TITLE VII AND SECTION 1981:

A Guide for Appointed Attorneys
in the Northern District of Illinois

Chicago Lawyers' Committee
for Civil Rights Under Law
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Foreword

The Chicago Lawyers' Committee for Civil Rights Under Law has prepared this manual for use by attorneys appointed by judges in the Northern District of Illinois to represent indigent clients in employment discrimination cases. The manual contains a summary of Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991, including important Supreme Court and Seventh Circuit cases decided through July 2008. This manual is intended to be a starting point for research and should not be used as a substitute for original research tailored to the facts of a specific case.

The Chicago Lawyers' Committee has agreed to assist appointed counsel by producing this manual and by conferring with appointed counsel in evaluating settlement offers, drafting pleadings, determining case strategy, and providing other assistance that appointed counsel may need. For assistance, appointed counsel may contact Laurie Wardell at the Chicago Lawyers' Committee for Civil Rights Under Law, 100 N. LaSalle, Suite 600, Chicago, IL 60602, (312) 630-9744, lwardell@clccrul.org. Finally, the Chicago Lawyers' Committee heartily thanks our Summer 2008 Public Interest Law Internship fellow, Brittany Parling, for her hard work on this manual.

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I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Introduction: Title VII, 42 U.S.C. §§ 2000e, prohibits discrimination in hiring, pay, promotion, termination, compensation, and other terms and conditions of employment because of race, color, sex (including pregnancy), national origin, or religion. To be actionable, the employment decision must have been adverse. *Minor v. Centocor, Inc*. 457 F.3d 632, 634 (7th Cir. 2006) (assignment of more work is sufficiently adverse). *Cf. Fane v. Locke Reynolds, LLP*, 480 F.3d 534 (7th Cir. 2007) (heavier work load not adverse); *Maclin v. SBC Ameritech*, 520 F.3d 781, 787 (7th Cir. 2008) (denial of discretionary bonus and change in title not adverse).

B. Covered Employers: Title VII applies to federal, state, and local governments and to private employers, labor unions, and employment agencies. Congress validly waived states' immunity under the Eleventh Amendment in enacting Title VII. *Nanda v. Bd. of Trustees*, 303 F.3d 817 (7th Cir. 2002). A covered employer must be a "person" (including a corporation, partnership, or any other legal entity) who has 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). *Arbaugh v. Y&H Corp.,* 126 S.Ct. 1235 (2006) (question whether employer has 15 workers is not jurisdictional); *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006) (highly placed managers may be treated as employees for counting purposes). The following types of employers are exempted from Title VII's coverage: bona fide membership clubs, Indian tribes, and religious organizations (a partial exemption). *Id.* The Seventh Circuit follows the "economic realities" test for determining who the actual employer is. *Heinemeier v. Chemetco, Inc.*, 246 F.3d 1078 (7th Cir. 2001).

C. Protected Classes: Title VII prohibits discrimination on account of:

1. Race or Color: This category includes blacks, whites, persons of Latino or Asian origin or descent, and indigenous Americans (Native Alaskans, Native Hawaiians, Native Americans).

2. National Origin: The Supreme Court has interpreted national origin as referring to "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (1981 reaches discrimination against a person because she is genetically a part of an ethnically and physiognomically distinctive group).

Discrimination based on national origin violates Title VII unless national origin is a bona fide occupational qualification (BFOQ) for the job in question. The employer must show that the discriminatory practice is "reasonably necessary to the normal operation of [the] particular business or

enterprise." 42 U.S.C. § 2000e-2(e)(1). *Henry v. Milwaukee County*, ----- (7th Cir. 2008). The courts and the EEOC interpret the BFOQ exception very narrowly. *See* 29 C.F.R. § 1604.2(a).

3. **Sex:** This provision prohibits discrimination based on gender, and applies to both men and women. Employer rules or policies that apply only to one gender violate Title VII. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (rule prohibiting having children applied only to women). Employment decisions based on gender stereotypes also violate Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Lust v. Sealy, Inc*., 383 F.3d 580 (7th Cir. 2004). Employers may not provide different benefits to women than to men. *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978). Title VII also prohibits sexual harassment, as described more fully below.

In 1978, Congress amended Title VII to make it clear that the statute prohibited discrimination because of pregnancy. 42 U.S.C. § 2000e-(k). Employers may not consider an employee's pregnancy in making employment decisions. Employers must treat pregnancy-related disabilities and medical conditions like other disabilities that similarly affect an employee's ability to work. In *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), the Supreme Court implied that classifications based on fertility or infertility alone were not barred by the Pregnancy Discrimination Act, which prohibits only gender-specific classifications. However, "even where (in)fertility is at issue, the employer conduct complained of must actually be gender neutral to pass muster." *Hall v. Nalco Co.* (7th Cir. 2008) (plaintiff's termination violated Title VII because employees terminated for taking time off to undergo in vitro fertilization would always be women, and thus the classification was gender-specific and not gender-neutral).

Discrimination based on sex violates Title VII unless sex is a bona fide occupational qualification (BFOQ) for the job in question. *Henry v. Milwaukee County*, ----(7th Cir. 2008)(juvenile detention center did not justify sex based assignments).

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

4. **Religion:** The term "religion" includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e-(j). The EEOC

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

Title VII exempts from coverage a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). The protection against religious discrimination does not cover jobs where the job function is "ministerial" in nature. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d. 698 (7th Cir. 2003). Religious discrimination is not unlawful under Title VII where religion is a BFOQ for the job in question. 42 U.S.C. § 2000e-2(e)(1).

D. Theories of Discrimination

1. Disparate Treatment: Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class. The central issue is whether the employer's action was motivated by discriminatory intent, which may be proved by either direct or circumstantial evidence.

a. Direct Method: Under the direct method, a plaintiff attempts to establish that membership in the protected class was a motivating factor in the adverse job action. Plaintiff may offer direct evidence, such as that the defendant admitted that it was motivated by discriminatory intent or that it acted pursuant to a policy that is discriminatory on its face. In most cases, direct evidence of discrimination is not available, given that most employers do not openly admit that they discriminate.

A plaintiff may also proceed by offering circumstantial evidence. A common type consists of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn." *Troupe v. May Dep't. Stores*, 20 F.3d 734, 736 (7th Cir. 1994); *see also Marshall v. Am. Hosp. Ass'n.*, 157 F.3d 520 (7th Cir. 1998).

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

Courts often give little weight to discriminatory remarks made by persons other than decision makers, "stray" remarks not pertaining directly to the plaintiff, or remarks that are distant in time to the disputed employment decision. *Gorence v. Eagle Food Ctrs, Inc.* 242 F.3d 759 (7th Cir. 2001); *Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569 (7th Cir. 2003) (stray remarks five months before and one month after adverse employment decision too far removed in time); *Oest v. Ill.Dep't. of Corr.*, 240 F.3d 605 (7th Cir. 2001) (remarks occurring four years before termination too remote).

The power of "stray remarks" was given some new life after the Supreme Court ruled in *Reeves v. Sanderson Plumbing, Inc.,* 530 U.S. 133 (2000), that a lower court of appeals erred by discounting evidence of the decision maker's age-related comments ("you must have come over on the Mayflower") merely because not made "in the direct context of termination."

Where a biased manager influenced the decision maker, the manager's bias can be imputed to the employer. *Sun v. Bd. of Tr. of the Univ. of Ill.*, 473 F.3d 799, 813 (7th Cir. 2007) (statements by someone other than the decision maker may be probative if that individual had significant influence over the decision maker); *West v. Ortho-McNeil Pharm. Corp.,* 405 F.3d 578 (7th Cir. 2005); *Waite v. Bd. of Trs.,* 408 F.3d 334 (7th Cir. 2005); *Cerutti v. BASF Corp.* 349 F.3d 1055 (7th Cir. 2003) (biased members of decision making panel must be shown to have influenced panel's decision).

