

**THE YEAR IN REVIEW: AN UPDATE OF THE MOST SIGNIFICANT CASES
UNDER EMPLOYMENT DISCRIMINATION (AND RELATED) STATUTES**

By Morris J. Baller¹
Goldstein, Demchak, Baller, Borgen & Dardarian
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
www.gdblegal.com

January 5, 2008

¹ The presenter gratefully acknowledges the assistance of Jinny Kim, Associate at Goldstein, Demchak, Baller, Borgen & Dardarian, in the preparation of this outline.

INTRODUCTION

This year's summary by a plaintiff's side employment lawyer, who specializes in class actions in his practice – my third annual Outline- focuses primarily on decisions of the federal appellate courts in employment discrimination cases and related procedural issues or statutes. However, several other recent decisions at the district court level are also noted where they touch on important issues before, or likely to confront the federal appellate courts. State court decisions and state law developments, including some of significance, as well as cases involving traditional labor law, are beyond the scope of this paper.

In order to provide coverage of at least twelve months of developments prior to the writing of this “annual summary,” some case decisions from the latter part of 2006, or earlier decisions in which appellate review was sought or granted in 2007, are included in this paper.

THE YEAR IN REVIEW

I. **Jurisdiction: Administrative Prerequisites to Filing Suit Under Title VII and the ADEA**

1. **Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S.Ct. 2162 (2007).**

In this, the most important decision of the past year in the area of employment discrimination law, the sharply divided U.S. Supreme Court, splitting 5-4 with Justice Alito writing for the majority and Justice Ginsburg penning the dissent, took a narrow view of when a Title VII plaintiff in an individual disparate treatment case must have filed an EEOC charge after a succession of allegedly discriminatory pay decisions had occurred. The decision also has great significance outside the context of compensation discrimination.

In March 1998, while employed at Goodyear, Ledbetter submitted an EEOC questionnaire and in July 1998 filed an EEOC charge alleging compensation discrimination. Following her retirement in November 1998, Ledbetter filed suit under Title VII against Goodyear for sex discrimination, specifically alleging that she was presently paid less than comparable male employees as a result of a series of pay decisions extending back many years. At trial, the jury awarded Ledbetter backpay and damages. On appeal, Goodyear argued that her pay discrimination claim was time barred for all pay decisions made more than 180 days (the local charge-filing period) before Ledbetter filed her EEOC questionnaire and that no discriminatory act relating to Ledbetter's pay occurred during the chargeable period. The Eleventh Circuit reversed the district court opinion, finding that a Title VII pay discrimination claim cannot be based on discriminatory events that occurred before the last pay decision that

affected the employee's pay during the EEOC charge-filing period – in Ledbetter's case, months but not years before she filed her charge.

In addressing the issue of whether Ledbetter's EEOC charge was timely filed, the Supreme Court relied primarily on National Passenger Railroad Corp. v. Morgan, 536 U.S. 101 (2002), but also on its earlier decisions in United Air Lines, Inc. v. Evans, Delaware State College v. Ricks, and Lorance v. AT&T Technologies, Inc. [citations omitted], and distinguished Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam). The Court interpreted (or erroneously re-interpreted, according to the dissenting opinion) earlier decisions relating to “continuing violation” and timeliness issues to identify the specific employment practice at issue and its relationship to the time of filing the EEOC charge. The Court held that the later effects of past discrimination, at least in cases of intentional discrimination and in the context of “discrete” compensation decisions, do not restart the clock for filing an EEOC charge. Applying this view, the Court ruled that because the last allegedly intentionally discriminatory decision determining Ledbetter's pay occurred outside the charge-filing period, her charge was not timely filed even though she continued to earn less than comparable males due to the past discrimination.

The key factors in the Court's reasoning were the holdings that (1) a pay-setting determination not based on a previously established and knowingly maintained “discriminatory pay structure” (like that found to exist in Bazemore) is not itself a discriminatory action that re-starts the charge-filing period; and (2) the issuance of paychecks at a compensation rate lowered by past discriminatory pay decisions, without more, is not a new and chargeable incident of discrimination.

Since the Ledbetter decision in May 2007, defendants in Title VII cases have wielded its holding and reasoning as a shield against other types of discrimination claims that could arguably be said to involve only the continuing effects of pre-charge period discriminatory acts, or a series of actions over time, such as promotions. Defendants have also used Ledbetter to argue that, in statistical analyses of the effects of employment decisions (such as promotions, compensation, or performance evaluations), only those decisions within the charge-filing period may be properly used to show adverse impact. Plaintiffs argue in response that Ledbetter has no application to adverse impact cases and class actions, where intent – at least at an individual decision level – is not the focus of the claim. The application of Ledbetter in a variety of such cases, and particularly to (1) Title VII cases on an adverse impact theory and (2) class actions, including pattern and practice actions requiring proof of intent that are not within the specific holding of Morgan (which dealt with hostile environment harassment claims), is being sharply contested in many cases and will no doubt be the subject of clarifying appellate decisions to come.

2. **Gordon v. Shafer Contracting Co., Inc., 469 F.3d 1191 (8th Cir. 2006).**

The Eighth Circuit did not reach the question, now pending before the Supreme Court (see the next case described below), of whether the filing of an EEOC intake questionnaire within the charge-filing period (300 days in the jurisdiction involved there) by an employee, who did not file an otherwise timely EEOC charge, satisfies the charge-filing requirement of Title VII and the ADEA. The court affirmed the lower court's dismissal of the plaintiffs' claims on their (lack of) merits, thereby sidestepping the question described above but briefly noting, in reliance on Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) and following circuit authority that filing a timely charge was not a jurisdictional prerequisite to bringing a federal court action. The court did not specifically address the position advanced by the EEOC in an amicus brief that the plaintiff's claims were not time-barred because he completed an EEOC Intake Questionnaire within 300 days of the adverse employment action.

3. **Holowecki v. Federal Express Corp., 440 F.3d 558 (2d Cir. 2006), cert. granted, 127 S.Ct. 2914 (2007).**

The Second Circuit held that the intake questionnaire and verified affidavit submitted by the plaintiffs to the EEOC constituted an EEOC "charge" sufficient to fulfill the ADEA's exhaustion requirements and that such a charge filed by one employee could be "piggy-backed" upon by eleven other plaintiffs who failed to file an EEOC charge or intake questionnaire. The Supreme Court granted certiorari, and heard oral argument on November 6, 2007.

Like the Eighth Circuit in Gordon, described above, the Second Circuit began by noting that the charge-filing requirement is not jurisdictional, citing Zipes and following Second Circuit case law. However, it proceeded to write a detailed and nuanced opinion on the question of what type of administrative submission satisfies the administrative prerequisites of the ADEA (and, presumably, Title VII). In keeping with decisions of several other circuits, the court held that an employee's written submission to the EEOC satisfies the charge filing requirement "only when the writing demonstrates that an individual seeks to activate the [EEOC's] administrative investigatory and conciliatory process." Thus, an individual who thereby invokes EEOC's processes "is not foreclosed from federal suit merely because the EEOC fails to follow through with notifying the employer and attempting to resolve the matter through 'conciliation, conference, and persuasion,'" so long as the submitted writing provided the information required in a more formal EEOC charge, as specified in EEOC regulations (29 CFR §1226).

4. Forester v. Chertoff, 500 F.3d 920 (9th Cir. 2007).

In this action under the ADEA by a federal employee, the court applied the ADEA's "bypass provision" under which federal employees can bypass the EEOC administrative requirements and file directly in district court if they file a notice of intent to file a civil action with the EEOC within 180 days of the discriminatory conduct and then wait 30 days before filing a civil action. The Ninth Circuit granted equitable tolling of the limitations period to plaintiffs, federal employees who prematurely filed their ADEA lawsuit in district court without waiting the requisite 30 days.

In reaching its decision, the court relied on the Supreme Court's decision in Arbaugh v. Y & H Corp., 546 U.S. 500, 126 S.Ct. 1235 (2006) in which the Court stated that "in recent decisions, we have clarified that time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" Arbaugh, 126 S.Ct. at 1242. The Court also relied on the Supreme Court's decisions in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), and Stevens v. Department of Treasury, 500 U.S. 1 (1991), and concluded that the 30 day waiting period was not jurisdictional and could be "forfeited, waived or equitably modified." In reaching its decision, the court distinguished the case at hand with the approach taken by the Ninth Circuit in Dempsey v. Pacific Bell Co., 789 F.2d 1451 (9th Cir. 1986), an ADEA case which strictly construed the 60 day time period a private employee must wait after filing an EEOC charge and before filing a lawsuit

This decision applies only to federal employee actions under the ADEA since there is no bypass provision applicable to the ADEA for private employees. In reaching its decision, the court reasoned that to hold otherwise would frustrate the humanitarian purpose of the ADEA to end age discrimination in employment and found that defendants would suffer no prejudice, the plaintiffs were under the mistaken belief that they needed to file their lawsuit earlier, and the interests of justice supported the result.

II. Substantive Discrimination Decisions Under Title VII

A. Disparate Treatment Discrimination

1. Jackson v. Gonzales, 496 F.3d 703 (D.C. Cir. 2007).

The D.C. Circuit affirmed summary judgment for the employer who selected a job candidate on the basis that she was more qualified and had more experience with a particular data management tool that was not specifically listed as a qualification on the job description, vacancy announcement or given as a reason for the applicant's low ranking of his knowledge, skills and abilities for the position. The court held that

comparative qualifications between two applicants for a position was not a pretext for discrimination and the fact that the employer hired someone based on a general job description did not raise an inference of discrimination which was sufficient to overcome summary judgment. The court reasoned that although the ability to use the particular management tool was not expressly listed in the job description, it was encompassed by the job description and vacancy announcement in seeking applicants with the “ability to use statistics to describe and predict trends,” “ability to manage resources, and ability to assign responsibility and delegate authority,” and “knowledge of statistical computer programs” and “computer software.”

In dissent, Judge Rogers focused on the employer’s motion for summary judgment which stated that the data management tool experience was the “overriding objective” in hiring someone for the position. The dissent questions the employer’s stated reasons for not hiring the plaintiff and found that if experience with the data management tool was truly the “overriding objective” in filling the position, “common sense” would dictate that the qualification would be specifically listed in the job description. The dissent recognized that plaintiff’s pretext argument had merit and raised material issues of disputed fact and stated, “while courts must be sensitive to the necessary and appropriate realities of hiring processes, courts cannot ignore, in determining whether summary judgment is appropriate, evidence that raises a material question of fact and be so deferential as to allow employers to mask unlawful discrimination with post-hoc justifications for employment decisions.”

