May
2009
Volume 57
Number 2

United States
Department of Justice
Executive Office for
United States Attorneys
Washington, DC
20530

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Director

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The United States Attorneys' Bulletin is published pursuant to 28 CFR § 0.22(b).

The United States Attorneys' Bulletin is published bimonthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201.

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Internet Address
www.usdoj.gov/usao/reading_room/foiamanuals.html

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United States Attorneys' Bulletin,
National Advocacy Center,
Office of Legal Education,
1620 Pendleton Street,
Columbia, SC 29201.

Employment Discrimination

In This Issue

Gender Discrimination and Hostile Work Environment

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I. Gender discrimination

A. Gender discrimination defined

Title VII of the Civil Rights Act of 1964, as amended, makes it unlawful to discriminate against anyone in the workplace based on their race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2000e-15. Where the allegation is that the employer discriminated against the employee because of his or her sex, it does not matter if the plaintiff is a man or a woman or if the allegations are made against a man or a woman. Same-sex discrimination, like opposite-sex discrimination, is actionable under Title VII. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 n.10 (1999) (noting that Congress has a comprehensive view of discrimination and allows for allegations of disparate treatment among members of the same protected class); *see also Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (2001) (sexual harassment of persons of the same sex violates Title VII). However, discrimination based **solely** on sexual orientation is **not** actionable under Title VII. *See Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005) (holding that plaintiff, a heterosexual, was not discriminated against "because of sex" where she charged that her lesbian supervisor showed preferential treatment toward lesbian employees).

In disparate treatment cases, the crux of the claim is that the plaintiff was not treated as well as another who was not a member of the plaintiff's protected class, and plaintiff received less favorable treatment **because of** his or her gender. (The disparate treatment case is the most common. Less common is the "pattern or practice" case in which the plaintiff relies on statistics to support a claim that the employer discriminates against a class of employees.)

B. The prima facie case

To make a prima facie case of disparate treatment discrimination, the courts apply the paradigm set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The plaintiff must show that he or she: (1) belongs to a protected class; (2) was qualified for the job; and (3) was subjected to an adverse employment action; and that (4) the employer gave better treatment to a similarly-situated person outside the plaintiff's protected class. *See Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008); *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d Cir. 2006); *Farrell v. Butler Univ.*, 421 F.3d 609, 613 (7th Cir. 2005); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002); *Geraci v. Moody-Tottrup Int'l, Inc.*, 82 F.3d 578, 580 (3d Cir. 1996). The plaintiff usually can meet the first two elements easily, but can have difficulty meeting the other two elements.

Generally, an adverse action includes failure to hire or promote, termination of employment, demotion, suspension, a cut in pay or benefits, reassignment of duties, reassignment to an undesirable position or location, and denial of opportunities for training and advancement. The definition of an "adverse action" depends upon the law of the circuit. The First, Second, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits take an expansive view of the types of actions that can be considered adverse. 1 Barbara T. Lindemann & Paul Grossman, Employment Discrimination Law, (4th ed. 2007) ("Lindemann & Grossman"), 624, n.138, citing *Ray v. Henderson*, 217 F.3d 1234, 1241-42 (9th Cir. 2000). Those courts define an adverse action as one that might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *See Davis,* 520 F.3d at 1089; *Lewis v. City of Chicago*, 496 F.3d 645, 653 (7th Cir. 2007); *Cooney v. Union Pac. R.R.*, 258 F.3d 731, 734 (8th Cir. 2001); *De la Cruz v. City of New York Human Res. Admin. Dep't. of Soc. Serv.*, 82 F.3d 16, 21 (2d Cir. 1996) (holding that the protections provided by Title VII are not limited to "instances of discrimination in pecuniary emoluments."). The Fifth and the Eighth Circuits hold that only "ultimate employment actions" such as hiring, firing, promoting, and demoting constitute actionable adverse actions. Lindemann & Grossman, 624, n.138.

In evaluating whether the plaintiff can establish a prima facie discrimination case, it is important to determine whether the alleged discrimination is sufficiently substantial to constitute an adverse action. *See Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 745 (7th Cir. 2002) (finding that plaintiff's lateral transfer did not justify "trundling out the heavy artillery of federal anti-discrimination law; 'otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'") quoting *Williams v. Bristol-Myers Squibb*, 85 F.3d 270, 274 (7th Cir. 1996).

The "similarly-situated" prong of the prima facie discrimination case requires the plaintiff to show that another employee who is not in the plaintiff's protected class was comparable to the plaintiff. In the nonselection case, the plaintiff who asserts she did not get the promotion because of her gender meets the similarly-situated element if the male selectee was less qualified. *See Vance v. Union Planters Corp.*, 209 F.3d 438 (5th Cir. 2000) (female plaintiff was the only qualified candidate to be president of a newly consolidated bank, but the head of the bank hired a male).

In discipline cases, the circuits have established varying standards. In general, however, individuals are similarly situated when they have similar jobs and display similar conduct. *See Josephs v. Pac. Bell*, 443 F.3d 1050, 1064-65 (9th Cir. 2006). The Sixth Circuit has held that to be similarly situated to the plaintiff an employee must have the same supervisor, be subject to the same standards, and have engaged in the same conduct. *See Hollins v. Atl. Co., Inc.*, 188 F.3d 652, 659 (6th Cir. 1999). The Seventh Circuit goes further, specifying that the plaintiff must show that he and the alleged comparable employee dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. *Ezell v. Potter*, 400 F.3d 1041, 1049-50 (7th Cir. 2005). The Tenth Circuit adds that, beyond having the same standards governing performance evaluation and discipline, the plaintiff and the comparable employee must have comparable work histories. *Green v. New Mexico*, 420 F.3d 1189, 1194 (10th Cir. 2005). If the plaintiff and the comparator employee do not have comparable records in the relevant particulars, the court will not find the two "similarly-situated." *See Leong v. Potter*, 347 F.3d 1117, 1124 (9th Cir. 2003) (proposed comparators had amassed records of misconduct comparable to plaintiff's, but they were not similarly situated because, unlike the plaintiff, the proposed comparators were not subject to a last chance agreement).

C. The employer's burden of proof and defenses

Once the plaintiff has established a prima facie case of gender discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action it took. *Texas v. Burdine*, 450 U.S. 248, 254 (1981). *See also Santana v. City and County of Denver*, 488 F.3d 860, 864 (10th Cir. 2007); *Wells v. SCI Mgmt., Inc.*, 469 F.3d 697, 701 (8th Cir. 2006); *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004).

In nonselection cases, the process that the employer used to award the position can be key. The more the decision was based on the selectee's meeting specific, objective requirements, the better. Conversely, if the selection criteria were amorphous and subjective, an argument could be made that the failure to promote the plaintiff was attributable to "sexual stereotyping." *See e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989) (male partners did not select the female plaintiff for partnership because they did not consider her sufficiently "feminine").

Where the decision relies upon subjective judgments about the candidate's ability to do the job, the correctness of the employer's action is immaterial in a Title VII case; the sole issue is whether the action was motivated by an unlawful purpose. *See Burdine,* 450 U.S. at 259 (1981) citing *Steelworkers v. Weber,* 443 U.S. 193, 207 (1979) (Title VII prohibits discrimination but "was not intended to 'diminish traditional management prerogatives.' "). Title VII does not require an employer to make the **best** decision; it simply must make a legitimate decision untainted by illegitimate motives. *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 748 (9th Cir. 2003) (employer has "leeway to make subjective business decisions, even bad ones.").

D. The ultimate burden of proof remains on the plaintiff

If the employer has met its burden of proof by articulating a legitimate, nondiscriminatory reason for its actions, the burden shifts back to the plaintiff to show that the employer's reason is a pretext for discrimination. *Cordova v. State Farm Ins. Co.*, 124 F.3d 1145, 1148 (9th Cir.1997). To

do that, the plaintiff must produce evidence that calls into question the defendant's nondiscriminatory explanation. Certainly, statements of the officials who were involved in the decision-making process that betray a sex-based bias is the sort of direct evidence of gender discrimination that can help the plaintiff create an issue of fact for trial. *See Vance*, 209 F.3d at 442 (decision-maker's statement that he was looking for a "mature man" for the branch president position was direct evidence of sex discrimination); *Taylor v. Runyon*, 175 F.3d 861 (11th Cir. 1999) (discrimination claim sustained where the U.S. Postal Service promoted a male instead of the female plaintiff because the male "had a wife and children and needed the money more than [the plaintiff].").

II. Sexual harassment and hostile work environment

A. The claims defined

Title VII provides that no action may be taken on the basis of sex that "[discriminates] against any individual with respect to compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Sexual harassment, a species of gender discrimination, is "verbal or physical conduct of a sexual nature." *E.E.O.C. Guidelines,* 29 C.F.R. §1604.11(a). "Harassing an employee on account of sex is, conceptually, the same as refusing to hire on account of sex, or paying less for the same work, or imposing more onerous duties for the same pay." *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000). "In each such case, the employer violates Title VII by offering terms and conditions to employees of one gender that are less favorable than those it offers to employees of another gender." *Id*. "Sexual harassment, if committed or tolerated by the employer, becomes a new and onerous term of employment." *Id*.

In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), a female employee alleged that she was pressured into having sex with her superior numerous times, and she did so without reporting the matter because she feared losing her job. The Supreme Court recognized the scenario as "hostile environment" sexual harassment and held that it is sex discrimination. Lindemann & Grossman, 1305. The Court in *Vinson* used the terms "quid pro quo" and "hostile environment" to illustrate the two types of sexual harassment: (1) changing the tangible terms or conditions of employment in connection with a sexual demand and (2) changing intangible terms or conditions of employment through severe or pervasive conduct. *Id.* at 1307.

The Supreme Court clarified the elements of the "hostile environment" claim under Title VII in *Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993). Lindemann & Grossman, 1307. In *Harris*, the Court held that, to be actionable, the work environment must be one that a "reasonable person" would find hostile, looking at all circumstances, and that the plaintiff must have subjectively perceived the environment as hostile.

Sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.' " *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001), citing *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Vinson*, 477 U.S. at 67 (some internal quotation marks omitted)).

As in gender discrimination, men and women can bring charges of sexual harassment. *See Dominic v. DeVilbiss Air Power Co.*, 493 F.3d 968 (8th Cir. 2007) (A male employee charged that his female supervisor made several sexual advances toward him including touching him and suggesting that they have sex.). Same-sex claims of sexual harassment also can be brought under Title VII. *Oncale*, 523 U.S. at 80 (sexual harassment of persons of the same sex violates Title VII).

B. The prima facie case

To establish a prima facie hostile work environment claim, the plaintiff must show that: (1) he or she was subjected to an intimidating, hostile, or offensive work environment; (2) the conduct was based on the plaintiff's protected status; (3) the conduct was sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create an abusive work environment for a reasonable person under similar circumstances; and (4) at the time such conduct occurred and as a result of such conduct, plaintiff subjectively perceived his or her work environment to be abusive. *Oncale*, 523 U.S. at 82; *Harris,* 510 U.S. at 21; *Vinson*, 477 U.S. at 66-67. *See also Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000).

> Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically

threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' "

Breeden, 532 U.S. at 269, citing *Faragher*, 524 U.S. at 787-88, quoting *Harris*, 510 U.S. at 23.

To prevail on a hostile work environment claim, a plaintiff must show that her "workplace [was] permeated with discriminatory intimidation . . . that [was] sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. *Brooks*, 229 F.3d at 923 (quoting *Harris*, 510 U.S. at 21 (1993)).

C. Conduct must be "sufficiently severe and pervasive"

The courts evaluate all of the circumstances to determine whether the alleged misconduct is sufficiently "severe and pervasive" to sustain a hostile work environment claim. The alleged harassment must amount to more than a few isolated incidents. "Simple teasing," offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." *Faragher*, 524 U.S. at 788 (quoting *Oncale,* 523 U.S. at 82); *Kortan v. California Youth Auth.*, 217 F.3d 1104, 1110-11 (9th Cir. 2000) (male supervisor's references to female plaintiff as a "castrating bitch," "madonna" or "regina," though offensive, were held insufficient to alter the terms and conditions of her employment). However, one court has held that certain terms used against women can be more offensive than epithets applied to men, even if the language is not directed toward the plaintiff, and, therefore, may be for the basis for a hostile work environment. *Reeves v. C.H. Robinson Worldwide, Inc.*, 525 F.3d 1139, 1143-44 (4th Cir. 2008); *see also*, *e.g.*, *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc) ("[S]exually charged comments . . . even if not directed specifically to the plaintiff, are relevant to determining whether the plaintiff was subjected to sex-based harassment."); *Jackson v. Quanex* 191 F.3d 647, 660 (6th Cir.1999) ("[O]ffensive comments need not be directed at a plaintiff in order to constitute conduct violating Title VII.").

