AN INTRODUCTION TO
TITLE VII AND THE EQUAL PAY ACT

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I. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

A. Introduction

Title VII prohibits discrimination in employment on the basis of race, color, gender, national origin, and religion. The Civil Rights Act of 1964, was the first major enactment of civil rights legislation since the Reconstruction Era Civil Rights Act of 1866. Title VII of the Civil Rights Act of 1964, improved the employment opportunities of minorities and women, and thereby dramatically changed the makeup of the American workforce.

The 1964 Act was amended in 1972, 1978, and 1991. Title VII provides that the hiring, training, promotion, and termination decisions of employers with 15 or more employees, as well as unions and employment agencies, can be reviewed by the Equal Employment Opportunity Commission (EEOC) and the courts to determine if the decisions were discriminatory. Title VII makes it unlawful for an employer, union, or employment agency to do the following:

1. Fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1).

2. Limit, segregate, or classify an employee or applicant for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2).

3. Discriminate against any individual because of his or her

race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or training. 42 U.S.C. § 2000e-2(d).

4. Retaliate against any employee, or applicant for employment, or member of a union, because he or she has opposed employment practices made unlawful by Title VII, or because he or she has made a charge, testified, assisted, or participated in a Title VII investigation, proceeding or hearing. 42 U.S.C. § 2000e-3(a).

5. Print or publish any notice or advertisement relating to employment indicating a preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-3(b).

From 1989 to 1991, the Supreme Court limited employees' ability to effectively enforce the civil rights laws prohibiting discrimination in employment. The Court crippled civil rights litigants by:

1. Issuing a very narrow interpretation of the Civil Rights Act of 1866, 42 U.S.C. §1981, declaring that it could not be applied to discriminatory acts that took place during the course of employment, but was limited to discrimination in the formation of employment contracts. Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d. 132 (1989);

2. Holding that a discriminatory seniority system must be challenged when adopted and not when applied to the affected employee, even though the affected employee may not have been subject to the seniority system at the time of its adoption. Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 109 S. Ct. 2261, 104 L. Ed. 2d. 961 (1989);

3. Allowing court-ordered consent decrees and court judgments to be collaterally attacked many years after their adoption. Martin v. Wilks, 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d. 835 (1989);

4. Holding that negative employment decisions based on gender, race, religion or national origin do not violate Title VII, if the employer would have reached the same result absent the discriminatory motive. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d. 268 (1989);

5. Articulating a new higher standard of proof in disparate impact cases, so as to protect employers from having to

defensively pursue a "quota system" of employment. The Court's holding made the burden of proof in disparate impact cases the same as in disparate treatment cases and reversed Griggs v. Duke Power Company, 401 U.S. 424, 91 S. Ct. 842, 28 L. Ed. 2d. 158 (1971). Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d. 733 (1989);

6. The Court held that Title VII did not apply to the practices of United States employers who employed United States citizens abroad. EEOC v. Arabian American Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d. 274 (1991); and
7. The Court also held that the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, did not include compensation for expert fees, thus preventing prevailing plaintiffs from being reimbursed for the expense paid for expert assistance throughout the course of litigation, including trial testimony. West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d. 68 (1991).

In passing the Civil Rights Act of 1991, Congress specifically stated that one of the purposes of the Act was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civ. Rights Act of 1991 § 3(4). The Civil Rights Act of 1991 either overrode or substantially modified the seven Supreme Court decisions referenced above.

The second purpose of the Civil Rights Act of 1991 was to expand the remedies available under Title VII, and provide monetary remedies in the form of compensatory and punitive damages to the victims of intentional discrimination and unlawful workplace harassment. Civ. Rights Act of 1991 § 3(1). Compensatory damages include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. Civ. Rights Act of 1991 § 102(b)(3). Punitive damages are recoverable for discriminatory practices engaged in with malice, or reckless indifference to the rights of an aggrieved individual. Civ. Rights Act of 1991 § 102(b)(1). Plaintiffs seeking compensatory and punitive damages are entitled to a jury trial. Civ. Rights Act of 1991 § 102(c)(1).

B. Coverage

(1) Private Employers

Title VII applies to private employers who affect commerce and have at least fifteen employees for each working day in each of

twenty or more calendar weeks in a calendar year, and any agent of such employer. 42 U.S.C. § 2000e(b). Affecting commerce is not usually an issue, because an employer with 15 or more employees will usually be deemed to have enough of an impact on commerce to meet the constitutional limits of regulatory power. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (constitutionality of Title VII upheld as within the regulatory authority given Congress under the Commerce Clause).

The method of determining whether an employer had 15 or more employees for each working day in each of 20 or more calendar weeks within a calendar year was recently decided by the Supreme Court. Walters v. Metropolitan Educational Enterprises, Inc., 117 S. Ct. 660 (1997). The Court's decision resolved a conflict among the circuits, which were using two different methods of counting employees to determine whether an employer was covered by Title VII. The Seventh Circuit used the "daily attendance" method, which required that an employee must be physically present at the workplace, or on a paid leave, for each day of the workweek, in order to be counted as an employee. Thus, parttime or hourly employees who did not work each day of the workweek would not be counted. The First and Fifth Circuits used the "payroll" method which counted all hourly or part-time employees on the employer's payroll, including those who had the day off without pay.

The Court adopted the "payroll" method, stating that "the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." Id. at 663-64. The Court held that "all one needs to know about a given employee for a given year is whether the employee started or ended employment during the year and, if so, when. He is counted as an employee for each working day after arrival and before departure." Id. at 665-66.

(2) Exceptions

The term "employer" under Title VII does not include: (a) the United States and its wholly owned corporations; (b) Indian tribes; and (c) bona fide private membership clubs. 42 U.S.C. § 2000e(b).

Pursuant to the 1972 Amendments, Title VII does cover most federal employers, including the executive and military departments, the United States Post Office, the Library of Congress and the competitive positions in the legislative and judicial branches. 42 U.S.C. § 2000e-16.

Also, pursuant to the 1972 Amendments, Title VII covers state and local governments. 42 U.S.C. § 2000e-(a) (amended to include the words "governments, governmental agencies, [and] political subdivisions").

Title VII does not apply to employers who hire aliens outside of the United States, but does apply to American corporations employing American employees overseas, unless compliance would cause the employer to violate the law of the foreign country. 42 U.S.C. § 2000e-1.

Title VII does not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying out of its activities. 42 U.S.C. § 2000e-1(a).

(3) Labor Organization and Employment Agencies

A union is an employer with respect to its officers and staff. A union is engaged in commerce if it operates a hiring hall or it has more than 15 members. 42 U.S.C. § 2000e(e). A union is liable for its own employment and membership practices, and is also liable when it causes or attempts to cause an employer to discriminate. 42 U.S.C. § 2000e-2(c).

An employment agency does not have to be a certain size, such as 15 employees, in order to be subject to Title VII. It is covered if it regularly undertakes, with or without compensation, to procure employees for an employer or to procure employment opportunities for employees. 42 U.S.C. § 2000e-(c).

(4) Individual Supervisors

In Lissau v. Southern Food Service, Inc., 159 F.3d 177 (4th Cir. 1998), the Fourth Circuit held that supervisors are not individually liable under Title VII. This decision resolved the dispute over individual supervisor liability which resulted from two previous inconsistent holdings. In Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir. 1994), the court held that supervisors could not be held individually liable under the ADEA. However, in Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989) the court held that individual supervisors could be held liable under Title VII:

> An individual qualifies as an "employer" under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment. (citations omitted). The supervisory employee need not have ultimate authority to hire or fire to qualify as an employer, as long as he or she has significant input into such personnel decisions. (citation omitted). Furthermore, an employee may exercise supervisory authority over the plaintiff for Title VII purposes even though the company has formally designated another

individual as the plaintiff's supervisor. As long as the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff, that employee will hold "employer" status for Title VII purposes.

Paroline, 879 F.2d 104.

In Birkbeck, the court stated:

As an initial matter, we must decide whether Fennessey is a proper defendant in this action. The ADEA makes it unlawful for an "employer" to discriminate on the basis of age against its employees. *See* 29 U.S.C. § 623(a). The Act defines the term "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person . . . " 29 U.S.C. § 630(b).

The few courts that have found individual liability under the ADEA tend to seize on the use of the word "agent" in § 630(b). *See*, *e.g.*, House v. Cannon Mills Co., 713 F. Supp. 159, 160-62 (M.D.N.C. 1988). They have reasoned that, under the ADEA, those with the authority to make discharge decisions for their employers are individually liable as their employer's "agents." Id. at 161-62.

