equipment and supplies and the maintenance of the workplace, (4) the source of payment and benefits, and (5) the duration of the job." *Daniel v. Sargent & Lundy, LLC*, No.

09-cv-7206 (N.D.Ill. Mar. 14, 2012) (citing *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002)) (*Available at*: 2012 WL 874419). It is important to note that the most important factor among those five is the first factor. *Id*.

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 (Native Alaskans, Native Hawaiians, Native Americans). Race can never be a bona fide occupational qualification (BFOQ). *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908, 913 (7th Cir. 2010) (explaining "a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race"); *See also Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990) (explaining in dicta that a merchant cannot refuse to hire African-American workers because they believe their customers prefer white workers); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982) (holding a state agency could not reguse to hire a white applicant because some community members stated that they preferred that the position go to an African-American).

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 Mfg. Co.*, 414 U.S. 86, 88 (1973); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (1981 reaches discrimination against a person because she is genetically a part of an ethnically and physiognomically distinctive group). The EEOC defines "national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or characteristics of a national origin group." 29 C.F.R. § 1606.1; *See also Salas v. Wisconsin Dept. of Corrections*, 493 F. 913 (7th Cir. 2007) (noting that labeling an employee "Hispanic" and taking an adverse employment action because the employee was "Hispanic" would constitute national origin discrimination despite the fact that a particular country is not referenced); *But See Lapine v. Edward Marshall Boehm, Inc.*, No. 89-cv-8420 (N.D.Ill. Mar. 28, 1990) (Available at: 1990 WL 43572) (dismissing the employee's claim because labeling an employee as "Jewish" did not indicate national origin because "Jews, like Catholics and Protestants, hail from a variety of different countries.").

a. Bona Fide Occupational Qualification: Discrimination based on national origin violates Title VII unless national origin is a bona

fide occupational qualification 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). *Henry v. Milwaukee County*, 539 F.3d 573 (7th Cir. 2008). The courts and the EEOC interpret the BFOQ exception very narrowly. *See* 29 C.F.R. § 1604.2(a).

b. **Political Boundaries Unnecessary:** "A Title VII plaintiff need not show origin in a 'nation' with recognized political or geographic boundaries." *Hamdan v. JK Guardian Sec. Services*, No. 94-cv-565 (N.D.Ill. Oct. 6, 1994) (*Available at*: 1994 WL 548229) (holding Title VII's national origins protections extend to Palestinians); *See also Janko v. Illinois State Toll Highway Auth.*, 704 F.Supp. 1531, 1532 (holding that Title VII's prohibitions extend to an employee labeled as a "Gypsy" by his employer because the term is generally used "to refer to various ethnic groups not originally from (a) land who are different from the rest because of ties to earlier nomadic minority tribal peoples.")

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 children applied only to women). Employment decisions based on gender stereotypes also violate Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Lust v. Sealy, Inc*., 383 F.3d 580 (7th Cir. 2004). Employers may not provide different benefits to women than to men. *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978). Title VII also prohibits sexual harassment, as described more fully below.

a. **Pregnancy:** In 1978, Congress amended Title VII to make it clear that the statute prohibits discrimination because of pregnancy. 42 U.S.C. § 2000e-(k). Employers may not consider an employee's pregnancy in making employment decisions. *Id*.; See also 29 C.F.R. § 1604.10(a). Employers must treat pregnancy-related disabilities and medical conditions like other disabilities that similarly affect an employee's ability to work. 29 C.F.R. § 1604.10(b) (See the Northern Distric's ADA Manual for further discussion on pregnancy-related conditions). In *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), the Supreme Court implied that classifications based on fertility or infertility alone were not barred by the Pregnancy Discrimination Act, which prohibits only gender-specific classifications. However, "even where (in)fertility is at issue, the

employer conduct complained of must actually be gender neutral to pass muster." *Hall v. Nalco Co.* 534 F.3d 644 (7th Cir. 2008) (plaintiff's termination violated Title VII because employees terminated for taking time off to undergo in vitro fertilization would always be women, and thus the classification was gender-specific and not gender-neutral).

b. **Bona Fide Occupational Qualification:** Discrimination based on sex violates Title VII unless sex is a bona fide occupational qualification (BFOQ) for the job in question. *See, e.g., Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (explaining that gender may be a BFOQ for accommodating a healthcare facilities' patients' privacy interests); *But See Henry v. Milwaukee County*, 539F.3d 573 (7th Cir. 2008) (juvenile detention center did not justify sex based assignments). It is important to note that the Seventh Circuit considers the "BFOQ defense (as) a narrow exception to the general prohibition on sex-based discrimination." *Keller v. Indiana Family & Soc. Servs. Admin.*, 388 F.App'x 551, 553 (7th Cir. 2010) (citing *Henry* at 579-580); *See also Dothard v. Rawlinson*, 433 U.S. 321 (1977). Conclusory statements regarding whether a particular sex is more suited for a particular position are insufficient to survive at the summary judgment level. *Id*. "Discrimination based on sex is valid only when the *essence of the business of the operation* would be undermined." *Dothard* at 333 (Emphasis added). The E.E.O.C. will consider sex as a BFOQ "where it is necessary for the purpose of authenticity or genuineness…e.g., an actor or actress." 29 C.F.R. § 1604.2(a)(2). Employers bear the burden of establishing the following: (1) that a particular qualification is a BFOQ and (2) that they were unable to "rearrange job responsibilities or otherwise eliminate the clash between the business necessities and the employment opportunities of" the affected gender. *Henry* at 580 (citing *Torres v. Wis. Dept. of Health & Social Servs.*, 838 F.2d 944, 953 n.6 (7th Cir. 1988)).

c. **Sexual Orientation v. Sex Stereotyping:** Title VII does not prohibit discrimination against someone because of his/her sexual orientation. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000). However, it does prohibit discrimination based on "sex stereotyping," that is, the failure to conform to established sexual stereotypes. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003).

(i) **Illinois Practice Note:** It is important to note that the Illinois Human Rights Act prohibits sexual orientation

discrimination in the employment context. 775 ILCS 5/1-102(A). Therefore, consider filing a complaint with the Illinois Department of Human Rights (IDHR).

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).

a. Required Notice: An employee must give fair notice that a religious practice might interfere with his employment. *Xodus v. Wackenhut Corp.*, 619 F.3d 683 (7th Cir. 2010) (employee's statement that it was against his "belief" to cut his hair did not put employer on notice of employee's Rastafarian faith).

b. Employer's Duty to Accommodate: Title VII imposes a duty to "reasonably accommodate to an 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); *See also* 29. C.F.R. 1605.2(b)(1)-(3); *See e.g. Matthews v. Wal-Mart Stores, Inc.*, 417 F.Appx. 552, 554 (7th Cir. 2011). 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. United States*, 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). It is important to note that an employer's "mere assumption that many more people with the same religious practices as the person being accommodated may also need the accommodation is not evidence of undue hardship." 29 C.F.R. § 1605.2(c)(1).

c. Religious Organizations Exempt: 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).

d. **Ministerial Positions:** The protection against religious discrimination does not cover jobs where the job function is "ministerial" in nature. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d. 698 (7th Cir. 2003).

e. **Bona Fide Occupational Qualification:** Religious discrimination is 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 action was 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 either through use of direct evidence or circumstantial evidence. *Winsley v. Cook County*, 563 F.3d 598, 604 (7th Cir. 2009); *See also Cosey v. Easter Seals Soc. Metro. Chicago, Inc.*, No.10-cv-2520 (N.D.Ill. Mar. 16, 2012) (*Available at*: 2012 WL 917846).

(i). **Direct Evidence:** 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.

(ii) **Circumstantial Evidence:** A plaintiff may also proceed under the direct method by offering circumstantial evidence. *See e.g. Burnell v. Gates Rubber Co.*, 647 F.3d 704, 708 (7th Cir. 2011); *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009); *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008). "Circumstantial evidence may include suspicious timing, ambiguous statements, behavior or comments direct at others in the protected class, and evidence that similarly situated employees outside the protected class received systematically better treatment." *Burnell v. Gates Rubber Co.*, 647 F.3d 704, 708 (7th Cir. 2011); *See also Marshall v. Am. Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998); *Troupe v. May Dep't. Stores*, 20 F.3d 734, 736 (7th Cir. 1994). When a plaintiff seeks to introduce words, either written or

spoken, as circumstantial evidence of discrimination, the Supreme Court has emphasized that looking to the context surrounding the words' usage is essential to determining whether certain words are discriminatory. *Ash v. Tyson Foods Inc*. 126 U.S. 1195 (2006) (use of the word "boy" may be discriminatory, depending on context). Positive comments about an employee's race do not demonstrate discrimination. *Brewer v. Bd. of Tr. of the Univ. of Ill.*, 479 F.3d 908, 916 (7th Cir. 2007).

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(iii). **Stray Remarks:** Courts generally give little strength to stray remarks, such as those made by persons other than the decisionmaker(s) that was/were responsible for the adverse employment action, those not pertaining directly to the plaintiff, or those which were made long before the disputed employment decision. *See e.g.*, *Dickerson v. Bd. of Trustees of Cmty. Coll. Dist. No. 522*, 657 F.3d 595, (7th Cir. 2011). *Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569 (7th Cir. 2003) (stray remarks five months before and one month after adverse employment decision too far removed in time); *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622 (7th Cir. 2009) (remark made three months before adverse action is probative). But recency alone may not be the decisive factor. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008). The power of "stray remarks" was given some new life after the Supreme Court ruled in *Reeves v. Sanderson Plumbing, Inc.,* 530 U.S. 133 (2000), that the court of appeals erred by discounting evidence of the decision maker's age-related comments ("you must have come over on the Mayflower") merely because not made "in the direct context of termination." *But see Davis v. Time Warner Cable of Southeastern Wisc., LP*, 651 F.3d 664 (7th Cir. 2011) (finding stray remarks insufficient evidence because the plaintiff presented no evidence that the remarks related to the reason for termination); *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 631 (explaining isolated remarks are not enough to meet the plaintiff's burden unless those remarks are coupled with an adverse employment action). Stray remarks that are neither proximate nor related to the employment decision itself are insufficient to defeat summary judgment on their own. *Dickerson v. Bd. of Trustees of Cmty. Coll. Dist. No. 522*, 657 F.3d 595 (7th Cir. 2011); *See also Nichols v. S. Ill. University-Edwardsville*, 510 F.3d 722 (7th Cir. 2007);

Jennings v. Waukegan Pub. Sch. Dist. No. 60, No. 10-cv-3130 (N.D. Ill. Sept. 22, 2011) (*Available at*: 2011 WL 4449676).