Where a committee is ostensibly the decisionmaker, a bigoted supervisor's stray remarks can be imputed to the committee if the committee is simply a rubber stamp. *Mateu-Anderegg, v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002).

b. ***McDonnell Douglas* Burden-Shifting Method:** In the majority of cases, the plaintiff lacks direct evidence of discrimination and must prove discriminatory intent indirectly by inference. The Supreme Court has created a structure for analyzing these cases, commonly known as the *McDonnell Douglas* burden-shifting formula, which it first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later refined in *Tex.Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The analysis is as follows: (1) the plaintiff must establish a prima facie case of discrimination; (2) the employer must then articulate, through admissible evidence, a legitimate, nondiscriminatory reason for its actions; and (3) in order to prevail, the plaintiff must prove that the employer's stated reason is a pretext to hide discrimination. *McDonnell Douglas*, 411 U. S. at 802-04; *Burdine*, 450 U.S. at 252-56. It is not necessary that the alleged discriminator's race (or other protected status) be different from that of the victim. *Oncale v. Sundowner Offshore Services.,* 523 U.S. 75 (1998); *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524 (7th Cir. 2003).

(1) **Prima facie case:** The elements of the prima facie case vary from context to context. In a discriminatory hiring case, they are: (i) the plaintiff is a member of a protected class; (ii) the plaintiff applied and was qualified for the job; (iii) the application was rejected; and (iv) the position remained open after the rejection. *Hicks*, 509 U.S. at 505-507. In a termination case, the second element is whether the plaintiff was performing up to the employer's "legitimate expectations" and the fourth element is whether similarly situated employees (not in plaintiff's protected group) were treated better. *Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001). The Seventh Circuit suggested recently that the plaintiff in a termination case need not show, for prima facie case purposes, a similarly situated comparator, but rather must show only that the employer sought someone else to do plaintiff's work after the termination. *Pantoja v. American NTN Bearing*, 495 F.3d 840, 846 (7th Cir. 2007).

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. Establishment of a prima facie case creates an inference that the employer acted with discriminatory intent. *Id*. at 254. Plaintiffs argue that it is the role of the judge, not the jury, to determine whether the plaintiff has stated a prima facie case. *Achor v. Riverside Golf Club*, 117 F.3d 339, 340 (7th Cir. 1997).

The legitimate expectations formulation may not be appropriate if those who evaluated the plaintiff's performance are accused of discrimination, *Pantoja v. American NTN Bearing*, 495 F.3d 840, 846 (7th Cir. 2007); *Thanongsinh v. Board of Education, District U-46*, 462 F. 3d 762, 772 (7th Cir. 2006) (employer cannot argue that an employee is unqualified if qualifications are measured in a discriminatory manner); *Peele v. Country Mutual Ins. Co.*, 288 F.3d 319 (7th Cir. 2002); *Oest v. Ill. Dep't. of Corr.,* 240 F.3d 605 (7th Cir. 2001), if the plaintiff claims she was singled out (i.e., for discipline) based on a prohibited factor, *Curry v. Menard, Inc.*, 270 F.3d 473 (7th Cir. 2001); *Grayson v. O'Neill*, 308 F.3d 808 (7th Cir. 2002), or if the employer's "expectations" are shown to be pretextual, *Brummett v. Lee Enters. Inc.*, 284 F.3d 742 (7th Cir. 2002); *Goodwin v. Board of Trustees, Univ. of Ill.,* 442 F.3d 611 (7th Cir. 2006).

As to the "similarly situated" requirement, some judges have required very close similarity of the plaintiff and her comparable employees, for both prima facie case and pretext purposes. *See e.g., Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731 (7th Cir. 2006) (plaintiff must identify employees who are "directly comparable in all material respects."); *Ineichen v. Ameritech,* 410 F.3d 956 (7th Cir. 2005); *Steinhauer v. DeGolier*, 359 F.3d 481 (7th Cir. 2004) (plaintiff not similar to comparable worker where plaintiff was probationary employee). *But see Fischer v. Avanade, Inc.*, 519 F.3d 393, 402 (7th Cir. 2008)*(*where an employer claims that another employee was not similarly situated simply because of his experience in the temporary position of the same job title, and where the plaintiff alleges that the initial appointment was itself made on a discriminatory basis, the employees' qualifications *before* the temporary

appointment are relevant to whether they were similarly situated); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (plaintiff and comparator need not have the same job title); *Humphries v. CBOCS West, Inc.,* 474 F.3d 387, 404-05 (7th Cir. 2007) (similarly situated test is flexible and meant to determine whether there are enough common factors to allow for a meaningful comparison); *Crawford v. Indiana Harbor Belt RR Co.,* 461 F. 3d 844, 845 (7th Cir. 2006) (rejecting tendency to require close and closer degrees of similarity)*; Ezell v. Potter*, 400 F.3d 1041, 1050 (7th Cir. 2005) (employee similarly situated to his supervisor)*; Freeman v. Madison Metro. Sch'l Dist.*, 231 F.3d 374, 383 (7th Cir. 2000) (employee can be similarly situated to employees in different job position). In the discriminatory termination context, the Seventh Circuit has held that "to be similarly situated, [an employee] must have been treated more favorably by the same decisionmaker that fired the [plaintiff]." *Ellis v. UPS, Inc*., 523 F.3d 823, 826 (7th Cir. 2008).

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

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

(2) **Employer's burden of production:** In order to rebut the inference of discrimination, the employer must articulate, through admissible evidence, a legitimate, non-discriminatory reason for its actions. The employer's burden is one of production, not persuasion; the ultimate burden of persuasion always remains with the plaintiff. *Hicks*, 509 U.S. at 511

(1993). But the employer must provide a nondiscriminatory reason which is sufficiently specific such that plaintiff can attempt to show pretext. *EEOC v. Target,* 460 F. 3d 946 (7th Cir. 2006).

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

To prove pretext, plaintiff must present evidence that impeaches the employer's stated reason for its employment decision. Plaintiff generally must show that the employer did not sincerely believe its proffered reason. *Humphries v. CBOCS West, Inc.*, 474 F. 3d 387, 407 (7th Cir. 2007) ("[e]rroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons."); *Sublett v. Wiley & Sons*, 463 F. 3d 731 (7th Cir. 2006) (employer's justification must be a lie rather than simply mistaken).

But one can argue based on *Reeves* and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993)(factfinder's disbelief of defendant's reason may together with prima facie case suffice to show pretext) that a jury need not find that an employer lied in order to find pretext. For example, evidence that the employer's belief was incorrect may also suggest that the employer's stated explanation is insincere. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000).

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

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

Circumstantial Evidence of Pretext: Any evidence that impeaches the employer's explanation may help show pretext. *Reeves v. Sanderson Plumbing Prods, Inc.,* 530 U.S. 133 (2000). For example, plaintiff may offer evidence that the employer's belief was incorrect (e.g., it did not hire the most qualified candidate) as proof that the employer's reason for action was insincere. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000). A plaintiff's superior qualifications can also show pretext, but the burden on the plaintiff is high. *Fischer v. Avanade, Inc.,* 519 F.3d 393, 404 (7th Cir. 2008) (holding that plaintiff must establish that "no reasonable person" could have disputed that plaintiff was better qualified for the position); *see also Ash v. Tyson Foods Inc.*, 126 U.S.1195 (2006); *Sublett v. Wiley & Sons*, 463 F. 3d 731 (7th Cir. 2006) (to show pretext, plaintiff's qualifications must be so superior that plaintiff is incontrovertibly better qualified for the position than the employee who received it).