While plaintiffs urge us to adopt this view, we find its rationale unpersuasive. Section 630(b) restricts the application of the ADEA to those "employers" who employ twenty or more workers. The purpose of this provision can only be to reduce the burden of the ADEA on small businesses. Given this evident limitation, it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more. *See* Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) ("If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees."). Such personal liability would place a heavy burden on those who routinely make personnel decisions for enterprises employing twenty or more persons, and we do not read the statute as imposing it. . . . We therefore hold that the ADEA limits civil liability to the employer and that Fennessey, as a Marvel employee, is not a proper defendant in this case.

Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510-11 (4th Cir. 1994).

In Lissau, the court, making no reference to Paroline, explained its new position:

We have already observed that Title VII is the ADEA's "closest statutory kin."

> (Citation omitted). Thus, reading Title VII to foreclose individual liability represents the only logical extension of Birkbeck. Like the ADEA, Title VII exempts small employers; it would be incongruous to hold that Title VII does not apply to the owner of a five-person company but applies with full force to a person who supervises an identical number of employees in a larger company. We interpret the inclusion of agent in Title VII's definition of employee simply to establish a limit on an employer's liability for its employees' actions.

Lissau, 159 F.3d at 180.

It may be necessary when a small corporation is the defendant to pierce the corporate veil, and for that reason the naming of individual defendants who are acting as the corporation will still be necessary.

(5) Third Parties as Employers under Title VII.

With the increase in temporary employment agencies, the issue of liability under Title VII for non-employers is growing. Title VII prohibits an employer from discriminating against "any individual". This prohibition is not limited to its own employees. 42 U.S.C. § 2000e-2(a)(1). Thus, an employer who uses the employees of a temporary agency or placement agency may be liable for discriminatory treatment of those individuals, even though they are not its own employees.

In Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973), the court held that a hospital which refused to refer a male private duty nurse to female patients was liable under Title VII, even though the employment relationship was between the private duty nurse and the patient. The court held the hospital liable because its refusal to refer a nurse to a job, based on his gender, interfered with the nurse's employment opportunities with another employer. Id. at 1341.

> Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress has determined to prohibit each of these from exerting any power it may have to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him. To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341.

The Eleventh Circuit held that a hospital could be liable under Title VII if its refusal to grant hospital privileges to a doctor was based on his national origin, and such refusal interfered with his employment contract. The plaintiff was an Iranian doctor who had entered into an employment contract with a local doctor. The employment contract was conditioned upon Dr. Pardazi obtaining

staff privileges at the hospital. Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988).

In King v. Chrysler Corp., 812 F.Supp. 151 (E.D. Mo. 1993), a cashier employed by a cafeteria which operated on the premises of a car manufacturer, sued the manufacturer for the harassing conduct of the manufacturer's employees. The court held that an employment relationship between plaintiff and defendant was not necessary to maintain a Title VII action.

In Bender v. Suburban Hospital, Inc., 159 F.3d 186 (4th Cir. 1998), the Fourth Circuit called into doubt the decision in Sibley. The court stated: "[a]lthough Sibley itself repeatedly referred to its interpretation of Title VII as applying to interference with 'direct employment relationships between third parties,' (citations omitted), the court there, without discussion or explanation, treated a private nurse's relationship with patients at a hospital as satisfying the rule." In Bender, the Fourth Circuit assumed without deciding that the general rule of Sibley applied but stated that it follows the articulated standard and requires a plaintiff to allege harm to an employer-employee relationship, as defined by the law of agency. Id. at 188-189, *see also* Maynard v. Kenova Chemical Company, 626 F.2d 359 (4th Cir. 1980) (analysis in workers' compensation case regarding when employee of temporary agency becomes a loaned servant and thus an employee of the company where he was assigned); NLRB v. Jewell Smokeless Coal Corporation, 435 F.2d 1270 (4th Cir. 1970) (discussion of joint employers).

C. Types of Claims under Title VII

There are two basic theories of discrimination under Title VII. Disparate treatment involves treating individuals differently because of their race, gender, religion, national origin, or color. Disparate treatment includes the subcategory of harassment cases, including quid pro quo sexual harassment and hostile work environment. Also within the context of disparate treatment cases are the mixed motive cases. Disparate impact cases involve neutral or objective selection criteria which adversely or disproportionately affect a protected classification of employees.

(1) Disparate Treatment Cases

A disparate treatment case is often an individual case which focuses on an adverse employment action suffered by one individual. It is the employee's burden to prove that the adverse employment decision, such as a termination, failure to promote, or a failure to hire, was the result of discriminatory bias on the part of the decision maker. The employer's defense is that the decision was based on legitimate nondiscriminatory reasons.

Disparate treatment cases can also be multiple plaintiff or class action cases which attempt to prove that the employer engages in a pattern or practice of discriminatory treatment.

A plaintiff, alleging disparate treatment employment discrimination, may prove the case by a

judicially created scheme which allocates burdens of persuasion and burdens of production. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 688 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980); Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982); Herold v. Hajoca Corp., 864 F.2d 317 (4th Cir. 1988); EEOC v. Clay Printing Co., 955 F.2d 936 (4th Cir. 1992).

The Supreme Court has articulated the plaintiff's burden in proving employment discrimination via the McDonnell Douglas framework in two more recent cases: St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L. Ed. 2d 407 (1993); and Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed. 105 (2000).

The goal of the McDonnell Douglas framework is to "progressively... sharpen the inquiry into the illusive factual question of intentional discrimination." Hicks at 506, 113 S. Ct. at 2746, 125 L. Ed. 2d at 415 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n8, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). Under this framework, a plaintiff must first establish by a preponderance of the evidence, a prima facie case of discrimination. Hicks at 506, 113 S. Ct. at 2747, 125 L. Ed. 2d at 415.

Under the McDonnell Douglas framework, a plaintiff meets the burden of presenting a prima facia case by showing: (1) that he or she is a member of the protected class; (2) that he or she suffered an adverse employment action; (3) that at the time of the adverse employment action plaintiff was qualified for the position or was performing the job at a level that met the employer's legitimate expectation; and (4) that the employer did not treat the employee's protected classification neutrally in making the adverse employment decision. Sailor v. Hubbell, Inc., 4 F.3d 323 (4th Cir. 1993); Duke v. Uniroyal Inc., 928 F.2d 1413, 1418 (4th Cir. 1991); Harold v. Hajoca Corp., 864 F.2d 317, 320 (4th Cir. 1988); EEOC v. Western Electric Co., 713 F.2d 1011, 1014-15 (4th Cir. 1983); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242-243 (4th Cir. 1982).

Upon the establishment of a prima facie case, the burden of production shifts to the defendant to disclose a legitimate, non-discriminatory reason for the adverse employment decision. Hicks at 506, 113 S. Ct. at 2747, 125 L. Ed. 2d at 416. The burden to rebut the plaintiff's prima facie case can be met by producing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 257, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

The burden of persuasion is then still on the plaintiff to demonstrate that defendant's proffered reason was not the true reason for the employment decision, and that an impermissible bias was the true basis of the decision. Id. Plaintiff can meet this final burden without producing evidence in addition to the evidence produced in meeting the prima facie case. Hicks at 511, 113 S. Ct. at 2749, 125 L. Ed. 2d at 418; Tuck at 375.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity) may, together with the elements of the prima facie case suffice to show intentional discrimination. Thus, rejection of

> the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

Hicks at 511, 113 S. Ct. at 2749, 125 L. Ed. 2d at 418.

Following the Court's decision in Hicks, there was concern that the Court was articulating a higher standard of proof for plaintiffs than previously required. That concern was stated by Justice Souter in his dissent in Hicks:

> [O]ther language in the Court's opinion which supports a more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not even be sufficient to sustain judgment for the plaintiff. For example, the Court twice states that the plaintiff must show "both that the reason was false, and that discrimination was the real reason."

Id. at 535, 113 S.Ct. at 2762 (Souter, J. dissenting). This approach has been dubbed "pretext-plus." Id. Under this approach to the burden shifting scheme outlined in Hicks a plaintiff may be required to prove more than that the employer's reason was pretextual.

> [U]nder the majority's scheme, a victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reason to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record.

Id. at 534, 113 S.Ct. at 2762 (Souter, J. dissenting).

The Fourth Circuit immediately adopted the "pretext-plus" test for determining summary judgment motions in ADEA and Title VII cases. To get to a jury, a plaintiff may not rest on disproving an employer's explanation for its action, but must also show that discrimination was the real reason for the action. Vaughan v. The Metrahealth Companies, Inc., 145 F.3d 197 (4th Cir. 1998)("Pretext-plus best preserves the character of statutes like the ADEA as antidiscrimination statutes."), Gillins v. Berkeley Elec. Cooperative, Inc., 148 F.3d 413 (4th Cir. 1998). The court adopted the same language in both cases.