(iv). **Cat's Paw Theory:** "In employment discrimination law, the 'cat's paw' metaphor refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor (or other decision-maker) who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action." *Cook v. I.P.C. Int'l Corp.*, ---F.3d--- (7th Cir. 2012); See also *Staub v. Proctor Hospital*, --- U.S. --- (2011), 131 S.Ct. 1186, 1193 (2011); *Schandelmeier-Bartels v. Chicago Park District*, 634 F.3d 372 (7th Cir. 2011); *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008) (derogatory remarks relevant if made by someone who provided input into challenged decision); *Sun v. Bd. of Tr. of the Univ. of Ill.*, 473 F.3d 799, 813 (7th Cir. 2007) (statements by someone other than the decision maker may be probative if that individual had significant influence over the decision maker); *West v. Ortho-McNeil Pharm. Corp.*, 405 F.3d 578 (7th Cir. 2005); *Waite v. Bd. of Trs.*, 408 F.3d 334 (7th Cir. 2005); *Cerutti v. BASF Corp.* 349 F.3d 1055 (7th Cir. 2003). In certain instances, the employer may attempt to evade liability because a committee was responsible for the adverse employment action in question. Under the Cat's Paw Doctrine, a bigoted supervisor's stray remark can be imputed to the committee if the plaintiff can show that the committee was simply a rubber stamp. *Mateu-Anderegg, v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002).

A. **Practice Note:** The Seventh Circuit's application of the Cat's Paw Doctrine has admittedly been quite inconsitent since it first recognized the doctrine in *Shager v. Upjohn*, 913 F.2d 398 (7th Cir. 1990). *See Brewer v. Bd. of Tr. of the Univ. Ill.*, 479 F.3d 908 (7th Cir. 2007) ("Our approach to Title VII cases involving an employee's influence over a decision maker has not always been quite clear."). In *Shager*, the Seventh Circuit characterized the subordinate's influence as needing to be "decisive" evaluating the "causal link" between the

subordinate's bias and Shager's discharge. *See Shager* at 405.

1. **The Lenient Approach:** In some cases following *Shager*, the Seventh Circuit applied a much more lenient standard, which merely asked whether the biased employee's animus "may have effected the adverse employment action." *Dey v. Colt Constr. and Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994); *See also Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004); *Hoffman v. MCA, Inc.*, 144 F.3d 1117 (7th Cir. 1998); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394 (7th Cir. 1997).

2. **The Stringent Approach:** In more recent cases, the Seventh Circuit has promoted the use of a far more stringent standard requiring the biased employee to exercise a "singular influence" over the official decisionmaker. *See Brewer* at 917-918; *See also Little v. Ill. Dept. of Revenue*, 369 F.3d 1007 (7th Cir. 2004) (explaining the biased employee must possess so much influence over the decision that he or she is the "functional…decision-maker.").

B. ***Staub*'s Effect on the Application of the Cat's Paw Doctrine:** In 2011, the Supreme Court overruled the more stringent approach called for by cases such as *Brewer* in a case arising under USERRA. *See Staub v. Proctor Hosp.*, ---U.S.---, 131 S.Ct. 1186 (2011). Applying the basic agency principles under tort law, Justice Scalia explained that an employer may be liable for employment discrimination if a non-decision-maker "performs an act motivated by (discriminatory) animus that is *intended*…to cause an adverse employment action, and…that act is a *proximate cause* of the ultimate employment action." *Id*. at 1194 (Emphasis added); *See also Harris v. Warrick County Sheriff's Dept.*, 666 F.3d 444 (7th Cir. 2012). Northern District and Seventh Circuit opinions following the *Staub* decision seem suggest that the Seventh Circuit and

Northern District are now likely to apply a more stringent standard than the approach taken in *Dey* but less stringent standard that in *Brewer*. *See e.g. Cook v. I.P.C. Int'l Corp.*, ---F.3d--- (7th Cir. 2012) (Title VII sex discrimination); *Dickerson v, Bd. of Trustees of Cmty. Coll. Dist. No. 522*, 657 F.3d 595, 602 (7th Cir. 2011) (ADA); *Davis v. Metroplex, Inc.*, No. 10-cv-3216 (N.D.Ill. 2012) (Title VII race discrimination claim); *Lee v. Waukegan Hosp. Corp.*, No. 10-cv-2956 (N.D.Ill. Dec. 5, 2011) (FMLA). It appears that courts now require the biased employee's "action to be *a causal factor* of the ultimate employment action." *Staub* at 1193 (Emphasis added); *See also Cook v. IPC Int'l Corp.*, ---F.3d--- (7th Cir. 2012) (Available at 2012 WL 739303); *But see Wojtanek v. District No. 8, Int'l Ass'n of Machinists & Aerospace Workers AFL-CIO*, 435 F.App'x 545, 549 (7th Cir. 2011) (explaining the Supreme Court's holding in *Staub* cannot be extended to the ADEA because under the ADEA, biased employee's action must be "the determinative factor—not just a motivating factor—in the (employer's) decision to take adverse action.").

(v) Pretext & Similarly Situated Employees are Unnecessary Under Direct Method: Under the direct method a plaintiff need not show pretext, *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622 (7th Cir. 2009), or have evidence that similarly situated employees were treated better. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008).

b. ***McDonnell Douglas* Burden-Shifting Method:** In most cases, the plaintiff lacks direct evidence of discrimination and must prove discriminatory intent by inference. The Supreme Court has created a structure for analyzing these 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 *Tex. Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Ctr. 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; *See also, Keri v. Bd. of Trustees of Purdue Univ.*, 458 F.3d 620, 643 (7th Cir. 2006). It is not necessary that the alleged discriminator's race (or other protected status) be different from that of the victim. *Oncale v. Sundowner Offshore Services.*, 523 U.S. 75 (1998); *See also Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524 (7th Cir. 2003).

(i) **Prima facie case:** "Under the indirect method, the plaintiff carries 'the initial burden under the statute of establishing a *prima facie* case of…discrimination." *Coleman v. Donahoe*, 667 F.3d 835, 845 (7th Cir. 2012). "The burden of establishing a *prima facie* case of disparate treatment is not onerous," and by establishing the prima facie case, the plaintiff creates an inference that the employer acted with discriminatory intent. *Burdine* 450 at 253-254. The elements of the *prima facie* case vary depending on the type of discrimination.

A. **Discriminatory Hiring Prima Facie Case:** 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.

B. **Wrongful Termination Prima Facie Case:** 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). A plaintiff in a termination case need not show, for *prima facie* case purposes, a similarly situated comparator, but rather must show only that the employer sought someone else to do plaintiff's work after the termination. *Pantoja v. American NTN Bearing*, 495 F.3d 840, 846 (7th Cir. 2007).

C. **Discriminatory Supervisor in Question:** The legitimate expectations formulation may not be

appropriate if those who evaluated the plaintiff's performance are accused of discrimination, *Pantoja v. American NTN Bearing*, 495 F.3d 840, 846 — (7th Cir. 2007); *Thanongsinh v. Board of Education, District U-46*, 462 F. 3d 762, 772 (7th Cir. 2006) (employer cannot argue that an employee is unqualified if qualifications are measured in a discriminatory manner); *Peele v. Country Mutual Ins. Co.*, 288 F.3d 319 (7th Cir. 2002); *Oest v. Ill. Dep't. of Corr.,* 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, *Goodwin v. Board of Trustees, Univ. of Ill.*, 442 F.3d 611 (7th Cir. 2006); *Brummett v. Lee Enters. Inc.*, 284 F.3d 742 (7th Cir. 2002).

D. **"Similarly Situated" Employees:** "The similarly situated inquiry is flexible, common sense, and factual. It asks 'essentially are there enough common features between the individuals to allow a meaningful comparison?'" *Coleman v. Donahoe*, 667 F.3d 835, 841 (7th Cir. 2012) (citing *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007)); *See also Good v. University of Chicago Medical Ctr.*, ---F.3d--- (7th Cir. 2012) (*Available at*: 2012 WL 763091). However, the degree of similarity that the court will require will vary from case-to-case. For example, in some instances, the Seventh Circuit has required very close similarity of the plaintiff and her comparable employees, for both *prima facie* case and pretext purposes. *See e.g., Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731 (7th Cir. 2006) (plaintiff must identify employees who are "directly comparable in all material respects"); *Ineichen v. Ameritech,* 410 F.3d 956 (7th Cir. 2005); *Steinhauer v. DeGolier*, 359 F.3d 481 (7th Cir. 2004) (plaintiff not similar to comparable worker where plaintiff was probationary employee). However, in other instances, the Seventh Circuit has required much less similarity. *See e.g., Good v. University of Chicago Medical Ctr.*, ---F.3d--- (7th Cir. 2012)

(*Available at*: 2012 WL 763091); *Weber v. Universities Research Ass'n, Inc.*, 621 F.3d 589 (7th Cir. 2010); *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010) (comparative need not be clone and need not have been accused of identical misconduct); *Fischer v. Avanade, Inc.*, 519 F.3d 393, 402 (7th Cir. 2008) (where an employer claims that another employee was not similarly situated simply because of his experience in the temporary position of the same job title, and where the plaintiff alleges that the initial appointment was itself made on a discriminatory basis, the employees' qualifications *before* the temporary appointment are relevant to whether they were similarly situated); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (plaintiff and comparator need not have the same job title); *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404-05 (7th Cir. 2007) (similarly situated test is flexible and meant to determine whether there are enough common factors to allow for a meaningful comparison); *Crawford v. Indiana Harbor Belt RR Co.*, 461 F. 3d 844, 845 (7th Cir. 2006) (rejecting tendency to require close and closer degrees of similarity)*; Ezell v. Potter*, 400 F.3d 1041, 1050 (7th Cir. 2005) (employee similarly situated to his supervisor)*; Freeman v. Madison Metro. Sch'l Dist.*, 231 F.3d 374, 383 (7th Cir. 2000) (employee can be similarly situated to employees in different job position).

1. **Size of the Company and Comparator Pool:** The degree of similarity required between the plaintiff and comparable employees may vary with the size of the company and the potential comparator pool. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007).

2. **Termination:** In the discriminatory termination context, the Seventh Circuit has held that "to be similarly situated, [an employee] must have been treated more favorably by the same decision maker that fired the [plaintiff]." *Ellis v. UPS, Inc.*, 523

F.3d 823, 826 (7th Cir. 2008). An employee is not similarly situated if governed by a different supervisor. *Montgomery v. American Airlines, Inc.*, 626 F.3d 382 (7th Cir. 2010).