Other circumstances that can suggest pretext include: a failure to timely mention a reason for termination, *Culver v. Gorman & Co.*, 416 F.3d 540 (7th Cir. 2005); deviations from the employer's stated policy, *Davis v. Wis. Dep't of Corrections*, 445 F.3d 971 (7th Cir. 2006); *Rudin v. Lincoln Land Cmty Coll.*, 420 F.3d 712 (7th Cir. 2005); the employer's grounds for its adverse action are poorly defined, the grounds are inconsistently applied, the employee has denied the existence of the grounds, and no manager owns responsibility for the

employment decision. *Gordon v. United Airlines*, *Inc.*, 246 F.3d 878 (7th Cir. 2001). In addition, the sincerity of the employer's belief is undercut by the unreasonableness of the belief; employers need not be taken at their word. *Id.*

Comparative evidence: Plaintiff may prove pretext by offering evidence that similarly situated employees who are not in the plaintiff's protected group were treated more favorably. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973)(employer's general practice with respect to minority employees may be relevant to pretext); *Lawson v. CSX Transp., Inc*. 245 F.3d 916 (7th Cir. 2001).

As discussed earlier, opinions differ as to who is similarly situated. *Radue v. Kimberly Clark Corp*., 219 F.3d 612 (7th Cir. 2000) (plaintiff and similarly situated employee must be subject to same decision maker). *But see Ezell v. Potter*, 400 F.3d 1041, 1050 (7th Cir. 2005) (plaintiff similarly situated to his supervisor)*;Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 383 (7th Cir. 2000) (plaintiff can be similarly situated to employees in different job positions).

Statistics: Pattern evidence is admissible in individual disparate treatment cases, but its usefulness depends on its relevance to the specific decision affecting the individual plaintiff. *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008) Statistics may be used as part of pretext evidence where the statistics encompass all employment decisions made by the employer in the relevant market. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000). However, statistics alone may not prove pretext. *Baylie v. Fed. Reserve Bank of Chi.*, 476 F. 3d 522, 524 (7th Cir. 2007); *Rummery v. Ill. Bell Tel. Co.*, 250 F.3d.553 (7th Cir. 2001). Evidence that an employer hires many workers within the protected class, while relevant, is not dispositive of nondiscrimination. *Reeves v. Sanderson Plumbing Prods, Inc.,* 530 U.S. 133 (2000).

Direct evidence: Just as direct evidence may be used to establish direct proof of discrimination, it may also support pretext. See the discussion about direct evidence above.

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

At summary judgement plaintiff need only raise a material issue of fact as to the believability of the employer's justification. Plaintiff need not also provide evidence of discriminatory motive. *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005). "The plaintiff's oral testimony if admissible will normally suffice to establish a genuine issue of material fact," *Randolph v. Indiana Regional Council of Carpenters,* 453 F.3d 413 (7th Cir. 2006). On summary judgement, where the movant's version of the facts is based solely on self-serving assertions, self serving assertions to the contrary from the nonmovant may create a material issue of fact. *Szymansky v. Rite Way Lawn Maint. Co., Inc.,* 231 F.3d 360 (7th Cir. 2000).

(5) **Instructing the jury:** If the case goes to a jury, the elaborate *McDonnell Douglas* formula should not be part of the jury instructions. *Achor v. Riverside Golf Club*, 117 F.3d 339, 340 (7th Cir. 1997). The ultimate question for the jury is whether the defendant took the action at issue because of the plaintiff's membership in a protected class. *Id*. at 341.

c. **Mixed Motives:** The plaintiff in a disparate treatment case need only prove that membership in a protected class was a motivating factor in the employment decision, not that it was the sole or even the "but for" factor. *Boyd v. Ill. State Police*, 384 F.3d 888 (7th Cir. 2004)(jury instruction that race had to be "catalyst" for decision was error). If the employer proves that it had another reason for its action and that it would have made the same decision without the discriminatory factor, the employer may avoid liability for monetary damages, reinstatement or promotion. *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003). *Hossack v. Floor Covering Assoc. of Joliet, Inc.*, No. 04-3390, pg. 9 (7th Cir. 2007). The court may still grant the plaintiff declaratory relief, injunctive relief, and attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (overruling in part *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989). If the employer shows that it provided multiple layers of internal review to eliminate any impermissible motives from an employment decision, summary judgment for the employer may be appropriate. *Sun v. Bd. of Tr. of the Univ. of Ill.*, 473 F. 3d 799, 815 (7th Cir. 2007).

The Seventh Circuit has held that in a mixed motives retaliation case, the plaintiff is not entitled to declaratory relief, injunctive relief, or attorneys fees because retaliation is not listed in the mixed motives provision of the 1991 Civil Rights Act. *Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001); *McNutt v. Bd. of Trs. of the Univ. of Ill.*, 141 F.3d 706, (7th Cir. 1998).

d. **After-Acquired Evidence:** If an employer takes an adverse employment action against an employee for a discriminatory reason and later discovers a legitimate reason which it can prove would have led it to take the same action, the employer is still liable for the discrimination, but the relief that the employee can recover may be limited. *McKennon v. Nashville Banner Publ's Co.*, 513 U.S. 352 (1995); *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002) (after-acquired evidence of misrepresentation on resume or job application does not bar claim). In general, the employee is not entitled to reinstatement or front pay, and the back pay liability period is limited to the time between the occurrence of the discriminatory act and the date the misconduct justifying the job action is discovered. *McKennon*, 513 U.S. at 361-62.

e. **Pattern or Practice Discrimination:** In class actions or other cases alleging a widespread practice of intentional discrimination, plaintiffs may establish a prima facie case using statistical evidence. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). The statistical

evidence needs to control for potentially neutral explanations for the employment disparities. *Radue v. Kimberly Clark Corp.*, 219 F.3d 612 (7th Cir. 2000). Plaintiffs often combine statistical evidence with anecdotal or other evidence of discriminatory treatment. *See, e.g., Adams v. Ameritech Servs., Inc.,* 231 F.3d 414 (7th Cir. 2000) (statistics eliminate innocent variables and anecdotal evidence supports discriminatory animus); *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 874-75 (7th Cir. 1994). The employer can rebut the prima facie case by introducing alternative statistics or by demonstrating that plaintiff's proof is either inaccurate or insignificant. *Teamsters*, 431 U.S. at 339-41. The plaintiff then bears the burden of proving that the employer's information is biased, inaccurate, or otherwise unworthy of credence. *Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985).

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

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

In 1989, the Supreme Court reduced the defendant's burden of proving business necessity to a burden of producing evidence of business justification. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989). The Civil Rights Act of 1991 overturned that portion of the *Wards Cove* decision.

b. **Examples:** Examples of practices that may be subject to a disparate impact challenge include written tests, height and weight requirements, educational requirements, and subjective procedures, such as interviews.

c. **Allocation of proof:**

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

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

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

d. Selection Criteria

(1) **Scored tests:** There are several methods of measuring adverse impact. One method is the EEOC's Uniform Guidelines on Employee Selection Criteria, which finds an adverse impact if members of a protected class are selected at a rate less than four fifths (80 percent) of that of another group. For example, if 50 percent of white applicants receive a passing score on a test, but only 30 percent of African-Americans pass, the relevant ratio would be 30/50, or 60 percent, which would violate the 80 percent rule. 29 C.F.R. §§ 1607.4 (D) and 1607.16 (R)(2003). The 80 percent rule is more of a rule of thumb for administrative convenience, and has been criticized by courts. The courts more often find an adverse impact if the difference between the number of members of the protected class selected and the number that would be anticipated in a random selection system is more than two or three standard deviations. The defendant may then rebut the prima facie case by demonstrating that the scored test is job related and consistent with business necessity by showing that the test is "validated," although a formal validation study is not necessarily required. 29 CFR § 1607.5(B)(2003); *see Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 998 (1988); *Albermarle Paper Co. v.*

Moody, 422 U.S. 405, 431 (1975). The Seventh Circuit has held, in the context of using a particular cut-off score for hiring decision, that such scoring satisfies business necessity if the score is based on a "logical 'break-point' in the distribution of scores." *Bew v. Chicago*, 252 F.3d 891 (7th Cir. 2001).