Avoiding communication with an employee who rejected sexual advances is not sufficiently severe and pervasive. *Hollis v. Fleetguard, Inc.*, 668 F. Supp. 631, 636 (M.D. Tenn. 1987) ("[The alleged harasser's] reluctance to interact in a working relationship with the plaintiff was childish and unprofessional, but it does not rise to the level of severity to constitute an actionable Title VII claim.").

The offensive conduct must be frequent and occur over a substantial period of time. *See Brenneman v. Famous Dave's of America, Inc.*, 507 F.3d 1139 (8th Cir. 2007) (plaintiff's supervisor began making sexual advances toward her the first 2 weeks they worked together; daily over a 3-month period, the supervisor touched the plaintiff inappropriately by slapping her on the buttocks and touching the badge on her belt, and he made inappropriate comments; held to be sufficiently severe and pervasive); *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1056 (9th Cir. 2007) (finding supervisor's repeated sexual advances and inappropriate sexual comments to the plaintiff over a 2-month period were sufficiently severe and pervasive).

A single incident or a few incidents are not actionable. *See Holmes v. Utah Dept.of Workforce Serv.*, 483 F.3d 1057, 1066 (10th Cir. 2007) (finding that two incidents that occurred within the filing period were too attenuated from earlier alleged misconduct); *Pomales v. Celulares Telefonica, Inc.* 447 F.3d 79, 83 (1st Cir. 2006) (finding a single incident insufficient); *LeGrand v. Area Res. for Cmty. and Human Serv.*, 394 F.3d 1098, 1103 (8th Cir. 2005) (finding three isolated incidents over 9-month period insufficient); *Jones v. Potter*, 301 F. Supp. 2d 1, 9-10 (D.D.C. 2004) (finding that harassing conduct by male supervisor toward male postal employee, rubbing his penis against the employee's buttocks on one occasion, was not severe or pervasive enough to create a hostile work environment because the incident lasted only seconds and the prior work environment was amicable).

III. The employer's liability and defenses

An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediately or successively higher authority over the employee. *Burlington Industries v.Ellerth*, 524 U.S. 742, 765 (1998). However, where no tangible employment action was taken (e.g., discharge, demotion, undesirable reassignment, for example), a defending employer may raise an affirmative defense to liability. *Id.*; *Faragher*, 524 U.S. at 807. The two elements of the affirmative defense are: (1) that the employer exercised

reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Id*. No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. *Id*.

Under the theory of respondeat superior, "liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor." *Steele v. Offshore Shipbuilding, Inc.,* 867 F.2d 1311, 1316 (11th Cir. 1989); *E.E.O.C. v. Hacienda Hotel,* 881 F.2d 1504, 1515-16 (9th Cir. 1989). If they determined that some form of harassment occurred, employers must have imposed remedial measures that were "reasonably calculated to end the harassment." *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991) (quoting *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1987)).

The existence of an effective policy against sexual harassment can insulate the employer against liability, if the employer followed that policy. *See Thornton v. Fed. Express Corp.*, 530 F.3d 451, 458 (6th Cir. 2008); *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 928 (9th Cir. 2008). An antidiscrimination policy is sufficient to allow the employer to take advantage of the *Ellerth-Faragher* defense where the policy includes a complaint procedure and many avenues for reporting alleged harassment; the policy is widely-disseminated through training, videos, and display of posters; the complainant is offered confidentiality and assurances that no action will be taken against him or her; and the allegations are investigated promptly. *Adams*, 538 F.3d at 928.

Where the employer did act promptly to stop the misconduct, the employer qualifies to assert the *Ellerth-Faragher* defense. *See Lapka v. Chertoff*, 517 F.3d 974, 984 (7th Cir. 2008) (holding that the Department of Homeland Security responded with appropriate remedial action reasonably likely under the circumstances to prevent conduct from recurring when it conducted an investigation into the alleged rape of a female employee by a male employee and fired the male employee); *Anda v. Wickes Furniture Co., Inc.*, 517 F.3d 526, 532 (8th Cir. 2008) (finding that even if coworker's conduct rose to the level of sexual harassment, the employer took prompt and effective remedial action, precluding the employee's claim of hostile work environment).

In *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001), the Ninth Circuit divided the employer's obligation to take corrective measures into two parts: (1) the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified; and (2) the permanent remedial steps the employer takes once it has completed its investigation. *Id*. However, no other circuits have adopted this approach. On the whole, most courts evaluate whether the corrective action the employer took was taken promptly and was reasonably calculated to end the harassment.

Even if the remedial action does not stop the alleged harassment, the corrective action may still be adequate if it was reasonably calculated to do so. In *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1125 (8th Cir. 2007), a female employee reported that a male coworker was sexually harassing her. In response, the employer sanctioned the coworker with an unpaid suspension, restricted his ability to gain access to buildings, assigned him to undergo counseling, and issued a stern warning that additional harassment or inappropriate conduct would result in termination. Finding that these measures were reasonably calculated to end the harassment, the court stated: "Although it turns out that [these actions] did not stop [the coworker's] harassment entirely, [they] did eliminate some of the offending conduct, and the law does not require an employer to fire a sexual harasser in the first instance to demonstrate an adequate remedial response." *Id.*

Where the employer has an effective policy, but the employee unreasonably fails to use it to report the alleged harassment to the employer, the *Ellerth-Faragher* defense can preclude the employer from liability for the alleged harassment. *See Chaloult v. Interstate Brands Corp*., 540 F.3d 64, 75 (1st Cir. 2008); *Thornton*, 530 F.3d at 458. The employer cannot be held liable for unreported incidents of sexual harassment if the employer had no way of knowing about the conduct. *Anda*, 517 F.3d at 532.

IV. Conclusion

The area of sexual harassment and hostile work environment covers a vast expanse in the case law. Not discussed here are the concepts of exhaustion, mixed-motive cases, and

discrimination based on pregnancy or unequal pay. This article addresses basic concepts that arise in most cases involving allegations of sexual harassment and hostile work environment based on sexual harassment. The case law continues to evolve from the Supreme Court down through the circuits. Application of the burdens of proof and adequacy of the evidence vary in some respects, but practitioners must familiarize themselves with every aspect of their cases to provide the best possible defense for their client agencies.❖

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Strategies for Effectively Defending Rehabilitation Act Claims

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I. Introduction

Disability discrimination lawsuits are among the most difficult and challenging to successfully defend. These cases require complex legal analysis, time-intensive fact discovery, retention of multiple experts, and a full assessment of plaintiff's medical status. They also require unique trial strategies due to the jury's natural inclination to sympathize with an impaired employee over a bureaucratic government agency. This article provides a general overview of the relevant law, including a discussion of the Americans with Disabilities Act Amendments Act of 2008., Pub.L. No. 110-325, 122 Stat. 3553 (2008). It also provides suggestions for effective discovery practices and trial presentation.

II. Definition of disability in the Americans with Disabilities Act (ADA)

A. The original definition

The Rehabilitation Act of 1973, 29 U.S.C. § 701-796l (2006), which applies to federal sector employees, incorporates the ADA's substantive standards. 29 U.S.C. § 794(d); 29 C.F.R. § 1614.203(b) (2008). To fall within the protection of the Rehabilitation Act, the plaintiff must establish that he/she is both an "individual with a disability" and "otherwise qualified." *See Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990). "Individual with a disability" is defined as one who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;
>
> (ii) has a record of such an impairment; or
>
> (iii) is regarded as having such an impairment.

29 C.F.R. § 1630.2(g).

Regulations promulgated under the ADA define major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The Equal Employment Opportunity Commission (EEOC) has added several activities to this list since the regulation was promulgated, including:

sitting, standing, lifting, and reaching, 29 C.F.R. pt. 1630, app. § 1630.2(i); mental/emotional processes such as thinking, concentrating, and interacting with others, EEOC Compliance Manual § 902.3(b) (1995); and sleeping, EEOC Notice No. 915.002, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (1997). Factors to be considered in determining whether an individual is substantially limited in a major life activity include:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

A "qualified" individual with a disability is one who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

B. The ADA Amendments Act of 2008 (ADAAA)

The first essential element that any ADA or Rehabilitation Act plaintiff must establish is that he is disabled within the meaning of the statute. In the ADAAA, Congress broadens the meaning of the ADA's term "individual with a disability." Americans with Disabilities Act Amendments Act of 2008 § 4. The new standard for determining the existence of a disability also applies to cases under the Rehabilitation Act. *Id.* § 7. The ADAAA retains the definition of disability contained in the ADA, but adds provisions to the statute which directly affect the determination of whether an individual satisfies this definition. *See* H.R. Rep. No. 110-730(I), at § 4 (2008). The ADAAA formally rejects the U.S. Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). Americans with Disabilities Act Amendments Act of 2008 § 2. Those decisions required a strict interpretation of "disability" and excluded individuals who could mitigate the effects of their impairments with medications or devices. The ADAAA requires disability to be evaluated without any consideration of mitigating measures, except for a limited few. Specifically, the assessment of whether an impairment substantially limits a major life activity will be made without regard to the mitigative effects of medications, assistive technology, auxiliary devices, learned behavior, or adaptive neurological modifications, except for vision corrections or improvements from "ordinary eyeglasses or contact lenses."

In addition, the ADAAA expands the meaning of "disability" by providing that "an impairment that is episodic or in remission is a [covered] disability if it would substantially limit a major life activity when active." Americans with Disabilities Act Amendments Act of 2008 § 4(a). This reverses the holding in *Toyota* that the ADA be interpreted "strictly to create a demanding standard for qualifying as disabled," and instead provides that to "achieve remedial purposes," the definition of disability "shall be construed broadly" by the courts. *Toyota,* 534 U.S. at 197; H.R. Rep. No. 110-730(I), at §§ 2(b)(4), 4(a).

The ADAAA also requests that the EEOC revise "substantially limits" to provide broader, less restrictive coverage, consistent with the purpose of the new act. Americans with Disabilities Act Amendments Act of 2008 § 2. As of the date this article was written, the EEOC had not issued draft regulations in response to the request. In the absence of guidance from the EEOC or the courts on this issue, agencies need to proceed cautiously when evaluating an employee's claimed disability. Further, the definition of "major life activities" is revised to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, as well as "major bodily functions" such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Americans with Disabilities Act Amendments Act of 2008 § 4(a). The ADAAA does not address whether interacting with others is a major life activity.

The ADAAA makes significant changes to the "regarded as" prong of the disability definition. The new statute reinstates the reasoning of the Supreme Court in *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), "which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973." H.R. Rep. No. 110-730(I), at § 2(b)(3). As a result, an individual will be able to satisfy the "regarded as" definition by establishing "that he or

she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Americans with Disabilities Act Amendments Act of 2008 § 4(a). The ADA plaintiff will thus no longer have to prove that a defendant perceived plaintiff as having an impairment that substantially limited a major life activity. The amendments instead focus on the employer's motivation, regardless of the perceived severity of the impairment. The "regarded as" prong, however, will not apply to a condition that is minor or is "transitory"—lasting, or expected to last, 6 months or less.

One issue on which courts have disagreed is whether the employer must accommodate individuals who claim they were merely "regarded as" disabled. The ADAAA states that employers "need not provide reasonable accommodation or a reasonable modification to policies, practices or procedures to an individual who meets the 'regarded as' definition but who is not actually impaired." Americans with Disabilities Act Amendments Act of 2008 § 6(a)(1).