E. **Statistics:** Statistics can be used to establish a *prima facie* case of disparate treatment. *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 decision-making is not a legal requirement. *Id*. Generally, the statistics should focus on employees from the same division where plaintiff worked, and include only similarly qualified employees with a common supervisor during a similar time period. *Balderston v. Fairbanks Morse Engine Div.*, 328 F.3d 309 (7th Cir. 2003); *See also Hemsworth v. Quotesmith.com*, 476 F.3d 487, 492 (7th Cir. 2007) (rejecting plaintiff's proposed statistical evidence where it lacked "the necessary context for meaningful comparison"); *Ibarra v. Martin*, 143 F.3d 286 (7th Cir. 1998); *Lenin v. Madigan*, No. 07-cv-4765 (N.D.Ill. July 12, 2011) (Available at: 2011 WL 2708341). Moreover, any use of "statistical evidence, which fails to properly take into account nondiscriminatory explanations (will) not permit an inference of discrimination." *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616-617 (7th Cir. 2000).

F. **Legitimate Expectations:** If an employer insists that it took the adverse employment action in question because the plaintiff failed to meet its legitimate expectations, the plaintiff can "stave off summary judgment and proceed to the pretext inquiry" by "*produc(ing) evidence sufficient* to raise an inference that an employer applied its legitimate expectations in a disparate manner." *Montgomery v. American Airlines, Inc.*, 626 F.3d 382, 394 (7th Cir. 2010) (citing *Elkhatib v. Dunkin Donuts, Inc.*, 497 F.3d 827, 831 (7th Cir. 2007) (Emphasis added)). If the plaintiff provides such evidence, "the second and fourth prongs (of the *prima facie* case) merge."

Id. It is important to note that the plaintiff must put forth "actual evidence" and not mere conclusory allegations in order to proceed in this manner. *Id*.; *See also Brummett v. Lee Enters., Inc.*, 284 F.3d 742, 744 (7th Cir. 2002) (explaining the plaintiff may not "put the pretext cart before the prima facie horse" by making providing mere conclusory statements alleging discrimination); *Grayson v. O'Neill*, 308 F.3d 808, 818 (7th Cir. 2002) ("The prima facie case must be established and not merely incanted.").

(ii) **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. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *See also Stockwell v. City of Harvey*, 597 F.3d 895, 901 (7th Cir. 2010). 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 (1993); *See also Hossack v. Floor Covering Associates of Joliet, Inc.*, 492 F.3d 853, 860 (7th Cir. 2007). But, the employer must provide a nondiscriminatory reason which is sufficiently specific such that plaintiff can attempt to show pretext. *EEOC v. Target*, 460 F. 3d 946 (7th Cir. 2006).

(iii) **Plaintiff's proof of pretext:** Proof that the defendant's asserted reason is untrue permits, but may not require, a finding of discrimination. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133 (2000); *Hicks*, 509 U.S. at 511 (1993); Anderson *v. Baxter Healthcare Corp*., 13 F.3d 1120, 1123 (7th Cir. 1994). If the employer's stated reason is not the true reason, the case cannot be decided on summary judgment. *Forrester v. Rauland-Borg Corp*, 453 F.3d 416 (7th Cir. 2006).

A. **Proving Pretext:** To prove pretext, plaintiff must present evidence that impeaches the employer's stated reason for its employment decision, which generally involves demonstrating that the employer did not sincerely believe its proffered reason. *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 635 (7th Cir. 2011) ("The question is not whether the employer's stated reason was inaccurate or

unfair, but whether the employer honestly believed the reason it has offered to explain the (adverse employment action)."); *See also Naik v. Boehringer Ingleheim Pharm., Inc.*, 627 F.3d 596, 601 (7th Cir. 2010) ("It's not the court's concern that an employer may be wrong about its employee's performance, or may be too hard on it employee. Rather the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie."); *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 397 (7th Cir. 2010); *Brown v. Ill. Dep't of Natural Res.*, 499 F.3d 675, 683 (7th Cir. 2007) ("To show pretext, a plaintiff must show that (1) the employer's nondiscriminatory reason was dishonest and (2) the employer's true reason was based on discriminatory intent.") *Humphries v. CBOCS West, Inc.*, 474 F. 3d 387, 407 (7th Cir. 2007) ("[e]rroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons."); *Sublett v. Wiley & Sons*, 463 F. 3d 731 (7th Cir. 2006) (employer's justification must be a lie rather than simply mistaken). However, the argument may be made, based *Reeves v. Sanderson Plumbing Prods, Inc*., 530 U.S. 133 (2000) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993), that a jury need not find that the employer lied in order to find pretext. Instead, merely demonstrating that the employer's belief was incorrect may suggest that the employer's stated explanation is insincere. Bell v. E.P.A., 232 F.3d 546 (7th Cir. 2000).

B. **Multiple Reasons For Adverse Action:** Where the defendant asserts several reasons for its decision, it may not be enough for the plaintiff to refute only one of the reasons. *Fischer v. Avanade, Inc.*, 519 F.3d 393, 403-04 (7th Cir. 2008); *See also Evertt v. Cook County*, 655 F.3d 723, 730 (7th Cir. 2011); *Walker v. Bd. of Regents*, 410 F.3d 387 (7th Cir. 2005). *But see Monroe v. Children's Home Ass'n of Ill.*, 128 F.3d 591, 593 (7th Cir. 1997) (a plaintiff who proves a prohibited factor motivated the adverse action need not rebut all asserted reasons). However, there may be circumstances where "multiple grounds offered by

the defendant . . . are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment." *Fischer*, 519 F.3d at 404 (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 69-70 (7th Cir. 1995)). Furthermore, pretext can be shown where the employer gives one reason at termination but then offers another later (and that one lacks documentation). *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010); *Fischer v. Avanade, Inc.*, 519 F.3d 393, 407 (7th Cir. 2008); *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002). *See also Pantoja v. American NTN Bearing*, 495 F.3d 840, 851 (7th Cir. 2007) (employer's shifting rationales are evidence of pretext)*; Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005); *Zaccagnini v. Charles Levy Circulating Co.*, 338 F.3d 672 (7th Cir. 2003).

C. **Circumstantial Evidence of Pretext:** Any evidence that impeaches the employer's explanation may help show pretext. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133 (2000). For example, plaintiff may offer evidence that the employer's belief was incorrect (e.g., 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). A plaintiff's superior qualifications can also show pretext, but the burden on the plaintiff is high. *Fischer v. Avanade, Inc.*, 519 F.3d 393, 404 (7th Cir. 2008) (holding that plaintiff must establish that "no reasonable person" could have disputed that plaintiff was better qualified for the position). *See also Ash v. Tyson Foods Inc.*, 126 U.S.1195 (2006); *Sublett v. Wiley & Sons*, 463 F. 3d 731 (7th Cir. 2006) (to show pretext, plaintiff's qualifications must be so superior that plaintiff is incontrovertibly better qualified for the position than the employee who received it).

D. **Specific Examples of Pretext:** Other circumstances that can suggest pretext include: a failure to timely mention a reason for termination; *Culver v. Gorman & Co.*, 416 F.3d 540 (7th Cir. 2005); deviations

from the employer's stated or usual procedure; *See e.g., Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010); *See also Davis v. Wis. Dep't of Corrections*, 445 F.3d 971 (7th Cir. 2006); *Rudin v. Lincoln Land Cmty Coll.*, 420 F.3d 712 (7th Cir. 2005); 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. *See e.g., Gordon v. United Airlines, Inc.*, 246 F.3d 878 (7th Cir. 2001). In addition, the sincerity of the employer's belief is undercut by the unreasonableness of the belief; employers need not be taken at their word. *Id.*

E. **Same Hirer/Firer:** The fact that the same person hired and fired the plaintiff does not preclude discrimination but is part of the evidentiary mix. *Chaney v. Plainfield Healthcare Center,* 612 F.3d 908 (7th Cir. 2010).

F. **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. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) (employer's general practice with respect to minority employees may be relevant to pretext); *Lawson v. CSX Transp., Inc.* 245 F.3d 916 (7th Cir. 2001). As discussed earlier, opinions differ as to who is similarly situated. *Radue v. Kimberly Clark Corp*., 219 F.3d 612 (7th Cir. 2000) (plaintiff and similarly situated employee must be subject to same decision maker). *But see Ezell v. Potter*, 400 F.3d 1041, 1050 (7th Cir. 2005) (plaintiff similarly situated to his supervisor)*; Freeman v. M Madison Metro. Sch.'l Dist.*, 231 F.3d 374, 383 (7th Cir. 2000) (plaintiff can be similarly situated to e employees in different job positions). But see *Patterson v. Indiana Newspapers, Inc*. 589 F.3d 357 (7th Cir. 2009)(plaintiff not similarly situated to his supervisor).

G. Using Statistics to Demonstrate Pretext: Pattern evidence is admissible in individual disparate treatment cases, but its usefulness depends on its relevance to the challenged decision. *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008). Statistics may suggest pretext where the statistics encompass 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 may not prove pretext. *Baylie v. Fed. Reserve Bank of Chi.*, 476 F. 3d 522, 524 (7th Cir. 2007); *Rummery v. Ill. Bell Tel. Co.*, 250 F.3d.553 (7th Cir. 2001). Evidence that an employer hires many workers within the protected class, while relevant, is not dispositive of nondiscrimination. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133 (2000).