(2) **Nonscored objective criteria:** The Uniform Guidelines are applicable to other measures of employee qualifications, such as education, experience, and licensing. In cases involving clerical or some blue collar work, the courts have generally found unlawful educational requirements that have a disparate impact. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (invalidating high school diploma requirement for certain blue collar positions, where 34 percent of white males in state had completed high school while only 12 percent of African American males had done so, and defendant did not demonstrate link between high school diploma and job performance.)

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

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

a. **Types of Harassment:** Traditionally, there were two types of sexual harassment, quid pro quo and hostile environment. These labels are not dispositive of liability, *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), although the terms continue to be used. For employer liability, the focus is on who the harasser is, what the harasser did, and how the victim responded. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. Inc., v. Ellerth*, 524 U.S. 742 (1998).

(1) **Quid pro quo:** "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission

to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . ." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(1) and (2)(2003). A promise for a promotion in exchange for sexual favors only constitutes quid pro quo harassment if a promotion actually was available and the plaintiff was qualified for the promotion. *Jackson v. County of Racine*, 474 F. 3d 493, 501 (7th Cir. 2007).

(2) **Hostile environment:** "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (2003). For a prima facie case, the plaintiff must demonstrate that (1) she was subjected to unwelcome sexual harassment; (2) the harassment was based on sex; (3) the harassment unreasonably interfered with the plaintiff's work performance and environment and (4) there is a basis for employer liability (more on this element below). *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). Courts generally require that the offensive behavior be fairly extreme, yet need not be so severe that it makes the work environment intolerable. *Jackson v. County of Racine*, 474 F. 3d 493, 500 (7th Cir. 2007) (work environment need not be "hellish" to constitute illegal harassment); *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 942 (7th Cir. 2007) ("Title VII comes into play before the harassing conduct leads to a nervous breakdown."). Factors that the courts consider include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993). Second hand harassment, harassment that plaintiff herself did not hear, will have a lesser impact on plaintiff. *Whittaker v. Northern Ill. Univ.*, 424 F.3d 640 (7th Cir. 2005); *Smith v. Northeastern Ill. Univ.*, 388 F.3d 559 (7th Cir. 2004).

Additional guidelines: Harassment need not be both pervasive *and* severe. *Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007). Direct contact with intimate body parts

is the most severe type of sexual harassment. *Patton v. Keystone RV Co.*, 455 F.3d 812 (7th Cir. 2006)(four touchings might suffice)*; Worth v. Tyer II,* 276 F.3d 249 (7th Cir. 2001) (two touchings of breast actionable). Comments need not be of a sexual nature as long as they create different terms and conditions of employment. *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007). Thus, a thinly-veiled murder threat can be sufficient. *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). The harassment must be both objectively and subjectively offensive; however, for the subjective inquiry, it is sufficient that the plaintiff declare that she felt harassed. *Worth,* 276 F.3d 249. A victim's own use of racist or sexist remarks does not necessarily mean that the victim welcomes these types of remarks. *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 940 (7th Cir. 2007); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004). Sexual harassment can exist when a man treats a woman in a way he would not treat a man. *Frazier v. Delco Elecs. Co.*, 263 F.3d 663 (7th Cir. 2001).

Application of guidelines: It is often difficult to predict whether a given set of facts will be sufficiently severe to be considered a hostile environment. *See, e.g. Worth v. Tyer II,* 276 F.3d 249 (7th Cir. 2001) (two touchings of breasts is actionable); *Gentry v. Exp. Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (touching, plus solicitation, plus crude pictures shown by supervisor is actionable); *Hostetler v. Quality Dining, Inc.* 218 F.3d 798 (7th Cir. 2000) (two attempted kisses, an attempted bra removal and a lewd comment may create hostile environment); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004) (repeated use of word "nigger" creates racial hostility"); *Patt v. Family Health Sys., Inc.*, 280 F.3d 749 (7th Cir. 2002) (eight offensive comments with only two said to plaintiff not pervasive or hostile); *Quantock v. Shared Mktg. Servs. Inc.*, 312 F.3d 899 (7th Cir. 2002) (boss propositioning employee sexually and explicitly at one single meeting actionable); *Hilt-Dyson v. Chicago*, 282 F.3d 456 (7th Cir. 2002)(occasional backrubbing and inspecting clothes not objectively unreasonable); *Wolf v. Northwest Ind. Symphony Soc'y,* 250 F.3d 1136 (7th Cir. 2001) (collecting cases).

Proof of Harm: The plaintiff is not required to prove psychological harm or tangible effects on job performance.

Harris v. Forklift Sys., 510 U.S. 17 (1993). "Objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998). The sexual harassment need not occur in front of other witnesses to be actionable. *Cooke v. Stefani Mgt. Servs., Inc.*, 250 F.3d 564 (7th Cir. 2001).

(3) Employer liability

(i) The Meritor Decision: In *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70-73 (1986), the Supreme Court held that an employer is not automatically liable for harassment by a supervisor in a hostile environment case, and that courts should look to traditional agency principles to determine liability. Essentially, there are two standards for employer liability: vicarious liability, where the harasser is a supervisor; and negligence, where the harasser is a coworker.

(ii) Harassment by a co-worker: When the harasser is a co-worker, the employer is liable only if it was negligent, that is, only if it knew or should have known of the harassment and failed to take reasonable corrective action. *Bernier v. Morningstar, Inc.*, 495 F.3d 369 (7th Cir. 2007) (plaintiff has burden to show that employer knew of harassment); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473(7th Cir. 2004) (no employer liability where victim made only vague complaints to managers). *But see Cerros v. Steel Technologies, Inc.* 398 F.3d 944 (7th Cir. 2005) (plaintiff need not follow letter of employer's harassment reporting procedure if employer had notice of harassment); *Loughman v. Malnati Org.*, 395 F.3d 404 (7th Cir. 2005) (if coworker harassment is sufficiently severe, it may not be enough for the employer to simply warn the harassers). The existence of a steady stream of harassment may be evidence that the employer's harassment policy is not effective. *Id. See also Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 943 (7th Cir. 2007) (failure to discipline harasser despite multiple complaints suggests that employer did not exercise reasonable care).

(iii) **Harassment by a supervisor:** An employer is liable for actionable harassment by a supervisor with immediate (or higher) authority over the harassed employee. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The employer can be liable for harassment by a supervisor that creates a hostile work environment or for harassment that results in an adverse job action. If the harassment creates a hostile work environment, the employer may have an affirmative defense to liability. If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is liable and has no affirmative defense. *Huff v. Sheahan*, 493 F.3d 893 (7th Cir. 2007); *see infra* "Affirmative Defense."

The harasser must be the one who imposes the adverse job action or there must be evidence of a conspiracy between the decision maker and the harasser. *Murray v. Chi.Transit Auth.*, 252 F.3d 880 (7th Cir. 2001).