> [T]o survive a motion for summary judgment under the McDonnell Douglas paradigm the plaintiff must do more than merely raise a jury question about the veracity of the employer's proffered justification. The plaintiff must have developed some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action.

Gillins, 148 F.3d at 417 (quoting Vaughan, 145 F.3d at 201-02).

The Supreme Court's recent decision clarifies that pretext plus is not the proper standard for proving discrimination using the McDonnell Douglas burden shifting scheme. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000). In Reeves, the Court considered whether the plaintiff had proven his ADEA claim by meeting the elements of his prima facie case and proving that the employer's nondiscriminatory reason for his termination was merely a "pretext". The employee rebutted the employer's reason for termination, shoddy recordkeeping, by offering sufficient evidence that he properly kept records. The Court reversed the Fifth Circuit's holding for the employer and stated:

> [T]he Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in St. Mary's Honor Center. There we held that the factfinder's rejection of the employer's legitimate nondiscriminatory reason for its action does not compel judgment for the plaintiff. 509 U.S., at 511, 113 S.Ct. 2742. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." Id., at 524, 113 S.Ct. 2742. In other words, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id., at 519, 113 S.Ct. 2742.
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> In reaching this conclusion, however, we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.
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> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. See id., at 517, 113 S.Ct. 2742 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." (Citations omitted)
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> Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. (Citations omitted) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration.") Thus, a plaintiff's prima facie case, combined with

> sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Reeves at 146-148, 120 S.Ct. at 2108-09. Thus, the Supreme Court rejected the "pretext-plus" approach.

The Fourth Circuit applied Reeves in a Title VII same sex, sexual harassment case. Leake v. Ryan's Family Steakhouse, 2001 WL 227216 (4th Cir. 2001). In Leake, a meat cutter from Ryan's Steakhouse brought claims of sexual harassment and retaliation under Title VII. Plaintiff's manager made sexual remarks to him and touched his buttocks and genitals. The court remanded as to the sexual harassment claim but affirmed summary judgment for the employer on the retaliation claim. The Leake court acknowledged the Fourth Circuit's prior standard of pretext plus was no longer good law.

> Although the district court used the proper framework, Leake contends that the court erred in the last step of its analysis by applying the "pretext-plus" standard. Under this standard, which was the law of this circuit at the time the district court rendered its decision, Leake was required to demonstrate that the explanation proffered by Ryan's was pretextual and produce evidence (beyond his prima facie case) that the real reason for his discharge was retaliation for his sexual harassment complaints. See Vaughan v. Metrahealth Cos., 145 F.3d 197, 202 (4th Cir. 1998). Since the district court decided this case, however, the Supreme Court has rejected the pretext-plus standard. See Reeves, 120 S.Ct. At 2108-09. Under Reeves, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 2109.

Leake at *3

In EEOC v. Sears Roebuck and Company, 243 F.3d 846 (4th Cir. 2001), the Fourth Circuit found that a rejected job applicant, Francisco Santana, proved his prima facie case of national origin discrimination under Title VII and raised questions as to whether Sears' alleged nondiscriminatory reason for failing to hire him was true. In reversing summary judgment for the employer, the court found that Sears' different justifications over time for not hiring Santana were probative of "pretext" which permitted the factfinder "to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Id. at 856 (citing Reeves, 120 S.Ct. at 2108).

(2) Harassment Cases

In 1986, the Supreme Court acknowledged two forms of sexual harassment, quid pro quo harassment and hostile environment harassment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 239, 91 L. Ed. 2d. 49 (1986).

Quid pro quo harassment occurs when a supervisor conditions an employment opportunity on the subordinate providing a sexual or social relationship. An employee who is the opposite sex of

the supervisor will prevail if she meets her burden of persuading the court that: (1) she was the subject of unwelcome sexual conduct; (2) the harassment complained of was based on sex; and (3) the employee's reaction to the harassment complained of affected her compensation, terms, conditions or privileges of employment. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 239, 91 L. Ed. 2d. 49 (1986); Katz v. Dole, 709 F.2d 251, 255-56 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

Hostile work environment harassment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to create an abusive working environment and alter the conditions of the victim's employment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295, 301 (1993). Title VII prohibits conduct which creates an environment which would reasonably be perceived, and is perceived, as hostile or abusive.

Title VII does not require the environment to be so abusive as to be psychologically injurious. Whether a working environment is hostile is determined by looking at all the circumstances, including, the frequency of the discriminatory conduct, its severity, whether it is threatening or humiliating, and whether it interferes with an employee's work performance. Id. at 22, 114 S.Ct. at 371, 126 L. Ed. 2d at 302-03.

In 1998, the Supreme Court issued two decisions that defined the framework for employer liability for hostile work environment harassment and cases where no tangible employment action is taken - Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed..2d 633 (1998).

In Faragher, the Supreme Court reversed the Eleventh Circuit's holding that two employees who were harassed by two of their supervisors, in the form of unwanted touching and offensive comments, did not have a claim against the employer, because they did not report the harassment to "high-level management." In Ellerth, the Court held that an employee who refused the unwelcome and threatening sexual advances of a supervisor, yet suffered no tangible job consequences, could recover against the employer under Title VII without showing any fault on the part of the employer. Both cases adopted the following framework for employer liability:

> An Employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately

> be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Faragher, 118 S.Ct. at 2292-2293, Ellerth, 118 S.Ct. at 2270.

The Supreme Court also decided that same-sex sexual harassment in the workplace is actionable sex discrimination under Title VII. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). The Court stated that harassing conduct need not be motivated by sexual desire to support an inference of discrimination. However, the discrimination must be "because of sex," and the behavior must be so objectively and subjectively offensive as to alter the victim's work conditions. Id., 118 S.Ct. at 1003.

> [H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] ... because of ... sex."

Id. 118 S.Ct. at 1002.

The court, however, left open the question of how an individual can prove discrimination "because of sex" in a single sex environment.

Until Oncale was decided, the Fourth Circuit had held that same-sex harassment was actionable under Title VII only if it was motivated by sexual desire. *See* Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1997) (heterosexual male employee harassed by gay supervisor and gay co-employees had Title VII claim, because he was harassed "because of" his sex); McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (there is no Title VII claim for hostile work environment harassment when victim and harasser were both heterosexual men, because the harassment was not "because of" sex).

(3) Mixed Motive Cases

The Supreme Court in Price Waterhouse held, that in a multiple motive case, plaintiff met the initial burden of proving a prima facie case by showing that at least one of the motives was based on an impermissible factor. The burden of production and persuasion then shifted to the employer to show that the adverse employment practice would have been taken, even if the impermissible factor was not considered. If the employer met its double burden, the employer was totally absolved of liability. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d. 268 (1989).

The 1991 Amendments maintained the burden shifting formula as outlined in Price Waterhouse. However, the Amendments overruled Price Waterhouse on the issue of liability by adding a new subsection, m, which states:

> (m) Motivations for practice.
>
> 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.

42 U.S.C. § 2000e-2.

Now, once the plaintiff meets the initial burden of showing that one of the impermissible factors was a motivating factor in the adverse employment decision, the plaintiff has proved a Title VII violation, and is entitled to declaratory or injunctive relief, attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i). For the potential difficulty in recovering attorney's fees in mixed motive cases in the Fourth Circuit see Sheppard v. Riverview Nursing Center, Inc., 88 F.3d 1332 (4th Cir. 1996), *cert. denied* 117 S. Ct. 483 (1996).

It appears that by this amendment, Title VII stands alone in providing a remedy to plaintiffs who can prove that an impermissible factor was a motivating factor but not the determining fact. Unfortunately, the amendment does not seem to allow for relief in mixed-motive retaliation claims brought under Title VII. McNutt v. Board of Trustees of the University of Illinois, 141 F.3d 706 (7th Cir. 1998). In addition, plaintiffs bringing claims under § 1981, the Rehabilitation Act, the Equal Pay Act, or the Americans with Disabilities Act will not enjoy the same benefits as Title VII litigants. Title VII litigants will also be in a better position than plaintiffs filing constitutional claims or claims under the National Labor Relations Act. *See* Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d. 471 (1977); NLRB v. Transportation Management Corp., 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d. 667 (1983); NLRB v. Fluor Daniel, Inc., 161 F.3d 953 (6th Cir. 1998)("There is no interference with, restraint, or coercion of applicants in the exercise of their protected rights when an employer, even with anti-union animus, rejects applicants who are in fact unqualified or for whose particular services the employer simply has no need.").