(iv) Sufficiency of Evidence: In *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133 (2000), the Supreme Court unanimously held that a plaintiff's *prima facie* case, combined with evidence sufficient to rebut the employer's nondiscriminatory explanation, often meets plaintiff's burden of persuasion. Proof of pretext generally permits (but does not require) a fact finder to infer discrimination because proof that an employer falsely stated its reasons is probative of discrimination. However, in some cases, proof of pretext may not suffice to sustain a finding of discrimination. (For example, defendant gives a false explanation to conceal something other than discrimination). *See e.g. Benuzzi v. Bd. of Educ. of the City of Chicago*, 647 F.3d 652 (7th Cir. 2011) (stating that an employee must show not only that the employer's stated reasons for suspending her were dishonest, but also that the true reason was based on prohibited discriminatory animus). In determining the sufficiency of evidence, a court must credit the employee's evidence, and consider only the evidence from the movant that is uncontradicted, unimpeached, and provided by disinterested witnesses. *Reeves*, 120 S. Ct. at 2110; *Davis v. Wis. Dep't of Corrections*, 445 F.3d 971(7th Cir. 2006); *Tart v. Ill. Power Co.*, 366 F.3d 461 (7th Cir 2004). Courts should be particularly careful not to supplant their view of the evidence for that of the jury in employment discrimination cases, which often involve only circumstantial evidence. *Id.*

A. **Surviving Summary Judgment:** At summary judgment plaintiff need only raise a material issue of fact as to the believability of the employer's justification. *E.E.O.C. v. Target Corp.*, 460 F.3d 946, 960 (7th Cir. 2006); *See also Malozienc v. Pacific Rail Servs.*, 606 F.Supp.2d 837 (N.D.Ill. 2009). Plaintiff need not also provide evidence of discriminatory motive. *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005). "The plaintiff's oral testimony if admissible will normally suffice to establish a genuine issue of material fact," *Randolph v. Indiana Regional Council of Carpenters,* 453 F.3d 413 (7th Cir. 2006). On summary judgment, where the movant's version of the facts is based solely on self-serving assertions, self serving assertions to the contrary from the nonmovant may create a material issue of fact. *Szymansky v. Rite Way Lawn Maint. Co., Inc.,* 231 F.3d 360 (7th Cir. 2000).

(v) **Instructing the jury:** If the case goes to a jury, the elaborate *McDonnell Douglas* formula should not be part of the jury instructions. *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 action at issue because of the plaintiff's membership in a protected class. *Id*. at 341.

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 or even the "but for" factor. *See e.g., Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012); *Makowski v. SmithAmudsen LLC*, 662 F.3d 818 (7th Cir. 2011); *Lewis v. City of Chicago Police Dep't*, 590 F.3d 427 (7th Cir. 2009); *Boyd v. Ill. State Police*, 384 F.3d 888 (7th Cir. 2004) (jury instruction that race had to be "catalyst" for challenged decision was error).

(i) Desert Palace: If the employer proves that it had another reason for its action and that it would have made the same decision without the discriminatory factor, the employer may avoid liability for monetary damages, reinstatement or promotion. 42 U.S.C. § 2000e-5(g)(2); *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003); *Cook v. IPC Int'l Corp.*, 673

F.3d 625 (7th Cir. 2012); *Hossack v. Floor Covering Assoc. of Joliet, Inc.*, 492 F.3d 853 (7th Cir. 2007). The court may still grant 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); *Cook v. IPC Int'l Corp.*, 673 F.3d 625 (7th Cir. 2012).

(ii) **Retaliation Claims:** The Seventh Circuit has 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. *Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001); McNutt *v. Bd. of Trs. of the Univ. of Ill.*, 141 F.3d 706 (7th Cir. 1998). Following *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009) it is not clear that a plaintiff can bring a *Price Waterhouse* mixed motive claim at all under Title VII's retaliation provisions, but the Seventh Circuit has yet to expressly declare such claims are prohibited.

d. **After-Acquired Evidence:** If an employer takes an adverse employment action 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 Publ's Co.*, 513 U.S. 352, 363 (1995) (holding the employer must establish that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge"); *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); *Rodriguez, ex rel. Fogel v. City of Chicago*, No. 08-cv-4710 (N.D.Ill. 2011) (*Available at*: 2011 WL 1103864); *Berg v. BCS Fin. Corp.*, 372 F.Supp. 108, 1096 (N.D.Ill. 2005) (explaining that Illinois state courts have not explicitly written off the acter-acquired doctrine but have suggested that it is not available in claims arising under state law); *Sheehan v. Donlen Corp.*, 979 F.Supp. 760, 766 (denying employer's motion for summary judgment based on the after-acquired evidence doctrine *Petrovich v. LPI Serv. Corp.*, 949 F.Supp. 626, 628 (N.D.Ill. 1996). In general, the employee is not entitled to reinstatement or front pay, and back pay 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 of Discrimination: In class actions or other cases alleging a widespread practice of intentional discrimination, plaintiffs may establish a *prima facie* case using statistical evidence. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). The statistical evidence needs to control for potentially neutral explanations for the employment disparities. *Radue v. Kimberly Clark Corp.*, 219 F.3d 612 (7th Cir. 2000). Plaintiffs often combine statistical evidence with anecdotal or other evidence of discriminatory treatment. *See, e.g., Adams v. Ameritech Servs., 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). 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. *Puffer v. Allstate Ins. Co.*, ---F.3d--- (7th Cir. 2012) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 325 n. 15) (explaining "disparate impact claims require no proof of discriminatory motive and 'involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity'…"); *Farrell v. Butler Univ.*, 421 F.3d 609, 616 (7th Cir. 2005); *See also O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 986 (7th Cir. 2001); *Reidt v. County of Trempealeau*, 975 F.2d 1336, 1340 (7th Cir. 1992) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 329).

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."

(i) ***Wards Cove*:** 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).

(ii) **The Civil Rights Act of 1991:** The Civil Rights Act of 1991 overturned that portion of the *Wards Cove* decision. 42 U.S.C. § 2000e-2(k).

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.

c. **Allocation of proof:**

(i) **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 plaintiff's statistical analysis or offer different statistics.

(ii) **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).

(iii) **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); *Bryant v. City of Chicago*, 200 F.3d 1092 (7th Cir. 2000) (upholding the content of police lieutenant's exam but holding the city violated Title VII by refusing to use a less discriminatory method for promotion); *Woodard v. Rest Haven Christian Servs.*, No.

07-cv-0665 (N.D.Ill. 2009) (*Available at*: 2009 WL 703270).

d. Selection Criterion

(i) Scored tests: There are several methods of measuring adverse impact.

A. The EEOC Four-Fifths Rule: 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 rate *less than four fifths* (80 percent) of that of another group. *See e.g. Allen v. City of Chicago*, 351 F.3d 306, 310 n. 4 (7th Cir. 2003); *Kozlowski v. Fry*, 238 F.Supp.2d (N.D.Ill. 2002). 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)(2003). The 80 percent rule is a rule of thumb for administrative convenience, and has been criticized by courts. In certain circumstances, the EEOC will determine that smaller differences than the above-mentioned Four-Fifths rule will constitute an adverse impact. In those circumstances, the smaller difference is deemed to be "significant both in and practical terms or where a user's actions have discouraged applicants disproportionately based on" the potential applicants' status as a member of a protected class. 29 C.F.R. § 1607.4(D).

B. **Standard Deviation Analysis:** 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*. *See e.g. Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 424 (7th Cir. 2000) ("Two standard deviations is normally enough to show that is extremely unlikely that [a] disparity is due to chance."); *See also Cullen v. Indiana University Bd. of Trustees,* 338 F.3d 693, 702 n. 6 (7th Cir. 2003). "However, the Seventh Circuit rejects a bright-line rule that would find statistical evidence of less than two standard deviations inadmissible." *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 465 (N.D.Ill. 2009) aff'd, No. 11-1273 (7th Cir. Mar. 27, 2012) (*Available at*: 2012 WL 1003548); *See also Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir. 2001).

C. **The Defendant's Rebuttal—"Business Necessity":** 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)(2003); *See also Lewis v. City of Chicago,* ---U.S.---, 130 S.Ct. 2191 (2010); *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). 2005 U.S. Dist. WL 693618 (N.D. Ill. Mar. 22, 2005) (a discriminatory cut score on an entrance exam must be shown to measure minimum qualifications for successful job performance).

(ii) **Nonscored objective criteria:** The Uniform Guidelines are applicable to other measures of employee qualifications, such as education, experience, and licensing.

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).

(iii) **Subjective criteria:** Subjective decision making criteria are subject to challenge under a disparate impact theory. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *See also McReynolds v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, No. 05-cv-6583 (N.D.Ill. Feb. 14, 2011) (Available at: 2011 WL 658155); *Watkins v. City of Chicago*, 73 F.Supp.2d 944, 948 (N.D.Ill. 1999).

e. **Race Conscious Steps to Avoid Disparate Impact**: In *Ricci v. DeStefano*, 557 U.S. 557 129 S.Ct. 2658 (2009), the Supreme Court held that an employer can take race conscious steps to mitigate the disparate impact of an employment test or procedure only where there is a strong basis in evidence that inaction would lead to disparate impact liability.

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

a. **Types of Harassment:** Traditionally, there were 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 Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. Inc., v. Ellerth*, 524 U.S. 742 (1998).

(i) **Quid pro quo:** "Quid pro quo harassment occurs in situations where submission to sexual demands is made a condition of tangible employment benefits." *Bryson v. Chicago State Univ.*, 96 F.3d 912, 915 (7th Cir. 1996) (finding that committee assignments and in-house titles can constitute tangible employment benefits for the purposes of

a quid pro quo harassment claim); *See e.g. Jackson v. County of Racine*, 474 F.3d 493, 501 (7th Cir. 2007) (holding a promise for a promotion in exchange for sexual favors only constitutes quid pro quo harassment if a promotion actually was available and the plaintiff was qualified for the promotion.); *Traylor v. Brown*, 295 F.3d 783, 789 (7th Cir. 2002) (upholding lower court's dismissal of plaintiff's claim because merely denying the plaintiff the ability to perform certain clerical duties did not deny her access to any tangible employment benfits); *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997); *Mattern v. Panduit Corp.*, No. 11-cv-984 (N.D.Ill. Oct. 11, 2011) (*Available at*: 2011 WL 4889091); *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, No. 09-cv-1824 (N.D.Ill. Oct. 5, 2011) (*Available at*: 2011 WL 4738520); *Walko v. Acad. of Bus. & Career Dev., LLC*, 493 F.Supp.2d 1042, 1046 (N.D.Ill. 2006); *Hawthorne v. St. Joseph's Carondelet Child Ctr.*, 982 F.Supp. 586 (N.D.Ill. 1997). The E.E.O.C. describes quid pro quo sexual harassment as "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 . . .." 29 C.F.R. § 1604.11(a)(1)-(2).

A. **Prima Facie Case:** "In *Bryson v. Chicago State University,* 96 F.3d 912, 915–916 (7th Cir.1996), the Seventh Circuit referred to a five-part test, in which a plaintiff must show: '(1) that she or he is a member of a protected group, (2) the sexual advances were unwelcome, (3) the harassment was sexually motivated, (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment, and (5) *respondeat superior* has been established.' The fourth element asks 'what tangible aspect of employment was affected,' and the fifth element 'recognizes that there is a need to link the employer to the actions of the harasser.'" *Mattern v. Panduit Corp.*, No. 11-cv-984 (N.D.Ill. Oct. 11, 2011) (Available at: 2011 WL 4889091).