2. **Hossack v. Floor Covering Associates of Joliet, Inc., 492 F.3d 853 (7th Cir. 2007).**

The Seventh Circuit held that the plaintiff did not introduce sufficient evidence of intentional discrimination. In this case, a female employee was terminated for having an extramarital affair with a male co-worker, who was not terminated. The female employee brought suit for sex discrimination under Title VII. After a hearing, the trial court set aside the jury’s verdict for the employee and entered judgment as a matter of law in favor of the employer finding that no reasonable jury could have found that the female employee was a victim of intentional discrimination without engaging in speculation.

Because the Seventh Circuit was reviewing the district court’s entry of judgment as a matter of law, it concluded that the McDonnell Douglas burden-shifting analysis no longer applied. Rather, it found that during and after any Title VII trial, the only issue was whether the plaintiff presented sufficient evidence to determine whether she was a victim of intentional discrimination. The court relied on St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993) and found that once a defendant

comes forward with a nondiscriminatory reason for its action, the McDonnell Douglas analysis “simply drops out of the picture.” The court also relied on Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148-49 (2000) and determined that the plaintiff had not introduced sufficient evidence for a jury to conclude that she was discriminated against because she was a woman. The court found that the employee was terminated because the employer feared her husband would carry out his threats and that the male employee was not terminated because he was the top salesperson and more important to the company and there was no evidence to establish that the company’s rationale was pretext.

3. Noyes v. Kelly Services, 488 F.3d 1163 (9th Cir. 2007).

In a reverse religious discrimination case, the Ninth Circuit reversed and remanded the district court’s granting of summary judgment for the employer because it misapplied the U.S. Supreme Court’s decision in St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 510-11 (1993), and applied an unduly heavy burden on the employee to show pretext by showing both that the employer’s proffered reason for the promotion decision was false and that discrimination was the real reason for promoting the other candidate over the plaintiff. The court concluded that by placing the burden on the employee to show evidence on both questions, the district court was making a determination on the merits rather than determining whether there were triable issues of fact.

In addition, in this opinion, the Ninth Circuit for the first time sets forth the standards it will apply in determining whether a plaintiff makes a prima facie case of reverse religious discrimination. The court approved the district court’s application of Godwin v. Hunt Wesson, Inc., 150 F.3d 1217 (9th Cir. 1998), a failure to promote case, which requires an employee to show: (1) she belongs to a protected class; (2) she was performing according to her employer’s legitimate expectations, (3) she suffered an adverse employment action, and (4) other employees with qualifications similar to her own were treated more favorably. The court recognized that although the protected class element was not the same in the two cases - plaintiff was not a member of a protected class but rather her lack of membership in a particular religion was the basis of her discrimination claim - it was appropriate to tailor the prima facie case elements to the circumstances of each case using the same general standards.

B. Disparate Impact Discrimination

1. Adams v. City of Chicago, 469 F.3d 609 (7th Cir. 2006), cert. denied, 127 S.Ct. 2141 (2007).

The City of Chicago administered a 1994 promotional examination for police sergeants, and made 1997 promotions based on the 1994 examination, which was valid but had an adverse impact on African American and Hispanic police officers. The City received a task force's recommendation to make 30% of promotions based on "merit," defined as officers' on-the-job performance, one month before the 1997 promotions were made. However, the City did not utilize the "merit"-based promotional system, in making the 1997 promotions; instead, it based the promotions solely on the written test. Plaintiffs challenged the 1997 promotions on the grounds that in basing them on the test, the City failed to use a less discriminatory and equally valid alternative, namely the "merit" system, and attempted to introduce evidence that the City had used the "merit" system for later promotions, made in 1998, with satisfactory results. The district court excluded that evidence as inadmissible under FRE 407 (subsequent remedial measures not admissible to show prior practices injurious) and also on relevancy grounds, and granted summary judgment to the defendant because the officers did not meet their burden of establishing disparate impact by showing that defendant refused to adopt an alternative employment practice.

The Seventh Circuit affirmed the grant of summary judgment, although it found that the district court abused its discretion in excluding evidence of the 1998 promotion process. The court held that plaintiffs had the burden of showing that Chicago had an equally valid and less discriminatory alternative available at the time it made the 1997 promotions, but failed to meet their burden. In its holding, the court noted that the recommendation to make "merit" promotions was made just one month before the 1997 promotions, before Chicago had a chance to consider the recommendation, develop a "merit" promotion procedure, and implement the procedure. Moreover, the court noted that plaintiffs failed to show the alternative would be as valid as the test. In dissent, Judge Williams argued that Chicago, having been provided an equally valid, less discriminatory alternative to exclusive reliance on testing and having failed to move promptly to adopt it, had not shown, to the extent of the summary judgment standard, that no viable alternative was "available."

C. Sex Discrimination (Including Pregnancy Discrimination Act Issues) and Sexual Harassment

1. Hulteen v. AT&T Corp., 498 F.3d 1001 (9th Cir. *en banc* 2007).

In this case, the employer’s retirement program required that in calculating employee pension and retirement benefits, time spent on pregnancy leave prior to the effective date of the Pregnancy Discrimination Act’s amendment to Title VII, which became effective in 1979, and which required employers to treat pregnancy the same as other types of leave-justifying conditions, would not count toward the employee’s service time, although other types of leave time would count. The Ninth Circuit, in an *en banc* rehearing, held that such a rule violates Title VII when applied to a retirement effective many years later.

In 1977, AT&T and its predecessor companies classified pregnancy leaves as personal leaves which provided for a maximum of 30 days credit rather than a temporary disability leave which had no cap on the amount of credit. On the effective date of the Pregnancy Discrimination Act, April 29, 1979, the employer changed the policy to provide credit for pregnancy leaves on the same terms as other disability leaves yet credit adjustments were not made for employees, such as the plaintiffs, who had taken a pregnancy leave under the old system.

The district court granted the plaintiffs’ motion for summary judgment but the three judge panel reversed, holding that Pallas v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991), cert. denied, 502 U.S. 1050 (1992) - in which the Ninth Circuit held that the employer violated Title VII when it gave service credit for all temporary disability leave taken by employees except for pregnancy leave – was not applicable following Landgraf v. USI Film Prods., 511 U.S. 244 (1994), which held that clear congressional intent is necessary for a statute to be given retroactive application, finding that Congress had not so indicated in the PDA. Hulteen v. AT & T Corp., 441 F.3d 653, 664 (9th Cir. 1994).

The *en banc* decision upheld the validity and applicability of Pallas and found that it was not “clearly irreconcilable” with Landgraf. The court also rejected AT&T’s argument that Pallas must be overruled because it relied on the “continuing violations” theory which was limited in National Railroad Passenger Corp. v. Morgan, 536 U.S. 202 (2002), finding Morgan inapposite for several reasons (i.e., because the plaintiffs in Hulteen had filed their EEOC charges within the statutory period, Morgan sought damages, and Pallas involved a retirement credit system whereas Morgan involved hostile environment claims). In upholding the decision of the district court, the *en banc* court looked at the plain language of the PDA that employers must treat “women affected by pregnancy...the same for all employment-related purposes” and found that

Hulteen was “affected by pregnancy” when she took pregnancy leave and when AT&T later chose to calculate her retirement service credits without giving credit for that leave.

In the dissenting opinion, the minority noted that the majority’s opinion creates a circuit split with the Sixth and Seventh Circuit. The dissent favored the Seventh Circuit’s approach in Ameritech Benefit Plan Committee v. Communications Workers of America, 220 F.3d 814 (7th Cir. 2000) which held that a cause of action for intentional discrimination accrues at the time the plaintiff is injured by the challenged system - when she is denied benefits - and that Hulteen could not show that AT&T adopted the pre-Pregnancy Discrimination Act leave rules with an intentionally discriminatory purpose.

AT&T filed a petition for certiorari on October 22, 2007.

2. **In re Union Pacific Railroad Employment Prac. Litig., 479 F.3d 936 (8th Cir. 2007).**

This decision of the Eighth Circuit is the first federal appellate decision to directly consider the lawfulness, under the Pregnancy Discrimination Act amendments to Title VII, and the basic prohibition on gender discrimination under Title VII, of an employer’s exclusion of prescription and non-prescription contraceptive medical materials and services when used solely for prescription. The Eighth Circuit panel majority, after noting a wide split among district courts that had addressed the same and closely related issues and over a strong dissent, held that a health plan which excluded such contraception from its benefits violated neither the PDA nor Title VII. The debate between the majority and the dissenting judge centered on the framework within which the exclusion of contraception was to be viewed. The majority defined that framework as limited to contraceptive materials and services, which it found to be denied equally to both men and women under the plan. The dissent saw the framework as including all preventative medical care, including both contraceptive and non-contraceptive services such as baldness prevention.

Proceeding from its more limited framework, the majority examined the PDA language defining sex as a prohibited basis of discrimination under Title VII as encompassing “pregnancy, childbirth, or related medical conditions,” and protecting “women affected by” such, inter alia, “related medical conditions” (emphasis added). The court held contraception not “related to” pregnancy for PDA purposes, in large part because contraception occurs prior to pregnancy and actually prevents pregnancy from occurring. The majority analogized contraception to infertility treatments, whose exclusion from plan coverage the court had previously held, in Krauel v. Iowa Methodist Medical Center, 95 F.3d 674 (8th Cir. 1996), as not in violation of the PDA; and rejected the analogy

offered by the employee plaintiffs, to the “potential pregnancy” condition that the Supreme Court held, in Int’l Union, etc. v. Johnson Controls, 499 U.S. 187 (1991), provided the basis for its decision striking down job restrictions on women of child bearing age to constitute unlawful sex discrimination. Further the majority rejected the employees’ attempts, aided by numerous Congresspersons who submitted an amicus curiae brief on this point, to show that the legislative history of the PDA supported their broad interpretation of the “related to” language of the Act as extending to all matters associated with pregnancy, including its avoidance; and further rejected as unpersuasive and not binding the EEOC’s “Commission Decision” interpreting the PDA to require insurance policies that cover other preventative medical treatments to include contraception. Under Title VII, the majority found that exclusion of contraception did not constitute disparate treatment of women, relying on its framework for analysis with the observation that the subject plans denied coverage for contraception to men and women alike.