C. Retroactivity of ADAAA

Significantly, the ADAAA appears to apply only prospectively. *See* Americans with Disabilities Act Amendments Act of 2008 § 8 ("This Act and the amendments made by this Act shall become effective on January 1, 2009."); *see also Equal Employment Opportunity Comm'n. v. Agro Distrib., LLC,* 555 F.3d 462, 469 n.8 (5th Cir. 2009) ("Congress recently enacted the [ADA Amendment], but these changes do not apply retroactively." (citation and quotation signals omitted)). Accordingly, nearly every court that has addressed the issue has concluded that the 2008 Amendments cannot be applied retroactively to conduct that preceded its effective date. *See, e.g., Equal Employment Opportunity Comm'n. v. Agro Distrib., Ltd. Liab. Co.,* 555 F.3d 462, 469 n.8 (5th Cir. 2009); *Kiesewetter v. Caterpillar, Inc.,* 295 Fed. Appx. 850, 851 (7th Cir. 2008); *Walstrom v. City of Altoona,* No. 3:2006-CV-81, 2008 WL 5411091, at *5 (W.D. Pa. Dec. 29, 2008); *Hays v. Clark Prod., Inc.,* No. 1:07-CV-328, 2008 WL 5384300, at *6 (S.D. Ind. Dec. 18, 2008); *Levy ex rel. Levy v. Hustedt Chevrolet,* No. 05-CV-4832, 2008 WL 5273927, at *3 n.2 (E.D.N.Y. Dec. 17, 2008); *Gibbon v. City of New York,* No. 07-CV-6698, 2008 WL 5068966, at *5 n.47 (S.D.N.Y. Nov. 25, 2008); *Knox v. City of Monroe,* No. 07-CV-606, 2008 WL 5157913, at *5 n.10 (W.D. La. Dec. 9, 2008) ("[T]he amendments to the ADA are not effective until January [1], 2009, and the Court must use the laws and interpretations of those laws in effect at the time of the complained-of-actions."); *Thorn v. BAE Systems Hawaii Shipyards, Inc.,* 2009 WL 274507, *2 (D. Haw. Feb. 2, 2009); *Schmitz v. Louisiana,* 2009 WL 210497, *3 (M.D. La. Jan. 27, 2009). These decisions hold that application of the ADAAA to pending cases would impermissibly increase liability for past conduct and impose new duties with respect to transactions already completed. The holdings rely, either directly or implicitly, on the reasoning set forth in *Landgraf v. USI Film Prod.,* 511 U.S. 244 (1994), which held that provisions of the Civil Rights Act of 1991, which created a right to compensatory and punitive damages for violations of Title VII, did not apply to cases already pending on appeal when the statute was enacted. *Id.* at 247. The Sixth Circuit arrived at a different result in a case involving injunctive relief rather than damages. In *Jenkins v. Nat'l Bd. of Med. Exam'r*, 2009 WL 331638, *2 (6th Cir. Feb. 11, 2009), the court ruled that *Landgraf* was based on the premise that "damages are quintessentially backward looking" and applying a statute retroactively in such a case "would attach an important new legal burden to [past] conduct." *Id.* at *2 (quoting *Landgraf)*. In contrast "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Id.* (quoting *Landgraf)*. Based on this reasoning, the *Jenkins* court applied ADAAA standards in a case involving a demand for injunctive relief rather than monetary damages.

While the statute is prospective, the Ninth Circuit recently opined that, regardless of whether the ADAAA applies retroactively, it offers important guidance on Congress's true intent when the ADA was originally passed. Accordingly, the statute may properly be considered in assessing whether the employee has established a covered impairment. *Rohr v. Salt River Project Agric. Imp. and Power Dist.,* 555 F.3d 850, 862 (9th Cir. 2009) (finding plaintiff established a material fact regarding whether his diabetes was a covered disability, regardless of which standard was used).

D. Medical evidence not required

An employee need not submit medical evidence to establish a covered impairment under the ADA. *See Head v. Glacier Northwest, Inc.,* 413 F.3d 1053 (9th Cir. 2005) (trial court erred in holding that comparative or medical evidence is

necessary to establish a genuine issue of material fact regarding the impairment of a major life activity; plaintiff's testimony may suffice to establish a genuine issue of material fact if it contains sufficient detail to convey the existence of an impairment).

E. A plaintiff who cannot perform with accommodations is not otherwise qualified

The ADA and Rehabilitation Act generally do not protect an employee who cannot perform the essential functions of the job even with accommodations. *See, e.g., Lucero v. Hart*, 915 F.2d at 1372. They protect the employee who, with reasonable accommodations, can do the job in spite of a disability. *See Zivkovic v. Southern California Edison Co.,* 302 F.3d 1080, 1090 (9th Cir. 2002) (plaintiff "must prove that he is a qualified individual with a disability who suffered an adverse employment action because of his disability." (quoting *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1353 (9th Cir. 1996)). A plaintiff who claims "failure to accommodate" a disability must first prove he/she is a qualified employee who can perform the essential functions of the job. *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985). As the court noted in *Paleologos v. Rehab Consultants, Inc.*, 990 F. Supp. 1460 (N.D. Ga. 1998):

> The [ADA] . . . was designed to prohibit discrimination against disabled persons and enable those persons to compete in the workplace and the job market based on the same performance standards and requirements expected of persons who are not disabled.

Id. at 1464 (quoting *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. 386, 389 (M.D. Fla. 1995)). Thus, a disabled person who cannot "perform the essential functions of the employment position" with or without reasonable accommodations is not a "qualified individual" entitled to sue under the law. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482 (9th Cir. 1996). The question of reasonable accommodation is simply not reached when an employee is totally and permanently disabled in that no accommodation will enable the employee to perform the essential functions of the job. *See Rogers v. Int'l Marine Terminals*, 87 F.3d 755, 759 (5th Cir. 1996) (no reasonable accommodation could have allowed plaintiff to perform his job when he had been off work for 3 months); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1224-25 (11th Cir. 1997) (plaintiff's claim of failure to reassign as accommodation failed where he was not physically capable of working in any position at time requested transfer was denied); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1110-12 (9th Cir. 2000) (a qualified individual is someone who "can perform").

F. No cause of action for disability harassment exists if a plaintiff is not otherwise qualified

As discussed in the preceding section, an employee who is not otherwise qualified cannot generally state a cause of action under the Rehabilitation Act. This includes claims for disability-based harassment. *See Lucero*, 915 F.2d at 1371 (to fall within the protection of the Rehabilitation Act, plaintiff must establish he is both "disabled" and "otherwise qualified"). Courts that have addressed hostile environment causes of action under the ADA or Rehabilitation Act require a plaintiff to show she is a qualified individual with a disability in order to establish a prima facie case of disability harassment. *See, e.g., Moritz v. Frontier Airlines*, *Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 598 (8th Cir. 1998); *Rio v. Runyon*, 972 F. Supp. 1446, 1459 (S.D. Fla. 1997); *see also Zivkovic*, 302 F.3d at 1091 (plaintiff "must prove that he is a qualified individual with a disability who suffered an adverse employment action because of his disability." (quoting *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1353 (9th Cir. 1996)).

III. The agency's reasonable accommodation obligation

In addition to prohibiting discrimination, the ADA requires that an employer accommodate known physical or mental disabilities, unless the employer can show that accommodation would impose an undue hardship on the employer. *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 329 (3d Cir. 2003); *see also* 29 C.F.R. § 1630.2(p) (undue hardship considerations). The requirement to accommodate applies only to qualified individuals. 29 C.F.R. § 1614.203.

"Reasonable" accommodations may include: (1) making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities; and (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations,

training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. *See* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2). One often overlooked accommodation that is liberally provided in the federal sector is the generous approval of unpaid leave. *Dark v. Curry County,* 451 F.3d 1078, 1090 (9th Cir. 2006) (use of unpaid medical leave has been recognized as a reasonable accommodation under the ADA; employer had an obligation to consider this as a possible option). The employer must also consider whether the employee should be reassigned if he/she cannot perform his/her current job. When considering reassignment, the employer must consider positions currently open and those that may become available in a reasonable time. *Dark*, 451 F.3d at 1089-90.

Certain accommodations are considered per se unreasonable. For example, while employers are obligated to consider reassignment to a vacant, equivalent job when an employee cannot be accommodated in his/her current job, they are not required to create "light duty" positions for their disabled employees. *See, e.g., Howell v. Michelin Tire Corp.,* 860 F. Supp. 1488, 1492 (M.D. Ala. 1994) ("Reasonable accommodation . . . does not require that an employer create a light-duty position[.]"). Morever, employers are not required to promote an employee as an accommodation or violate a collective bargaining agreement. *See Hedrick v. Western Reserve Care Sys. and Forum Health,* 355 F.3d 444 (6th Cir. 2004) (promotion not required); *Willis v. Pacific Mar. Ass'n*, 244 F.3d 675, 677 (9th Cir. 2001) (accommodation is per se unreasonable if it conflicts with bona fide seniority provisions in CBA).

Moreover, a futile accommodation is not required. There must be some indication that the accommodation requested would enable the employee to perform the essential job functions. *See Evans v. Fed. Express Corp.*, 133 F.3d 137, 140 (1st Cir. 1998) (one element in the reasonableness equation is likelihood of success); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1175 (9th Cir. 1998) (plaintiff must show that suggested accommodation would, more probably than not, allow him to perform essential functions of the job); *Carrozza v. Howard County*, 45 F.3d 425 (4th Cir. 1995) (where county has already provided ample training, complying with request for more would be futile); *Stubbs v. Marc Ctr.*, 950 F. Supp. 889, 894-95 (C.D. Ill. 1997) (employer was not required to provide modified hours where there was no evidence plaintiff would be able to perform essential functions with modified work schedule); *Hoyt v. NYNEX Corp.*, 1996 WL 550374 (N.D.N.Y. Sept. 25, 1996) (unpublished) (employer was not required to provide bucket truck that would not obviate all heavy-lifting and pole-climbing requirements of plaintiff's position).

Finally, an employer is not obliged to provide every accommodation an employee desires. Rather, "[i]f th[e] accommodation [provided by the employer] was reasonable . . . the inquiry is over." *Sharpe v. American Tel. & Tel. Co.*, 66 F.3d 1045, 1050 (9th Cir. 1995). As the Seventh Circuit stated, "the ADA does not obligate an employer to provide a disabled employee every accommodation on his [or her] wish list." *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1016 (7th Cir. 1996). To the contrary, the employer has wide latitude in selecting the accommodation that is easiest for it to provide. *Rayha v. United Parcel Serv., Inc.*, 940 F. Supp. 1066, 1070 (S.D. Tex. 1996). Where the accommodation offered is reasonable, the fact that additional accommodations could have been made is irrelevant. *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 947 (N.D. Ga 1995) (employer is not required to provide maximum accommodation or every conceivable accommodation possible); *see also Gruber v. Entergy Corp*, 6 A.D. Cases 1028 (E.D. La. 1997) (plaintiff must show that the accommodation provided was unreasonable, not that other accommodations could have been provided); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.' " (quoting 29 C.F.R. pt. 1630, app. § 1630.9)).

IV. The agency's obligation to engage in the interactive process

In addition to the duty to reasonably accommodate a qualified disabled employee, the employer must satisfy a separate obligation to engage in good faith in an informal, interactive process with the employee. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that might overcome those limitations. 29 C.F.R. § 1630.2(o)(3).

An employer faces liability for a failure to engage in the interactive process only if a reasonable accommodation would have been possible, but was not given. *See Barnett v. U.S. Air Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000), *vacated on other grounds*, 535 U.S. 391 (2002). Moreover, it is generally up to the employee to request an accommodation and, if he/she does not do so, the majority of courts have held the employer is under no duty to explore accommodations. 29 C.F.R. pt. 1630, app. § 1630.9; *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001); *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361 (11th Cir. 1999). Note, however, that some circuits take the position that the employer must explore accommodation if the employer knows the employee has a disability and knows, or has reason to know, the employee is experiencing workplace problems because of the disability. *Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004); *Miller v. Illinois Dep't of Corr.*, 107 F.3d 483 (7th Cir. 1997).

In summary, in order to hold an employer responsible for a breakdown of the interactive process, the employee generally must show that: (1) the employer was aware of the disability; (2) the employee requested reasonable accommodation for the disability; (3) the employer did not make a good faith effort to assist the employee in obtaining reasonable accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. *Conneen*, 334 F.3d at 330-31.

V. Conduct and discipline issues

In some circuits, it is a per se violation of the ADA to base a disciplinary decision on conduct resulting from a disability. *Dark v. Curry County*, 451 F.3d 1078, 1084 (9th Cir. 2006) (in ADA claim, the stated reason for employee's termination must "constitute a valid nondiscriminatory explanation, i.e. one that 'disclaims any reliance on the employee's disability.' " (quoting *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir.2001)); "conduct resulting from a disability is considered to be part of the disability rather than a separate basis for termination." (quoting *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir.2001)). The *Dark* court further ruled that the ADA does not require that a discriminatory impetus was the only motive for an adverse employment action; it outlaws adverse employment decisions motivated, even in part, by animus based on an employee's disability or request for an accommodation. *See also Humphrey v. Mem'l Hosp. Ass'n*, 239 F.3d 1128, 1140 (9th Cir. 2001) (narrowing grounds for discipline based on misconduct when the misconduct emanates from a disability; employer can only do so for egregious or criminal misconduct); *Gambini v. Total Renal Care*, 486 F.3d 1087, 1093 (9th Cir. 2007) (holding that if an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury *must be instructed* that it may find that the employee was terminated on the impermissible basis of her disability; jury must be "entitled to infer reasonably that her 'violent outburst' was a consequence of her bipolar disorder, which the law protects as part and parcel of her disability").

VI. The direct threat defense

An employer may exclude an employee from a job if he/she would pose a "direct threat" to health or safety. 42 U.S.C. § 12113; EEOC Technical Assistance Manual, Chapter 4.5, *available at* http://www.jan.wvu.edu/links/adatam1.html#IV. A circuit court split currently exists over whether the employer or employee has the burden of proving or disproving that the employee posed a direct threat. *Compare Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004) (employer's burden) *with Waddell v. Valley Forge Dental Assoc., Inc.*, 276 F.3d 1275 (11th Cir. 2001) (employee had burden of establishing he was not a direct threat).