Who Is a Supervisor?

Harassment by high level supervisors is imputed to the employer as a matter of vicarious liability. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001). The plaintiff must show that the harasser was her supervisor, rather than someone with managerial authority over other employees. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004). A supervisor has the authority to hire, fire, demote, promote, transfer, *or* discipline an employee. *Valentine v. City of Chicago*, 452 F.3d 670 (7th Cir. 2006); *Huff v. Sheahan*, 493 F.3d 893 (7th Cir. 2007) (individuals who are authorized to take tangible employment actions against the plaintiff are supervisors). But see *Rhodes v. IDOT*, 359 F.3d 498 (7th Cir. 2004); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002)*;Gawley v. Ind. Univ.,* 276 F.3d 301 (7th Cir. 2001). Supervisors without this authority are treated the same as co-workers for purposes of determining employer liability (negligence standard). *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir.

2001). But the Seventh Circuit recently stated that an employer must exercise greater care where the harasser is a low level supervisor than is required where the harasser is a coworker; how much greater is usually a jury question. *Doe v. Oberweis*, 456 F.3d 704 (7th Cir. 2006). One factor in determining whether a manager has sufficient supervisory authority is whether he is the only manager on site for long periods. *Doe*, 456 F.3d 704.

If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is liable and has no affirmative defense (described below).

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

(v) **Affirmative Defense:** When the harasser is the employees' supervisor and no tangible employment action is taken, the employer may raise an affirmative defense. The defense has two elements: "(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Reasonable Care

While proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. For example, an employer must promulgate a policy

which plaintiff can understand. *EEOC v. V&J Foods, Inc*., 507 F.3d 575 (7th Cir. 2007).

The employer's response to reported harassment must be reasonably calculated to prevent future harassment. *Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007). An employer has taken adequate remedial measures where it conducts a prompt investigation into the harassment complaint, reprimands the harasser, produces a letter of apology, and separates the victim from the harasser. *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044 (7th Cir. 2000).

The mere creation of an anti-harassment policy does not establish this affirmative defense; the employer must implement the policy and respond to complaints brought under it. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001). The defense is not available when the employer fails to name a person to whom an employee may complain, *Gentry v. Exp. Packaging Co.*, 238 F.3d 842 (7th Cir. 2001), or where the employer's harassment policy designates the harasser as the only person to whom the harassment victim can complain. *Faragher,* 524 U.S at 790. If the employer shrugs off complaints of harassment and does not provide ready access to its anti harassment policy, it has not acted in good faith. *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001). An employer who transfers a harassment victim into a materially worse position has not provided an effective remedy and may be liable for damages arising from the undesirable transfer (even if the harassment has stopped). *Hostetler v. Quality Dining, Inc.* 218 F.3d 798 (7th Cir. 2000); *Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001) (employer response that stops harassment not necessarily adequate).

Plaintiff's Failure to Complain

While proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use a complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden

under the second element of the defense. *Faragher*, 524 U.S. 775, 118 S.Ct. 2275, 2292-93; *see also Burlington Indus.*, 524 U.S. 742, 118 S. Ct. 2257, 2270. But a plaintiff's failure to complain about harassment for a full year can, in some circumstances, be reasonable. *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000). *But see Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007) (four months is a long time to wait before reporting harassment). An employee need not use the phrase "sexual harassment" when making her complaint. *Gentry v. Exp. Packaging Co.*, 238 F.3d 842 (7th Cir. 2001). An employee who complains that a supervisor "put his hands on me" sufficiently put the employer on notice. *Valentine v. City of Chicago,* 452 F.3d 670 (7th Cir. 2006). A plaintiff's complaint to a coworker, if relayed to management, may suffice to put the employer on notice. *Bombaci v. Journal Community Publishing Group, Inc.* 482 F.3d 979 (7th Cir. 2007).

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

Discovery: A harassment plaintiff who claims emotional distress damages will likely be required to turn over psychiatric records. *Doe v. Oberweis,* 456 F.3d 704 (7th Cir. 2006).

b. **Same sex harassment:** An employer may be liable for harassment by a supervisor or co-worker who is the same gender as the plaintiff, provided that the harassment was motivated by the plaintiff's gender.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S.Ct. 998 (1998) (holding sex discrimination consisting of same-sex sexual harassment is actionable under Title VII). A husband and wife employed in the same workplace may both experience gender-based harassment, at the hands of different managers. *Venezia v. Gottlieb Mem'l Hosp.*, 421 F.3d 468 (7th Cir. 2005). Harassment based on sexual orientation alone is not actionable. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr, Inc.* 224 F.3d 701 (7th Cir. 2000).

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

d. "Equal Opportunity" Harassment: The Seventh Circuit has held that when an employer harasses everyone equally, Title VII is not violated.. *See e.g., Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000); *Wyninger v. New Venture Gear, Inc.* 361 F.3d 965 (7th Cir. 2004)(both men and women experienced vulgar language). But where an employer harassed all employees, but one group experienced more severe harassment because of membership in a protected class, Title VII may have been violated. *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 940 (7th Cir. 2007).

e. Employer liability: See above.

4. Retaliation

a. Retaliation for "Participation": Title VII prohibits discrimination against a current or former employee or a job applicant "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997) (the term "employees," as used in anti-retaliation provision of Title VII, includes former employees). The participation clause has been liberally construed, and it applies even if the employee is wrong on

the merits of the original charge. *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1043 (7th Cir. 1980). For the employee's expression or conduct to be protected from retaliation, it must make reference to a protected class or type of discrimination. *Tomanovich v. City of Indianapolis*, 2006 WL 2256922 (7th Cir 2006), and not merely to lost benefits. *Miller v. Am. Family Mut. Ins. Co.,* 203 F.3d 997 (7th Cir. 2000). Where an employer loans an employee's services to another employer, Title VII protects the employee against retaliation by either entity. *Flowers v. Columbia Coll. Chi.*, 397 F.3d 532 (7th Cir. 2005).

b. **Retaliation for "Opposition":** Title VII also prohibits discrimination against a current or former employee or an applicant "because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The employee is protected if he or she had a reasonable and good faith belief that the practice opposed constituted a violation of Title VII, even if it turned out not to be a violation of Title VII. *Fine v Ryan Int'l Airlines*, 305 F.3d 746 (7th Cir. 2002); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994). *Cf. EEOC v. Concentra Health Servs*., 496 F.3d 773 (7th Cir. 2007)(employee could not reasonably believe that it violated Title VII for his supervisor to favor a subordinate with whom supervisor was having an affair). But if the worker engages in protected activity that is unreasonable with a bad faith purpose, there is no protection. *Mattson v. Caterpillar, Inc*. 359 F.3d 885 (7th Cir. 2004); *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984) (court should balance disruption of plaintiff's absences from work to attend protests against the protest's advancement of Title VII's policy of eliminating discrimination).

c. **The Importance of Timing:** The amount of time that passed between the protected activity and the adverse employment action can be probative of the retaliatory motive. *Lewis v. City of Chicago*, 496 F.3d 645, 655 (7th Cir. 2007); *Lang v. Ill.s Dep't. of Children & Family Servs.,* 361 F.3d 416 (7th Cir. 2004) (after years of positive evaluations, baseless complaints made after plaintiff's protected complaint); *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000). A three month time span between the protected activity and the alleged retaliation is not too long to support an inference of retaliation. *Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720 (7th Cir. 2003). However, suspicious timing alone, without additional evidence and even as short as one week between protected activity and discharge, can be insufficient. *Culver v. Gorman & Co.,* 416 F.3d 540 (7th Cir. 2005); *Pugh v. City of Attica*, 259 F.3d 619 (7th Cir. 2001); *see also Hall v.*

Forest River, Inc. (7th Cir. 2008) (holding that "the mere fact that one event preceded another does not prove causation," especially when the alleged retaliation is a failure to promote).

d. **Application of McDonnell-Douglas:** Plaintiffs may use the *McDonnell-Douglas* burden-shifting formula in retaliation cases. To show a prima facie case a plaintiff must show that she engaged in protected expression, that she suffered an adverse action, and that there is a causal link.