(ii) **Hostile environment:** "A sexually hostile work environment is a form of sex discrimination under Title VII." *E.E.O.C. v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 432 (7th Cir. 2012). In order to be actionable, "a plaintiff must prove conduct that is so severe and pervasive as 'to alter the conditions of [her] employment and create an abusive working environment.'" *Id*. (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). The E.E.O.C. describes such a working environment as existing when "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." 29 C.F.R. § 1604.11(a)(3).

A. **Prima Facie Case:** 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, 328-329 (7th Cir. 2003); *See also Erickson v. Wisc. Dep't of Corrections*, 469 F.3d 600, 604 (7th Cir. 2006); *Patton v. Keystone RV Co.*, 455 F.3d 812, 815-816 (7th Cir. 2006) (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-431 (7th Cir. 1995) (holding mere offensive conduct does not give rise to liability, for "Title VII is not a civility code" and the "occasional vulgar banter tinged with sexual innuendo, of coarse and boorish workers" does not establish a hostile work environment). "The third prong of the prima facie case requires both a subjective and objective inquiry, compelling the court to ask whether a reasonable person would find the environment hostile…. It is not a bright line…between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other." *Id*. at 329; *See e.g., E.E.O.C. v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 432 (7th Cir. 2012) (quoting *Gentry v. Export Packaging Co.*, 238 F.3d 842, 850 (7th Cir.

2001) (explaining the work environment should be evaluated "from both a subjective and objective viewpoint, 'one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'"); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 975-976 (7th Cir. 2004); *Barth v. Village of Mokena*, No. 03-cv-6677 (N.D.Ill. Mar. 31, 2006) (*Available at*: 2006 WL 862673). This analysis is fact-intensive and depends on the totality of the circumstances. *Bilal v. Rotec Indus., Inc.*, 326 F.App'x 949, 957 (7th Cir. 2009); *See also Lapka v. Chertoff*, 517 F.3d 974, 982 (7th Cir. 2008) (explaining courts should evaluate a plaintiff's claim of hostile work environment in light of the "particular facts and circumstances" of the case); *Robinson* at 329 (explaining the court "must consider *all of the circumstances*, including the frequency of the discriminatory conduct; its severity; whether is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.") (Emphasis added).

B. **Degree of Severity of Offensive Conduct**: Courts generally require that the offensive behavior be fairly extreme, yet need not be so severe that it makes the work environment intolerable. *See e.g. Jackson v. County of Racine*, 474 F. 3d 493, 500 (7th Cir. 2007) (work environment need not be "hellish" to constitute illegal harassment); *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 942 (7th Cir. 2007) ("Title VII comes into play before the harassing conduct leads to a nervous breakdown."). 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 Sys.*, 510 U.S. 17, 23 (1993); *See e.g. E.E.O.C. v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 432-433 (7th Cir. 2012) (plaintiff was subjected to harassment during every shift that a particular assistant manager was on duty).

C. **Second Hand Harassment:** Second hand harassment (harassment that plaintiff herself did not hear) will have a lesser impact on plaintiff. *Whittaker v. Northern Ill. Univ.*, 424 F.3d 640 (7th Cir. 2005); *Smith v. Northeastern Ill. Univ.*, 388 F.3d 559 (7th Cir. 2004); *See also Yuknis v. First Student*, 481 F.3d 552, 555-556 ("Offense based purely on hearsay or rumor really is 'second hand;' it is less credible, and, for that reason and also because it is less confrontational, it is less wounding than offense based on hearing or seeing…."); *Mannie v. Potter*, 394 F.3d 977, 983 (7th Cir. 2005) (holding that comments made about the plaintiff out of her presence were less damaging); *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134 (7th Cir. 1997); *Miller v. Dep't of Corrections*, No. 08-cv-50248 (Mar. 24, 2011) (Available at: 2011 WL 1120270);*Taylor v. ABT Electronics, Inc.*, No. 05-cv-576 (N.D.Ill. Jan. 15, 2010) (*Available at*: 2010 WL 234997). Whether a comment is second-hand harassment or simply a vague comment directed at the plaintiff can be difficult to determine so the comment should be analyzed by examining the context in which it was said. *Yuknis* at 554. Incidents of harassment directed at co-workers have some relevance in determining whether a hostile work environment exists; however, they are more o an indirect connection, so they are given less weight. *Yancick v. Hanna Steel Corp*., 653 F.3d 532 (7th Cir. 2011).

D. **Additional guidelines:** Harassment need not be both pervasive *and* severe. *Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007); *See also Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) ("Even one act of harassment will suffice if it is egregious."). Direct contact with intimate body parts is the most severe type of sexual harassment. *Patton v. Keystone RV Co.*, 455 F.3d 812 (7th Cir. 2006) (four touchings might suffice)*; 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.

Berry v. CTA, 618 F.3d 688 (7th Cir. 2010) (comments may be sexist rather than sexual, but those comments must still be analyzed objectively and subjectively); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007). 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 that she felt harassed. *Worth*, 276 F.3d 249. A victim's own use of racist or sexist remarks does not necessarily mean that the victim welcomes these types of remarks. *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 940 (7th Cir. 2007); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (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 Elecs. Co.*, 263 F.3d 663 (7th Cir. 2001).

E. **Application of 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) (two touchings of breasts is actionable); *Gentry v. Exp. 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.*, 358 F.3d 473 (7th Cir. 2004) (repeated use of word "nigger" creates racial hostility"); *Patt v. Family Health Sys., Inc.*, 280 F.3d 749 (7th Cir. 2002) (eight offensive comments with only two made to plaintiff not pervasive or hostile); *Quantock v. Shared Mktg. Servs. Inc.*, 312 F.3d 899 (7th Cir. 2002) (boss propositioning employee sexually and explicitly at one meeting actionable); *Hilt-Dyson v. Chicago*, 282 F.3d 456 (7th Cir. 2002) (occasional back rubbing and inspecting clothes not objectively unreasonable); *Wolf v. Northwest Ind. Symphony Soc'y*, 250 F.3d 1136 (7th Cir. 2001) (collecting

cases); *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011) (making mean faces at another falls short of hostile environment).

F. **Proof of Harm:** The plaintiff is not required to prove psychological harm or tangible effects on job performance. *Harris v. Forklift Sys.*, 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 Servs., Inc.*, 523 U.S. 75 (1998). The sexual harassment need not occur in front of other witnesses to be actionable. *Cooke v. Stefani Mgt. Servs., Inc.*, 250 F.3d 564 (7th Cir. 2001).

(iii) Employer liability

A. **The *Meritor* Decision:** In *Meritor Sav. 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. Essentially, there are two standards for employer liability: vicarious liability, where the harasser is a supervisor; and negligence, where the harasser is a coworker.

B. **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. *Bernier v. Morningstar, Inc.*, 495 F.3d 369 (7th Cir. 2007) (citing *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005)) (plaintiff has burden to show that employer knew of harassment and that the employer did not act reasonably to equalize the working conditions once it had knowledge); *See also Sutherland v. Wal-Mart Stores*, 632 F.3d 990 (7th Cir. 2011) (holding an employer may be liable for a hostile work environment created by employees when the employer does not promptly and adequately respond to employee harassment);

Montgomery v. Am. Airlines, Inc., 626 F.3d 382 (7th Cir. 2010); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004) (no employer liability where victim made only vague complaints to managers); *Miller v. Ill. Dep't of Corrections*, Case No. 08-cv-50248 (N.D.Ill. Mar. 24, 2011) (*Available at*: 2011 WL 1120270); *But see Cerros v. Steel Technologies, Inc.* 398 F.3d 944 (7th Cir. 2005) (plaintiff need not follow letter of employer's harassment policy if employer had notice of harassment); *Loughman v. Malnati Org.*, 395 F.3d 404 (7th Cir. 2005) (if coworker harassment is sufficiently severe, it may not be enough for the employer to simply warn the harassers).

1. **Notice:** "With respect to the extent of the notice given to an employer, a plaintiff cannot withstand summary judgment without presenting evidence that she gave the employer enough information to make a reasonable employer think there was some probably that she was being sexually harassed." *Parkins v. Civil Contractors of Ill., Inc.*, 163 F.3d 1027, 1035 (7th Cir. 1998). The plaintiff must present this evidence to someone who has some sort of duty to channel the complaints to those who are empowered to act upon such a complaint. *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997). If a direct supervisor is identified in a company's employment policy as someone who can receive and relay employee complaints, the plaintiff's notification to that person is considered notice to the corporation itself. *Id*. at 675; *See also Parkins* at 1035; *Miller v. Ill. Dep't of Corrections*, Case No. 08-cv-50248 (N.D. Ill. Mar. 24, 2011) (*Available at*: 2011 WL 1120270)

2. **Reasonable Response**: Once an employer knows of conduct causing a hostile work environment "an employer satisfies its legal duty in coworker harassment cases if it takes reasonable steps to discover and rectify acts

of harassment by its employees. *Bernier* at 373. The assessment of an employer's actions begins by evaluating the steps the employer actually took. *Sutherland* at 994. The steps an employer "failed to take only relevant if the steps it actually took were not reasonably likely to end the harassment." *Id*. It is important to note that what is "reasonable" wholly depends on the gravity of the harassment. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995).

3. Steady Stream of Harassment: The existence of a steady stream of harassment may be evidence that the employer's harassment policy is not effective. *Id. See also Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 943 (7th Cir. 2007) (failure to discipline harasser despite multiple complaints suggests that employer did not exercise reasonable care).

C. Harassment by a supervisor: An employer is liable for actionable harassment by a supervisor with immediate (or higher) authority over the harassed employee. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The employer can be liable for harassment by a supervisor that creates a hostile work environment or for harassment that results in an adverse job action. If the harassment creates a hostile work environment, the employer may have an affirmative defense to liability. 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. *Huff v. Sheahan*, 493 F.3d 893 (7th Cir. 2007); *see infra* "Affirmative Defense."

1. The Harasser: The harasser must be the one who imposes the adverse job action or there must be evidence of a conspiracy between the decision maker and the

harasser. *Murray v. Chi.Transit Auth.*, 252 F.3d 880 (7th Cir. 2001).