(4) Disparate Impact Cases

Section 105 of the Civil Rights Act of 1991 amended § 703 of Title VII (42 U.S.C. § 2000e-

2) by adding a new subsection as follows:

(k) Disparate impact as basis of practice

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substance Act or any other provision

of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

Section 105, to a large extent, reverses the Supreme Court's decision in Wards Cove and modifies the remainder of the decision (requiring plaintiff to prove that each particular challenged employment practice caused a disparate impact). Section 105 essentially reinstates Griggs v. Duke Power Co., which was overruled by Wards Cove.

The road map of a disparate impact case under Griggs was as follows:

1. The burden of proof and persuasion was on plaintiff to show that a facially neutral employment practice had a disparate impact;

2. The burden of proof then shifted to defendant to show that the challenged practice was job related or had a manifest relationship to the job; and

3. The burden then shifted back to the plaintiff to prove that there were less discriminatory methods of meeting the employer's need.

There was no requirement that plaintiff show that the discrimination was intentional since under disparate impact the relevant issue was effect and not motivation.

In Wards Cove, the Court threw out the Griggs' shifting burden of proof, and left the burden of proof always upon the plaintiff. The road map under Wards Cove was as follows:

1. The burden of proof and persuasion was on plaintiff to show that a facially neutral employment practice had a disparate impact;

2. The employer then had the burden of production to show a business justification for the challenged practice (as opposed to a business necessity). The employer did not have the burden of persuasion on the business justification issue;

3. Plaintiff then had the burden of production and persuasion to show a lack of the business justification or alternative methods that are less discriminatory; and

4. It was the plaintiff's burden to isolate and identify the specific employment practices that are allegedly responsible for the disparate impact.

Under § 105 the shifting burden of proof reverts back to the Griggs formulation. If a plaintiff demonstrates that a challenged practice causes a disparate impact, the employer, to avoid liability, must carry the burden of production and persuasion to show the validity of the business necessity and not merely state a business justification. Civ. Rights Act 1991 § 105(a).

It is still plaintiff's burden to isolate and prove which particular challenged employment practices caused the disparate impact. The exception to this rule is that if an employer's "decision making processes are not capable of separation for analysis, the decision making process may be analyzed as one employment practice". Civ. Rights Act of 1991 § 105(a).

In helping to define business necessity in the future, there are two principal authorities which followed Griggs. Dothard v. Rawlinson, 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d. 786 (1977) and New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d. 587 (1979). The better case for plaintiffs is Dothard. Dothard involved minimum height and weight requirements for employment as state prison guards. After finding that plaintiffs had made their prima facie case, the court found that the state of Alabama had failed to show that the height and weight requirements had a "manifest relationship to the employment in question." Dothard, 433 U.S. at 329-31, 53 L. Ed. 2d. 797-99 (quoting Griggs). The Court then elaborated by finding that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performances to survive a Title VII challenge." Dothard, 433 U.S. at 331, 53 L. Ed. 2d. at 799 n. 14.

Beazer involved an employment policy which prohibited the hiring of persons who used methadone. In Beazer, the Court articulated the business necessity standard as not necessarily being those required to meet the employer's legitimate business goals, as long as they significantly served those goals. Beazer, 440 U.S. at 587. In Beazer, the Court initially found that plaintiffs failed to prove their prima facie case, so the Court's comment on the employer's burden was dicta.

The language of § 105 regarding business necessity is that the employer must demonstrate that the challenged practice "is job related for the position in question and consistent with business necessity". The Americans with Disabilities Act uses identical language in defining business necessity. 42 U.S.C. § 12112(b)(6). Therefore, plaintiffs can look to the legislative history of the ADA for assistance in interpreting business necessity. The only case cited in the legislative history regarding business necessity is Prewitt v. U.S. Postal Service, 662 F. 2d. 292 (5th Cir. 1981). Prewitt cited to Dothard in defining the burden of persuasion regarding business necessity. Prewitt, at 306, 307.

(5) Other Forms of Discrimination

There are other forms of discrimination which are prohibited by Title VII, but which are not discussed in this paper. A growing area of the Title VII practice includes claims based on the employee being retaliated against for filing a claim or participating in the investigation or trial of a discrimination claim. *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998); McNutt v. Board of Trustees of the University of Illinois, 141 F.3d 706 (7th Cir. 1998); Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997). Pregnancy discrimination is also a form of sex discrimination. See 42 U.S.C. 2000e(k), added in the 1978 amendments.

Another issue which received a great deal of judicial and media attention is whether prohibiting employees from speaking any language other then English is a form of national origin discrimination. *See* EEOC Guidelines on National Origin, 29 C.F.R. § 1606.7; Garcia v. Spun Steak

Co., 13 F.3d 296 (9th Cir. 1993), *cert. denied* 512 U.S. 1228 (1994).

D. Discrimination Charges Filed With the EEOC

The timely filing of a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) is a prerequisite to filing a court action alleging discrimination. 42 USC § 2000e-5 (Title VII claims alleging discrimination based on race, color, sex {including harassment and pregnancy}, religion, and national origin); 29 USC § 626(d) (ADEA claims alleging discrimination based on age); 42 USC § 12117 (ADA claims alleging discrimination based on disability). The rationale for requiring that a charge first be filed with the EEOC is to give the EEOC notice of the alleged discriminatory conduct and to allow the EEOC the opportunity to investigate, conciliate, and secure compliance with the anti-discrimination statutes. 42 USC § 2000e-5; 29 USC § 626(d); 42 USC § 12117; Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S. Ct. 1011, 39 L.Ed.2d 147 (1974); United Black Firefighters v. Hirst, 604 F.2d 844 (4th Cir. 1979).

(1) Who May File

A charge of discrimination may be filed by, or on behalf of, an aggrieved person. 42 USC § 2000e-5(b); 29 USC § 626(d); 42 USC § 12117; 29 CFR § 1601.7 (Title VII, ADA); 29 CFR §§ 1626.3 & 1626.4 (ADEA). A member of the EEOC may file a charge of discrimination alleging a violation of Title VII or the ADA, or assist in the filing of an age discrimination charge. Id. Labor unions or other associations may file charges on their own behalf and on behalf of their members or the people they represent. *EEOC Compliance Manual §2:0005*. It is the better practice to include specific individuals who have been aggrieved in the charge, so that those individuals will maintain their right to sue following administrative action. Id.

In a 1994 decision, the U.S. Court of Appeals for the District of Columbia ruled that a civil rights organization had standing to sue under Title VII, based on allegations that "employment testers" who worked for the organization were discriminated against by the defendant employment agency. Fair Employment Council of Greater Washington Inc. v. BMC Marketing Corp., 28 F.3d 1268 (D. C. Cir. 1994). The court limited the organization's claims to the effect the defendant's discrimination "perceptibly impaired its programs". Further, the court ruled, that based on the pre-1991 version of Title VII, the individual testers did not have standing to seek relief because only equitable remedies were then available. However, the court's opinion indicated that, based on the expanded remedies provided by the Civil Rights Act of 1991, testers would have standing to seek damages, even though they were not actual job applicants. Id.

Prior to the D. C. Circuit Court's opinion, the EEOC had determined that testers were aggrieved parties within the meaning of 42 USC § 2000e-5, and thus were entitled to file charges of discrimination. *EEOC Policy Guidance No. 915-062; EEOC Compliance Manual (BNA) N:6025 (Nov. 20, 1990).* "Whether or not a person intends to accept a position for which he/she applied, he/she has a statutory right, pursuant to Title VII, § 703(a)(1), not to have been rejected on the basis

of race, color, religion, sex or national origin. The discriminatory rejection itself constitutes an injury, even though the tester may not have suffered the loss of a real employment opportunity or any monetary loss." Id. The EEOC's position was based on analogizing testers in employment discrimination situations with testers challenging discriminatory housing practices. Id. The D. C. Circuit rejected that analogy.

However, the use of "testers" is not new in the employment context. Consider the holding of the Fourth Circuit in a 1971 opinion regarding the use of testers in 1965.