Judge Bye’s dissenting strongly worded and reasoned opinion finds it plain that a plan which excludes preventative medical care “used exclusively by females” but not preventative care “used exclusively by males” violates the PDA and Title VII’s core prohibitions of sex discrimination. The dissent adopts a “health paradigm” for its analysis, and under this view finds that since only women’s health can be burdened by pregnancy, an exclusion of contraception burdens only one sex in violation of the equal treatment principles underlying both statutes. Moreover, the dissent interprets the “related to” language of the PDA as clearly encompassing contraception, and points out that the distinction between contraception and medical coverage of pregnancy itself, on the grounds that contraception occurs before and in avoidance of pregnancy, is untenable in light of the Supreme Court’s decision in Johnson Controls striking down a restriction based on a potential (therefore “pre-”) pregnancy basis; and analyzes Krauel as based not on a pre-post conception distinction but rather on the fact that the plan in question denied coverage for infertility to both men and women. The dissent also found persuasive legislative history to support its conclusion that Congress intended to include contraception in the matters “related to” pregnancy for PDA purposes.

3. Scheidemantle v. Slippery Rock University State System of Higher Educ., 470 F.3d 535 (3rd Cir. 2006).

In a failure to promote case, the district court granted the employer’s motion for summary judgment on the basis that under McDonnell Douglas, the applicant could not establish a *prima facie* case of discrimination because she failed to meet the qualification prong based on the objective criteria listed in the position announcement. Scheidemantle applied for a locksmith position in which she and the three

other male applicants lacked the job posting requirement of two years of experience. The person selected for the position also lacked the two years of experience. The Third Circuit reversed and remanded and found that when the employer departed from the objective requirements in its hiring decision, the employer established different qualifications in which the applicant then met the qualifications prong and established a prima facie case of discrimination. In doing so, the court reasoned that because the employer placed similarly “unqualified males” in the locksmith position, it could no longer point to the job posting’s objective qualifications as a valid reason for refusing to promote the applicant.

4. Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781 (7th Cir. 2007).

The Seventh Circuit reversed a district court’s grant of summary judgment for an employer in this Title VII sex discrimination and Equal Pay Act case, holding, on the Title VII issue, that at least eighteen sexist or anti-female statements, although not sexually demanding or suggestive, made by the plaintiffs’ supervisor in less than a year, were sufficient to create a hostile work environment. The court also found that the evidence that the supervisor repeatedly subjected the plaintiff to offensive conduct, which could be seen as retaliatory actions, after plaintiff complained about him to human resources, and the employer’s failure to respond to the complaints, required reversal of the trial court’s grant of summary judgment on the plaintiff’s constructive discharge claim. The court further held that the denial of a raise to plaintiff and underpayment for hours she recorded on time cards constituted adverse employment actions that would support a prima facie case of disparate treatment.

On plaintiff’s claim that she was discriminatorily denied a raise that was given to a similarly-situated male co-worker, the court found that summary judgment was erroneously granted to the employer because a fact issue existed as to whether the plaintiff was similarly situated to the co-worker. The court reiterated its narrow definition of “similarly situated” as one who is “directly comparable [to the plaintiff] in all material aspects,” and specifically with regard to whether the compared employees (1) had the same job description; (2) were subject to the same standards; (3) were subject to the same supervisor; and (4) had comparable experience, education, and other qualifications.

D. Retaliation and Definition of Adverse Employment Action

On June 22, 2006, the U.S. Supreme Court issued its landmark decision in Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (2006), clarifying the standard for determining what constitutes an “adverse employment action” in a retaliation case under Title VII as including actions in the workplace that affect the terms, conditions or

status of employment, but also other adverse actions that “could dissuade a reasonable worker from making or supporting a charge of discrimination.” Since the Burlington Northern decision, courts have attempted determine for the scope and applicability of its standard for identifying an adverse employment action. For example, a number of courts have declined to apply Burlington Northern in discrimination cases because it only addressed the definition of adverse employment action in a retaliation action and its rationale in that context does not extend to ordinary discrimination complaints. Tepper v. Potter, ---F.3d---, 2007 WL 2983156, *7 (6th Cir. 2007); Buboltz v. Residential Advantage, Inc., 2007 WL 951548 (D. Minn. 2007); Wallace v. Georgia Dept. of Transp., 212 Fed. Appx. 799 (11th Cir. 2006). Similarly, other courts have found that Burlington Northern does not address the issue of pretext (Parker v. Univ. of Pennsylvania, ---Fed. Appx. ---, 2007 WL 2602210 (3rd Cir. 2007)); and does not address constitutional claims (Milano v. Astrue, 2007 WL 2668511 (S.D.N.Y. 2007)).

Court have also interpreted Burlington Northern’s decision as to what constitutes an “adverse employment action.” For example, in Jordan v. Chertoff, 224 Fed. Appx. 499 (7th Cir. 2006), the district court granted summary judgment for the employer on the plaintiff’s retaliation claim. The plaintiff filed a petition with the US Supreme Court which remanded the matter in light of Burlington Northern. The Seventh Circuit held that a federal employee’s request to be permanently assigned to her “detailed” position (a temporary assignment to a different position) was not retaliation because there was no available position. The Eighth Circuit has held that activities such as performance evaluations, aimed at the department as a whole, and not just the plaintiffs -- women in the department -- were not adverse employment actions. Weger v. City of Ladue, 500 F.3d 710 (8th Cir. 2007).

In identifying the limits of what should be determined an adverse action, the Tenth Circuit held that it does not require tangible, subjective psychological or monetary injury in order to find adverse action (Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079 (10th Cir. 2007). In Moses v. City of New York, 2007 WL 2600859 (S.D.N.Y. 2007), the court found that placing an employee under the supervision of intermediate managers, when it does not result in a change of job tasks, does not constitute an adverse action. The Eighth Circuit held that lack of supervision or mentoring is not an adverse employment action although the court recognized it could be if the plaintiff had put forth evidence that she was left to “flounder” or was negatively impacted by the lack of supervision or mentoring. Higgins v. Gonzales, 481 F.3d 578, 590 (8th Cir. 2007). The Higgins court further noted that a transfer in and of itself is not a materially adverse action without evidence that the new duties were more difficult, less desirable or less prestigious. Id. at 591. Similarly, courts have held that increased scrutiny does not constitute adverse action

(Moses, 2007 WL 2600859 (S.D.N.Y. 2007); Scott v. Celco Partnership, 2007 WL 1051687 (S.D.N.Y. 2007)); write-ups without loss of pay for failing to log hours and being out of uniform does not constitute adverse action (Secherest v. Lean Sielger Serv., Inc., 2007 WL 1186597 (M.D. Tenn. 2007)); being called worthless is the type of “petty slights, minor annoyances and simple lack of good manners” that does not constitute an adverse employment action (Gilmore v. Potter, 2006 WL 3235088 (E.D. Ark. 2006)); and letters from the employer requesting that an employee refrain from contacting other employees related to a pending EEO complaint is not an adverse employment action (Jones v. Johanns, 2007 WL 2694017 (6th Cir. 2007)).

Other courts, identifying what is an adverse action, have found that not being selected for a management skills program which contributes to professional advancement is a materially adverse employment action (Hare v. Potter, 220 Fed. Appx. 120 (3d Cir. 2007)); placing a police officer on a paid administrative leave is a “close question” but declining to answer the question on the particular facts of the case (McCoy v. City of Shreveport, 492 F.3d 551 (5th Cir. 2007)); lower performance evaluation scores that significantly impact an employee’s wages and professional advancement are materially adverse (Halfacre v. Home Depot, USA, Inc., 221 Fed. Appx. 424 (6th Cir. 2007); and denial of a raise is a material, adverse action (Bouhmedi v. Plastag Holdings LLC, 489 F.3d 781 (7th Cir. 2006) (see Outline at p. 11 above).

E. Parent Corporation’s Liability Under Title VII for Acts of Subsidiary

1. Veliz v. Novartis, 244 F.R.D. 243 (S.D.N.Y. 2007).

In this class action based on racial discrimination, the district court granted plaintiffs’ motion for class certification (see p. 24 of this Outline) as well as the motion of one defendant – the corporate parent of the company that directly employed the plaintiffs- for summary judgment on the basis that plaintiffs failed to show the parent corporation is subject to liability for its subsidiary’s actions. In analyzing parent corporation liability, the Second Circuit followed its recent decision in Gulino v. N.Y.S. Educ. Dept., 460 F.3d 361 (2d Cir. 2006) and applied for the Title VII context, the four part test adopted by the National Labor Relations Board. The NLRB test holds that a parent and subsidiary cannot be found to constitute a “single, integrated enterprise” unless there is evidence of: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership of financial control. Of these, the court noted, the most important is the second part; particularly “whether the two enterprises exhibit centralized control of labor relations.”

The court stated that, in determining centralized control of labor relations, the important question is what entity made the final decision regarding employment matters related to the person claiming discrimination. The court further noted that, when considering the interrelation of operations prong, courts in the Second Circuit look to such things as whether the parent was involved in the daily decisions, whether the two entities shared employees, whether the entities commingled bank accounts, whether the parent maintained the subsidiary's books and whether the parent issued the subsidiary's paychecks. Finally, the court observed that common management and common ownership were less important because those are normal aspects of a parent-subsidary relationship.

III. Sufficiency and Admissibility of Proof of Discrimination Based on Actions of Supervisors Other Than the Ultimate Decision-Maker

1. EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476 (10th Cir. 2006), cert. dismissed, 127 S.Ct. 1931 (2007).

In a case involving the “cats paw” doctrine, in which the Supreme Court granted certiorari to resolve a circuit split, the petitioner dismissed its petition shortly before the case was scheduled for oral argument, and thus, the issues surrounding the question there presented remains unresolved and likely to attract the Court’s attention in the future. The question presented was: “[u]nder what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate’s discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee?”

In the employment discrimination context, the “cats paw” theory refers to situation in which a biased subordinate who lacks decisionmaking power, influences a formal decisionmaker, knowingly or unknowingly, in the subordinate’s deliberate scheme to trigger a discriminatory employment action. For example, in the BCI case, a black employee was terminated by a human resources official who worked in a different city, had never met the plaintiff, and did not know he was black, relying exclusively on information provided by the plaintiff’s immediate supervisor who had a long history of treating black employees unfavorably.