2. **Who is a Supervisor:** Harassment by high-level supervisors is imputed to the employer as a matter of vicarious liability. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001). The plaintiff must show that the harasser was her supervisor. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004). A supervisor has the authority to hire, fire, demote, promote, transfer, *or* discipline an employee. *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382 (7th Cir. 2010) (stating "supervisor is a term of art that denotes more than an individual with a higher rank, a superior title, or some oversight duties."); *Valentine v. City of Chicago*, 452 F.3d 670 (7th Cir. 2006); *Huff v. Sheahan*, 493 F.3d 893 (7th Cir. 2007) (individuals who are authorized to take tangible employment actions against the plaintiff are supervisors); *But see Rhodes v. IDOT*, 359 F.3d 498 (7th Cir. 2004); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002)*; Gawley v. Ind. Univ.*, 276 F.3d 301 (7th Cir. 2001). Supervisors without this authority are treated the same as co-workers for purposes of determining employer liability (negligence standard). *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001). But, an employer must exercise greater care where the harasser is a low level supervisor than where the harasser is a coworker; how much greater is usually a jury question. *Doe v. Oberweis*, 456 F.3d 704 (7th Cir. 2006). One factor in determining whether a manager has sufficient supervisory authority is whether he is the only manager on site for long periods. *Doe*, 456 F.3d 704.

3. **Tangible Employment Action:** 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).

D. Harassment by independent contractor: An employer may be liable for harassment by a third party, *Lapka v. Chertoff*, 517 F.3d 974, 984 n. 2 (7th Cir. 2008), for example, by an employee of an independent contractor. *Dunn v. Wash. County Hosp.*, 429 F.3d 689 (7th Cir. 2005). Moreover, where an employer loans an employee's services to another employer, Title VII protects the employee against retaliation by either entity. *Flowers v. Columbia Coll. Chi.*, 397 F.3d 532 (7th Cir. 2005).

E. The Faragher/Ellerth Affirmative Defense: When the harasser is the employee's supervisor and no tangible employment action is taken, the employer may raise an affirmative defense. 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.

1. **Reasonable Care**: 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. For example, an employer must promulgate a policy, which the plaintiff can understand. *EEOC v. V&J Foods, Inc*., 507 F.3d 575 (7th Cir. 2007).

2. **Will the response prevent future harassment:** The employer's response to reported harassment must be reasonably

calculated to prevent future harassment. *Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007); See e.g., Tutman v. WBBM-TV, Inc./CBS, Inc., 209 F.3d 1044 (holding 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); *See also Roby v. CWI*, 579 F.3d 779 (7th Cir. 2009) (employer's response sufficient where employer promptly investigated and reprimanded harasser); *Porter v. Erie Foods Intern., Inc.*, 576 F.3d 629 (7th Cir. 2009) (employer's investigation was sufficient); *But see Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001) (employer response that stops harassment not necessarily adequate); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798 (7th Cir. 2000) (holding an 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 due to the transfer)).

3. **Anti-Harassment Policies:** The mere creation of an anti-harassment policy does not establish this affirmative defense; the employer must implement the policy and respond to complaints brought under it. *E.E.O.C. v. Mgmt Hospitality of Racine, Inc., et al.*, 666 F.3d 422 (2012) (holding "a rational jury could have found that the (employer's) policy and complaint mechanis, were not reasonably effective in practice," because the managerial employees did not carry out their duties, frequently ignored complaints of harassment, delayed investigations for months, and were at times possibly engaging in harassing behavior); *See also Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001). The defense is

not available when the employer fails to name a person to whom an employee may complain. *Gentry v. Exp. Packaging Co.*, 238 F.3d 842 (7th Cir. 2001), or where the employer's harassment policy designates the harasser as the only person to whom the harassment victim can complain. *Faragher*, 524 U.S at 790. Moreover, if the employer shrugs off complaints of harassment and does not provide ready access to its anti-harassment policy, it has not acted in good faith. *See e.g., Berry v. CTA*, 618 F.3d 688 (7th Cir. 2010) (where supervisor to whom plaintiff complained told plaintiff that she would lose her job if she complained and made other disparaging remarks, summary judgment reversed as to whether employer was negligent in responding to harassment complaint); *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001).

F. The Plaintiff's Complaint (or lack thereof): While proof that an employee failed to fulfill his or her corresponding obligation of reasonable care by not making use of an employer-provided complaint procedure, demonstrating the employee's fail to use the procedure will normally satisfy the employer's duty under the second element of the employer's affirmative defense. *Faragher*, 524 U.S. 775 (1998); *See also Burlington Indus.*, 524 U.S. 742 (1998). If the plaintiff waited a significant period of time to complain about harassing behavior, that may also satisfy the employer's duty under the second element of the affirmative defense. *See e.g., Roby v. CWI, Inc.*, 579 F.3d 779 (five months too long); *Jackson v. County of Racine*, 474 F.3d493 (7th Cir. 2007) (four months too long); *But see Johnson v. West*, 218 F.3d 725 (7th Cir. 2000) (allowing a case to proceed even though plaintiff waited an entire year to report harassing behavior). An employee's refusal to provide details during an investigation may also doom his or her claim. *Porter v. Erie Foods Intern, Inc.*, 576 F.3d 629 (7th Cir. 2009).

An employee need not use the phrase "sexual harassment" when making her complaint. *Gentry v. Exp. Packaging Co.*, 238 F.3d 842 (7th Cir. 2001); *See e.g. Valentine v. City of Chicago*, 452 F.3d 670 (holding an employee who complains that a supervisor "put his hands on me" sufficiently put the employer on notice."). A plaintiff's complaint to a coworker, if relayed to management, may also suffice to put the employer on notice. *Bombaci v. Journal Cmty. Pub. Group, Inc.*, 482 F.3d 979 (7th Cir. 2007).

G. **Constructive discharge:** Severe harassment, which would compel an employee to resign, renders the affirmative defense unavailable because such constructive discharge is a tangible employment action. *Pa. State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342 (2004); *Patton v. Keystone RV Co.*,2006 WL 2129723 (7th Cir. 2006). The employer may assert the *Faragher* affirmative defense unless the plaintiff reasonably resigned in response to an adverse action changing her employment status such as a demotion, extreme cut in pay or humiliating change of position. Where the harasser has been fired, there is no evidence that the harassment would continue, undercutting constructive discharge. *McPherson v. City of Waukegan*, 379 F.3d 430 (7th Cir. 2004).

H. **Discovery:** Plaintiffs who seek damages for emotional distress will likely be required to turn over psychiatric records. *See e.g., Doe v. Oberweis*, 456 F.3d 704, 718 (7th Cir. 2006); *See also Flowers v. Owens*, 274 F.R.D. 218 (N.D.Ill. 2011); *Noe v. R.R. Donnelley & Sons*, Case No. 10-cv-2018 (N.D.Ill. Apr. 12, 2011) (Available at: 2011 WL 1376968). However, the Seventh Circuit has yet to declare whether *all* plaintiffs who seek damages for emotional distress must turn over such records or only those plaintiffs whose emotional distress claims are "severe." *See Flowers* at 224-229.

(iv). **Same Sex Harassment:** An employer may be liable for harassment by a supervisor or co-worker who is the same gender as the plaintiff, provided that the harassment was motivated by the

plaintiff's gender. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998) (holding sex discrimination consisting of same-sex sexual harassment is actionable under Title VII); *See e.g. Warner v. USF Holland, Inc.*, Case No. 08-cv-6823 (N.D.Ill. Jan. 25, 2012) (*Available at*: 2012 WL 245190). A husband and wife employed in the same workplace may both experience gender-based harassment, at the hands of different managers. *Venezia v. Gottlieb Mem'l Hosp.*, 421 F.3d 468 (7th Cir. 2005). Harassment based on sexual orientation alone is not actionable. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr, Inc.* 224 F.3d 701 (7th Cir. 2000).

(v). Racial or Ethnic Harassment: Workers who are subjected to racial or ethnic jokes, insults, graffiti, etc. may be able to establish a violation of Title VII. *See Cerros v. Steel Technologies*, 288 F.3d 1040 (7th Cir. 2002) (anti-Hispanic harassment actionable; an unambiguous racist statement such as "spic"is at the severe end of the spectrum)*; Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668 (7th Cir. 1993). While racial harassment need not be explicitly racial, the harassment must be sufficiently tied to race to be actionable. *Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854 (7th Cir. 2005). In general, the legal standards for racial harassment are the same as for sexual harassment, as detailed above.

(vi). "Equal Opportunity" Harassment: When an employer harasses everyone equally, Title VII is not violated.. *See e.g. Yancick v. Hanna Steel Corp.,* 653 F.3d 532 (7th Cir. 2011); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000); *Wyninger v. New Venture Gear, Inc.* 361 F.3d 965 (7th Cir. 2004) (both men and women experienced vulgar language). But where one group experienced more severe harassment because of membership in a protected class, Title VII has been violated. *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 940 (7th Cir. 2007).

4. Retaliation

a. Standing for Retaliation Claims: Any person aggrieved by an unlawful retaliatory action may bring a retaliation claim under Title VII. *Thompson v. North American Stainless*, 131 S.Ct. 863 (2011) (holding an employer's alleged act of firing an employee in retaliation against an employee's fiancée, if proven, constituted unlawful retaliation). The Supreme Court defined "person aggrieved" as anyone in the protected "zone of interest" of the

Title VII provision whose violations form the basis for the legal complaint. *Id.* at 870. This includes more than just the person who participated or opposed an unlawful employment practice or action. *Id.* In *Thompson*, the Supreme Court held the plaintiff had standing to bring a retaliation action when he was fired after his fiancée filed a discrimination complaint. *Id.*

b. Retaliation for "Participation": Title VII prohibits discrimination against an employee or job 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). *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). For the employee's expression or conduct to be protected, it must make reference to a protected class or type of discrimination. *Tomanovich v. City of Indianapolis*, 457 F.3d 656 (7th Cir. 2006). If an employee only refers to lost benefits is not protected conduct under Title VII. *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997 (7th Cir. 2000). Informal complaints made to an employer are protected. *Davis v. Time Warner Cable of Southeastern Wisconsin, L.P.*, 651 F.3d 664 (7th Cir. 2011). Where an employer loans an employee's services to another employer, Title VII protects the employee against retaliation by either entity. *Flowers v. Columbia Coll. Chi.*, 397 F.3d 532 (7th Cir. 2005).