> Plaintiffs appeal the disallowance of backpay and counsel fees. An epitome of the evidence and the Court's findings with respect to these two items were crisply stated by the District Judge:
>
> "Since it is clearly apparent that when plaintiffs applied for employment at defendant's Eno Plant on September 2, 1965, their primary motive was to test defendant's employment practices rather than to seek actual employment, and *since there has been no showing whatever that defendant has since employed any females, either Negro or white, possessing plaintiffs' education, background, skill and work experience,* and since no vacancy of any type existed on September 2, 1965, plaintiffs are not entitled to recover back pay from September 2, 1965, or counsel fees. The fact that no vacancy existed on September 2, 1965, does not, however, preclude plaintiffs from maintaining this action, since Negro females were not considered for employment at that time. The order will apply prospectively only, but will be sufficient to effectively eliminate all discriminatory practices with respect to future female applicants for employment." (Accent added.) 301 F. Supp. at 102. This finding is unassailable as "clearly erroneous", F.R.Civ.P. 52(a), and justifies refusal of the compensation demand.
>
> However, the claim for counsel fees is not so fragile. In our evaluation the record upholds this prayer. Plaintiffs prevailed on the merits. They not only obtained an injunction against unfair employment practices but also opened the way for employment of Negro women in the Cone Mills plant. True, specific employment was not sought, and even if the application was solely a predicate for this suit, these facts ought not defeat the claim for attorneys' fees. This pronouncement upon their rights, and the requirement of Cone Mills to observe them in the future, were ordered in implementation of the Equal Employment Opportunities Act. Plaintiffs should not be denied attorneys' fees merely because theirs was a "test case".

Lea v. Cone Mills Corp., 438 F.2d 86, 87-88 (4th Cir. 1971).

Theoretically, charges can be filed confidentially and the identity of the aggrieved person protected. See 29 CFR §§ 1601.7, 1626.4. However, practically it is difficult, if not impossible, for the EEOC to investigate a charge of discrimination and the employer not to surmise who brought the charge.

(2) What the Charge Must Contain

Title VII requires that charges filed with the EEOC be in writing, under oath or affirmation, and contain such information and be in such form as the EEOC requires. 42 USC § 2000e-5(b). This requirement covers charges of disability discrimination. 42 USC § 12117. The ADEA does not specify what must be contained in a charge alleging age discrimination. 29 USC § 626(d). The Code of Federal Regulations sets out what should be contained in a charge of discrimination covered by Title VII:

(a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7 (as a practical consideration include the charging party's Social Security number because the EEOC uses it to identify the charging party);

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement, and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing

> out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

29 CFR § 1601.12 (Title VII and ADA) (almost identical language contained in 29 CFR § 1626.8 governing ADEA charges).

The EEOC and the courts have generally taken a liberal approach in determining when a charge contains sufficient information. A charge is normally sufficient if it identifies the parties and generally alleges the discriminatory acts. 29 CFR §§ 1601.12(b) & 1626.6. *See* Waiters v. Robert Bosch Corp., 683 F.2d 89, 92 (4th Cir. 1982) (writing received by the EEOC is sufficient to meet the statutory requirements if it identifies the parties, nature of the discrimination, dates of discrimination and supporting circumstances); Russell v. American Tobacco Co., 528 F.2d 357, 364-65 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) (charge not originally sworn to will qualify as a charge if later verified).

The rationale which supports a liberal construction regarding the sufficiency of a discrimination charge rests on protecting the rights of laypersons unsophisticated in the law. Id. Obviously, attorneys who draft charges for their clients will not be entitled to the same generosity. Charges should be carefully drafted, because the charge will establish the parameters of the litigation. Attorneys who undertake representation of clients while their case is still pending before the EEOC should consider filing an amendment to the charge.

The general rule is that litigants alleging discrimination must base their court claims on the charges of discrimination filed with the EEOC. Again, because most individuals filing a charge with EEOC are not trained in the law the courts have developed a broad standard to determine the proper scope of the civil litigation.

The leading case in articulating the breadth allowable in the civil litigation is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). In Sanchez, the court stated:

> the allegations in a judicial complaint filed pursuant to Title VII "may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission".... In other words, the "scope" of the judicial complaint is limited to the "scope" of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

Sanchez at 466. The court reasoned that the principal goal of the charge filing process is to commence the EEOC's investigation and conciliation process, and thus rejected a narrow pleading rule which would be applied to charging parties "who are unlettered and unschooled in the nuances of literary draftsmanship". Sanchez at 465.

The Fourth Circuit has stated that the scope of a lawsuit initiated by EEOC was whether the

discrimination was stated in the charge or disclosed in the course of the investigation. EEOC v. General Electric Co., 532 F.2d 359, 366 (4th Cir. 1976). In General Electric, the EEOC was permitted to bring claims of sex discrimination even though the charge alleged only race discrimination. Id. *Accord*, EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982) (charge alleged race discrimination in one branch of defendant's bank, but civil action allowed against bank for discrimination in multiple branches).

In a lawsuit initiated by an individual who had filed his own charge with the EEOC, the Fourth Circuit applied the same rule:

> The plaintiff, a trainman employed by Seaboard Coast Line Railroad Company, filed a charge with the Equal Employment Opportunity Commission on May 9, 1972. His claim, as stated in his charge, was that at the time of his re-employment in June, 1970, he had been denied his seniority, acquired during his previous employment with the defendant railroad. This denial, he said, was discriminatory because the employer "rehired drunks with full seniority and vacation rights." The EEOC seems to have taken no action on the charge but it did issue a suit letter on behalf of the plaintiff under date May 15, 1973.... He then filed this suit under Title VII. The defendants moved for summary judgment in their favor and the District Court granted the motion. The plaintiff appeals. We affirm.
>
> ***********
>
> [O]ne who seeks relief under that Title must, as a prelude to any right to sue, file a charge "in writing" and "under oath" with the EEOC within ninety days after the act of discrimination of which he complains occurred. That charge, enlarged only by such EEOC investigation as reasonably proceeds therefrom, fixed the scope of the charging party's subsequent right to institute a civil suit. The suit filed may encompass only the "discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge." The discrimination stated by the plaintiff in his charge is not based on race or sex nor reasonably related to or like a race or sex discrimination. Because "drunks" were treated more generously than the plaintiff has no resemblance or likeness to a race or sex discrimination. Plaintiff in his charge did not accordingly state a discrimination within the purview of Title VII nor was there an EEOC investigation that could under any theory have enlarged that charge to embrace racial discrimination. Plaintiff's action for this reason does not state a cause of action under Title VII.

King v. Seaboard Coast Line Railroad Co., 538 F.2d 581, 583 (4th Cir. 1976) (quoting EEOC v. General Electric Co., at 365).

Generally, the same rule applies to ADEA cases as was developed for Title VII cases. *But see* Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir.), *cert. denied*, 484 U.S. 913 (1987) (college professor limited to facts and legal theory stated in age discrimination charge filed with EEOC).

It is important to name each defendant correctly in the EEOC charge. Title VII only authorizes the bringing of a civil suit against "the respondent named in the charge". 42 USC § 2000e-5(f)(1). The same requirement applies to ADA cases by virtue of 42 USC § 12117, which incorporates the provisions of 42 USC § 2000e-5. The intent of 29 USC § 626(d), which governs age discrimination claims, is the same.

Fortunately, this provision has also been liberally construed to include defendants sufficiently implicated by the allegations of discrimination, even though not named in the charge. Thus, individuals named in the body of the charge may well be deemed to have notice of the allegations and an opportunity to conciliate.

Another area of concern is whether the court will allow the plaintiff to litigate incidents which occurred after the filing of the EEOC charge. Often the later incidents may constitute retaliation prohibited by all the anti-discrimination statutes. On other occasions the subsequent incidents may involve a continuation of the same form of alleged discrimination, such as failure to hire, to promote, or to provide training opportunities. A stronger argument for inclusion can be made when the allegations are related and the EEOC investigated the subsequent events. Kirkland v. Buffalo Board of Education, 622 F.2d 1066, 1068 (2d Cir. 1980). Conversely, it will be more difficult to include the post-charge incidents in the civil litigation if those events were not investigated by the EEOC and the defendant was without prior notice. Patterson v. General Motors Corp., 631 F.2d 476, 483 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981).

Therefore, attorneys representing clients before the EEOC should file a second charge of discrimination covering events which occur subsequent to the original charge. This practice will insure that the subsequent events can be litigated in court. However, it may require that the initial complaint be filed covering only the first allegations of discrimination and then amended to include the subsequent allegation (for which a right-to-sue letter may not have been obtained prior to the expiration of the 90 day period to file the initial complaint).

Charges of discrimination which may effect more than your individual client should include language which reflects that the charge is being filed on behalf of all persons similarly situated or on behalf of a class of individuals. This may allow co-workers or co-applicants who did not timely file a charge of discrimination with the EEOC to join the civil litigation initiated by your client. See Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983)(Individuals who did not file EEOC charge allowed to intervene and join in federal court litigation regarding discrimination in hiring, promotions, and discharges; court found that purpose of notice and opportunity for conciliation had been met by three individuals who filed charges).