In BCI, the Tenth Circuit noted that circuits are divided as to the level of control a biased subordinate must exert over the employment decision for unlawful conduct to be found on the part of the employer. Both the Fifth Circuit (Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000)) and the Seventh Circuit (Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446 (7th Cir. 1994)) take a lenient approach to assigning liability

when a subordinate exerts influence over the decisionmaker. The Fourth Circuit, on the other hand, has held that an employer cannot be held liable even if the subordinate has “substantial influence” or plays a “significant” role in the employment decision. Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004). The Tenth Circuit favored the approach of the Seventh Circuit and found that to prevail on a subordinate bias claim, the plaintiff must prove more than mere “influence” or “input” in the decisionmaking process; instead, the court addresses whether the biased subordinates discriminatory reports, recommendation or other actions caused the adverse employment action.

As illustrated by several decisions summarized below, the lower courts continue to grapple with these issues.

2. Poland v. Chertoff, 494 F.3d 1174 (9th Cir. 2007).

The Ninth Circuit held that a supervisor’s bias can be imputed to the employer if the plaintiff can show that the “independent” adverse employment decision was not truly independent because the biased subordinate [here, the supervisor] influenced or effectively determined the outcome of decision-making process. In this case, a federal employee filed an age discrimination EEO complaint against his supervisor. In turn, the supervisor initiated an administrative inquiry into the employee’s performance. Following the administrative inquiry, another employee, at the recommendation of a review board and inquiry panel, transferred the employee to a non-supervisory position out of state. In these circumstances, the Ninth Circuit, the court considered the question of how involved the biased supervisor of the employee must be in the investigation for his animus to be imputed to the employer who took the adverse employment action.

In attempting to reach a standard, the court analyzed several approaches taken by the Circuit Courts of Appeals. First, the court considered and rejected the expansive concept of employer liability that could be imputed if a “but for” causation test is applied. The court reviewed the Tenth Circuit’s decision in BCI and rejected it, finding that such an inclusive standard for liability would unduly weaken the deterrent effect in subordinate bias cases as well as being inconsistent with traditional tort law principles of causation that apply to civil rights cases. Next, the court considered the “rubber stamp” or “cat’s paw” approach of imputing animus to an employer where the subordinate “dominates the investigatory process” and the final approval is a “rubber stamp” of the subordinate’s decision, as adopted by the Fourth Circuit in Hill v. Lockheed Martin Logistics Mgmt., Inc., but agreed with criticism of that approach, as giving too restrictive an interpretation to the causation test, by the Seventh Circuit in Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004), and the Tenth Circuit in EEOC v. BCI.

After surveying and rejecting the more extreme positions of other Circuits, the Ninth Circuit announced its standard for these cases: if an employee engages in protected activity that leads to an adverse employment action by way of the subordinate setting in motion a proceeding by an independent decisionmaker, the subordinate's bias is imputed to the employer if the subordinate "influenced, affected, or was involved in the adverse employment decision." This standard is consistent with decisions in other Title VII retaliation cases (Bergene v. Salt River Project Agric. Improvement & Power Dist., 272 F.3d 1136 (9th Cir. 2001), and Galdamez v. Potter, 415 F.3d 1015 (9th Cir. 2005)), and with the law in the First, Third, Fifth, Seventh and D.C. Circuits.

3. Mendelsohn v. Sprint/United Management Co., 466 F. 3d 1223 (10th Cir. 1996), cert. granted, 127 S.Ct. 2937 (2007).

The issue on appeal in this case brought by a plaintiff who alleged she was laid off because of her age was whether the district court erred in excluding all evidence about layoffs of other employees, which the plaintiff contended were also age-discriminatory, where the other laid-off employees had different supervisors. Specifically, the district court granted a motion in limine by defendant excluding evidence about layoffs of employees who were not "similarly situated" to the plaintiff, defining "similarly situated" as meaning that such other employees would have to have had the same supervisor and been laid off temporal proximity to the plaintiff. Precluded from introducing evidence of a five other layoffs by this ruling, the plaintiff lost at a jury trial.

On appeal, the Tenth Circuit panel, with a dissenting opinion, reversed and remanded the matter for a new trial on the ground that the testimony concerning other older employees who were supervised, and may have been discriminated against, by other supervisors was relevant on the issue of the employer's discriminatory intent. In so holding, the Tenth Circuit noted that such evidence was potentially probative on the question of the plaintiff's supervisor's intent because it might show a pattern and practice of discriminatory layoffs or a general culture of age discrimination, and that the probative value of the testimony was not outweighed by the danger of undue prejudice (rejecting exclusion under FRE 403).

Oral argument is scheduled for December 3, 2007.

4. Vickers v. Powell, 493 F.3d 186 (D.C. Cir. 2007).

The D.C. Circuit upheld the district court's decision to grant summary judgment to the defendant in this federal employee Title VII case on the plaintiff's claims of discrimination and retaliation, but reversed the district court's grant of summary judgment for the

government on plaintiff's claim that she was subjected to a hostile work environment on account of her sex and race (African American). To prove a hostile environment existed, the plaintiff relied on 13 incidents over a period of years, many of them far outside the charge-filing period. The court relied on Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 120 (2002), which recognized the admissibility, relevance and probative value of historical acts of harassment where a long-term pattern of actions creating a single hostile environment is alleged and at least one of the specific acts occurs within the charge-filing period.

In particular, the court was required to apply the principles of Morgan in a situation where many of the historical acts alleged to be a part of the pattern creating a hostile environment were committed not by the plaintiff's supervisor during the charge-filing period, but by a previous supervisor; and where the past supervisor's actions consisted of crude sexual statements and conduct whereas the current supervisor's acts were allegedly harassing exercises of more normal supervisory functions (such as performance appraisals, reviewing leave requests, and the like). The court held that the plaintiff's claim could not be rejected on summary judgment as she might be able to demonstrate that "the acts about which [she] complains [including the prior supervisor's acts] are part of the same actionable hostile work environment practice" and were not time-barred because the employee failed to report them to the agency's EEO counselor within forty-five days of the conduct. The court found that the district court erred when it determined that the employee's former supervisor, who had created a sexually hostile work environment, could not reasonably be considered part of the same present allegedly hostile work environment created by his deputy-turned successor, who may have perpetuated the same environment albeit through different and less blatantly hostile and gender-based acts.

IV. 42 U.S.C. Section 1981

1. Humphries v. CBOCS West, Inc., 474 F.3d 387 (7th Cir. 2007).

The Seventh Circuit joined the Second, Fifth, Eighth and Eleventh Circuit by holding that section 1981 applied to retaliation claims. In doing so, the court analyzed section 1981's origin in the Civil Rights Act of 1866 and the Supreme Court's decision in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), which did not use the term "retaliation" but prohibited discrimination in all contractual facets of the employment relationship. The court also analyzed the Supreme Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989) as well as cases interpreting Patterson and the Civil Rights Act of 1991 which superseded Patterson, neither of which specifically dealt with retaliation.

In holding that section 1981 applies to retaliation claims, the court overruled, in part, its decision in Hart v. Transit Management of Racine, Inc., 426 F.3d 863 (7th Cir. 2005), which held that § 1981 did not apply to retaliation claims for complaining about the discrimination experienced by other people. The court found that Hart conflicted with the Supreme Court decisions in Sullivan and Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) (upholding under Title IX a cause of action for retaliation even though the term was never specifically mentioned in that statute).

V. Americans with Disabilities Act

1. Bates v. United Parcel Service, Inc., 465 F.3d 1069 (9th Cir. 2006) reh'g en banc granted, 485 F.3d 1053 (9th Cir. 2007).

In this certified class action brought on behalf of deaf or hearing-impaired persons excluded from package car driver positions, the defendant refused to consider any persons for the job unless they could pass a U.S. Department of Transportation (DOT) hearing standard that applied to heavier trucks than the package vehicles that the plaintiffs would have operated as drivers. A panel of the Ninth Circuit affirmed the district court's entry of injunctive relief, finding that plaintiffs made a prima facie case that they may have been qualified but were categorically excluded from the position and that the defendant failed to prove its insistence on applying the DOT hearing standard for lighter vehicles than those to which it specifically applied was required as a matter of business necessity. The court subsequently granted UPS's motion for rehearing *en banc*; the court heard oral argument on June 26, 2007.

The Ninth Circuit panel's decision includes several significant holdings. Addressing plaintiffs' standing, the court held that at least one class representative plaintiff who challenges a qualification standard must establish that she meets the qualification standards other than the one she challenges in order to establish standing; however, that plaintiff does not have the burden of establishing that she can drive "safely" in order to challenge the single requirement at issue. Interpreting the initial burden on plaintiffs once standing is established, the court ruled that in a challenge to a categorical qualification standard like UPS's, the plaintiff has meets her burden of showing that she is a "person with a disability" without having to show she is "a qualified person with a disability," here in the sense of being able to drive safely or to meet the DOT standard. Once the plaintiff carried the burden of showing that the qualification standard "screens out or tends to screen out" people with disabilities, the employer has the burden of establishing that the qualification standard is job-related and consistent with business necessity.

Ultimately, the court upheld the district court's finding and rejected defendant's argument that it carry its burden of establishing the business necessity defense to justify its facially discriminatory policy, because it did not establish, through studies or expert testimony, that all or substantially all deaf drivers present a higher risk of accidents than non-deaf drivers. The court concluded that defendant failed to meet its burden to establish that there are no practical or effective criteria to show which deaf drivers were safe.

The court also noted that because this case involved an employer's facially discriminatory policy, it was not necessary or appropriate to apply the burden-shifting principles applicable to disparate treatment cases brought by individuals, as set out in McDonnell-Douglas, or in pattern-and-practice actions, as set out in Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

2. Holly v. Clairson Industries, L.L.C., 492 F.3d 1247 (11th Cir. 2007).

The Eleventh Circuit reversed and remanded the district court's grant of summary judgment for the defendant on the ground that there were genuine issues of material fact as to whether strict compliance with the employer's newly adopted strict punctuality policy was an essential function of the job. The plaintiff's claim was sympathetic: confined to a wheelchair, he was occasionally a few minutes late to clock in due to mobility limitations causing delays in his commuting to work or his progress through the clock-in line; and before adopting its new punctuality policy the employer had informally accommodated the employee's disability-related tardiness for seventeen years during which the plaintiff had been a "strong performer."