c. Retaliation for "Opposition": Title VII also prohibits discrimination against an employee or applicant "because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The opposition clause protects an employee who complains of discrimination, whether he makes an affirmative complaint or simply responds to his employer's questions. *Crawford v. Metropolitan Gov't of Nashville*, 129 S.Ct. 846 (2009). The employee is protected if 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 violate Title VII. *Fine v Ryan Int'l Airlines*, 305 F.3d 746 (7th Cir. 2002); *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1043 (7th Cir. 1980). But, if the worker engages in protected activity that is unreasonable with a bad faith purpose, there is no protection. *Nelson v. Realty Consulting Services, Inc.*, 431 Fed.Appx. 502 (7th Cir. 2011); *Mattson v. Caterpillar, Inc*. 359 F.3d 885 (7th Cir. 2004); *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984) (court should balance disruption of plaintiff's work absence to attend protests against the protest's advancement of Title VII

policies). A complaint to one's employer concerning a third party harasser (i.e. clients or customers) may also trigger retaliation protection. *Pickett v. Sheridan Heath Care Ctr.*, 619 F.3d 434 (7th Cir. 2010).

d. **The Importance of Timing:** The amount of time that passes between the protected activity and the adverse employment action can be probative of the retaliatory motive. See e.g., *Burnell v. Gates Rubber Co.*, 647 F.3d 704 (7th Cir. 2011) (plaintiff being fired after a meeting in which he was accused of "playing the race card" establishes a question of material fact regarding causation sufficient enough to survive summary judgment); *Magyar v. St. Joseph Regional Medical Center*, 544 F.3d 766 (7th Cir. 2008) (on employer's Rule 56 motion, suspicious timing clock starts at most plaintiff-favorable time); *Lewis v. City of Chicago*, 496 F.3d 645, 655 (7th Cir. 2007); *Lang v. Ill.s Dep't. of Children & Family Servs.*, 361 F.3d 416 (7th Cir. 2004) (after years of positive evaluations, baseless complaints made after plaintiff's protected complaint); *Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720 (7th Cir. 2003) (holding a three-month time span between the protected activity and the alleged retaliation is not too long to support an inference of retaliation.); *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000). However, suspicious timing alone, without additional evidence and even as short as one week between protected activity and discharge, can be insufficient. *Culver v. Gorman & Co.*, 416 F.3d 540 (7th Cir. 2005); *Pugh v. City of Attica*, 259 F.3d 619 (7th Cir. 2001); *see also Hall v. Forest River, Inc.* (7th Cir. 2008) (holding that "the mere fact that one event preceded another does not prove causation," especially when the alleged retaliation is a failure to promote). A supervisor's hostility following a discrimination complaint can support an inference of causation. *Pickett v. Sheridan Heath Care Ctr.*, 619 F.3d 434 (7th Cir. 2010) (citing supervisor comments such as "nothing is going to change" and "why don't you go elsewhere"). For a helpful circumstantial evidence retaliation analysis, albeit in a First Amendment case, see *Valentino v. Village of South Chicago Heights*, 575 F.3d 664 (7th Cir. 2009).

e. **Application of *McDonnell-Douglas*:** Plaintiffs may use the *McDonnell-Douglas* burden-shifting formula in retaliation cases. To show a prima facie case, a plaintiff must show that she engaged in protected activity under Title VII; that she suffered an adverse action; and that there is a causal link between the two under either the direct or indirect method of proof. *O'Neal v. City of Chicago*, 588 F.3d 406 (7th Cir. 2009); *See also Tomanovich v. City of*

Indianapolis, 457 F.3d 656, 662-663 (7th Cir. 2006); *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 642-644 (7th Cir. 2002). How clear the causal connection must be in order to establish the prima facie case is still unclear. Some judges require a direct causal connection between the two while others have only required the plaintiff to establish that he or she was performing his or her job satisfactorily when he or she experienced the adverse action following his or her protected activity. *See e.g. Burnell v. Gates Rubber Co.*, 647 F.3d 704 (7th Cir. 2011); *Culver v. Gorman & Co.*, 416 F.3d 740 (7th Cir. 2005); But see, *Johnson v. Cambridge Indus.*, 325 F.3d 892 (7th Cir. 2003) (holding that a causal link is unnecessary to establish a prima facie case) *and Sublett v. Wiley & Sons*, 463 F. 3d 731, 740 (7th Cir. 2006) (same). Circumstantial evidence can suffice. *See e.g., Sylvester v. SOS Children's Villages Illinois, Inc*. 453 F.3d 900 (7th Cir. 2006).

f. **Employment-Related Nature of Retaliation:** The retaliation need not be employment related, but it must involve "real harm." *Johnson v. Cambridge Indus.*, 325 F.3d 892, 902 (7th Cir. 2003); *See also Metzger v. Ill. State Police*, 519 F.3d 677 (7th Cir. 2008); *Szymanski v. County of Cook*, 468 F.3d 1027 (7th Cir. 2006); *Harris v. Firstar Bank Milwaukee, N.A.*, 97 Fed.Appx. 662, 665 (7th Cir. 2004). For example, the denial of a consulting contract, while not strictly employment related, may be actionable. *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632 (7th Cir. 2004).

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

h. **Post-employment retaliation:** Retaliation claims are actionable even if the defendant no longer employs the plaintiff at the time of filing an EEOC charge and at the time of the alleged retaliation. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *See also Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 712 (7th Cir. 2008) (spreading derogatory rumors about the plaintiff after she filed an EEOC charge was actionable, even though the plaintiff was no longer employed by defendant).

5. **Adverse Action:** An employment action is materially adverse if it would deter a reasonable worker from complaining of discrimination. *Burlington Northern v. White*, 126 S.Ct. 2405 *(*2006); *Washington v. Ill. Dep't. of Revenue*, 420 F.3d 658 (7th Cir. 2005). It follows that the range

of conduct prohibited under the retaliation provisions of Title VII is *broader* than the range of conduct prohibited under the discrimination provisions. *Lewis v. City of Chicago* 496 F.3d 645, 654-55 (7th Cir. 2007).

a. **Examples of Actionable Adverse Actions:** Besides discharge, demotion, lack of promotion, harassment and retaliation, other "adverse" conditions of employment can be actionable, such as loss of a more distinguished title, loss of benefits, or diminished job responsibilities. *Lewis v. City of Chicago*, 496 F.3d 645, 653 (7th Cir. 2007) (distinguishing between adverse action for retaliation and for other types of disparate treatment); *Tart v. Ill. Power Co.*, 366 F.3d 461 (7th Cir 2004) (reviewing cases). Adverse action may also include firing a family member in response to an employee filing a complaint. *Thompson v. North American Stainless*, 131 S.Ct. 863 (2011) (firing the employee's fiancé constitutes retaliation by the employer). Additional examples of adverse action include: *Timmons v. Gen. Motors Corp.*, 469 F.3d 1122 (7th Cir. 2006) (material diminution of responsibilities even in the absence of a diminution of compensation); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (denial of a raise and underpayment for work); *Patt v. Family Health Sys. Inc.*, 280 F.3d 749 (7th Cir. 2002) (change in responsibilities that prevents career advancement); *Russell v. Bd. of Trs.*, 243 F.3d 336 (7th Cir. 2001) (5-day suspension plus misconduct charge in personnel file); *Stutler v. Ill. Dep't. of Corr.*, 263 F.3d 698 (7th Cir. 2001) (retaliatory harassment); *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000) (denial of raise and denial of temporary promotion); *Place v. Abbott Labs.*, 215 F.3d 803 (7th Cir. 2000) (medical exam upon return from leave); *Malacara v. Madison*, 224 F.3d 727 (7th Cir. 2000) (failure to train an employee); *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000) (career ending performance review).

b. **Constructive discharge:** In order to succeed on a claim for constructive discharge, a plaintiff must show that the harassment made her working conditions so severe that a reasonable person would have resigned. *Pa. State Police v. Suders*, 124 S.Ct. 2342 (2004). Claims for constructive discharge are quite difficult to prove because courts typically require extremely intolerable conditions before crediting an employee with a constructive discharge. *Griffin v. Potter*, 356 F.3d 824 (7th Cir. 2004) (change in work location not materially adverse and does not justify constructive discharge); *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662 (7th Cir. 2001). *Cf. Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (jury could find that a reasonable person had no

choice but to resign after repeated complaints of sexual harassment were ignored); *Patton v. Keystone RV Co.*, 455 F.3d 812 (7th Cir. 2006) (sexual harassment sufficient to constitute 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, it defines "race" quite broadly, to mean identifiable classes of persons based on their ancestry or ethnic characteristics. For example, Section 1981 has been applied to discrimination against groups such as blacks, whites, Latinos, Jews, Iraqis, and Arabs. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). *See Pourghoraishi v. Flying J*, 449 F.3d 751 (7th Cir. 2006) (collecting cases); *see also Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 712 (7th Cir. 2008)..

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). A plaintiff can make a claim under Section 1981 *only* if she has rights under the existing contract that she wishes to enforce. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

4. Section 1981 authorizes retaliation claims. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007) upheld by *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (U.S. 2008).

C. Differences from Title VII: Section 1981 discrimination claims are analyzed in the same manner as claims brought pursuant to Title VII of the Civil Rights Act. *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 389 (7th Cir. 2010). However, there are some differences, which are listed below.

1. Section 1981 applies to *all employers* regardless of size, unlike Title VII's restriction to employers with 15 or more employees. Individual supervisors may be named under Section 1981 (though not under Title VII), if they personally harassed or discriminated against the plaintiff. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 753 (7th Cir. 1985).

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 intentional discrimination. *General Bldg Contractors Ass'n 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 most employment based § 1981 claims is four years. The Supreme Court in *Jones v. R.R. Donnelley*, 541 U.S. 369 (2004) held that a four year statute of limitations applied to any claims that were made possible by a post-1990 enactment.

6. It is important to note that following *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), it is doubtful that a plaintiff can bring a *Price Waterhouse* mixed motive claim under section 1981.

D. State Law Tort Claims: If a plaintiff can make out a tort law claim independent of any duties derived from the Illinois Human Rights Act, the tort is not preempted by the Illinois Human Rights Act and can be added to a federal court complaint. *Naeem v. McKesson*, 444 F.3d 593 (7th Cir. 2006); *Maksimovic v. Tsogalis*, 177 Ill.2d. 511 (Ill. 1997).