In *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), the Supreme Court determined that the EEOC's direct threat regulation (which allows an employer to defend an adverse action when an employee's disability would pose a danger to the employee or others) is valid under the ADA. Specifically, the Court ruled that Chevron did not violate the ADA when it refused to hire an individual with a disability (liver disease) because the performance of the job posed a risk of serious injury or death to the disabled applicant. It found the EEOC regulation is reasonable because "a disabled individual's right to operate on equal terms within the workplace" under the ADA would otherwise be "at loggerheads with the competing policy of OSHA, to ensure the safety of 'each' and 'every' worker." *Id.* at 85.

The employer is required to engage in a rigorous and particularized analysis before making a direct threat determination. *Bragdon v. Abbott*, 524 U.S. 624 (1998) (assessment should

be based on objective scientific information); *see also* 29 C.F.R. §1630.2(r). In *Echazabal v. Chevron U.S.A. Inc.*, 336 F.3d 1023 (9th Cir. 2003), for example, the Ninth Circuit determined that before an employer can exclude an individual as a direct threat, it must consider the duration of risk, the nature and severity of potential harm, the likelihood that harm will occur, and the imminence of harm. This requires a particularized inquiry, and a "reasonable medical judgement that relies on the most current medical knowledge and/or the best available objective evidence." *Id.* at 1028. The employer must do more than rely on the advice of a general physician and an expert in preventive medicine; specialized medical information is required. *Id*.

Suggested Resources: National Employment Institute, *Resolving ADA Workplace Questions* (26th ed. 2009); EEOC Technical Assistance Manual.

VII. Discovery guide

Discovery in Rehabilitation Act cases should begin with contention interrogatories to assess the following: the nature and extent of plaintiff's alleged impairments, including the specific major life activities plaintiff alleges are affected; any changes in plaintiff's condition during the relevant period of time; plaintiff's contentions about the prong of the disability definition he/she is proceeding under (substantially impaired, record of impairment, or regarded as disabled); details regarding all efforts plaintiff made to place management on notice of the condition; and the specifics of all requests for reasonable accommodation. Prior to deposing the plaintiff, the defendant should obtain all of his/her medical and psychiatric records. The latter may require a court order if the plaintiff refuses to authorize release of the records. In addition, a thorough defense requires all files maintained by the Office of Workers' Compensation (OWCP), Social Security Administration, and Office of Personnel Management regarding any OWCP, disability, or disability retirement income received by plaintiff. Again, this may require a court order absent authorization. Do not assume the records will be provided without a court order or authorization merely because the record holder is a federal agency. Once all the records are in hand, it is often beneficial to seek an independent medical or psychiatric exam, including psychiatric testing.

When the plaintiff alleges a psychiatric impairment, it is critical to become familiar with psychiatric testing protocols (such as the Millon Behavioral Health Inventory, the Diagnostic and Statistical Manual of Mental Disorders, the Global Assessment of Functioning scale, and all axes on the psychiatric reports). Retain a psychiatric expert and explore the role of personality disorders, such as narcissism, paranoia, and borderline personality disorder. The defendant should obtain psychiatric testing as part of an order for independent psychiatric examination. The courts will usually order such an exam if the plaintiff is offering expert testimony of more than "garden variety" emotional distress. An excellent reference for psychiatric disabilities is the treatise *Mental and Emotional Injuries in Employment Litigation* (Francine Kulick & James McDonald eds., BNA Books 1994).

Finally, depose plaintiff's key medical providers. Plaintiffs often rely on providers to avoid the cost of designating experts, and these doctors are not professional experts. They are more likely to be honest and forthright and to admit facts unhelpful to the plaintiff on cross-examination. They often concede, for example, that plaintiff could be motivated by secondary gain. Moreover, try to use plaintiff's experts to prove defendant's case. For example, a plaintiff trying to obtain OWCP or disability payments will usually ask his/her provider for medical letters that demonstrate plaintiff is so impaired that he/she is not otherwise qualified. Elicit as much testimony as possible regarding how disabled plaintiff is, in the hope that the jury will conclude he/she is not an "otherwise qualified individual with a disability." Providers will generally admit that they accepted plaintiff's statements about his/her condition as true and relied on them. Plaintiff's treaters can also confirm helpful admissions made by plaintiff in the treatment context and authenticate records needed to prove the case.

VIII. Trying the Rehabilitation Act case

A. Jury instructions

Pattern instructions: Some of the commonly used pattern instructions in ADA and Rehabilitation Act cases are:

- Definition of "Otherwise Qualified Individual with a Disability";
- Essential Job Function Defined;
- Reasonable Accommodation Defined;
- Good Faith Effort at Reasonable Accommodation Bars Liability;

- Jurors Cannot be Swayed by Sympathy; and
- Statements by Patient to Doctor.

Causation instructions: The Fifth Circuit has held that the determination of whether to provide the jury a "but for" or "mixed motive" instruction depends on whether plaintiff alleges a cause of action under § 501 or § 504 of the Rehabilitation Act. *Pinkerton v. Spellings*, 529 F.3d 513 (5th Cir. 2008). A claim under § 504 is governed by the "solely" or "but for" rather than "mixed motive" standard because that section provides that "[n]o otherwise qualified individual . . . shall, *solely* by reason of her or his disability, . . . be subjected to discrimination under any program or activity receiving financial assistance." *See* 29 U.S.C.A. § 794(a) (emphasis added); *Wong v. Regents of Univ. of California*, 410 F.3d 1052, 1058 (9th Cir. 2005) (holding that Rehabilitation Act plaintiff must demonstrate, in part, that "he 'was dismissed solely because of [his] disability' " (quoting *Wong v. Regents of the Univ. of California*)); *Soledad v. U.S. Dep't of Treasury,* 304 F.3d 500, 505-06 (5th Cir. 2002) ("the plain language of § 794(a) clearly requires the use of a 'solely because of' form of causation. . . . We conclude that the proper question to be asked in a Rehabilitation Act claim is whether the discrimination took place 'solely because of' the disability."); *Peebles v. Potter,* 354 F.3d 761, 767 (8th Cir. 2004) ("We are mindful of the sole motivation language of [29 U.S.C. § 794(a)]: the discrimination has to occur "solely by reason of her or his disability."); *see also Sellers v. Sch. Bd. of the City of Manassas,* 141 F.3d 524, 528 (4th Cir. 1998); *Knapp v. Northwestern Univ.,* 101 F.3d 473 (7th Cir. 1996). In *Pinkerton*, 529 F.3d 513, the plaintiff filed suit under both § 504 and § 501 of the Rehabilitation Act, 29 U.S.C. § 791(g), which is permitted under Fifth Circuit precedent. A few circuits disagree, holding that § 501 is the exclusive right of action for federal employees alleging disability discrimination. *See, e.g., Taylor v. Small*, 350 F.3d 1286, 1291 (D.C. Cir. 2003); *Rivera v. Heyman,* 157 F.3d 101, 104-05 (2d Cir. 1998); *McGuinness v. U.S. Postal Serv.,* 744 F.2d 1318, 1321-22 (7th Cir. 1984). Ruling that plaintiff was entitled to a mixed motive instruction on his § 501 Rehabilitation Act Claim, the court reversed the jury verdict and remanded for a new trial. *Pinkerton,* 529 F.3d at 519.

This causation issue, however, has not been definitively resolved. Some courts have used a less stringent causation standard, *see Sutton v. Lader,* 185 F.3d 1203, 1207-08 & n.5 (11th Cir.1999) (stating that a § 501 plaintiff must show that "he was subjected to unlawful discrimination as a result of his disability[,]" and that "[t]he standard for determining liability under the Rehabilitation Act is the same as that under the ADA."), or declined to decide the issue based on unclear statutory guidance, *see Burciaga v. West,* 996 F. Supp. 628, 640 (W.D. Tex. 1998) (Section 501 plaintiff must prove that he "was discriminated against because of the handicap"). *See also Williams v. Widnall,* 79 F.3d 1003, 1005 n. 4 (10th Cir. 1996) ("whether a Section 501 plaintiff must show that his disability was *the* cause or *a* cause of termination is not necessary to the resolution of this case . . . we leave that issue to another day"); *Leary v. Dalton,* 58 F.3d 748, 752 (1st Cir. 1995) ("Not only is it unclear whether the right of action under Section 504 overlaps with that in Section 501, it is also unclear, in light of recent amendments to the Rehabilitation Act, whether the two sections require the same showing of causation."); *Florence v. Runyon,* 990 F.Supp. 485, 491 (N.D. Tex. 1997) ("In short, it is not entirely clear whether § 504's causation standard applies to § 501 cases.")

Discipline instructions: In cases involving discipline for disability-based conduct, the plaintiff may be entitled to a very favorable jury instruction. This occurred in *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007), which involved a bipolar employee who was terminated for inappropriate behavior, based on conduct standards applicable to all employees. The Ninth Circuit held that "conduct resulting from a disability is considered part of the disability, rather than a separate basis for termination." *Id.* at 1093 (quoting *Humphrey*, 239 F.3d at 1139-40). The court further found that as a practical result of that rule, "where an employee demonstrates a causal link between the disability-produced conduct and the termination, a *jury must be instructed* that it may find that the employee was terminated on the impermissible basis of her disability. . . . A jury must be "entitled to infer reasonably that her 'violent outburst' was a consequence of her bipolar disorder, which the law protects as part and parcel of her disability." *Id.* at 1094.

B. Themes and arguments in Rehabilitation Act cases

As noted in the introduction to this article, because jurors naturally sympathize with an impaired employee, Rehabilitation Act cases require unique defensive trial strategies. More

than 2,500 years ago, the famed Chinese general, Sun Tzu, made a statement that applies well to these cases: "If you know yourself but not your opponent, for every victory gained you will also suffer a defeat." Sun Tzu, 500 BC.

From the defense perspective in a disability discrimination case, this means understanding strategies employed by plaintiffs' counsel. Most of our opponents avoid overt appeals to a jury's passions and prejudices. But a competent plaintiff's counsel will understand that one simple strategy can maximize his/her client's recovery in a disability discrimination case: mobilize the jury's emotions. If plaintiff's counsel is effective, the jury will view plaintiff as a victim, martyr, saint, or even hero standing up against a powerful, cruel, unfeeling, ungrateful and, most important, faceless government. A defense attorney who does not learn how to effectively counter plaintiff's efforts to mobilize the jury's emotions will lose Rehabilitation Act cases that should be won.

Perhaps the best way to counter plaintiff's efforts is to get the jury to: (1) understand there are two sides to the story; and (2) see the story through the managers' eyes. This means humanizing your agency client and reducing plaintiff's jury appeal by exposing his/her warts. It also means drawing on universally cherished values when formulating defendants' themes. The following examples can be quite effective, where the facts support them:

- This case is about whether one man/woman's private needs and demands outweigh the agency's vital public mission.
- We did everything humanly possible to satisfy plaintiff's demands, but nothing we could do would ever be enough for him/her [i.e., plaintiff is an unreasonable, selfish, egocentric whiner with an exaggerated sense of entitlement who wanted to be put in a better position than his/her coworkers].
- Plaintiff is a cynical opportunist gaming the system [i.e., it's all about a big payday or avoiding work, and/or this whole case is a set up by plaintiff].
- This case has nothing to do with plaintiff's physical/mental condition; it is about his/her absenteeism/tardiness/fraud/lying/insubordination/poor performance/misconduct/refusal to do the job/etc.
- As much as we wanted to help plaintiff, we owed a greater duty to his/her coworkers/the public/others; plaintiff is a danger to those others [direct threat].
- The law did not require us to give plaintiff what he/she wanted, because plaintiff is not disabled.
- Plaintiff was not able to do the job, and nothing we could reasonably do would ever change that [not a "qualified" disabled individual].

These themes are not intended to suggest that all Rehabilitation Act claims are frivolous or even weak. Certainly, the themes listed in this section would need to be toned down in many cases and would not be appropriate at all in others. For reasons of both fairness and effective advocacy, government defense themes must be carefully tailored to the facts of each case.

Although many Rehabilitation Act claims are resolved during the administrative process, others continue on to the federal district courts, despite an agency's good faith efforts to settle. Some of the plaintiffs who cannot be mollified during the administrative process want more than the disability discrimination laws allow them, such as an unearned promotion or an unduly large cash payment. In cases involving an overreaching employee whom the agency has diligently tried to accommodate, remind the jury that the employee does not get to pick and choose his/her "preferred" accommodation.