(3) When and Where to File the Charge

A charge of discrimination must be filed with the EEOC within 180 days from the date the alleged discriminatory conduct occurred, unless there is a State Age Discrimination Agency for ADEA cases or a deferral agency for Title VII or ADA cases. 29 USC § 626(d); 42 USC § 2000e-5.

Charges of age discrimination must be filed with the local office of the EEOC because North Carolina does not have a state statute which prohibits age discrimination in employment and establishes a state agency to grant or seek relief from age biased practices. 29 USC § 633. The only agency in the state that is designated a certified fair employment practice agency is the New Hanover Human Relations Commission. 29 CFR § 1601.80. It is designated as an FEP agency for New Hanover County and the city of Wilmington. Wrightsville Beach, Carolina Beach, and Kure Beach are not included in the designation. 29 CFR § 1601.74. The remainder of this paper will assume that there is not a deferral agency involved.

The statute of limitations begins to run from the date the alleged discriminatory act occurred. The discriminatory act is generally viewed as occurring when the employee received unequivocal notice of the act or when the employer adopted the discriminatory policy. The leading cases on this issue are two Title VII Supreme Court cases: Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980); and Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981). In Ricks, a college professor was informed that he would not be granted tenure but was given a terminal one year contract. He filed his EEOC charge prior to the expiration of his contract, but more than 180 days after receiving clear notice of his termination. The Court held that the charge was untimely because it was filed more then 180 days after the denial of tenure. Ricks at 439-42. The Court rejected the professor's argument that since he had filed a grievance challenging the adverse tenure decision that the 180 days should not begin to run until the denial of the grievance. Ricks at 441.

The Fourth Circuit adopted the time of notification of the adverse decision rule for determining when the unlawful act occurs in Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982)("the filing period runs from the time at which the employee is informed of the allegedly discriminatory employment decision, regardless of when the effects of that decision come to fruition.").

The Fourth Circuit took a very restrictive view of when the statute of limitations begins to run in Hamilton v. 1st Source Bank, 928 F.2d 86 (4th Cir. 1990). In Hamilton, a former vice-president of the bank timely filed an EEOC charge alleging that his termination was in violation of the ADEA. He obtained his right-to-sue and initiated litigation. During discovery he learned for the first time that he had been paid a lower salary then younger vice-presidents with similar responsibilities. He then filed a second EEOC charge alleging discrimination in pay. This second charge was filed within 180 days of his learning of the differences in salary, but almost 17 months following the receipt of his last paycheck. He obtained his second right-to-sue letter and was allowed to amend his complaint to incorporate the additional discriminatory allegations. He prevailed on both claims at trial. On appeal the Fourth Circuit held that the statute of limitations for filing a charge started to run at the time of the discriminatory occurrence, not when the plaintiff learned of the discrimination. Hamilton at 90. Thus, the discriminatory pay claim was time barred.

In its decision the Hamilton court relied on Lorance v. A T & T Technologies, Inc., 490 U.S. 900, 109 S. Ct. 2261, 104 L. Ed. 2d 961 (1989). In Lorance,

> a group of female employees who had been demoted during an economic slowdown challenged under Title VII a seniority system that had been in effect for four years. The Court began by "identify[ing] precisely the `unlawful employment practice'" of which the women complained. Id. 109 S. Ct. at 2264 (citing Ricks, 449 U.S. at 257, 101 S.Ct. at 503). Because the alleged discriminatory act occurred with the adoption of the seniority system four years earlier, the Court held the employees' claim time-barred, even though the discriminatory effects were not evident until years afterwards.

Hamilton at 88.

The Civil Rights Act of 1991 amended Title VII to avoid the Supreme Court's holding in Lorance that a neutral seniority system adopted with an intentionally discriminatory purpose had to be challenged at the time of its adoption and not when its adverse effect becomes apparent. 42 USC § 2000e-5(e)(2). Although the amendments to Title VII do not apply to the ADEA, plaintiffs' attorneys should argue that since Congress determined that the holding in Lorance was not good law and did not reflect Congressional intent it should not be applied in ADEA cases. Plaintiffs' attorneys should also continue to argue that it was never Congress' intent that a victim of discrimination be barred from the courts prior to learning of the discrimination. *See* Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (1975) (woman discharged and told it was for economic reasons, learned nine months later that she was replaced by a man six weeks after her termination; court held that statute of limitations did not start until she learned that she had been replaced by a man); *contra* Hamilton at 88-90.

Edelman v. Lynchburg College, 228 F.3d 503 (4th Cir. 2000) held invalid the EEOC regulation which allowed claimants to cure the failure to verify a charge after the 180 days has run.
The court noted that its decision was inconsistent with other circuits.

The 180 day statute of limitations for filing a charge of discrimination is not a jurisdictional prerequisite and is subject to the equitable doctrines of tolling, estoppel, and waiver. *See* Zipes v. Trans World Airlines , Inc., 455 U.S. 385, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982).

Tolling or estoppel can be used when the employee is unaware of statutory rights or the employer fails to post the statutorily required notices informing employees of their rights under the federal anti-discrimination statutes. *See* Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir. 1977); Vance v. Whirlpool Corp., 716 F.2d 1010, 1013 (4th Cir. 1983). Employer misconduct including coercion, fraud, or misrepresentation which results in an employee failing to file a charge may estop the employer from successfully asserting a statute of limitation defense. *See* Dillman v. Combustion Engineering, Inc., 784 F.2d 57 (2d Cir. 1986); Felty v. Graves-Humphreys Co., 785 F.2d 516 (4th Cir. 1986).

Some courts have held that bad advice or misinformation provided by the EEOC are grounds for tolling an employee's 180 day statute of limitation. *See* Seredinski v. Clifton Precision Products

Co., 776 F.2d 56, 61 (3d Cir. 1986); Chappell v. Emco Machine Works, 601 F.2d 1295, 1300-03 (5th Cir. 1979).

A continuing course of discriminatory conduct may allow a victim of discrimination to file a timely charge outside the 180 day statute of limitation. Bazemore v. Friday, 478 U.S. 385, 395-96, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). The two most likely theories to prevail in a continuing violation argument are: (1) when an act of discrimination which occurs within the 180 day period is part of a pattern of discrimination which reaches back to similar events occurring outside the 180 day period; and (2) the preservation of a discriminatory policy which was still in effect during the filing period. Id. A discriminatory pay plan, a policy of permitting conduct which constitutes a hostile work environment, or a quid pro quo sexual harassment case in which the demands for sexual favors extended over several years are examples of potential continuing violations. *See* Nealon v. Stone, 958 F.2d 584, 591 (4th Cir. 1992).

The EEOC has three offices in North Carolina: the Charlotte District Office with jurisdiction over North and South Carolina; the Raleigh Area office; and the Greensboro Local Office. Their addresses and phone numbers are:

Equal Employment Opportunity Commission
Greensboro Local Office
801 Summit Avenue
Greensboro, NC 27405-7818
(336) 333-5174 - phone / (336) 333-5051 - fax

Equal Employment Opportunity Commission
Charlotte District Office
129 W. Trade Street, Suite 400
Charlotte, NC 28202
(704) 344-6682 - phone / (704) 344-6734 - fax

Equal Employment Opportunity Commission
Raleigh Area Office
1309 Annapolis Drive
Raleigh, NC 27608
(919) 856-4064 - phone / (919) 856-4151 - fax

(4) Practice before the EEOC

In order to avoid the delays and inconvenience of filing a charge in-person at one of the offices, it is my practice to file charges by certified mail. Certified mail is used to avoid disputes regarding the day the charge was filed. The EEOC will frequently want to redraft the charge in its own language. If you allow the EEOC to revise the original charge, it is critical that the revised charge contains language such as: "*This charge amends and modifies my original charge of [date].*" Failure to include such language may create timeliness problems, with the revised charge falling

outside the time for filing.

The EEOC will want to obtain an affidavit from your client. It is my practice to have the interview conducted by phone, with the client in my office using a speaker phone. I then ask the EEOC to send me the proposed affidavit. I review the affidavit and make whatever revisions are appropriate.

It is advisable to suggest discovery and witnesses to the EEOC investigator. Discovery need not be as formally drafted as it would be for litigation. It should take the form of a request for information normally used by the EEOC. However, the EEOC is in charge of its own investigation and is not required to incorporate suggestions of counsel.

In employment cases the employer has most of the relevant documents and the witnesses at its disposal. Therefore, the more information obtained by the EEOC, the more information a plaintiff's attorney will have available to review prior to determining whether to file a complaint. Additionally, the more precise the EEOC requires the employer to be in defending the charge of discrimination, the fewer defenses the employer will have available, during litigation, without appearing inconsistent with its earlier position.