Some judges have further required a plaintiff to establish a causal link between the protected expression and the adverse action while others have only required that the plaintiff establish that she was performing her job satisfactorily. *Compare Culver v. Gorman & Co.,* 416 F.3d 540 (7th Cir. 2005)(holding that a causal link is required to establish a prima facie case) *with Johnson v. Cambridge Indus.*, 325 F.3d 892 (7th Cir. 2003)(holding that a causal link is unnecessary to establish a prima facie case) *and Sublett v. Wiley & Sons*, 463 F. 3d 731, 740 (7th Cir. 2006)(same). Circumstantial evidence can suffice, *see e.g.*, *Sylvester v. SOS Children's Villages Illinois, Inc*. 453 F.3d 900 (7th Cir. 2006).

e. **Employment-Related Nature of Retaliation:** The retaliation need not be employment related, but it must involve "real harm." *Johnson v. Cambridge Indus.*, 325 F.3d 892, 902 (7th Cir. 2003). *See also Szymanski v. County of Cook*, 468 F.3d 1027 (7th Cir. 2006). For example, the denial of a consulting contract, while not strictly employment related, may be actionable. *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632 (7th Cir. 2004).

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

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

5. **Adverse Action:** An employment action is materially adverse if it would deter a reasonable worker from complaining of discrimination. *Burlington Northern v. White,* 126 S.Ct. 2405 *(*2006); *Washington v. Ill. Dep't. of Revenue*, 420 F.3d 658 (7th Cir. 2005). It follows that the range of conduct prohibited under the retaliation provisions of Title VII is broader than the range of conduct prohibited under the discrimination provisions. *Lewis v. City of Chicago* 496 F.3d 645, 654-55 (7th Cir. 2007).

Besides discharge, demotion, lack of promotion, harassment and retaliation, other "adverse" conditions of employment can be actionable, such as loss of a more distinguished title, loss of benefits, or diminished job responsibilities. *Lewis v. City of Chicago*, 496 F.3d 645, 653 (7th Cir. 2007) (distinguishing between adverse action for retaliation and for disparate treatment purposes); *Tart v. Ill. Power Co.*, 366 F.3d 461 (7th Cir 2004) (reviewing cases).

Adverse action present: *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007) (two days overtime); *Timmons v. Gen. Motors Corp.*, 469 F.3d 1122 (7th Cir. 2006) (material diminution of responsibilities even in the absence of a diminution of compensation); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (a denial of a raise and underpayment for work); *Patt v. Family Health Sys. Inc.*, 280 F.3d 749 (7th Cir. 2002) (a change in responsibilities that prevents career advancement); *Russell v. Bd. of Trs.,* 243 F.3d 336 (7th Cir. 2001) (5-day suspension plus misconduct charge in personnel file); *Stutler v. Ill. Dep't. of Corr.*, 263 F.3d 698 (7th Cir. 2001) (retaliatory harassment); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.*, 254 F.3d 644 (7th Cir. 2001); *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000) (denial of raise and denial of temporary promotion); *Place v. Abbott Labs.*, 215 F.3d 803 (7th Cir. 2000) (requiring a medical exam upon return from leave); *Malacara v. Madison*, 224 F.3d 727 (7th Cir. 2000) (failure to train an employee); *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000)(career ending performance review).

Constructive discharge: *Pa. State Police v. Suders*, 124 S.Ct. 2342 (2004) (plaintiff must show that the harassment made her working conditions so severe that a reasonable person would have resigned). Courts require fairly intolerable conditions before crediting an employee with a constructive discharge. *Griffin v. Potter*, 356 F.3d 824 (7th Cir. 2004) (change in work location not materially adverse and does not justify constructive discharge); *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003); *Johnson v. Nordstrom, Inc.*, 260 F.3d 727 (7th Cir. 2001); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662 (7th Cir. 2001); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (jury could find that a reasonable person had no choice but to resign after repeated complaints of sexual harassment were ignored); *Cf.*

Patton v. Keystone RV Co., 2006 WL 2129723 (7th Cir. 2006) (sexual harassment sufficient to constitute constructive discharge).

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

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

B. Scope

1. Section 1981 prohibits only "racial" discrimination, although "race" is defined quite broadly, to mean identifiable classes of persons based on their ancestry or ethnic characteristics. Section 1981 applies to discrimination against groups such as blacks, Latinos, Jews, Iraqis, Arabs, and whites. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). *See Pourghoraishi v. Flying J,* 449 F.3d 751 (7th Cir. 2006)(collecting cases); *see also Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 712 (7th Cir. 2008).

2. Section 1981 applies to all employers even if they do not have 15 employees.

3. The term "make and enforce contracts" in § 1981 "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (added by the Civil Rights Act of 1991 to overrule *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which held that § 1981 applied only to hiring and promotions that create a new and distinct relation between the employer and employee). A plaintiff can make a claim under Section 1981 only if she has rights under the existing contract that she wishes to enforce. *Domino's Pizza, Inc. v. Mcdonald*, 546 U.S. 470 (2006).

4. Section 1981 authorizes retaliation claims. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008).

C. Differences from Title VII:

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

2. Section 1981 claims are filed directly in federal court, not with the EEOC or any other agency.

3. Section 1981 does not prohibit practices that have a disparate impact; it only applies to intentional discrimination. *General Bldg Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

4. A successful plaintiff may receive unlimited compensatory and punitive damages; there are no caps on damages as there are under Title VII.

5. The statute of limitations for most employment based § 1981 claims is four years. The Supreme Court in *Jones v. R.R. Donnelley*, 541 U.S. 369 (2004) held that a four year SOL applied to any claims that were made possible by a post 1990 enactment.

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

III. EEOC PROCEEDINGS

A. Scope of these materials: This manual is intended for use by attorneys appointed to represent plaintiffs in employment discrimination cases in the Northern District of Illinois. At the time of such appointment, proceedings before the EEOC have terminated. Therefore an extensive discussion of EEOC proceedings is beyond the scope of this manual.

B. Summary of Proceedings

1. Title VII Prerequisite: Title VII claims may not be brought in federal court until after they have been filed in writing with the EEOC and the EEOC has issued a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1); *Vela v. Sauk Vill.,* 218 F.3d 661 (7th Cir. 2000). A dismissal for failure to exhaust the EEOC administrative process will not be on the merits (unless the plaintiff failed to cooperate with the EEOC). *Hill v. Potter*, 352 F.3d 1142 (7th Cir. 2003).