The court held that the fact that the plaintiff's non-disabled co-workers were also subject to the punctuality policy was not relevant to whether the employer discriminated against the plaintiff by failing to accommodate his disability and that the employee did not have the burden to show disparate treatment. The court noted that "the very purpose of reasonable accommodation laws is to *require* employers to treat disabled individuals differently in some circumstances- namely, when different treatment would allow a disabled individual to perform the essential functions of his position by accommodating his disability without posing an undue hardship on the employer. Allowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement."

In a thematically related decision, but one not containing general language on new or significant issues, the Eighth Circuit, in E.E.O.C. v. Convergys Customer Management Group, Inc., 491 F.3d 790 (8th Cir.

2007), upheld a jury's verdict including \$100,000 punitive damages against an employer that declined to provide an extra 15 minutes at lunch break as a reasonable accommodation to a wheelchair-bound employee who required additional time because the employer's parking lot did not have any handicap parking spaces, finding that the plaintiff's request for accommodation, although it did not specify exactly what accommodation he sought, was sufficient to trigger the obligation of the employer to enter into an interactive process.

3. E.E.O.C. v. Schneider Nat., Inc., 481 F.3d 507 (7th Cir. 2007).

The Seventh Circuit held, in a decision written by Judge Posner, that summary judgment was properly granted to the defendant because the EEOC failed to show that an employer who fired a driver diagnosed with neurocardiogenic syncope (which can cause fainting spells) regarded him as disabled in violation of the ADA. Although the plaintiff had been cleared by his doctor to work with no restrictions, he was terminated under the employer's zero tolerance policy for neurocardiogenic syncope, which the employer adopted after another driver with neurocardiogenic syncope drove off a bridge and died despite the fact that there was no certainty that the condition caused the accident. The company recognized that it might be safe for someone with neurocardiogenic syncope to drive trucks- as DOT safety regulations permit - but was not willing to take the risk.

The court found that the employer was free to decide what degree of risk it would assume under the ADA. Applying the Supreme Court's decision in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999), the court found that the company did not "regard" the medical condition as substantially limiting major life activities and that there no evidence that the employer considered the condition to impair any life activity other than driving a truck for defendant or companies like defendant that had higher than the minimum safety standards required by the federal government. Since the employee was neither disabled nor regarded as disabled with respect to any major life activity in the employer's and the court's view, he was not entitled to the ADA's protections.

This decision would appear to allow employers to decide what level of risk they are willing to take and incorporate their judgment into the determination of whether employees are regarded as disabled, even if the employer is acting on the basis of uncertain evidence or unfounded fears.

4. Albra v. Advan, Inc., 490 F.3d 826 (11th Cir. 2007).

In a matter of first impression, the Eleventh Circuit held that an employer's owners, officers or managers could not be individually liable for retaliation under the Americans with Disabilities Act in the

employment context. In so holding, the court analyzed the plain language of the anti-retaliation provision of the subchapter of the ADA relating to employment, 42 USC §12203, which provides that “[n]o person shall discriminate...” and found that the use of “person” rather than “entity” or “employer” was not conclusive in determining individual liability. The court then analyzed the remedies created by the ADA’s employment provisions which incorporate the definition of “person” and remedies of Title VII. The court concluded that limiting the remedies to those available under Title VII – which the Eleventh Circuit has held does not provide a cause of action for employment discrimination against individuals who are not the plaintiff’s “employer” even if the individuals exercised authority over the plaintiff on behalf of the defendant (Mason v. Stallings, 82 F.3d 1007 (11th Cir. 1996) – would not deviate considerably from the intent and purpose of the ADA and was consistent with the EEOC regulations and EEOC interpretive guidance.

In reaching its holding, the court reviewed and distinguished its opinion in Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1166 n. 5 (11th Cir. 2003) which found that individual liability was not precluded by the ADA provisions governing public services yet specifically declined to decide the issue of whether individual liability was precluded in the employment context. The court found Shotz distinguishable or inapplicable because its public services context made Title VI of the Civil Rights Act, rather than Title VII, the appropriate statute to which the ADA provision had to be compared, and the rationale of the Shotz decision was the Court’s analysis finding that the ADA’s remedies could not be limited to those available under Title VI.

The court also reiterated its holding in Mason that there is no cause of action against individual defendants for employment discrimination under the ADA.

VI. Age Discrimination in Employment Act (ADEA)

- 1. Mendelsohn v. Sprint/United Management Co., 466 F. 3d 1223 (10th Cir. 1996), cert. granted, 127 S.Ct. 2937 (2007).**

See case description at page 16 of this Outline.

VII. Family Medical Leave Act

- 1. Rucker v. Lee Holding Co., 471 F.3d 6 (1st Cir. 2006).**

Under the Family Medical Leave Act, an employee is eligible for leave if, among other things, s/he was employed by the relevant employer for 12 months. In this case, the plaintiff worked for the defendant for 5 years, left his employment and returned 5 years later. After seven more months on the job, the plaintiff took medical leave and was subsequently

terminated. He alleged the termination violated the FMLA but the district court disagreed and granted the employer's motion to dismiss. The First Circuit, in a matter of first impression apparently not addressed by any Circuit, held that the 12 months of employment need not be continuous and uninterrupted.

The First Circuit relied on the Department of Labor's interpretation of its own regulation implementing the FMLA to reach its decision. Finding that the statutory language was ambiguous and the legislative history did not provide any evidence of clear congressional intent on the question presented by the case, the court proceeded to examine the regulation issued by the DOL pursuant to Congress's direction in enacting the FMLA. Applying Chevron, the court found the regulation itself ambiguous in its language on the specific issue, but relied on the interpretation of the Department of Labor regulation which it found to constitute a reasonable exercise of the DOL's statutory authority. The Court agreed with the DOL, which appeared as amicus curiae, that there were important policy issues involved and that under the Chevron doctrine is appropriate to defer to the DOL's interpretation of how to resolve those issues.

VIII. Certification of Class Actions

1. **Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007), Pet. for Review under Rule 23(f) pending.**

A divided panel of the Ninth Circuit affirmed the district court's grant of class certification in this Title VII sex discrimination case based on pay and promotions. Wal-Mart did not contest numerosity given that the proposed class numbered approximately 1.5 million women. On the issue of commonality, the parties engaged in an enormously complex and expansive "battle of the experts." The plaintiffs presented significant evidence of company-wide practices and policies and their effects, including expert opinions supporting the existence of company-wide policies and practices, expert statistical evidence of gender disparities in compensation and promotions, a "social framework analysis" of the ways Wal-Mart's practices fostered sex discrimination and could have been, but were not, controlled, as well as extensive anecdotal evidence of discrimination from numerous class members. Defendant presented extensive expert testimony in an attempt to contradict virtually all of plaintiffs' experts' opinions and findings. The court rejected defendant's challenges which it held went to a merits determination and was not proper on a motion for class certification. The court also noted that a lower Daubert standard applied at the class certification stage. The court reviewed the substantial evidence of subjective decision-making in support of its conclusion that the district court's findings on commonality and typicality were within its discretion. Further, the court approved as

not an abuse of discretion the lower court's rulings, including a bifurcated trial plan with shifting of burdens of proof under Teamsters, as a method of handling the action in a way that would make it manageable. The court agreed that plaintiffs, both current and former employees of Wal-Mart, met the requirements of Rule 23(b)(2) and had the primary goal of injunctive and declaratory relief even though their additional claims for back pay and classwide punitive damages could amount to huge sums. In addition, the court rejected Wal-Mart's due process arguments that by certifying a class it would be deprived of raising defenses to each individual's claims, and ruled that neither constitutional nor case authority require plaintiffs to prove their damages in individualized hearings; instead, the court found that statistical formulas could be applied to determine backpay and punitive damages after a finding of liability.

Wal-Mart filed a petition for rehearing *en banc* on February 20, 2007. Briefing on that petition by all parties and numerous amici curiae is complete and a ruling is awaited. The panel decision, and any opinions resulting from further appeals in the case, will provide a reference point for arguments on both sides of the major class certification issues in the context of employment discrimination cases.

2. **In re Initial Public Offering, 471 F.3d 24 (2d Cir. 2007), reh'g denied, 483 F.3d 70 (2d Cir. 2007).**

In vacating a district court's class certification decisions in six related securities fraud class actions, the Second Circuit addressed the question of "what standards govern a district judge in adjudicating a motion for class certification under Rule 23 of the Federal Rules of Civil Procedure," which it found "surprisingly unsettled" in the circuit despite the leading employment discrimination action class certification ruling in Caridad v. Metro-North Commuter Railroad, 191 F.3d 283 (2d Cir. 1999). That Second Circuit's holdings on various aspects of this question will have major impact on the standards applied to certification of employment discrimination class actions is inevitable – indeed, it already has had such major impact – by the court's extensive discussion of employment discrimination class action decisions involving the application of Rule 23.

In its decision, the court moved away from commonly held interpretations of Eisen v. Carlisle & Jacquelin, 417 U.S. 147 (1974), i.e. that during the class certification inquiry, the district court cannot "conduct a preliminary inquiry into the merits of a suit," and Caridad, that a plaintiff's making "some showing" of satisfying each of the Rule 23 standards is sufficient for certification. Keying off the Supreme Court's decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), a leading employment discrimination decision, the Second Circuit held that a district judge may not certify a class action without determining that each separate Rule 23 requirement – the four parts of

Rule 23(a) and, in this case, the two-part test of Rule 23(b)(3) is met and that the trial judge erred when she applied the lesser standard of “some showing” as to those requirements. Further, the court ruled that the district court’s determinations on those requirements may extend to matters that “concern[], or even overlap[] with, an aspect of the merits. In so holding, the court noted the Supreme Court’s observation in Falcon, that “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” Further, where the court makes such determinations in the course of assessing compliance with the Rule 23 criteria, to the extent they, or the ultimate class certification decision, rest on findings of fact they are reviewable under an abuse-of-discretion standard; while to the extent they raise questions of whether a correct legal standard was used they are reviewable *de novo*.

After analyzing the case law in the Second Circuit and other Circuits, as well as the 2003 amendments to Rule 23, the court reached the following conclusions: (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements have been met; (2) such determinations can only be met if judge resolves factual disputes relevant to each Rule 23 requirement and can rule that the requirement is met; (3) the obligation to rule is not lessened by the Rule 23 requirement and a merits issue but the district judge should not assess merits that are unrelated to a class certification issue; and (4) the trial judge can place limits on discovery and the hearing to ensure that it is not a partial trial of the merits.