In response to the EEOC's request for information, it is the practice of many attorneys representing employers to submit a position paper in defense of the claim. Therefore, although EEOC rarely requests such a paper from attorneys representing claimants, it may well be helpful to the investigator to have the facts and theory of the claimant's case presented in one concise document.

The EEOC is now attempting to mediate cases prior to completing an investigation. This leaves counsel for the parties, but especially plaintiff's attorneys, the unenviable task of trying to make settlement decisions without having conducted discovery or knowing the strengths and weaknesses of each sides case.

In summary, zealous advocacy before the EEOC can assist your client in resolving the case prior to litigation. If litigation is required, it can increase the likelihood of a favorable result. Unfortunately, many clients never retain an attorney until the EEOC process is concluded.

E. Remedies and the Right to a Jury Trial

(1) Remedies

The Civil Rights Act of 1991 allows a prevailing plaintiff in a Title VII disparate treatment claim to obtain compensatory and punitive damages. Compensatory and punitive damages are limited to disparate treatment claims under Title VII, or § 501 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act. Compensatory and punitive damages are not available to plaintiffs asserting disparate impact claims.

A plaintiff may recover compensatory and punitive damages "provided that the complaining party cannot recover under [42 U.S.C. § 1981]." 42 U.S.C. § 1981a. The plain language of the statute allows the interpretation that plaintiffs with potential claims under § 1981 cannot seek Title VII compensatory and punitive damages, even if they fail to file a § 1981 action. The more logical interpretation of this language is that it was intended to prevent double recoveries. This interpretation is supported by the Danforth Interpretive Memorandum which states in part:

> In order to assure that a complaining party does not obtain duplicative damage awards against a single respondent under both section 1981 and section 1981A, the provision limits section 1981A damage awards to a complaining party who "cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981)." The complaining party need not prove that he or she does not have a cause of action under section 1981 in order to recover damages in the section 1984A action.
>
> Moreover, this provision does not prevent a person from challenging discrimination which causes demonstrably different harms under each of the statutes. For example, a woman who suffers both race and sex harassment, and is injured in different ways by each, may challenge the race discrimination under section 1981 and the sex discrimination under section 1981A, and if proven, may recover under both. The court should, of course, ensure that she does not receive duplicate awards for the same harm.

137 Cong. Rec. S 15484 (October 30, 1991).

Plaintiffs claiming racial or ethnic discrimination should sue under § 1981 in order to protect their rights to compensatory and punitive damages. In any event, plaintiffs with § 1981 claims will want to sue under that statute, since § 1981 damages are not capped and there are caps to the damages allowed under § 1981a.

Compensatory and punitive damages are not available to plaintiffs seeking relief pursuant to the Americans with Disabilities Act of 1990, or the Rehabilitation Act of 1973 if the defendant can demonstrate that:

1. It consulted with plaintiff regarding the necessary accommodations;

2. It made a good faith effort to reasonably accommodate plaintiffs' disability; and

3. The employer's offered accommodation, provided plaintiff with "an equally effective opportunity."

42 U.S.C. § 1981a(a)(3).

Compensatory damages are obtainable from all classes of employers, including the federal government. *See* 42 U.S.C. §

1981a(a)(1). However, punitive damages cannot be obtained from a government agency or political subdivision. 42 U.S.C. § 1981a(b)(1). This statute codifies the holding in City of Newport v. Fact Concerts, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d. 616 (1981) (municipality is immune from punitive damages under § 1983). Section 102(b)(1) also codifies the standard of proof required to win punitive damages. The plaintiff must demonstrate[1] that the employer engaged in discriminatory practices "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." This punitive damages standard was originally formulated in Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d. 632 (1983) (with "evil motive or intent or when it involves reckless or callous indifference to federally protected rights of others.")

The new Act limits the compensatory and punitive damages plaintiffs can be awarded by placing caps on such damages. The size of the cap is tied to the size of the employer. The limitations are as follows:

NUMBER OF EMPLOYEES	LIMITATION ON DAMAGES
15-100 employees	$ 50,000.00
101-200 employees	$100,000.00
201-500 employees	$200,000.00
Over 500 employees	$300,000.00

42 U.S.C. § 1981a(b)(3).

The caps apply to each individual plaintiff, so there is no penalty for filing a multiple plaintiff complaint, or a class action. 42 U.S.C. § 1981a(b)(3).

There are no caps on the monetary relief that has always been available under Title VII. Thus, awards for backpay and interest on backpay are excluded from compensatory damages and there is no limit placed on the amount of relief available. 42 U.S.C. § 1981a(b)(3).

The caps also do not apply to relief available pursuant to 42 U.S.C. § 1981. 42 U.S.C. § 1981a(b)(4). Thus, a plaintiff with a discrimination claim based on both race and gender can file the race claim under § 1981 and the gender claim under Title VII, and receive damages under both. The separate damages for the separate types of discrimination would not be a prohibited double recovery.

The ability of plaintiffs to obtain compensatory and punitive damages will be most significant in: (1) sexual harassment claims where the plaintiff continues to work and suffers no wage loss; and (2) in hiring, promotion and discharge claims where the victim employee substantially or completely mitigates his or her damages. The victim of harassment or discrimination should have an easier time proving compensatory damages (emotional pain, suffering, inconvenience, mental anguish or loss of enjoyment of life) than in

meeting the test for intentional infliction of emotional distress (burden of proving extreme and outrageous conduct, plus severe emotional distress). *See* Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d. 116 (1986), Brown v. Burlington Industries, Inc., 93 N.C. App. 431, 378 S.E.2d. 232 (1989).[1]

Plaintiffs' ability to hold the corporate employer liable for the intentional torts of supervisors and managers is also easier to establish under Title VII than it is under North Carolina common law. Title VII defines employer as including any agent of the employer. 42 U.S.C. § 2000e(b). While not imposing absolute liability on employers for the acts of their supervisors, the focus of the liability issue will be whether the supervisor was an agent of the employer and acted under the scope of his or her apparent authority. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 239, 91 L. Ed. 2d. 49 (1986); Sparks v. Pilot Freight Carriers, Inc., 830 F. 2d. 1554 (11th Cir. 1987); *see also*, discussion of Faragher and Ellerth at pp. 10-11.[2]

Thus, the compensatory and punitive damages provisions of § 1981a provide a remedy to plaintiffs who cannot prevail in an intentional infliction of emotional distress case, and who had

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[1] For the difficulty in proving outrageous conduct, read Wilson by Wilson v. Bellamy, 105 N.C. App. 446, 414 S.E. 2d. 347 (1992). In Wilson, the Court found that the conduct of fraternity members who undressed a seventeen year old female freshman, then kissed and fondled her in the presence of others, while she was unconscious, was not conduct so outrageous or extreme as to go beyond the bounds of decency. Wilson at 467-68, 414 S.E.2d. at 359.

The North Carolina Supreme Court established the standard for severe emotional distress as being:

> any emotional or mental disorder, such as, for example neuroses, psychoses, chronic depression, phobia or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Waddle v. Sparks, 331 N.C. 73, 414 S.E.2d. 22, 27 (1992) (Citing Johnson v. Ruark Obstetrics and Gynecology Assoc., 327 N.C. 283, 304, 395 S.E.2d. 85, 97 (1990)).

[2] Under state common law, the burden is much higher. The plaintiff must prove either: (1) that the harassing employee's act was expressly authorized by the employer; or (2) that the harassing employee's act was committed within the scope of employment and in furtherance of the employer's business; or (3) that the harassing employee's act was ratified by the employer. *See* Hogan, *supra*, Brown, *supra*.

insufficient wage loss damages under Title VII prior to November 21, 1991.

(2) Jury Trials

Jury trials under Title VII are now available when the claim is for intentional discrimination and seeks compensatory and punitive damages. 42 U.S.C. § 1981a(c). The right to a jury trail is linked to the demand for compensatory and punitive damages. Id. Thus, jury trials are not available in disparate impact theory cases, because compensatory and punitive damages are not available in those cases. 42 U.S.C. § 1981a(a)(1). The jury will not be informed that there are caps on the amount of damages that can be awarded. 42 U.S.C. § 1981a(c)(2).

In a case which claims both disparate treatment and disparate impact, a jury may be demanded on the intentional discrimination claim. The jury's finding of fact on issues relevant to both claims will be binding. *See* Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 110 S. Ct. 1331, 108 L. Ed. 2d. 504 (1990).