A visual aid known as "the scroll" can be used to forcefully bring this point home in cases where the government has made numerous efforts to accommodate plaintiff. During the trial, write down each accommodation that comes into evidence. Work closely with the managers before trial to identify every such accommodation. They may not realize that many of their routine courtesies can legitimately be counted as accommodations. Then tape the pages of this list together end to end, attach stiffeners to the two ends of the combined pages, affix a weight to the bottom end, and roll it all up into something resembling a scroll. The following excerpt (the names and some of the facts in the excerpts have been changed) from a recent closing argument shows how to use the scroll to maximum effect:

> I want to talk now about the central issue in this case: Did the Army **reasonably** accommodate Ms. Von? You just heard her lawyer arguing that the Army should have given her more leave instead of firing her, and

that its refusal to grant more leave was a failure to reasonably accommodate her.

Remember, the Army had been granting Ms. Von week after week after week of leave for 3 years— and did much more than that to accommodate her on those days when she happened to show up for work. I won't repeat each of the other accommodations provided for this woman, but there were 43 of them. Forty-three. You may recall that I scribbled each one down on the overhead projector as her supervisors, her coworkers, and Ms. Von herself listed them. I've got a copy of those scribbles in my hand here.

As I was reviewing all these accommodations last night, I started thinking about my law school training some 20 years ago. They taught us a few Latin phrases, most of which I've long forgotten. But one I do remember is res ipsa loquitur – the thing speaks for itself. The thing speaks for itself. You know it's funny, but it took this case to teach me what that phrase really means.

The Army did not reasonably accommodate Rita Von? [Release bottom end of scroll with a flick of the wrist, letting the weight unravel it across the floor].

Res ipsa loquitur.

For added effect, consider draping the scroll over the podium when done, as a standing reminder until opposing counsel makes the effort to remove it (or does not).

In cases where plaintiff is only nominally disabled or is otherwise "gaming" the system, call him/her on it. Better yet, get the jury to call plaintiff out. One powerful technique for challenging plaintiff is to contrast him/her with the types of employees that the ADA and Rehabilitation Act were truly designed to help. The excerpt below illustrates this technique. This is the conclusion of defendant's closing argument in a Rehabilitation Act case against the Secretary of the Navy.

In a few minutes, after Ms. Smith's lawyer finishes his rebuttal, the case will go to you. It'll be for you to decide what the facts are. It's not for Mr. French, it's not for the judge, and it's certainly not for Ms. Smith. It's up to you. And it will be your call whether she has proven her case.

At the end of your deliberations, if you find that Ms. Smith has proven that she was a qualified disabled person, and that the Navy unlawfully discriminated against her because of a disability, then you give her the money. And don't give her a cent less just because you don't like her or some of the bad things she did. No, if you conclude she made her case, then you give her the money. Because that's what the law requires. And that is justice.

But if you find she did not prove her case, then do not give her a penny. Send her packing with nothing. Feel sorry for her, sure. But do not give her something just because of your compassion or sympathy—or as a compromise. Because if you do, you will be trivializing the plight of real discrimination victims—and of every disabled worker in the job force today who truly can do the job, who is doing the job, and who is sincerely working with her employer and coworkers every single day proving that she can do the job. And you will be trivializing the plight of real discrimination victims; the folks that the civil rights laws are meant to protect. And that is not justice.

The Rehabilitation Act serves a serious, serious purpose. It is not a game of hide the ball for those who cannot, or will not, show that they can do the job. It is not a sanctuary for those unable or unwilling to work. And it is sure not a trap to snare a diligent supervisor who did her level best to help a struggling employee, while at the same time trying to serve the needs of our fighting men and women.

Discrimination happens—it happens every day. As surely as you are sitting in that jury box, it is happening out there right now. But it did not happen in this case.

Now after Mr. French finishes his rebuttal, the judge will send you through that door into the jury room. You'll find a table, 10 chairs, a sink and a white board in there. You'll have a chance to sit down, study the court's instructions, talk about the witnesses's testimony, and look at the exhibits. You will then reach a decision.

I am confident it will be the right decision.

Thank you.

IX. Conclusion

Skilled advocacy is more critical to success in disability discrimination lawsuits than many other types of actions. In addition to a firm grasp of complex legal principles and strong skills of persuasion, practitioners must be keen students of human nature to succeed in this area. Because disability discrimination cases turn as much on motivations and social values as on legal or technical issues, this field of the law is an excellent practice area for the well-rounded advocate.❖

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Amtrak v. Morgan: An Update on the Use of Time-Barred Discrete Acts

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I. Introduction

In *Nat'l R.R. Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101 (2002), the Supreme Court instructed lower courts to undertake a separate timeliness analysis for disparate treatment claims and hostile work environment claims. According to the Court, discrete acts, such as a denied promotion or failure to hire, are separate unlawful employment practices within the meaning of Title VII and must be timely raised with an Equal Employment Opportunity (EEO) counselor. Untimely discrete acts cannot be salvaged by factually relating them to a timely act through application of the continuing violation doctrine. A hostile work environment, on the other hand, can encompass acts extending over a period of time, with some of the component parts falling outside the limitations period. Even though it extends over a period of time, a hostile work environment is still a single unlawful employment practice within the meaning of Title VII. So long as one act comprising part of the claim falls within 45 days of plaintiff's EEO contact, the entire hostile workplace claim is timely.

In the 7 years since *Morgan*, lower courts have disagreed on the treatment of time-barred discrete acts. While *Morgan* observed that untimely discrete employment decisions may serve as relevant background evidence in support of a timely claim, *id.* at 113, some lower courts have allowed plaintiffs to wrap time-barred acts into a hostile work environment claim for purposes of assessing liability. In taking this approach, courts are permitting plaintiffs to breathe life into a discrete act that, if challenged separately, would be dismissed. This approach is inconsistent with the principles of *Morgan*.

II. The dual timeliness analysis of *Morgan*

The two timeliness rules adopted by the Supreme Court in *Morgan* are based upon the Court's reading of the plain language of Title VII, 42 U.S.C. § 2000e-2, and how to define a cause of action. First, regarding discrete discriminatory acts, the Court held that each discrete act is a separate wrong within the meaning of the statute. *Id.* at 114. In this regard, each separate incident of discrimination is actionable as an unlawful practice and an aggrieved federal employee must contact an EEO counselor within 45 days of the occurrence of that incident. "Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113.

The rule announced in *Morgan* is straightforward and unequivocal: "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113. Under this analysis, the continuing violation theory met its

demise, as applied to discrete acts. As the Court held, "[t]here is simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." *Id.* at 111. Consequently, a plaintiff can no longer reach back and salvage time-barred discrete acts by contending those acts are factually related to a timely challenged act.

Second, as to a hostile work environment claim, a plaintiff may rely upon acts outside of the limitations period so long as that conduct is part of a hostile workplace that continues into the limitations period. The Court again based this result on the language of the statute, noting that a "hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.' . . . It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period." *Id.* at 117. After *Morgan*, the continuing violation doctrine is not what permits a plaintiff to rely upon conduct outside of the limitations period. Instead, that result is based on the plain language of the statute. By definition, a hostile workplace is an "unlawful employment practice" which by its "very nature involves repeated conduct." *Id*. at 115.

The *Morgan* Court then fashioned a two part inquiry in a hostile workplace case: "A court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period." *Id.* at 120. Accordingly, the first step in assessing timeliness is to define the conduct that comprises the hostile workplace and then to determine whether an act that is part of the hostile environment falls within the limitations period.

III. The use of time-barred discrete acts after *Morgan*

After *Morgan*, discrete discriminatory acts must be raised with an EEO counselor within 45 days of when the acts occurred. *See* 29 C.F.R. §1614.105(a)(1). Discrete acts not timely challenged are subject to dismissal. However, the Court did observe that Title VII does not "bar an employee from using the prior acts as background evidence in support of a timely claim." *Morgan*, 536 U.S. at 113. The Court provided no further guidance on this evidentiary use of untimely discrete acts, but it is logical to assume that courts would apply Rules 401 and 403 of the Federal Rules of Evidence in determining whether time-barred acts are admissible.

In the wake of *Morgan*, some courts have stepped beyond the boundary of using time-barred discrete acts as background evidence for purposes of showing discriminatory motive or intent and, instead, have permitted those acts to be wrapped into a hostile work environment claim. In such cases, the time-barred discrete acts are substantively considered as part of the actionable hostile work environment, thereby factoring into the assessment of liability and, presumably, damages. Other courts have held that the plain language of *Morgan* precludes such an analysis. According to these courts, including time-barred acts in a hostile workplace claim improvidently permits a plaintiff to resurrect stale discrete acts, which is flatly inconsistent with the holding in *Morgan*.

By way of example, in *Royal v. Potter*, 416 F. Supp. 2d 442, 445 (S.D.W.Va. 2006), plaintiff alleged that she had been sexually harassed by her supervisor at the Postal Service. According to plaintiff, the supervisor intimidated her and forced her to engage in nonconsensual sexual relations during a 17-month period. *Id*. Plaintiff further alleged that her supervisor did not select her for two supervisory vacancies, decisions which she characterized as tangible employment actions within the meaning of *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). *Royal*, 416 F. Supp. 2d at 447. Defendant moved for summary judgment, arguing that plaintiff's nonselections for the supervisory position were time barred since the personnel decisions were not raised with an EEO counselor within 45 days. *Id*. Plaintiff, on the other hand, insisted that "tangible employment actions which occur during and as part of a hostile work environment are not time barred." *Id*. The court framed the issue as follows: "The *Morgan* decision does not expressly address the issue presented in this case, that is whether discrete acts of discrimination falling outside the relevant time period may be considered in holding the defendant vicariously liable for hostile work environment." *Id.* at 448.

After considering the language in *Morgan*, as well as other lower court decisions, the court in *Royal* observed that the following two principles were clear:

> First, discrete acts, including discriminatory and retaliatory acts, which may have been actionable on their own under Title VII, may still be considered in holding an employer

> liable for hostile work environment. This is true even for discrete acts that occurred outside of the statutory time period for filing a complaint. Second, when a plaintiff brings a claim for hostile work environment and supports that claim with acts that could be considered discrete acts, the court must review the evidence to make sure that the plaintiff is not attempting to allege a hostile work environment claim based only upon the separate discrete acts.

Id. at 453.

Relying upon these principles, the court in *Royal* determined that the two denied promotions were not time barred because they were part of the overall hostile work environment claim, which included demands for sexual favors and other abusive conduct. As the court held, "[b]ecause these acts occurred within the single 'unlawful employment practice,' they are not time barred discrete acts." *Id*. at 454. Furthermore, the court emphasized that these time-barred non-promotions were more than background evidence; they were part of the hostile work environment and could be considered in the liability assessment. *Id*. at 449. Given this conclusion, the court held that it was not necessary for the plaintiff to contact an EEO counselor regarding the denied promotions. *Id*. at 454.

A similar approach was taken in *Ikwut-Ukwa v. Biehler*, 2009 WL 90348 (M.D. Pa. Jan. 14, 2009), where the plaintiff identified a series of seemingly discrete acts, including the denial of 14 promotions since commencing work for defendant and receiving lower than expected performance evaluations. *Id.* at *4. The court rejected defendant's position that "the denial of promotions and other discrete alleged discriminatory incidents can not be considered in connection with the plaintiff's hostile environment claim." *Id*. at *5. As the court held:

> A plaintiff may not bootstrap a series of discrete acts without more into a hostile environment claim. But in view of all of the incidents and the incidents that could reasonably be construed as racially derogatory conduct by at least one superior official, an inference might be established that a number of the incidents, including the discrete alleged discriminatory actions, were connected and were racially motivated.

Id. at *5; *see also Austion v. City of Clarksville*, 244 Fed. Appx. 639, 650 (6th Cir. 2007) (plaintiff "can rely on past incidents, including the time-barred acts of discrimination, such as the 2001 and 2002 promotion denials and the 1998 demotion, in establishing his hostile work environment claim."); *Keeshan v. Eau Claire Coop. Health Ctr., Inc.*, 2007 WL 2903962 at *14 n.3 (D.S.C. Oct. 2, 2007) ("although Plaintiff's demotion in 2003 cannot be considered as a separate, free-standing disparate treatment claim, it could be considered as part of her separate hostile work environment claim, if the facts show that it was relevant to that claim.").