Following the In re Initial Public Offering decision, two Judges of the Southern District of New York have interpreted and applied its holdings in granting certification of large employment discrimination class actions. In Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204, 209 (S.D.N.Y. 2007), the district court found “the holdings of In re IPO are both significant and narrow- a district judge must consider all of the relevant evidence in determining whether Rule 23 has been satisfied, but a judge may not go beyond the boundaries of Rule 23 when making such a determination.” In Veliz v. Novartis, 244 F.R.D. 243 (S.D.N.Y. 2007), the court found that In re IPO required a “definitive assessment” of each class certification requirement even if it overlapped with merits issues. The Veliz also found that to establish commonality, the In re IPO decision requires that the court not certify a class on issues that cannot succeed as a matter of law. (*See also*, discussion of Veliz at p. 13 of this Outline on the issue of parent-subsidiary liability.)

3. District Court Decisions on Class Certification

District courts in California and New York continue to grant certification of large employment discrimination class actions. See

description of Ellis v. Costco, p. 35 of this Outline; and comments regarding Veliz v. Novartis and Hnot v. Willis Group Holdings in the description of In re Initial Public Offerings, p. 23 of this Outline. Still, class certification motions continue to be a risky business. See, for example, description of Gutierrez v. Johnson & Johnson, at p. 35 of this Outline.

IX. Damages Issues

1. Alexander v. City of Milwaukee, 474 F. 3d 437 (7th Cir. 2007).

See discussion at p. 29 of this Outline.

2. Depaoli v. Vacation Sales Associates, L.L.C., 489 F.3d 615 (4th Cir. 2007).

The Fourth Circuit affirmed the district court's reduction of the jury's award to the Title VII statutory cap of \$200,000 in a Title VII retaliation lawsuit.

The jury had awarded the plaintiff backpay in the amount of \$200,000, compensatory damages of \$2.5 million and punitive damages of \$5 million. The district court granted the defendant's motion to reduce the damages to the statutory cap of \$200,000 but denied its request to apply a lower cap. Both the district court and the Fourth Circuit rejected defendant's argument that the Title VII statutory cap should be based on the year of the violation - when defendant had 100-200 employees and thus benefited from a cap of \$100,000, and not when the damages award was made - when defendant had 200-500 employees and was thus subject to a cap of \$200,000. Rather, the court held that the language of Title VII governing caps, "current or preceding calendar year," refers to the year in which the Title VII violation occurred and not the year the damages award was made.

3. Spencer v. Wal-Mart Stores, Inc., 486 F.3d 311 (3d Cir. 2006), cert. denied, 127 S.Ct. 2985 (2007).

The Third Circuit in this decision reviewed awards and denials of back pay, compensatory damages, and attorneys' fees in this appeal from a judgment after trial of an ADA action. The court first deliberated the familiar principle that back pay is a form of equitable relief to be decided by the court and not the jury. Therefore, it was proper for the trial judge to vacate the jury verdict awarding back pay to the plaintiff. The Third Circuit next held that the trial judge had properly exercised his equitable discretion to award or deny back pay, in holding that a successful hostile work environment claim alone, without a successful constructive discharge claim, was insufficient to support a back pay award. The court

reasoned that if a “hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue.”

Finally, the court affirmed the trial court’s decision to award plaintiff attorneys’ fees of only 25% of the lodestar amount because the plaintiff prevailed on only one of a number of claims and obtained very limited relief, noting that such a reduction may be proper “even where the plaintiff’s claims were interrelated, non-frivolous, and raised in good faith,” and that the court could consider the amount of damages awarded compared to the amount sought, so long as it did not do so under a rule of proportionality between the amounts of damages and fees awarded.

X. Attorneys’ Fees

1. Arbor Hill Concerned Citizens Neighborhood Ass’n v. County of Albany, 484 F.3d 162 (2d Cir. 2007).

Plaintiffs prevailed in a lawsuit for a violation of the Voting Rights Act of 1965 (which, like the statutes prohibiting employment discrimination, provides for recovery of reasonable attorneys fees by prevailing plaintiffs from the defendants) in elections in Albany County (Albany), New York. Their action was brought in the Northern District of New York, employing the services of attorneys from a large firm in New York City, in the Southern District of New York, where higher hourly attorneys’ rates are prevalent. In this appeal, the Second Circuit opined about, and established standards (for the Second Circuit) governing, how district courts should determine reasonable fees and particularly reasonable hourly rates in a case brought in one forum by attorneys from another forum.

Surveying Supreme Court and Second Circuit law, the court found confusion and imprecision over whether and how to use a “lodestar” (attorney’s hourly rate times hours worked) or a market-based “economic model,” and also over whether adjustments to the basic lodestar or market-model fee should be made in determining the hourly rate or in adjustments to the rate or the overall fee after determination of the basic hourly rate. Professing to clarify this confusion, the Second Circuit suggested (but did not require) that courts abandon use of the term “lodestar” and move toward a market-based approach in determining the applicable hourly rate when awarding attorneys’ fees.

The court’s opinion is most notable for its discussion of factors that should be considered, and how they should be considered, in setting both the hourly rate and the reasonable fee. In addressing the “forum rule” – the presumption that hourly rates in the “community” where the litigation is brought should be used, even if out-of-forum lawyers’ time is being compensated – the court held that in-forum rates should

presumptively be used, on the presumption that the economically reasonable (hypothetical) client would ordinarily pay the lowest rates necessary to obtain competent counsel (and the assumption that the local forum would ordinarily provide those rates). However, the court recognized that a court may depart from that presumption “in the unusual case” – if it finds that “retention of an out-of-district attorney was reasonable under the circumstances as they would be reckoned by a client paying the attorney’s bill.” It further opined that such a hypothetical client, in retaining a hypothetical attorney, would factor in the attorney’s willingness to work wholly or partially on a *pro bono* basis or to promote the attorney’s reputational interest or societal goals. The court also noted, however, that while following a market-rate approach, the definition of the relevant market may not be exclusively geographic in all cases; in some, the “market may be defined by practice area.” Finally, the court held that these considerations should enter into the setting of the hourly rate used in the fee award, rather than considered as adjustments to an hourly rate initially determined in other ways.

In reviewing the district court’s award to plaintiffs in this case, the Second Circuit found that the lower court had used erroneous methods but arrived at the correct result in awarding fees at the lower rates prevalent in the forum, i.e. the Northern District., and affirmed the award as constituting, overall, a reasonable fee. In particular, while the Second Circuit held that the district court had applied the forum rule too strictly and found that the district court might properly have adjusted the hourly base rate to account for a reasonable decision to retain out-of-district counsel, it also found the district court did not abuse its discretion because a reasonable paying client would have made a greater effort to retain an attorney practicing in the Northern District or insisted on paying their attorneys at a rate not higher than that charged by attorneys in the Northern District.

2. Johnson v. City of Tulsa, Okla., 489 F.3d 1089 (10th Cir. 2007).

The Tenth Circuit found that some – but not all – of class counsel’s monitoring and compliance efforts following a consent decree in an African-American police officers’ race discrimination class action might be compensable in an award of attorneys’ fees under the Civil Rights Attorneys’ Fees Act, 42 U.S.C. §1988. The issue arose after class counsel engaged in a variety of post-consent decree monitoring, enforcement, and dispute-resolution activities pursuant to a consent decree that at least implicitly provided for class counsel’s participation in monitoring and enforcement activities, but also established mechanisms by which the defendant police department and an official external monitor were to supervise the proper workings of specified compliance procedures as well as procedures for resolution of disputed actions involving individual class member police officers. The court held that although the post-consent

decree activities of class counsel did not themselves change the legal relationship of the parties as the entry of the consent decree had done, Buckhannon Board & Care Home, Inc., v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001) did not preclude an award of fees since class counsel had originally obtained the consent decree and ongoing efforts by them were contemplated in its provisions. Relying on Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986) the Tenth Circuit held that class counsel's work to secure the relief for the class contemplated by the decree – which it termed the “fruits of the decree” – was in principle compensable. In its discussion, the Tenth Circuit rejected the Seventh Circuit's decision in Alliance to End Repression v. City of Chicago, 356 F.3d 767, 771 (7th Cir. 2004), insofar as that decision applied the bar of Buckhannon to all requests, not provided for in a consent decree, for fees for monitoring compliance with the decree.

However, the court distinguished among the various types of work done by class counsel in attempting to apply the “fruit of the decree” criterion. It found that work reasonably done to assure the proper functioning of the mechanisms set up by the consent decree (i.e., “addressing systemic failure of the Decree's enforcement mechanisms”) qualified for possible compensation, but work done to represent individual class members in claims of post-consent decree discrimination, which they claimed violated the consent decree's terms but did not result in a modification of those terms or awards to the class members, would not so qualify. The Tenth Circuit reversed and remanded the district court order denying the request for attorneys' fees and directed the lower court to compensate class counsel “for reasonable efforts to preserve the fruits of the decree,” which were to be identified by the district court.

3. Richlin Sec. Service Co. v. Chertoff, 472 F.3d 1370 (Fed. Cir. 2006), cert. granted --- S.Ct. ---, 2007 WL 2175908 (Nov. 13, 2007).

On November 13, 2007, the U.S. Supreme Court granted certiorari in a case that could resolve a split in the Circuit Courts and may have broad implications on how much prevailing plaintiffs can recover for the cost of paralegal services under fee-shifting statutes. In this case, the Federal Circuit held that under the Equal Access to Justice Act (EAJA), paralegal services cannot be recovered at market rate under “attorneys' fees” but only at cost as part of “expenses.”

The EAJA provides for the recovery of attorneys' fees and expenses to prevailing parties in certain actions or proceedings against the government or their officials. In holding that paralegal services are not attorneys' fees, the Federal Circuit reviewed two Supreme Court decisions that sought attorneys' fees under section 1988. In Missouri v. Jenkins,

491 U.S. 274, 275 (1989), the Supreme Court held that under 1988, “reasonable attorney’s fee” includes the work of paralegals and refers to “a reasonable fee for the work product of the attorney” and could not “have been meant to compensate only for work performed personally by members of the bar.” In West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83 (1991), the Supreme Court held that expert fees were not recoverable as attorneys’ fees under section 1988 and reaffirmed the Jenkins holding that paralegal services are included in attorneys’ fees under section 1988.