2. Time requirements for charges: In general a charge must be filed with the EEOC within 180 days from when the discrimination occurs, except in states like Illinois, where the Illinois Department of Human Rights also has the power to investigate claims of discrimination. In Illinois, a charging party has 300 days from the date of the alleged discrimination to file a charge with the EEOC if the IDHR also has jurisdiction over the claim. *Marlowe v. Bottarelli*,

938 F.2d 807, 813 (7th Cir. 1991); *Sofferin v. Am. Airlines, Inc*., 923 F.2d 552, 553 (7th Cir. 1991). This filing requirement is not a jurisdictional prerequisite, and is subject to laches, estoppel, and equitable tolling, *Zipes v. Trans World Airline, Inc.*, 455 U.S. 385, 393 (1982), and relation back principles, *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 122 S.Ct.. 1145 (2002). Equitable tolling may delay the statute of limitations until such time as the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) her injury. *Allen v. CTA,* 317 F.3d 696 (7th Cir. 2003) (tolling allowed where plaintiff did not know that failure to promote was race based); *Clark v. City of Braidwood*, 318 F.3d 764 (7th Cir. 2003). *Cf. Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854 (7th Cir. 2005)(tolling asks whether a reasonable plaintiff would have been aware of possibility of discrimination). For "equitable estoppel" to apply (as opposed to equitable tolling), a plaintiff must show that the employer prevented the plaintiff from filing suit (concealing the claim or promising not to plead the statute of limitations). *Beckel v. Wal-Mart Assocs., Inc.,* 301 F.3d 621 (7th Cir. 2002).

The period starts to run when the discriminatory act occurs, not when the last discriminatory effects are felt. *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980). When an employer adopts a facially neutral policy with discriminatory intent, the statute begins to run when the policy was adopted. *Castel v. Exec. Bd. of Local 703*, 272 F.3d 463 (7th Cir. 2001). A current refusal to reverse a previous discriminatory act does not revive an expired limitations period. *Sharp v. United Airlines, Inc.*, 236 F.3d 373 (7th Cir. 2001).

Continuing Violations: Plaintiffs may try to allege a continuing violation, linking a series of discriminatory acts with at least one occurring within the charge-filing period. Courts struggled for many years to define a principled basis for the continuing violations theory. The Supreme Court provided some guidance for individual disparate treatment cases in the *Morgan* case. Discrete discriminatory acts (such as termination, failure to promote, refusal to hire) are not actionable if time barred, even if they are related to other still timely discriminatory acts. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854 (7th Cir. 2005). Even if events are not actionable because they are untimely, they may be relevant to actionable, timely events and therefore admissible. *West v. Ortho-McNeil Pharm. Corp.,* 405 F.3d 578 (7th Cir. 2005); *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696 (7th Cir. 2001).

Charge Intake Questionnaire: May suffice as a EEOC charge. *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147(2008).

Equal pay: In *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) the Supreme Court severely limited the application of continuing violation theory in equal pay cases.

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

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

4. **Determination:** At the conclusion of the investigation, the EEOC issues a letter of determination as to whether "there is reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). If there is a reasonable cause finding, the EEOC must attempt to conciliate the claim. 28 C.F.R. § 42.609(a)(2003).

5. **Dismissal and Issuance of Right-to-Sue Letter:** The EEOC will issue a right-to-sue letter even if it finds there is no reasonable cause to believe that the charge is true. The EEOC may dismiss a charge and issue a right-to-sue letter in any of the following situations:

   a. the EEOC determines it does not have jurisdiction over the charge, 29 C.F.R. § 1601.18(a)(2003);

   b. the EEOC closes the file where the charging party does not cooperate or cannot be located, 29 C.F.R. § 1601.18(b), (c)(2003);

   c. the charging party requests a right-to-sue letter before the EEOC completes its investigation (if less than 180 days after filing of charge, EEOC must determine that the investigation cannot be completed within 180 days);

   d. the EEOC determines there is no reasonable cause, 29 C.F.R. 1601.19(a)(2003); or

e. the EEOC has found reasonable cause, conciliation has failed, and the EEOC (or the Department of Justice for governmental respondents) has decided not to litigate.

6. State and local government employees: While the EEOC investigates charges involving employees of state and local governments, it is the Justice Department, not the EEOC, that has the authority to litigate these cases. 42 U.S.C. § 2000e-5(f)(1). If the Justice Department declines to litigate the case, the EEOC issues a right to sue to the charging party.

7. Federal employees: Federal employees do not file original charges directly with the EEOC; they first go through an internal process. The regulations describing this process and related appeals are at 29 C.F.R. §§ 1614.105 and 1614.408. Federal agencies who fail to raise defenses to employment charges during the administrative exhaustion process have waived those defenses in subsequent lawsuits. *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001).

IV. THE COMPLAINT

A. Proper Defendants for a Title VII Action: As a general rule, a party not named in an EEOC charge cannot be sued under Title VII.

1. Employers: Title VII applies to employers. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar years, and any agent of such a person." 42 U.S. C. 2000e(b).

2. Labor organizations and employment agencies: These entities are also covered by Title VII. 42 U.S.C. 2000e-2. See *Maalik v. International Union of Elevator Constructors,* 437 F.3d 650 (7th Cir. 2006)(union liable for refusing to take steps to encourage its members to train plaintiff, a black woman); *Randolph v. Indiana Regional Council of Carpenters,* 453 F.3d 413 (7th Cir. 2006)(union could be liable for refusing to put plaintiff on work list because of her gender or age).

3. Supervisors: A supervisor, in his or her individual capacity, does not fall within Title VII's definition of an employer. *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995).

4. Sufficiency of Complaint: A Title VII complaint need not track the *McDonnell-Douglas* formula; like all civil complaints, it need only be a short and plain statement. *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007); *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S.Ct. 992 (2002).

In *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007), the Supreme Court held that a complaint stating a cause of action under the Sherman Act must allege facts which, if taken as true, would suggest that an agreement had been made to violate the antitrust laws. Thus, allegations of parallel business conduct, along with a bare assertion of conspiracy, were not sufficient to state a claim. *Id.* at 1968. After *Bell Atlantic*, the Seventh Circuit has held that a Title VII complaint must "describe the claim in sufficient detail to give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests,'" and that "its allegations must plausibly suggest that the defendant has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court." *Concentra Health Servs.*, 496 F.3d at 776 (citations omitted). "Acknowledging that a complaint must contain something more than a general recitation of the elements of the claim," however, the court in *Concentra* "nevertheless reaffirmed the minimal pleading standard for simple claims of race or sex discrimination." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008).

B. **Scope of the Title VII Suit:** A plaintiff may pursue a judicial claim not explicitly included in an EEOC charge only if the claim falls within the scope of the EEOC charge. In determining whether the current allegations fall within the scope of the earlier charges, the court looks at whether they are like or reasonably related to those contained in the EEOC charge. If they are, the court then asks whether the current claim reasonably could have developed from the EEOC's investigation of the charges before it. *Geldon v. South Milwaukee Sch. Dist.,* 414 F.3d 817 (7th Cir. 2005); *McGoffney v. Vigo County Div. of Family & Children Servs.*, 389 F.3d 750 (7th Cir. 2004)(charge held to cover only one denial of promotion, despite references to other promotions).

C. **Timeliness in a Title VII Suit:** A judicial complaint must be instituted within ninety days of the "receipt" of the right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1). A Title VII complaint can be filed before a right-to-sue is issued, but is subject to dismissal until its issuance. *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535 (7th Cir. 2002).

1. The ninety day limit begins to run on the date the notice was delivered to the most recent address plaintiff provided the EEOC. *St. Louis v. Alverno Coll.*, 744 F.2d 1314, 1316 (7th Cir. 1984). If the plaintiffs' attorney or even her former attorney receives the right-to-sue letter, this receipt may suffice to start the clock. *Reschny v. Elk Grove Plating Co.*, 414 F.3d 821 (7th Cir. 2005).

2. Compliance with the 90 day time limit is not a jurisdictional prerequisite. It is a condition precedent to filing suit and is subject to equitable modification.