Other courts have interpreted *Morgan* differently, refusing to allow a plaintiff to pull untimely discrete acts into a hostile work environment claim. For example, in *Hartz v. Adm'r of Tulane Educ. Fund*, 275 Fed. Appx. 281 (5th Cir. 2008), the circuit court rejected the district court's finding that an untimely denial of tenure decision was intertwined with a hostile work environment claim. As the court observed, that analysis is foreclosed by *Morgan*. *Id.* at 288-89. "While *Morgan* allowed the possibility that an untimely act could be used as 'background evidence in support of a timely claim,' (citation omitted), [plaintiff] cannot breathe new life into her denial of tenure claim by simply incorporating it into her hostile work environment claim." *Id*. at 289. Similarly, in *Patterson v. Johnson*, 391 F. Supp. 2d 140 (D.D.C. 2005), plaintiff challenged several discrete acts of discrimination, including a decision not to select him as an acting deputy director. While those discrete acts all occurred outside of the 45 day EEO contact period, plaintiff sought to relate these discrete acts to a hostile workplace claim. The court rejected that approach, holding that "plaintiff cannot cure his failure to timely exhaust his complaints about these incidents by sweeping them under the rubric of a hostile work environment claim." *Id*. at 146.

The Eleventh Circuit addressed the flip side of these decisions in *Chambless v. Louisiana-Pac. Corp.*, 481 F.3d 1345 (11th Cir. 2007). In that case, the only timely claims were discrete acts—a denied promotion and a claim for retaliation. Plaintiff sought to use these as anchor violations to raise a hostile work environment claim. In this regard, plaintiff identified numerous instances of sexual touching, jokes, and propositions by male employees. Yet none of these non-discrete acts continued into the limitations period. Hence, unlike the situations in *Royal* and *Ikwut-Ukwa,* the plaintiff in *Chambless* sought to use a timely discrete act as the

foundation for salvaging a hostile work environment claim. *See id.* at 1350.

The circuit did not adopt a bright line rule that discrete acts and hostile work environment claims must always be the subject of a separate analysis. Instead, following the contextual approach of the other cases cited above, the *Chambless* court suggested that the analysis depends upon whether the untimely non-discrete acts are related to the timely discrete acts so as to be part of the same hostile workplace claim. As the court observed:

> Where the discrete act is sufficiently related to a hostile work environment claim so that it may be fairly considered part of the same claim, it can form the basis for consideration of untimely, non-discrete acts that are part of the same claim. The pivotal question is whether the timely discrete acts are sufficiently related to the hostile work environment claim. Here, the discrete acts do not meet that test. The circumstances surrounding [defendant's] failure to promote and retaliation against [plaintiff] do not suggest that those discrete acts were the same type of "discriminatory intimidation, ridicule, and insult" that characterized the untimely allegations.

Id. at 1350; *compare Sobutay v. Intermet Int'l, Inc.*, 2007 WL 4166168 at *4 (M.D. Ga. Nov. 20, 2007) (where the only timely act was a racial slur, the court cited *Chambless* and refused to permit the plaintiff to wrap an untimely termination and failure to promote claim into the otherwise timely hostile workplace, finding that the "termination and failure to be promoted are not sufficiently related to [the] hostile environment claim.").

Courts that refuse the invitation to mesh untimely discrete acts into a hostile work environment claim adhere to the central holding of *Morgan,* namely that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. at 113. Pointing to the language of the statute, the Supreme Court reasoned that "'strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" *Id.* at 108. If a plaintiff could resurrect a time-barred discrete act by recasting it as part of a hostile workplace, the first part of the *Morgan* decision and the requirement that a plaintiff exhaust administrative remedies would become meaningless. *See also Crayton v. Alabama Dep't. of Agric.*, 589 F. Supp. 2d 1266, 1279 (M.D. Ala. 2008) ("[b]ecause the Supreme Court has explicitly differentiated between discrete employment acts and a hostile work environment, many courts have concluded that a discrete act cannot be part of a hostile work environment claim and instead constitutes a separate unlawful employment practice."); *McCann v. Mobile County Pers. Bd.*, 2006 WL 1867486, at *20 (S.D. Ala. July 6, 2006) ("discrete discriminatory acts must be challenged as separate statutory violations and not lumped together under the rubric of hostile work environment. The plaintiff, who describes her 1998 termination . . . as contributing to her hostile work environment . . . is in direct violation of this principle."); *Davis v. City of Seattle*, 2008 WL 202708, at *20 (W.D. Wash. Jan. 22, 2008) ("[d]iscrete acts, such as refusal to promote, denial of transfer, suspension, demotion, are independently actionable, and they may not be cobbled together into a harassment claim.").

By contrast, courts which permit plaintiffs to wrap untimely discrete acts into a hostile work environment claim run afoul of the plain language of *Morgan.* To be sure, decisions such as *Royal v. Potter* and *Ikwut-Ukwa v. Biehler* do not unequivocally hold that discrete acts can always be wrapped into a hostile work environment claim. Instead, there must be an analysis of context; the plaintiff cannot merely glue together a series of discrete acts and call the result a hostile work environment. The untimely discrete acts must be factually woven into a fabric of discriminatory intimidation, ridicule, and insult. Nevertheless, while these courts urge the importance of assessing context, the result appears to fly in the face of *Morgan*. As the court observed in *Royal* in prefacing its analysis, "[t]hese [time-barred] acts can be considered not just as background evidence to the claim, but as conduct for which an employer is liable." *Royal*, 416 F. Supp. at 449.

Additionally, subsuming time-barred discrete acts into a hostile work environment claim raises difficult issues regarding damages. Under the 1991 amendments to Title VII, a plaintiff is entitled to compensatory damages for an actionable hostile work environment claim. *See* 42 U.S.C. § 1981a. Given the analysis in *Royal v. Potter* and *Ikwut-Ukwa v. Biehler,* those courts would presumably allow the jury to consider the time-barred discrete acts in assessing compensatory damages. However, when a trier of fact awards emotional distress damages for a hostile workplace that encompasses time-barred

discrete acts, the jury is ultimately awarding relief for those untimely adverse actions. That result seems irreconcilable with *Morgan's* admonishment that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. at 113. As the First Circuit observed in interpreting *Morgan*, a "discriminatory action for which a claim was not timely filed cannot be used as a basis to award relief but can be used as background in support of later claims of . . . discrimination." *DeCaire v. Mukasey*, 530 F.3d 1, 18 (1st Cir. 2008). An award of compensatory damages for a hostile work environment claim that includes time-barred discrete acts is a form of relief for those personnel decisions, even though those acts are part of a larger whole.

Situations may arise where the facts surrounding a time-barred discrete act will be admissible as part of a hostile workplace. For instance, if a supervisor used gender related comments in connection with a decision not to promote a female and if that nonselection is untimely, the constellation of facts surrounding the nonselection would likely be admissible as part of a timely hostile environment claim. Such comments would be part of the totality of the circumstances considered by the trier of fact. Nevertheless, the plaintiff would not be entitled to relief for the untimely act, including economic and compensatory damages. If the case proceeded to trial, the defendant would be entitled to a limiting instruction advising the jury that the facts surrounding the adverse employment action may be relevant in assessing whether the plaintiff has established a hostile working environment, but the jury is not to award any damages in connection with the discrete act.

IV. Conclusion

Courts that permit plaintiffs to wrap time-barred discrete acts into a hostile work environment claim are taking a position that is contrary to language in *Morgan.* After *Morgan*, discrete acts that are not raised with an EEO counselor within 45 days are barred and cannot be salvaged, for purposes of liability or damages, by wrapping them into a timely hostile workplace claim.❖

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Juries—A Love/Hate Relationship

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I. Introduction

Recently, while discussing strategy with a high-level federal agency officer regarding a nonselection case, a trial-weary official adamantly exclaimed, "I hate juries! You never know what they are going to do." And he is right. One of the unknown factors of a jury trial concerns the very aspect that defines that type of trial—the jury. In many ways, jurors are the most important people in the courtroom. Thus, jury selection is a critical

component of trial advocacy. With a little luck and lots of planning, jury selection can turn an unknown component into an asset to your case. This article discusses key areas that every government attorney should think about prior to jury selection; determining preferred jury composition, voir dire, and *Batson* challenges.

II. Jury composition

In our profession it has often been said that a case can be won or lost during jury selection. Before actually selecting the jury, it is important to determine what type of juror will best understand the government's theme. This determination sets the stage for everything that follows during the trial. The qualifications to serve as a juror in a federal district court trial are minimal. A prospective juror must be a United States citizen; at least 18 years old; a resident of the judicial district for at least 1 year; able to read, write, speak, and understand English; be mentally and physically capable of performing jury duty; and have no felony convictions or felony charges pending. 28 U.S.C. § 1865.

Jurors serving on a federal civil case may number between 6 and 12; however, the verdict must be returned by a jury of at least 6 members. FED. R. CIV. P. 48. To ensure that there are at least six jurors available to render a verdict, federal civil juries usually consist of eight jurors to allow for the possibility of a juror being unable to complete jury service. Unless waived by consent of all parties, the verdict must be unanimous. *Id.* Generally, consent to a jury verdict that is not unanimous is not advisable.

III. Defining the ideal juror

Determining the characteristics of the ideal juror for any given case can be difficult. Desirable traits will change from case to case. Indeed, there are no hard and fast rules on whether to select a particular juror. Common sense and instinct play an important role in determining which jurors will be favorable to the government's position.

Generally, certain types of jurors have been considered helpful for a defendant in employment discrimination cases; business owners, managers, anyone who has had hiring/firing responsibilities, and jurors in financially-oriented positions. In contrast, the types of jurors who may be best for a plaintiff in such cases include jurors who are unemployed; employed in a job similar to the plaintiff's or by the government or other bureaucracy; employed in professions that involve sympathetic causes, such as social workers, home health aides, teachers, or artists; have or had a family member who has been a plaintiff in a lawsuit; or who were disciplined or fired. The key to developing a profile of an ideal juror is defining someone who will understand and empathize with the theory of the case.

Discussing the theory with family, friends, and others may help define the type of juror who will best understand your case. In addition, the use of jury researchers and consultants may be helpful in some cases to determine how jurors may ultimately respond to the evidence. *See* Constantine D. Georges, *Understanding Your Prospective Juror—Jury Selection and Strategies,* 48 UNITED STATES ATTORNEYS' BULLETIN 5 (Sept. 2000).

IV. Methods of jury selection

Every district and judge has their own rules for conducting jury selection. It is important to know your district's and individual judge's rules prior to commencement of jury selection. Accordingly, visit the court's Web site for guidance, speak to chambers and court deputies to determine the judge's process, and talk with colleagues who have selected juries in that particular judge's courtroom to find out whether the judge has any idiosyncracies that you need to be aware of prior to commencing trial.

The standard method of jury selection consists of seating 12 prospective jurors in the jury box, with the remainder of the jury pool sitting in the gallery. Often, counsel will have received questionnaires completed by the prospective jurors prior to the seating of the jury. These questionnaires provide initial information to counsel from which to make decisions concerning jurors. The judge asks questions of the 12 prospective jurors, after which the judge may excuse some jurors. Then the parties exercise their challenges (for cause and peremptory). If a juror is removed from the jury box during the questioning due to a for-cause challenge, another juror from the pool takes that dismissed juror's place in the jury box. After the exercise of all parties' challenges, the remaining jurors in the jury box will comprise the final jury.

V. Voir Dire—putting your plan into action

Black's Law Dictionary (8th ed. 2004) defines "voir dire" as a preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors. The purpose of voir dire is to ensure that all parties receive a fair trial by a qualified and impartial jury. During this process an attorney learns as much as possible about the potential jurors so that informed decisions about the use of challenges (both for cause and peremptory challenges) can be made.

The judge may or may not allow you to speak directly to the jurors. Generally, judges do all the questioning and attorneys conducting federal jury trials are not permitted to speak directly to the jury pool. However, in the event the court permits you to speak with a jury panel during jury selection, it is recommended that you take this opportunity. Use the time to introduce yourself and any individuals present at counsel table (including individuals you represent). Stand in front of the jury and make eye contact. Show confidence in your case and, if at all possible, introduce your theory of the case. Do not ask the same questions as the judge or opposing counsel. Do not ask personal or embarrassing questions which might make jurors uncomfortable. Whether questioning a jury panel directly or speaking with a juror at side bar, never argue with a juror who disagrees with you. It is better to know the juror's true feelings than to try to convince him or her to see it from your point of view.

Whether the judge intends to conduct all voir dire alone or whether attorneys are allowed to participate, preparing proposed voir dire questions prior to trial is helpful. Even where a judge does not use a party's submissions, the simple task of drafting targeted questions will help frame the concept of the ideal juror.

Beyond the standard questions of name, address, occupation, education, and ability to be fair, draft questions that relate to the type of case being tried (disability or gender discrimination). Determine if any prospective juror has a background in management or oversight of employees, including whether the juror has been involved in the hiring and firing process. While it is inappropriate to discuss the specifics of the case, seek to address concerns particular to the case. For instance, if the case involves a law enforcement agency, it is appropriate to determine a juror's general feelings about law enforcement officers. Additional areas of questioning that are important include the juror's marital status and questions about his or her family members, previous experience with the legal system (as a party, eyewitness, or juror), involvement with the government (employment, benefits, military), community groups and organizations, hobbies, the type of television shows watched, and whether they read newspapers. Moreover, avoid asking yes or no questions. Instead, phrase the questions to be open-ended.