In reaching its holding, the Federal Circuit compared the language of section 1988 and the EAJA and found that the language of the statutes is different in important aspects. The court found that 1988 allows for the recovery of only attorneys’ fees and costs, not expenses, and that the purpose of 1988 is “to encourage litigation protecting civil rights” and “to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.” On the other hand, the court reasoned, the EAJA allows for the recovery of expenses and the purpose of EAJA is not to make the party whole but rather and reimburse all of the costs of the prevailing party but only to provide partial reimbursement only when the government’s position was not substantially justified. The Federal Circuit also reasoned that given the EAJA attorneys’ fees cap of \$125, it was unlikely that Congress would have capped paralegal services at the same level as attorneys’ fees.

The Richlin decision does not call into question the practice of the courts of compensating prevailing plaintiffs for paralegals’ time at market rates in §1988 cases. To the extent that other fee-shifting provisions share the language and/or rationale of §1988 – such as Title VII’s fees provision, 42 USC §2000e-5(k) – there should be no question that the same market-rate standard applies.

4. Spencer v. Wal-Mart Stores, Inc., 486 F.3d 311 (3d Cir. 2006).

See discussion at p. 25 of this Outline.

XI. Affirmative Action and Reverse Discrimination

1. Alexander v. City of Milwaukee, 474 F. 3d 437 (7th Cir. 2007).

The Seventh Circuit in this case reviewed a verdict and awards of compensatory and punitive damages for seventeen white male police officers who brought suit against a city, the former police chief, board of police commissioners, and the five commissioners individually for discriminatory promotion practices favoring women and minorities in violation of sections 1981 and 1983, as well as Title VII. The court affirmed the verdict that defendants had discriminated against the officers

and rejected defendants' qualified immunity defense, but vacated the damages awards because of errors in the methods used to determine them.

The court found that the commissioners were not entitled to qualified immunity on procedural and substantive grounds. The basis for this ruling on substantive grounds was that actions of the type found discriminatory by the jury – selecting women and minorities for promotion on a favored basis using vague and undefined qualifications and selection criteria – were not shown to serve the city's compelling interest in diversity in the police management ranks, and were not narrowly tailored to that end. Therefore, the defendants' racially discriminatory practices failed the test of strict scrutiny applicable to a public employer under § 1983; and, moreover, defendants' constitutional violations were clear under established law at the time they occurred. The court also affirmed the municipal liability of the city under Title VII based on respondeat superior.

The decision also includes a number of interesting holdings on damages issues. The court applied the Seventh Circuit's "loss of a chance" doctrine for calculating damages; this method limits the amount of a plaintiff's financial loss when what s/he lost was a chance to compete on equal footing, not necessarily the promotion itself, to a sum factoring in both the amount of damages based on the assumption that the plaintiff would have been promoted but for discrimination, and the likelihood that the promotion would have been obtained absent discrimination. The Seventh Circuit found that the district court misapplied the loss of a chance method and it erred in assuming that each plaintiff was assured of a promotion ahead of all other qualified available officers. The court ruled that both economic and compensatory damages had to be calculated using this method. In addition, the court ruled that front pay should have been cut off at the time of the "first unimpeded promotional opportunity" of each plaintiff, rather than his actual promotion date.

Finally, the court upheld the punitive damages awards against the individual defendants finding that the jury could properly conclude that their discriminatory conduct reflected "reckless or callous indifference to the federally protected rights of the plaintiffs." However, the court remanded the actual awards for redetermination because the degree of fault of each separate defendant had not been considered, and the amounts awarded may have been disproportionate to the culpability of some or all of the defendants.

XII. Arbitration

1. Dale v. Comcast, 498 F.3d 1216 (11th Cir. 2007).

The Eleventh Circuit held that an arbitration agreement between the cable television provider and its subscribers which prohibited class actions was substantively unconscionable under Georgia law. In so holding, the court relied on and followed a decision of the First Circuit, Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006), resolving the same issue in a virtually identical consumer class action brought against the same defendant, which invoked the same arbitration clause, based on the same statutory claims. The court noted that without the benefit of a class action, the subscribers would be effectively precluded from suing Comcast for a violation of the Cable Communications Policy Act of 1984 because the cost of bringing an individual suit compared to the recovery is too great and because since the Cable Act does not provide for attorneys' fees, potential plaintiffs would likely be unable to obtain legal representation.

The court concluded that the enforceability of a class action waiver in an arbitration agreement must be determined by looking at the totality of the facts which include: (1) the fairness of the provisions; (2) the cost to a plaintiff of vindicating the claim versus the potential recovery; (3) the ability to recover attorneys' fees and costs which affects the ability to obtain legal representation; (4) the effect the waiver will have on the company's ability to engage in unchecked market behavior; and (5) related public policy concerns.

While not an employment case, this case is important because the principles the court articulated will apply to arbitration agreements in employment cases, at least in the Eleventh Circuit. An interesting aspect of this topic is that the court distinguished its own decision of just one year earlier, Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2006), an employment discrimination class action brought under the ADEA, FLSA, ERISA and Title VII, that the court dismissed based on an arbitration provision that, in this author's view (but not the Eleventh Circuit's), was procedurally unconscionable to an egregious extent. (The Caley decision is summarized in last year's Outline.) Whether the lesson of the Caley-Comcast combination is that the Eleventh Circuit will enforce arbitration clauses with scarce concern for procedural unconscionability but not those it finds substantively unconscionable, or that it will strive to enforce arbitration agreements in employment discrimination class actions but not in consumer class actions, or simply that different panels react differently to arbitration clauses that include class action waivers, remains to be seen. The Comcast panel's articulated grounds for distinguishing Caley were (1) the very small size of the consumer claims at issue, making individual actions practically infeasible, and (2) that Title VII and the

ADEA, but not the Cable Act, provide fee-shifting remedies for prevailing plaintiffs.

XIII. Settlement

1. Dillard v. Starcon Intern., Inc., 483 F.3d 502 (7th Cir. 2007).

The Seventh Circuit ruled that the enforceability of a settlement agreement in a federal court case is to be determined under state contract law and held that since the employer and employee had agreed to all material terms, the oral settlement was enforceable even though the parties had a subsequent dispute as to the written terms. In this racial discrimination case, the parties orally agreed on the key terms of a settlement. When the employer provided the plaintiff with a proposed written agreement, it introduced provisions not previously discussed. The court held the oral agreement enforceable and found that the terms the parties could not agree upon were immaterial and did not affect the “meeting of the minds.”

In reaching its decision, the court noted the uncertainty in case law over whether to apply federal or state law in enforcing a federal lawsuit settlement. In determining that state law applied, the court relied on Lynch v. SamataMason Inc., 279 F.3d 487 (7th Cir. 2002), which in turn followed Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375 (1994), holding that the settlement of a federal claim is enforced “just like any other contract” under the state law of contracts “unless it is embodied in a consent decrees or some other judicial order or unless jurisdiction to enforce the agreement is retained.”

XIV. Other Relevant Supreme Court Decisions in Cases Not Based on Employment Discrimination Statutes

1. Davenport v. Washington Education Association, 127 S.Ct. 2732 (2007).

The United States Supreme Court upheld, as not in violation of the First Amendment, an initiative enacted in 1992 by the voters of the State of Washington that requires public-sector labor unions to receive affirmative authorization from a nonmember before spending the nonmember’s agency shop fees for election-related purposes.

The National Labor Relations Act allows states to regulate their labor relationships with their public employees and entitles the union to charge a fee for employees who are not union members but who are represented by the union in collective bargaining. In the case of public sector unions and employees, however, such arrangements in the public sector raise First Amendment concerns because individuals are forced to contribute to unions as a condition of government employment.

The State authorized its public-sector unions, including the defendant WEA, to negotiate agreements for such agency shop fees; and the WEA did so but implemented its agreement in ways the State and plaintiff non-union members objected to in their action against WEA, which was based on the initiative. The Supreme Court of Washington concluded that the initiative violated the First Amendment of the federal constitution because of the requirement placed on the union to receive affirmative consent.

The U.S. Supreme Court upheld the initiative finding that it placed a “reasonable viewpoint-neutral limitation” on the state’s general authorization allowing public-sector unions to acquire and spend the money of government employees. The Court emphasized that its holding only applied to “the unique context of public-sector agency-shop arrangements,” and not to private-sector union arrangements.

2. Long Island Care at Home, Ltd. v. Coke, 127 S.Ct. 2339 (2007).

In this case, a domestic worker who, as a “third party” employee of the defendant home-care agency, provided “companionship services” to elderly and disabled persons in their homes, sued her former employer and its owner claiming she was not paid minimum and overtime wages in violation of FLSA. The plaintiff contended that a regulation of the Department of Labor, which exempted such third party companionship workers, was invalid or unenforceable on substantive and procedural grounds. The Second Circuit found the regulation unenforceable and set aside the trial court’s grant of summary judgment based on the regulation.

The U.S. Supreme Court held that the DOL regulation applying FLSA’s “companionship services” exemption for persons employed by third parties (as opposed to family or household members) was valid as a “gap-filling” regulation that Congress intended the Department to issue, and therefore one binding on the courts under Chevron. The Court also disposed of arguments against the regulation’s validity or enforceability on grounds that it conflicted with another, more general and less specific regulation defining “domestic service employment” for other purposes, and that the DOL had not followed proper APA procedures for adoption of binding, as opposed to merely “interpretive” regulations.

Although EEOC and DOL regulations under Title VII, the ADEA, the ADA, and Executive Order 11246 may not be, and in most cases clearly are not, so clearly intended by Congress as “gap filling” regulations intended to be binding on the courts, the Supreme Court’s reasoning in Long Island Care could be looked to in determining how much deference the courts give to various regulations and interpretive guidelines of those agencies in the employment discrimination context.

3. **Office of Senator Mark Dayton v. Hanson, 127 S.Ct. 2018 (2007).**

In this suit against the Office of a U.S. Senator, plaintiff based his claim to federal court jurisdiction on the Congressional Accountability Act (CAA) of 1995, § 412 of which gives the Supreme Court direct-appeal jurisdiction over any order “upon the constitutionality” of any provision of the CAA. The district court denied the defendant’s motion to dismiss the action based on immunity under the Speech or Debate Clause of the Constitution, and the D.C. Circuit affirmed that dismissal. Plaintiff appealed to the Supreme Court, contending that the denial of a motion to dismiss based on the Speech or Debate Clause necessarily implicated the statute’s constitutionality, and therefore provided the necessary jurisdictional basis for the appeal.