The opportunity to obtain a jury trial may now be severely limited the Supreme Court's decision in Circuit City Stores, Inc. v. Adams, 121 S.Ct. 1302 (2001) which held that an agreement to arbitrate employment disputes, contained in an employment application, was binding on an employee bringing a discrimination claim in civil court.

II. Equal Pay Act, 29 U.S.C. § 206 (d).

A. Introduction

In 1963, one year before the passage of Title VII, Congress passed the Equal Pay Act (EPA).

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry- the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."

Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1, 10 (1974).

The Equal Pay Act amended the Fair Labor Standards Act by adding subsection (d), titled Prohibition of sex discrimination, to section 206 of the Act. Section 206(d) reads:

> (d) Prohibition of sex discrimination
> (1) No employer having employees subject to any

provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 206(d).

In essence, the Equal Pay Act requires equal pay for equal work on jobs requiring equal skill, effort, and responsibility that are performed under similar working conditions. When the jurisdictional requirements of both the Equal Pay Act and Title VII are met, a violation of the Equal Pay Act will also be a violation of Title VII. A plaintiff may recover under both the Equal Pay Act and Title VII, as long as the recovery is not duplicative. The employee may elect the most favorable remedy and may elect relief under one statute for one period of time and under the other statute for a separate period of time, if such an election will

maximize the recovery. 29 CFR § 1620.27(b).

B. Coverage

The Equal Pay Act is part of the Fair Labor Standards Act (FLSA) and thus the jurisdictional requirements of the FLSA cover the EPA. The Equal Pay Act will cover certain employers not covered by Title VII, because they will have less than 15 employees, but still meet the jurisdictional requirements of the FLSA.

Jurisdiction under the FLSA is comprised of a two part test. The first test focuses on the employee and whether the employee is engaged in commerce or in the production of goods for commerce. 29 U.S.C. § 206(a). The second test focuses on the employer and whether the employer is an enterprise engaged in commerce. 29 U.S.C. § 203(s).

With some exceptions, the FLSA covers federal, state, and local government employees and labor unions. 29 U.S.C. § 203(e); 29 U.S.C. § 206(d)(2).

C. Claims under the Equal Pay Act

A successful claim under the EPA contains the following elements: (1) employees of the opposite sex; (2) are located in the same **establishment**; (3) performing **equal work**; (4) but receiving **unequal wages**; (5) **on the basis of sex**.

(1) Establishment

A violation under the Equal Pay Act must occur within the same establishment. Establishment is not defined in the statute, but is defined in the regulations as being different than the definition of an enterprise. 29 CFR § 1620.9. Although the regulations refer to a distinct physical place of business in defining "establishment", case law reveals that multiple operations conducted at multiple physical locations can still constitute one establishment if a central authority was responsible for the job assignments and wages. *See* Brennan v. Goose Creek Consolidated School Dist., 519 F.2d 53, 58 (5th Cir. 1975) (janitors working for a single school district but assigned to separate schools were employed by a single establishment).

(2) Equal Work

In determining whether two jobs are equal, courts have uniformly held that the jobs must be "substantially equal" rather than identical. Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd

Cir.), *cert. denied*, 398 U.S. 905 (1970). There are four factors which comprise equal work: skill, effort, responsibility, and similar working conditions. 29 U.S.C. § 206(d); 29 CFR § 1620.13-18.

In evaluating whether two jobs require equal skill, experience, training, education and ability are to be considered. EEOC v. Universal Underwriters Insurance Co., 653 F.2d 1243 (8th Cir. 1981); Howard v. Campbell Soup Co., 593 F.Supp. 470 (N.D.Il. 1983). The critical element is the skill needed for the job, as opposed to the skill possessed by an individual performing the job. *See* Ellison v. United States, 30 Wage & Hour Cases (BNA) 1362 (1992) (background in law enforcement, which was not necessary in performance of job duties, was not a basis for finding different skill level).

The most subjective of the criteria is equal effort, and thus it is the factor most frequently litigated. Effort is the measurement of physical or mental exertion needed to perform a job. Job factors which cause mental fatigue or stress are to be considered in determining the effort required to perform a job. 29 CFR § 1620.16. Job effort does not have to be identical. One job which requires more physical effort may be equal to a second job which requires less physical effort but more mental exertion. Howard v. Campbell Soup Co., 593 F.Supp. 470 (N.D.Il. 1983); Usery v. Columbia University, 568 F.2d 953 (2nd Cir. 1977); Brennan v. South Davis Community Hospital, 538 F.2d 859 (10th Cir. 1976).

"Responsibility" refers to the degree of accountability required by the job, with emphasis on the importance of the job obligation. 29 CFR § 1620.17. Determining whether different jobs require equal responsibility is fact intensive. Factors which courts consider in determining equal responsibility include: (1) the extent to which an individual employee must exercise independent judgment (Howard v. Campbell Soup Co., 593 F.Supp. 470 (N.D.Il. 1983)); (2) the degree of creativity exercised by an employee (Horner v. Mary Institute, 613 F.2d 706 (8th Cir. 1980)); and (3) the magnitude of the employee's supervisory responsibilities (Young v. Columbia University, 23 EPD (CCH)¶ 31,058 (S.D.N.Y. 1980)).

"Similar working conditions" encompass two factors: surrounding and hazards. Corning Glass Works v. Brennan, 417 U.S. 188, 202, 94 S. Ct. 2223, 41 L. Ed. 2d 1, 14 (1974). Hazards encompass physical hazards regularly encountered and the severity of the injury that can be caused. 29 CFR § 1620.18. Surroundings measure the elements such as toxic chemicals, their intensity and their frequency. 29 CFR § 1620.18. The standard by which similar working conditions are measured is a flexible standard, which calls for the application of practical judgment and common sense in determining whether the difference in working conditions is the

kind normally taken into consideration in determining wage scales. 29 CFR § 1620.18.

(3) Unequal Wages

The term "wages" includes all payments made to an employee as remuneration for employment. 29 CFR § 1620.10. All forms of compensation are wages including, profit sharing, expenses, guarantees, bonuses, uniform cleaning allowance, insurance, housing, use of a company car and other fringe benefits. 29 CFR § 1620.10.

(4) On the Basis of Sex

“On the basis of sex” can be shown by proving that a person of the opposite sex receives higher wages for equal work. Corning Glass Works v. Brennan, 417 U.S. 188, 208, 94 S. Ct. 2223, 41 L. Ed. 2d 1, 17 (1974); Brobst v. Columbus Servs., International, 761 F.2d 148 (3rd Cir. 1985).

The statute sets out exceptions where the difference in wages is not on the basis of sex: (1) a seniority system; (2) a merit system; (3) a system based on quality or quantity of work; or (4) any factor other then sex. 29 U.S.C. § 206(d)(1).

An employer bears the burden of persuasion in proving that a factor other than sex was the basis for the payment of unequal wages. The courts have recognized several defenses available to employers.

Participation in a bona fide training program can be a factor other than sex, which permits a difference in wages, if the training program has substance, is independent of the trainee's job, has a termination point, and is equally available to both genders. Hodgson v. Security National Bank, 460 F.2d 57 (8th Cir. 1972).

Experience or education can be a basis for paying different wages. Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995) (experience); Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) (experience); Brennan v. Victoria National Bank, 493 F.2d 896 (5th Cir. 1974) (education). However, the education which is being rewarded by a higher wage must be related to the job being performed in order to be a valid factor other than sex. See 29 CFR § 1620.20 through § 1620.26 for a discussion of other defenses such as red circle rates, collective bargaining agreements, head of household status, market rates and extra duties.

D. Procedural Issues

The statute of limitations for filing an Equal Pay Act claim

is normally two years, except in a case where the violation is willful and then the statute of limitations is expanded to three years. 29 U.S.C. § 255. Charges of Equal Pay Act violations may be filed with the EEOC, but are not required. The filing of a charge with the EEOC will not toll the statute of limitations for filing a case in court.

An Equal Pay Act action may be filed in either State or Federal court. 29 U.S.C. § 216(b). Each party plaintiff must file a written consent with the court. Id. Thus, class actions cannot be maintained pursuant to Fed. R. Civ. P. 23. Instead, each plaintiff who wishes to join the action must file a written consent.

E. Remedies and Jury Trials

An employer will be liable to the underpaid employee for back wages and liquidated damages, which is double the back wage liability. 29 U.S.C. § 216(b). Back wages include all the remuneration discussed above. The court may reduce or deny liquidated damages if the employer can prove it acted in good faith and with reasonable grounds for believing it was not in violation of the Equal Pay Act. 29 U.S.C. § 260.

Jury trials are available because back wages and liquidated damages are considered legal remedies.

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