During voir dire, watch how the jurors respond to questions—your observations of a juror's body language are just as important as the response to the question. Watch to see how jurors interact with each other. For example, jurors who work for the same company may gravitate toward each other. You must be aware if a potential "voting block" develops on the jury. It is always easier to appeal to an individual juror than to convince a group.

Given that the plaintiff will sit at counsel's table, it is recommended that the alleged discriminating official also sit at counsel's table for the duration of the trial, including jury selection. If that is not possible, have an appropriate agency official sit at counsel's table to humanize the federal agency. Moreover, clients sitting at counsel's table may get a particular "vibe" from a prospective juror that the attorney does not pick up on. Importantly, many of our clients are trained in law enforcement and pick up on body language and other clues regarding particular jurors that may prove useful in determining who would be a good juror. With regards to observing jurors, the more the merrier. In essence, use any tool available that may provide assistance in the jury selection process. One key assistive aide is to use a jury chart to keep track of information related to specific jurors on the panel.

VI. Using challenges effectively

Section 1870 of 28 United States Code addresses peremptory challenges.

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. . . . All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

28 U.S.C. § 1870.

There is an unlimited number of for-cause challenges, however. These challenges are made first, before peremptory challenges are exercised. Depending on the judge's individual practice, for-cause challenges can be made during the actual questioning of jurors or after the completion of the questioning of all jurors—but at all times, prior to the exercising of peremptory challenges.

Types of for-cause challenges include failure to meet statutory requirements, *see* 28 U.S.C. § 1865; any indication that a juror cannot be fair and impartial, such as when a juror states he is biased towards one party; when the juror has similar experiences to the issues being tried; when a juror cannot put personal experiences aside and follow the evidence and law of the case; and one who has had bad experiences with the government.

The standard for determining whether a prospective juror may be excluded for cause is whether the "juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotation marks and footnote omitted). Thus, aside from the failure to meet statutory requirements, a potential juror can only be removed for cause if that juror clearly indicates that he or she cannot be fair and impartial.

A party's intention to remove for cause usually becomes apparent during their one-on-one conversations with a potential juror. If you do not want a particular prospective juror on the jury and you do not want to use one of the limited peremptory challenges, you will need to find a way to remove the juror for cause. This may be by finding a way to make the prospective juror admit that he or she cannot, or may be unable to, put aside certain feelings and be fair to both parties.

In contrast, there may be a good prospective juror that the opposing party is attempting to challenge for cause. You will need to find a way to rehabilitate the juror so that he or she remains in the jury pool. One way is to ask the juror directly whether the juror is saying that he or she cannot be fair without having heard any evidence in the case. Generally, a juror will assert that he or she can be fair.

As stated previously, each party will have three peremptory challenges. If there are multiple parties on the same side, the number of challenges may be adjusted at the discretion of the court. The plaintiff exercises peremptory challenges first, followed by the parties in caption order; that order rotates during each successive round. Depending on the judge's particular practice, if a party passes on a specific round, that party may not regain the opportunity to challenge during the next rounds. Permissible grounds for the use of peremptory challenges include a juror's attitude and demeanor, his occupation, dress, or hair style and length.

VII. *Batson* challenges

Generally, a peremptory challenge can be made for any reason. However, a peremptory challenge is improper if used to excuse a juror based on race, ethnic origin, or gender. It is a violation of due process for any party to use peremptory challenges in a discriminatory manner. If a party believes another party is exercising peremptory challenges to exclude a specific class of persons, a *Batson* challenge may be made. *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Supreme Court held that discrimination on the basis of race is not permitted in the exercise of challenges in criminal cases. In *Hernandez v. New York*, 500 U.S. 352 (1991), the Supreme Court extended *Batson* to peremptory challenges based on ethnic origin (in that case, Latino). In *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the Supreme Court extended *Batson* to peremptory challenges based on gender. The holding in *Batson* has also been extended to civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

While the Supreme Court has not extended *Batson* to other constitutionally recognized categories, such as religion, some lower courts have done so. For instance, the Second Circuit expanded *Batson* to include strikes based simply on religion. *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003). However, the Ninth Circuit has "not extended the reach of *Batson* to peremptory challenges based on religion [.]" *United States v. Jordan*, 210 Fed. Appx. 672, 674, n.1 (9th Cir. 2006). It is important to know the law in your circuit.

When a *Batson* challenge is made, the trial court applies a three-part test to evaluate the claim that a party's use of peremptory challenges was discriminatory. *See Batson*, 476 U.S. at 96; *see also Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (to establish a prima facie case, the moving party must raise an inference that opposing counsel used a peremptory challenge to exclude the potential juror from the jury because of membership in a protected class). This initial burden is not high,

however. The *Batson* court relied on the Supreme Court's earlier Title VII holdings and specifically cited *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Recently, the Supreme Court reaffirmed that the *Batson* prima facie standard is not onerous. In *Johnson v. California*, the court held that a prima facie case only requires "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." 545 U.S. 162, 170 (2005) (rejecting a requirement for the moving party to show that it was "more likely than not" that a peremptory challenge had been exercised on a prohibited ground as too high a standard).

The opposing party must then offer a neutral, nondiscriminatory explanation for the peremptory challenge. *Batson*, 476 U.S. at 97-98. The Supreme Court in *Hernandez*, 500 U.S. at 360, held that a "racially-neutral" explanation is an "explanation based on something other than the race of the juror." The Court in *Hernandez* upheld the exclusion of bilingual jurors on the grounds that the prosecutor offered a neutral basis for the use of peremptory challenges (i.e., the potential jurors were hesitant to agree that they would rely on the translated testimony by the interpreter rather than the testimony given in Spanish from the witness). This second step "does not demand an explanation that is persuasive, or even plausible. 'At this step of the inquiry, the issue is the facial validity of the explanation. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race neutral.' " *Purkett*, 514 U.S. at 768 (quoting *Hernandez*, 500 U.S. at 358-59).

The trial court must then determine whether the party claiming discrimination has carried his or her burden or whether the stated non-discriminatory reason is pretextual. *Batson*, 476 U.S. at 98; *see also Hernandez*, 500 U.S. at 363-64. In *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005), the Supreme Court reiterated that, at this third step, a "[moving party] may rely on all relevant circumstances to raise an inference of purposeful discrimination." The Court further clarified that a moving party does not have to identify an identical juror of another race who was not peremptorily challenged. The Court held that "[n]one of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." *Id.* at 247, n.6; *see Coulter v. McCann*, 484 F.3d 459, 465 (7th Cir. 2007) (discussing *Miller-El*'s clarification of "the way in which jurors of different races should be compared[; i]t called for direct comparisons between 'similarly situated' venirepersons of different races.").

Once a party offers a neutral, nondiscriminatory reason for the use of the peremptory challenge and "the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [party asserting the challenge] had made a *prima facie* showing becomes moot." *See Hernandez,* 500 U.S. at 359. The "ultimate burden of persuasion regarding racial motivation rests with . . . the opponent of the strike." *Purkett*, 514 U.S. at 768.

VIII. When to make a *Batson* challenge

A *Batson* challenge may be made after any exercise of a peremptory challenge and may be raised more than once during jury selection. However, the challenge must be raised before the jury is empaneled and sworn in. A *Batson* challenge can be successful even if only one peremptory strike resulted from discriminatory intent. *See Cochran v. Herring*, 43 F.3d 1404, 1412 (11th Cir. 1995). However, in an opinion written by now-Supreme Court Justice Samuel Alito, the Third Circuit held in *Bronshtein v. Horn* that "[w]e do not hold that a *prima facie* case always requires more than one contested strike, but the absence of a pattern of strikes is a factor to be considered." 404 F.3d 700, 724-25 (3d Cir. 2005) (citing to *Simmons v. Beyer*, 44 F.3d 1160, 1167 (3d Cir. 1995) (pattern of strikes and number of racial group members in panel relevant)). "[A] lawyer must challenge an adversary's use of peremptory challenges before the completion of jury selection, in part so that the court can (i) contemporaneously assess the adversary's conduct; and (ii) remedy any improper conduct without to repeat the jury selection process." *United States v. Franklyn*, 157 F.3d 90, 97 (2d Cir. 1998).

A trial attorney should always consider that a *Batson* challenge will be made whenever he or she makes a peremptory strike, especially in employment discrimination cases where protected categories are relevant to the lawsuit. It is wise to research in advance how the judge views such challenges and to have ready a neutral explanation as to why counsel is exercising the peremptory strike. Some jurisdictions have recognized lists of reasons that are per se acceptable or per se pretextual. Knowing these lists will help the attorney offer a reason for the strike that has already been found acceptable.

Trial courts are given wide discretion in deciding *Batson* claims.

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the findings "largely will turn on evaluation of credibility." In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the [attorney's] state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S. at 365 (citations omitted). An appeals court review of an unpreserved *Batson* objection is generally reviewed for "plain error." *See United States v. Brown*, 352 F.3d 654, 663 (2d Cir. 2003) (citing cases). *But see James v. Bowersox*, 187 F.3d 866, 869, n.4 (8th Cir. 1999) (noting in dicta that plain error review does not apply to untimely *Batson* challenges).

IX. Conclusion

Employment discrimination cases concern highly charged factual allegations involving characteristics that are protected from being used as discriminatory factors. Early consideration of the key areas of preferred jury composition, voir dire, and *Batson* challenges is critical to having jurors on the panel who can understand the actions taken and the theory of the case. Careful preparation in these important areas can turn the jurors into assets to your case.❖

ABOUT THE AUTHORS

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Mixed-Motive Discrimination Cases And Summary Judgment

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I. Overview

In the Civil Rights Act of 1991, Congress enacted a series of amendments to Title VII, including 42 U.S.C. § 2000e-2(m). That section provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Congress added this provision in response to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where the Supreme Court considered the issue of causation under Title VII when faced with an employment decision motivated by both legitimate and illegitimate considerations. A plurality of the Court held that, once the plaintiff establishes that an unlawful reason was a motivating factor in an employment decision, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even in the absence of a prohibited basis, such as race or gender. Under *Price Waterhouse*, proof that defendant would have made the same decision is a complete defense. *Id.* at 258.

Under the 1991 amendments, if a plaintiff establishes that an illegitimate consideration was a motivating factor in an employment decision, the burden shifts to the employer to demonstrate that it would have made the same decision, even in the absence of discrimination. Unlike the holding of *Price Waterhouse*, however, successful proof of that affirmative defense does not avoid liability. Instead, the statute provides that proof of the same decision defense only insulates the defendant from damages and certain types of injunctive relief. 42 U.S.C. § 2000e-5(g)(2)(B).

In the wake of the 1991 amendments, however, lower courts continued to debate the evidentiary hurdle that a plaintiff had to meet before shifting the burden of proof to the defendant to establish the same decision defense. This is where Justice O'Connor's concurrence in *Price Waterhouse* took on a life all its own. While Justice O'Connor agreed that proof of the same decision was a defense to liability, she was unwilling to shift the burden of persuasion to the employer in every case where the evidence established both legitimate and illegitimate motivations. She held that the burden of persuasion should be shifted to the employer only when the plaintiff demonstrates "by direct evidence that an illegitimate factor played a substantial role" in the action. *Id.* at 275. Focusing on this concurrence, lower courts developed an extensive body of case law assessing the type and quantum of "direct evidence" that a plaintiff must present before shifting the burden to the defendant.

In *Desert Palace v. Costa*, 539 U.S. 90 (2003), the Supreme Court, relying upon the plain language of Title VII, rejected the notion that a plaintiff must offer direct evidence before shifting the burden to the defendant. A plaintiff is entitled to a mixed-motive jury instruction upon the presentation of sufficient evidence, be it circumstantial or direct, for a reasonable jury to conclude that race, color, religion, sex, or national origin was a motivating factor in the employment decision, even if other legitimate considerations also motivated the decision. *Id*. at 101-02.

The Supreme Court recently granted certiori in *Gross v. FBL Financial Group*, 526 F.3d 356 (8th Cir. 2008), to consider whether a plaintiff in an Age Discrimination in Employment Act (ADEA) case must offer direct evidence of discrimination before the burden of proof shifts to the defendant to establish the same decision. Since § 2000e-2(m) did not amend the ADEA or the retaliation provisions of Title VII (42 U.S.C. § 2000e-3(a)), some lower courts have continued to apply the rules of *Price Waterhouse* to age and retaliation claims, including the requirement that a plaintiff present direct evidence before the burden of persuasion shifts to the defendant to prove the same decision defense.