The Supreme Court dismissed the interlocutory appeal, finding that denial of the motion to dismiss was not a ruling “upon the constitutionality” of any provision of the CAA, but rather “a ruling on the scope of the Act,” i.e. as an Act that was not intended “to be interpreted to permit suits that would otherwise be prohibited by the Speech or Debate Clause.” Therefore, the Court ruled it lacked jurisdiction. Treating the direct appeal as a petition for certiorari, the Court also denied certiorari.

4. **Parents Involved in Community Schools v. Seattle School District No. 1, and Meredith v. Jefferson County Bd. of Education, 127 S.Ct. 2738 (2007).**

In a case likely to have implications for affirmative action in employment, the Supreme Court, in a 5-4 decision by Chief Justice Roberts joined by Justices Alito, Scalia and Thomas, and partially joined in by Justice Kennedy, who concurred in the judgment, the Court struck down race-conscious student assignment plans that had been voluntarily adopted by public school districts in Seattle and Louisville to promote racial integration or avoid racial segregation of certain schools. The Court found it significant that Seattle had never been found guilty of de jure school segregation, and Jefferson County had been found to have achieved unitary status after many years subject to federal court desegregation decrees.

The Court held the voluntary plans could not be justified by either of the two interests that have been recognized as satisfying the strict scrutiny standard in applying the Equal Protection Clause in education cases: remedying the past effects of intentional discrimination and the interest in diversity in higher education. The majority opinion characterized the subject plans as making race determinative in student assignment decisions rather than one factor or means used in an effort to achieve educational diversity in some broader sense, and, in its plurality

portion, decried the constitutionality of any program that would amount to “imposition of racial proportionality.”

In his concurring opinion, Justice Kennedy disagreed with the majority’s conclusion that in the absence of one of the two rationales previously held compelling in school cases, which he agreed were not applicable in these cases, race can never taken into account. Rather, his opinion holds out the possibility that a narrowly tailored race-conscious student assignment (or other educational diversity promoting program) might be justifiable upon a showing that it serves a compelling interest in diversity and uses race as only one dimension of, and factor in, promoting that diversity. Justice Breyer authored a 68 page dissenting opinion that the plurality opinion criticized vehemently.

The implications of these decisions based on the Equal Protection Clause in the educational context, for voluntary affirmative action programs in the employment context, remain to be sorted out over time. At a minimum, it is clear that a plurality of four of the current Justices would have little tolerance for a public employer’s voluntary efforts unless, at a minimum, they were shown to meet the compelling interest standard and are specifically and narrowly addressed to remedying judicially determined prior discrimination with ongoing effects. However, Justice Kennedy’s opinion, which sets out the minimum requirements accepted by five Justices, appears to leave the door open to more carefully targeted public employer programs in which race is not used as a “crude” measure (to use a word appearing repeatedly in his opinion), but rather as one aspect of a more nuanced effort to address needs other than, or in addition to, racial balancing of a workforce. The school case decisions do not directly apply to private sector affirmative action programs, which continue to be governed by Title VII standards.

XV. Cases to Watch in the Coming Year

1. Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007).

The defendant’s Rule 23(f) Petition for interlocutory review of the panel opinion’s affirmance of the district court’s order certifying the case as a class action (see p. 22 of this Outline) was filed on February 20, 2007, and has been fully briefed by the parties and a plethora of *amici curiae* on both sides of the issues. If *en banc* review is granted, it could potentially produce the most influential, or at least notorious, decision to date on the standards for certification of employment discrimination class actions and their application to a huge case that defendant argues presents both practical manageability challenges and constitutional due process dimensions because of its size. If rehearing is denied, Wal-Mart has vowed to seek review in the Supreme Court.

2. **Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (N.D. Cal. 2007), 9th Cir. No. 07-15838.**

In this gender discrimination class action challenging Costco's promotional practices for top warehouse store manager jobs, the U.S. District Court for the Northern District of California certified a class action under Rule 23(b)(2) including plaintiffs' class claims for compensatory and punitive damages as well as traditional injunctive and equitable back pay relief. The district court found the 23(b)(2) test met because the plaintiffs' primary emphasis was on injunctive relief, bifurcation of further proceedings on compensatory damages kept the present focus on practices affecting the class as a whole, and punitive damages would turn on the defendant's conduct not the individual aspects of plaintiffs' claims. Costco has filed a Rule 23(f) petition for review of the class certification order, which is pending on very extensive briefing. If review is granted at this stage, the Ninth Circuit would have to consider the application of Rule 23(b)(2) certification standards to a class action for compensatory damages, which were not sought in Dukes v. Wal-Mart, and which are the specific target of the Allison line of cases, in other circuits, holding such claims non-certifiable as class actions.

3. **Gutierrez v. Johnson & Johnson, 467 F.Supp.2d 403 (D. N.J. 2006) review granted, 3d Cir. No. 07-8025 (2007).**

The district court in New Jersey denied certification of a class action brought on behalf of African American and Hispanic employees allegedly discriminated against because of their race under section 1981, Title VII and state law. The plaintiffs sought certification of a very broad class including approximately 8,600 class members employed by defendant in 35 separate (or allegedly separate, according to plaintiffs) operating companies, claiming that the employer's subjective promotion, compensation, and performance evaluation practices were used to discriminate against minority employees. Plaintiffs submitted extensive expert witness reports involving statistical and sociological opinions; defendant responded with equally extensive rebuttal reports.

The district court, echoing IPO (see Outline p. 23 above), relied on Newton v. Lynch, 259 F.3d 154 (3d Cir. 2001) in finding that some preliminary inquiry into the merits was necessary to determine whether the claims could be properly resolved as a class action. The court held that commonality and typicality were not met because plaintiffs failed to identify any policy that was the source of discrimination nor did they show that the policies permitted subjectivity. The court found that statistical disparities shown in plaintiffs' analyses were insufficient foundation for class action certification unless they could be connected with particular discriminatory practices common to the class, and held that plaintiffs

hadn't made such a showing. The court also noted that the class was very broad and diverse.

On September 11, 2007, in a rare decision to review a *denial* of class certification, the Third Circuit granted plaintiffs' 23(f) petition. Briefing is now in progress, and a significant decision on the standards for class certification, issues of commonality in a subjective practices case, and/or the consideration of expert witness reports in class certification, may result. There is also a question presented as to the timeliness of the plaintiffs' filing of the 23(f) petition, which could, if addressed by the Third Circuit, either provide a significant precedent on the interpretation of the 10 day filing deadline for such petitions, and/or moot consideration of the other issues at this stage.

4. **Bates v. UPS, Inc., 465 F.3d 1069 (9th Cir. 2006), *en banc* reh. granted, 485 F.3d 1085 (9th Cir. 2007).**

See case description at Outline, p. 18 above regarding the potentially significant questions of interpretation of the ADA involved in this appeal.

5. **Mendelsohn v. Sprint/United Management Co., 466 F.3d 1223 (10th Cir. 1996), cert. granted, 127 S.Ct. 2937 (2007).**

See case description at Outline, p. 16 above, regarding this case in which oral argument is scheduled for December 3, 2007.

6. **Holowecki v. Federal Express Corp., 440 F.3d 558 (2d Cir. 2006), cert. granted, 127 S.Ct. 2914 (2007).**

See case description at Outline, p. 3 above, regarding this case in which oral argument was heard on November 6, 2007 and a decision of the Supreme Court is awaited.

XVI. Legislative Developments Affecting Employment Discrimination Law

A. ADA Restoration Act (ADARA)

On the 17th anniversary of the enactment of the original ADA in 1990, the ADARA was introduced in the House of Representatives as a bipartisan effort by Majority Leader Steny Hoyer (D-MD) and Representative James Sensenbrenner (R-WI). ADARA would reinstate original congressional intent regarding the definition of disability and correct the series of cases decided by the U.S. Supreme Court in 1999 and 2002 which has narrowed the class of people who can invoke the ADA's protection from discrimination - Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) (holding that corrective and mitigating measures such as medication, hearing aids, prosthetics and other auxiliary aids must be taken into account in

determining whether an individual is “substantially limited” in a major life activity under the ADA); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding that “mere difference” in how a person performs a major life activity does not make the limitation “substantial” and how an individual learns to compensate for the impairment including “measures undertaken, whether consciously or not, with the body’s own systems” must be taken into account); and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (holding that the elements of the definition of disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled” and that “substantial limitation” means “prevent or severely restrict” activities that are of central importance to people’s daily lives - not just work-related tasks).

The purpose of ADARA is to provide “a clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” by restoring the broad protections available under the ADA. Among other things, ADARA specifically eliminates the “substantial limitation” requirement of a “major life activity” and defines disability as a physical or mental impairment without considering the impact of any mitigating measures the individual may or may not be using or whether or not any manifestations of an impairment are episodic, in remission or latent. Thus, ADARA will reinstate the original congressional intent of the ADA and enable workers to prove their claims of unlawful bias instead of having to overcome the hurdles of demonstrating that they have a “disability” within the narrow definitions adopted by the Supreme Court.

B. Lilly Ledbetter Fair Pay Act of 2007

On July 31, 2007, in a close vote of 225 to 199, the House of Representatives passed the Ledbetter Fair Pay Act of 2007 to allow compensation discrimination claims to be filed within 180 days of the issuance of any paycheck that is affected by prior discriminatory acts of the employer. The bill specifies that each paycheck that results from a discriminatory decision is itself a discriminatory act that resets the 180 day time period during which an employee must file his/her EEOC charge. The bill adopts the argument articulated in Justice Ginsburg’s dissenting opinion in the Ledbetter case, see p. 1 of this Outline, that in reality many employees often do not know whether they have been a victim of pay discrimination, or find out that they have been only long after the discriminatory acts that lowered their pay have occurred, since employees generally are not supposed to or do not discuss their paychecks with their colleagues or otherwise find out how much other employees earn.

A companion bill, the bipartisan Fair Pay Restoration Act, was introduced in the Senate on July 20, 2007 and is being supported by employee advocates. President Bush has promised to veto any Act Congress may pass that incorporates the provisions of these bills.