D. **Timeliness in a § 1981 Suit:** As discussed above, most § 1981 claims are now subject to a four year SOL. Filing a complaint with the EEOC does *not* toll the running of the statute of limitations on a § 1981 claim.

E. **Right to a Jury Trial:** When legal and equitable claims are presented, both parties have a right to a jury trial on the legal claims. The right remains intact and cannot be dismissed as "incidental" to the equitable relief sought. *Curtis v. Loether*, 415 U.S. 189, 196 (1974). If the plaintiff seeks compensatory and punitive damages, any party may demand a jury trial. 42 U.S.C. § 1981a(c).

F. **Evidence:** The Illinois Personnel Records Review Act, 820 ILCS 40/1 et seq. requires employers to give employees access to documents used to determine qualifications for employment or discharge, and sets forth sanctions for noncompliance. In *Park v. City of Chicago*, 297 F.3d 606 (7th Cir. 2002), the Seventh Circuit considered the implication of an employer's noncompliance with this Act in a Title VII case. The Court held as follows: (1) an employer's failure to produce documents to an employee in response to a request under the Act does not render those documents inadmissible under the Federal Rules of Evidence; (2) there is no cause of action in federal court for violations of the Act where the only relief sought is barring the inadmissibility of the evidence; and (3) failure to keep records in accordance with the similar EEOC record-keeping requirements **(**absent bad faith) does not require an adverse inference instruction to the jury.

G. **Rule 68 Offers of Judgment:** A plaintiff who rejects an offer of judgment that turns out to be more than the amount the plaintiff recovers after trial cannot recover her attorneys' fees incurred after the date of the offer. *Payne v. Milwaukee County*, 288 F.3d 1021 (7th Cir. 2002).

V. Remedies

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

1. Back pay in an individual Title VII case may be awarded as far back as two years prior to the filing of a charge with the EEOC. 42 U.S.C. § 2000e-5(g)(1).

2. A back pay award will be reduced by the amount of interim earnings or the amount earnable with reasonable diligence. 42 U.S.C. § 2000e-5(g)(1). It is defendant's burden to prove lack of reasonable diligence. *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989).

3. Back pay and/or reinstatement/order to hire will only be granted if the court determines that, but for the discrimination, the plaintiff would have gotten the promotion/job or would not have been suspended or discharged. 42 U.S.C. § 2000e-5(g)(2)(A).

4. In a mixed motive case, if the employer shows that it would have taken the adverse employment action even absent discrimination, the court may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment, but may grant declaratory relief, injunctive relief (as long as it is not in conflict with the prohibited remedies) and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(I).

5. A district court can order demotion of somebody whose promotion was the product of discrimination. *Adams v. City of Chicago*, 135 F.3d 1150 (7th Cir. 1998). Other injunctive relief includes expungement of an adverse personnel record, and injunction against future retaliation where plaintiff will continue working for the same (discriminatory) supervisors. *Bruso v. United Airlines, Inc.,* 239 F.3d 848 (7th Cir. 2001).

B. Compensatory and Punitive Damages: Compensatory and punitive damages are available in disparate treatment cases, but not in disparate impact cases. 42 U.S.C. § 1981a. Punitive damages are not available against state, local, or federal governmental employers. 42 U.S.C. § 1981a(b)(1).

1. Compensatory damages may be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 42 U.S.C. 1981a(b). Medical evidence is not necessary to show emotional distress. *Farfaras v. Citizens Bank*, 433 F.3d 558 (7th Cir. 2006).

2. Punitive damages may be awarded when the defendant is found to have engaged in discriminatory practices with malice or with reckless indifference. 42 U.S.C. § 1981a(b)(1). *See, e.g., Gile v. United Airlines, Inc.* 213 F.3d 365 (7th Cir. 2000); *Slane v. Mariah Boats, Inc.,* 164 F.3d 1065 (7th Cir. 1999). The question of whether an employer has acted with malice or reckless indifference ultimately focuses on the actor's state of mind, not the actor's conduct. An employer's conduct need not be independently "egregious" to satisfy § 1981(a)'s requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an

employee can show the "malice" or "reckless indifference" needed to qualify for such an award. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118 (1999).

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

The Seventh Circuit has stated the test for punitive damages as: (1) the employer knows of the anti-discrimination laws (or lies to cover up discrimination); (2) the discriminators acted with managerial authority; and (3) the employer failed to adequately implement its own anti-discrimination policies (no good faith). *Bruso v. United Airlines, Inc.* 239 F.3d 848 (7th Cir. 2001); *Cooke v. Stefani Mgmt. Servs., Inc.*, 250 F.3d 564 (7th Cir. 2001). In the context of sexual harassment, there is no good faith if the employer shrugs off complaints of harassment, does not put its anti-harassment policy in writing and does not provide ready access to the policy. *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001); *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (punitive damages allowed when company knows that touchings are illegal and sees it happening). In the context of retaliation, punitives have been awarded when the employer creates two documents explaining why it discharged plaintiff (one truthfully disclosing a retaliatory motive; one giving a pretextual motive). *Fine v. Ryan Int'l Airlines*, 305 F.3d 746 (7th Cir. 2002). Punitive damages may be awarded even when back pay and compensatory damages are not. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998). *See also Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007) (holding the ratio between punitive damages and compensatory damages may be high when the compensatory damages are relatively low).

3. Compensatory and punitive damages are added together and the sum is subject to caps in Title VII cases. The sum amount of compensatory and punitive damages awarded for each complaining party shall not exceed, (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more

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

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

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

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

2. Although the language of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, in a § 1981 case, the prevailing defendant is only entitled to attorney's fees if the court finds that the plaintiff's action was "vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429, n.2 (1983).

3. "A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Cady v. City of Chicago*, 43 F.3d 326, 328 (7th Cir. 1994).

VI. Arbitration

A. **The Gilmer Decision:** In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that an Age Discrimination in Employment Act claim could be subject to compulsory arbitration. The Supreme Court did not decide in *Gilmer* whether this rule applied generally to all employment relationships. However, the Court held that the employee retains the right to file a charge with the EEOC and obtain a federal government investigation of the charge. *Id.* at 28.

B. **The Circuit City Decision:** In *Circuit City Stores, Inc. v. Adams,* 121 S.Ct. 1302 (2001), the Supreme Court resolved the question unanswered in *Gilmer* and held that any employment agreement containing an agreement to arbitrate an employment discrimination claim is subject to compulsory arbitration. The Seventh Circuit had previously held that Title VII claims are also subject to compulsory arbitration. *See, e.g., Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Kresock v. Bankers Trust Col*, 21 F.3d 176 (7th Cir. 1994). However, in *EEOC v. Waffle House,* 534 U.S. 279 (2002), the Supreme Court held that the EEOC may pursue a claim on behalf of a Charging Party notwithstanding the Charging Party's agreement to arbitrate her individual case with her employer.

C. **Collective Bargaining Agreements:** In the Seventh Circuit, collective bargaining agreements cannot compel arbitration of statutory rights. *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997). However, in the limited context of railway and airline employees who work under collective bargaining agreements, *Haw. Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994), requires arbitration of employment disputes that involve interpretation of the applicable collective bargaining agreements. *Brown v. Ill. Central R.R. Co.*, 254 F.3d 654 (7th Cir. 2001). In that context, when the collective bargaining agreement is potentially dispositive of a discrimination claim, the plaintiff must arbitrate before proceeding to court. *Tice v. Am. Airlines, Inc.,* 288 F.3d 313 (7th Cir. 2002).

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

employment after the employer published notice of implementation of a mandatory arbitration policy was sufficient consideration to enforce the policy (even where the employee denied receiving notice).