In holding that this section does not require direct evidence, the Supreme Court in *Costa* observed that it was not deciding whether § 2000e-2(m) applies outside of the mixed-motive context. 539 U.S. 94 n.1. Furthermore, the question addressed by *Costa* was raised in the context of a jury instruction, and the Supreme Court had no occasion to consider the summary judgment analysis in a mixed-motive and single-motive case. This article will address some of the more recent circuit court opinions and how government counsel should approach a Rule 56 motion in a case that may warrant a mixed-motive analysis.

II. The mixed-motive and single-motive distinction

In the wake of *Costa*, some lower courts questioned the continuing viability of the distinction between a single-motive (or pretext) case and a mixed-motive case, and, in that regard, whether the *McDonnell Douglas* framework survives the enactment of § 2000e-2(m). *See Love-Lane v. Martin*, 355 F.3d 766, 786-87 (4th Cir. 2004) (identifying, but not deciding, "the

extent that the Supreme Court's recent decision in *Desert Palace* . . . might change the role that the *McDonnell Douglas* burden-shifting framework plays in race discrimination cases"); *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987 (D. Minn. 2003) (holding *McDonnell Douglas* of limited utility after the enactment of § 2000e-2(m)). Throughout its opinion, however, the Supreme Court in *Costa* observed that it was only considering the evidentiary burdens in a mixed-motive case under § 2000e-2(m). As the Court stated, "[t]he question before us in this case is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII." 539 U.S. at 92. It again emphasized the limited nature of its inquiry in a footnote: "This case does not require us to decide when, if ever, [§2000e-(2)(m)] applies outside of the mixed-motive context." *Id.* at 94 n.1.

After *Costa*, the Supreme Court reiterated the *McDonnell Douglas* paradigm in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). While that case arose under the Americans with Disabilities Act, the Court spoke at length about the burden shifting scheme of *McDonnell Douglas* without referring to *Costa*, acknowledging that lower courts "have consistently utilized [the *McDonnell Douglas*] burden-shifting approach when reviewing motions for summary judgment in disparate treatment cases." *Id.* at 50 n.3. More recently, in *Ash v. Tyson Foods, Inc.,* 546 U.S. 454 (2006), the Court addressed standards for determining when a plaintiff's qualifications may suffice in some cases to show pretext. The Courts of Appeal also continue to distinguish between single-motive and mixed-motive cases. Accordingly, both theories remain viable methods of assessing evidence in Title VII cases after *Costa*. The question that remains is how to approach those theories in a summary judgment motion.

III. Summary judgment after *Costa*

A. Overview of circuit decisions

Since the decision in *Costa*, the Courts of Appeal have articulated different approaches to summary judgment for single-motive and mixed-motive cases. One approach is a modified *McDonnell Douglas* test. Under this analysis, a plaintiff must still meet the elements of the prima facie case, followed by defendant articulating a legitimate, nondiscriminatory reason. In *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004), the circuit court described the summary judgment analysis as follows:

> Under this integrated approach, called, for simplicity, the modified *McDonnell Douglas* approach: the plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, "the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive[s] alternative).' "

See also Alvarado v. Texas Rangers, 492 F.3d 605, 611 (5th Cir. 2007) (adopting summary judgment analysis of *Rachid* without commenting on whether the case is pretext or mixed-motive). Under this modified *McDonnell Douglas* analysis, the court still considers the plaintiff's prima facie case and the defendant's legitimate, nondiscriminatory reason, whether the evidence supports a single-motive or mixed-motive case. The analysis only changes at the final stage of the *McDonnell Douglas* test. At that point, the plaintiff may choose the pretext approach and undermine the defendant's articulated reason as untrue or implausible. But such an attack is not required. Instead, the plaintiff may bypass the pretext analysis and offer evidence that the defendant's decision was motivated by an illegitimate consideration.

In contrast to this modified *McDonnell Douglas* approach, other circuits separate the analyses. The case may be assessed as single-motive, with the plaintiff having to prove pretext, or as a mixed-motive case. As the court observed in *Richardson v. Suggs*, 448 F.3d 1046 (8th Cir. 2006), mixed-motive is a two step process. First, the plaintiff must "demonstrate that an illegitimate criterion was a motivating factor in the employment decision." *Id*. at 1057. This can be done by direct or circumstantial evidence. Second, once this showing is made, the defendant must "come forward with an affirmative defense that it would have made the same decision." *Id*.; *see also Johnson v. Mechanics & Farmers Bank,* No. 07-1725, 2009 WL 188077 (4th Cir. Jan. 23, 2009) (undertaking separate single-motive and mixed-motive analyses); *Cornwell v. Electra*

Central Credit Union, 439 F.3d 1018, 1028 (9th Cir. 2006) (to overcome summary judgment, a plaintiff may prove that a prohibited consideration more likely than not motivated the employer's decision, or that the employer's articulated reason for the action is unworthy of credence).

In *White v. Baxter Healthcare Corp.,* 533 F.3d 381 (6th Cir. 2008), the court adopted separate analyses for single-motive and mixed-motive cases and in so doing refused to apply the *McDonnell Douglas* test in a mixed-motive case. In reaching that conclusion, the court first provided a concise overview of the approaches taken by the other circuits, and then held:

> [T]he *McDonnell Douglas/Burdine* burden-shifting framework does not apply to the summary judgment analysis of Title VII mixed-motive claims. We likewise hold that to survive a defendant's motion for summary judgment, a Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) "race, color, religion, sex, or national origin was a motivating factor" for the defendant's adverse employment action.

Id. at 400 (citing § 2000e-2(m)). The court further advised trial courts that "[t]his burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim." *Id.*

In rejecting application of *McDonnell Douglas* in a mixed-motive case, the court in *White* considered the basic rationale for the development of that framework. That test was adopted by the Supreme Court as a way to assess the evidence and to eliminate the most common nondiscriminatory reasons for an employment action. By way of example, such reasons could be the plaintiff's membership in a protected class or having the basic qualifications for a job. According to the Sixth Circuit, however, "this elimination of possible legitimate reasons for the defendant's action is not needed when assessing whether trial is warranted in the mixed-motive context." *Id.* at 401. In a mixed-motive case, a plaintiff can prevail by establishing that a prohibited factor motivated the decision, even if legitimate factors also played a part.

In *Makky v. Chertoff*, 541 F.3d 205 (3d Cir. 2008), the Third Circuit also assessed the interplay of the *McDonnell Douglas* factors in a mixed-motive case, finding that in some circumstances a plaintiff with sufficient evidence of mixed-motive may still face dismissal if he cannot establish basic minimum qualifications for the job. In that case, plaintiff, who was born in Egypt and had emigrated to the United States, worked for the Transportation Security Administration. He performed a job that required a security clearance, which he initially received in 1987. *Id*. at 207-08. In 2002, plaintiff began working for a new supervisor, who took an interest in his background and asked him about his national origin. *Id*. at 209. While his application for renewal of his security clearance was pending, the Iraq war began, at which time the plaintiff's supervisor placed him on administrative leave. *Id*. Thereafter, plaintiff's security clearance was denied and he was placed on indefinite suspension. *Id*. at 209-10.

Relying on a mixed-motive theory, plaintiff contended that his qualifications for the job were not part of the inquiry and that he only needed to demonstrate that a prohibited reason motivated the decision to suspend him. The court sidestepped the question as to whether all of the prima facie elements of *McDonnell Douglas* needed to be satisfied in a mixed-motive case, holding only that "a mixed-motive plaintiff has failed to establish a prima facie case of a Title VII employment discrimination claim if there is unchallenged objective evidence that s/he did not possess the minimal qualifications for the position plaintiff sought to obtain or retain." *Id*. at 215. The court further advised that its holding "involves inquiry only into the bare minimum requirement necessary to perform the job," and will typically involve a licensing requirement that can be "measured by an external or independent body rather than the court or the jury." *Id*.

The D.C. Circuit has chosen to modify the summary judgment analysis for both single-motive and mixed-motive cases. In *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490 (D.C. Cir. 2008), the court held that a judicial analysis of the *McDonnell Douglas* prima facie elements is unnecessary once a defendant has articulated a legitimate, non-discriminatory reason. As the court observed, "[i]n a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not - and should not - decide whether the plaintiff actually made out a prima

facie case under *McDonnell Douglas*." *Id*. at 494; *see also Jones v. Bernanke*, 557 F.3d 670, 678 (D.C. Cir. 2009). Despite finding the prima facie case "a largely unnecessary sideshow," *Brady*, 520 F.3d at 494, the D.C. Circuit continues to recognize both single and mixed-motive cases. In this regard, once the defendant has articulated its legitimate, non-discriminatory reason, the next step in the analysis depends upon the type of evidence offered by plaintiff.

> [A] plaintiff may pursue a "single-motive case," in which he argues race . . . was the sole reason for an adverse employment action and the employer's seemingly legitimate justifications are in fact pretextual. . . . Alternatively, he may bring a "mixed-motive case," in which he does not contest the bona fides of the employer's justifications but rather argues race was also a factor motivating the adverse action.

Ginger v. District of Columbia, 527 F.3d 1340, 1345 (D.C. Cir. 2008); *see also Fogg v. Gonzales*, 492 F.3d 447, 453 (D.C. Cir. 2007) (recognizing single-motive and mixed-motive theories are "alternative ways of establishing liability"); *Pollard v. Quest Diagnostics*, Civil Action No. 07-692 (CKK), 2009 WL 383689, at *13 (D.D.C. Feb. 17, 2009).

B. Return to *Burdine*

Despite these different articulations of summary judgment in single-motive and mixed-motive cases, the basic inquiry in a Rule 56 motion does not really change after the decision in *Costa*. Whether the evidence supports a single-motive (or pretext case) or a mixed-motive case, the ultimate question is the same: Is there a triable issue of fact as to whether the plaintiff was the victim of intentional discrimination? As the Fourth Circuit observed:

> Although the Supreme Court eliminated any heightened requirement of direct evidence to establish a mixed-motive sex discrimination claim under Title VII, [citing *Costa*], the fundamental basis for the district court's decision has not been affected. Regardless of the type of evidence offered by a plaintiff as support for her discrimination claim (direct, circumstantial, or evidence of pretext), or whether she proceeds under a mixed-motive or single-motive theory, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." [Citation omitted]. To demonstrate such an intent to discriminate on the part of the employer, an individual alleging disparate treatment based upon a protected trait must produce sufficient evidence upon which one could find that "the protected trait . . . actually motivated the employer's decision." (citing *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 141 (2000)).

Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 286 (4th Cir. 2004); *see also Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1071-72 (9th Cir. 2004).

This articulation of the standard is consistent with the Supreme Court's decision in *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981):

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Prior to the enactment of §2000e-2(m) and the decision in *Costa*, a plaintiff was able to raise a triable issue of fact by undermining the defendant's articulated reason or by showing that a prohibited factor more likely motivated the decision. Those inquiries continue to control a Rule 56 motion.

Of course, a couple of considerations must be kept in mind in preparing a motion for summary judgment in light of §2000e-2(m) and *Costa*. First, in a pretext case analyzed using *McDonnell Douglas*, summary judgment is routinely granted to a defendant on grounds that a plaintiff cannot establish a prima facie case, such as the inability to show that similarly situated employees outside of the protected class received more favorable treatment or that the plaintiff was qualified for the job. *See Morris v. Emory Clinic*, 402 F.3d 1076, 1082 (11th Cir. 2005). If the evidence supports a mixed-motive case, however, this line of attack will be precluded unless an argument can be constructed along the lines of the *Makky* decision that the plaintiff lacks basic qualifications.

Second, even if the case is assessed under the mixed-motive approach, a defendant may still obtain summary judgment on the same decision defense. If it is undisputed that the defendant would have taken the same action even absent any discriminatory reason, summary judgment (or partial summary judgment) is appropriate. *See Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1085 (11th Cir. 1996) (while there was disputed evidence regarding the supervisor's discriminatory intent, "[b]ased on the overwhelming evidence . . ., the defendants are entitled to summary judgment with regard to their affirmative defense, namely, that [the supervisor] would have made the same recommendation . . . even in the absence of discriminatory intent."). Of course, under the 1991 amendments, proof of the same decision in a claim brought pursuant to §2000e-2(a) is no longer a complete defense; a plaintiff is still entitled to limited relief. *See* 42 U.S.C. § 2000e-5(g)(2)(B). In such a case, partial summary judgment could be granted as to the same decision defense, with the issue of relief left to the court.

IV. Conclusion

The basic inquiry on a Rule 56 motion is not impacted by *Costa*. Whether a case is assessed under the single-motive or mixed-motive theory, the analysis in a motion for summary judgment must still focus on whether the evidence, circumstantial or direct, demonstrates that plaintiff was the victim of discrimination. Plaintiff may attempt to establish a triable issue by offering evidence to undermine the defendant's articulated reason for the action, thereby showing pretext, or by showing that the action was more likely than not motivated by an illegitimate reason.❖

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