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); See also Hill v. Potter, 352 F.3d 1142, 1145-46 (7th Cir. 2003); *Vela v. Sauk Vill.*, 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. *Filipovic v. K &R Express Sys., Inc.*, 176 F.3d 390, 395 (7th Cir. 1999); *Marlowe v. Bottarelli*, 938 F.2d 807, 813 (7th Cir. 1991); *Sofferin v. Am. Airlines, Inc*., 923 F.2d 552, 553 (7th Cir. 1991).

   a. **Equitable Tolling:** 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 Coll.*, 535 U.S. 106, 122 S.Ct. 1145 (2002). Equitable tolling may delay the statute of limitations until such time as the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) her injury. *Allen v. CTA*, 317 F.3d 696 (7th Cir. 2003) (tolling allowed where plaintiff did not know that failure to promote was race based); *Clark v. City of Braidwood*, 318 F.3d 764 (7th Cir. 2003). *Cf. Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854 (7th Cir. 2005) (tolling asks whether a *reasonable plaintiff* would have been aware of possibility of discrimination).

   b. **Equitable Estoppel:** For "equitable estoppel" to apply (as opposed to equitable tolling), a plaintiff must show that the employer prevented the plaintiff from filing suit (e.g., concealed the claim or promised not to plead the statute of limitations). *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621 (7th Cir. 2002).

   c. **The 300-Day Statute of Limitation Period for Discrete Acts:** The period starts to run when the discriminatory act occurs, not when the last discriminatory effects are felt. *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980). Discrete discriminatory acts (such as termination, failure to promote, refusal to hire) are not actionable if time barred, even if they are related to other still timely

discriminatory acts. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854 (7th Cir. 2005). For example, 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). Each allegedly discrete, discriminatory act starts a new clock for filing a charge so as to each discrete act of alleged discrimination, the plaintiff has 300 days to file a charge with the E.E.O.C. from each discrete act. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *See also Roney v. Ill. Dep't. of Transp.*, 474 F.3d 455, 460; *Plantan v. Harry S. Truman College*, Case No. 10-cv-108 (N.D.Ill. Oct. 28, 2011) (*Available at*: 2011 WL 5122691). Additionally, an employer's current refusal to reverse a previous discriminatory act does not revive an expired limitations period; rather, it begins a new limitation period for the discriminatory refusal. *Sharp v. United Airlines, Inc.*, 236 F.3d 373 (7th Cir. 2001). It is important to note that even if discrete acts are not actionable because they are untimely, they may be relevant to actionable, timely events and therefore admissible. *West v. Ortho-McNeil Pharm. Corp.*, 405 F.3d 578 (7th Cir. 2005); *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696 (7th Cir. 2001).

d. **Disparate Impact:** A plaintiff who does not file a timely charge challenging the *adoption* of a practice may assert a disparate impact claim in a timely charge challenging the employer's *application* of that practice. *Lewis v. City of Chicago*, 130 S.Ct. 2191 (2010).

e. **Continuing Violations:** Plaintiff may try to allege a continuing violation, linking a series of discriminatory acts with at least one occurring within the charge-filing period. Courts struggled for many years to define a principled basis for the continuing violations theory. The Supreme Court provided some guidance for individual disparate treatment cases in the *Morgan* case.

(i) **Equal Pay:** In *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) the Supreme Court limited the application of continuing violation theory in equal pay cases. Congress acted to overturn this decision in the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2. In the Act, Congress clarified "that a discriminatory compensation decision or other practice that is unlawful under [Title VII] occurs *each time* compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes."

f. **E.E.O.C. Charge Intake Questionnaire**: The simple act of filling out an E.E.O.C. charge intake may suffice as an EEOC charge. *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).

g. **Harassment Context:** Because hostile work environment claims require repeated conduct, continuing violation theory applies to these claims. In other words, so long as one act of harassment occurs within the statutory time period, all prior acts that are part of the same harassment pattern are actionable. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

3. **Investigation:** The EEOC's investigation may include a request for information regarding the respondent's position, witness interviews, and a request for documents. The EEOC has the power to issue subpoenas in connection with an investigation. 42 U.S.C. § 2000e-9. Plaintiff's counsel may request a copy of the EEOC's investigative file under FOIA and under Section 83 of the EEOC's Compliance Manual.

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). If there is a reasonable cause finding, the EEOC must attempt to conciliate the claim. 28 C.F.R. § 42.609(a)(2003).

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)(2003);

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)(2003);

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)(2003); 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 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 that 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.

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. *See Maalik v. International Union of Elevator Constructors,* 437 F.3d 650 (7th Cir. 2006) (union liable for refusing to take steps to encourage its members to train plaintiff, an African American woman); *Randolph v. Indiana Regional Council of Carpenters,* 453 F.3d 413 (7th Cir. 2006) (union could be liable for refusing to put plaintiff on work list because of her gender or age).

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).

4. Sufficiency of Complaint: The Seventh Circuit has long held that a Title VII complaint need not track the *McDonnell-Douglas* formula; like all civil complaints, it need only be a short and plain statement. *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007). But, the Supreme Court

arguably recently raised the pleading standard in two non-employment cases. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court held that a complaint must state a claim that is *plausible* on its face. *See also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). After *Bell Atlantic*, the Seventh Circuit held that a Title VII complaint must "describe the claim in sufficient detail to give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests,'" and that "its allegations must plausibly suggest that the defendant has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007) (citations omitted). "Acknowledging that *a complaint must contain something more than a general recitation of the elements of the claim*," however, the court in *Concentra* "nevertheless reaffirmed the minimal pleading standard for simple claims of race or sex discrimination." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008) (Emphasis added); *See also Swanson v. Citibank, N.A.* 614 F.3d 400 (7th Cir. 2010) (setting forth what individual disparate treatment plaintiff must plead).

B. **Scope of the Title VII Suit:** A plaintiff may pursue a judicial claim not explicitly included in an EEOC charge *only if* the claim falls within the scope of the EEOC charge. *Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 602 (7th Cir. 2009): *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 550 (7th Cir. 2002). In determining whether the current allegations fall within the scope of the earlier charges, the court looks at whether the allegations are like or reasonably related to those contained in the EEOC charge. *See e.g. Irby v. Bd. of Educ. of City of Chicago*, Case No. 10-cv-3832 (N.D.Ill. April 20, 2011) (quoting *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994)) (*Available at*: 2011 WL 1526732) (Explaining "Claims are deemed reasonably related if there is a factual relationship between them. 'This means that the E.E.O.C. charge and the complaint must, at a minimum describe the same conduct and implicate the same individuals.'") 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. *Geldon v. South Milwaukee Sch. Dist.*, 414 F.3d 817 (7th Cir. 2005); *McGoffney v. Vigo County Div. of Family & Children Servs.*, 389 F.3d 750 (7th Cir. 2004) (charge held to cover only one denial of promotion, despite references to other promotions). Adverse employment actions, which occur *after* the plaintiff's final E.E.O.C. charge, are generally not deemed reasonably related to the E.E.O.C. *See e.g., Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 602 (7th Cir. 2009).

C. **Timeliness in a Title VII Suit:** A judicial 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 the complaint is subject to dismissal until issuance of the right-to-sue. *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 Coll.*, 744 F.2d 1314, 1316 (7th Cir. 1984). It is important to note that the term "delivered" refers to the point at which the plaintiff *or his or her agent* actually receives the right-to-sue letter. *DeTata v. Rollprint Packaging Products, Inc.*, 632 F.3d 962, 967-968 (7th Cir. 2011); *Prince v. Stewart*, 580 F.3d 571, 574 (7th Cir. 2009); *Threadgill v. Moore, U.S.A., Inc.*, 269 F.3d 848, 849-50 (7th Cir. 2001). If the plaintiff's attorney or even her former attorney receives the right-to-sue letter, this receipt may suffice to start the clock. *Reschny v. Elk Grove Plating Co.*, 414 F.3d 821 (7th Cir. 2005).

2. Solely oral notice that the EEOC has issued a right-to-sue letter is insufficient to commence running of the 90-day limitations period. *DeTata v. Rollprint Packaging Products Inc.*, 632 F.3d 962 (7th Cir. 2011).

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.

D. Timeliness in a § 1981 Suit: As discussed above, most § 1981 claims are now subject to a four-year statute of limititaions. Filing a complaint with the EEOC does *not* toll the running of the 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 Records Review Act, 820 ILCS 40/1 et seq. requires employers to give 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 violation of the Act where the only relief sought is 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 may not be

able to recover her attorneys' fees incurred after the date of the offer. *Payne v. Milwaukee County*, 288 F.3d 1021 (7th Cir. 2002).

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 in an individual Title VII case 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, if the employer shows that it would have taken the adverse employment action even absent discrimination, 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 1150 (7th Cir. 1998). Other injunctive relief includes expungement of an adverse personnel record, and an 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 against state, local, or federal governmental employers. 42 U.S.C. § 1981a(b)(1).

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). Medical evidence is not necessary to show emotional distress. *Farfaras v. Citizens Bank*, 433 F.3d 558 (7th Cir. 2006). But the award will be reduced if monstrously excessive, not rationally supported by the evidence, or out of line with awards in similar cases. *Marion County Coroner's Office v. EEOC*, 612 F.3d 924 (7th Cir. 2010)(reducing emotional distress award of 200k to 20k).

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. Am. Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118 (1999).

   The "malice" or "reckless indifference" necessary to impose punitive damages pertains to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. 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 (i.e., no good faith). *Bruso v. United Airlines, Inc.* 239 F.3d 848 (7th Cir. 2001); *Cooke v. Stefani Mgmt. Servs., 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 and the other giving a pretextual motive. *Fine v. Ryan Int'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). There need not be a one-to-one ratio between compensatory and punitive damages. *Pickett v. Sheridan Health Care Center* (7th Cir. 2010). *See also Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007) (holding the ratio between punitive damages and compensatory damages may be high when the compensatory damages are relatively low).

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).

C. Front Pay and Lost Future Earnings: Both front pay and lost future earnings 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 non-pecuniary 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 then must 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 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 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).

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. The 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 question unanswered in *Gilmer* and held that employment agreements containing an agreement to arbitrate an employment discrimination claim are 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 Col*, 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 *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 846(2009) the Supreme Court held that a collective bargaining agreement that clearly and unmistakably requires members to arbitrate statutory discrimination claims is enforceable. The Seventh Circuit had previously held that collective bargaining agreements cannot compel arbitration of statutory rights. *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997).

D. **Fact-Specific Defenses to Arbitration:** A plaintiff can assert contract defenses to an arbitration agreement. *See Tinder v. Pinkerton Sec.*, 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). *But see Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997) (arbitration agreement was unenforceable because the employer did not give the employee any consideration for her agreement to arbitrate). 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 Mgmt. 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.

E. **Class Actions**: Arbitrators cannot decide class claims unless the arbitration policy expressly provides for arbitration of these claims. *Stolt-Nielsen v. Animal Feeds Int'l Corp.*, 130 S.Ct. 1758 (2010)