Employment Discrimination Issues

May 2004
Volume 52
Number 3

United States
Department of Justice
Executive Office for
United States Attorneys
Office of Legal Education
Washington, DC
20535

Robin C. Ashton
Acting Director

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

The United States Attorneys' Bulletin is published bi-monthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201. Periodical postage paid at Washington, D.C. Postmaster: Send address changes to Editor, United States Attorneys' Bulletin, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201.

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Send article submissions to Managing Editor, United States Attorneys' Bulletin, National Advocacy Center, Office of Legal Education, 1620 Pendleton Street, Columbia, SC 29201.

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Putting Bite Into Federal Employment Discrimination Law: Litigation Strategies After the No FEAR Act

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I. Introduction

In August 2000, Marsha Coleman-Adebayo, an African-American senior manager at the Environmental Protection Agency (EPA), prevailed, in part, in an employment discrimination lawsuit against the agency. Although it did not find any discrimination based on physical disability or retaliation, the jury awarded Ms. Coleman-Adebayo a $600,000 verdict against the EPA on claims for race and sex discrimination. The legacy of this lawsuit, however, is the legislation it spawned.

On October 1, 2003, the Notification and Federal Anti-Discrimination and Retaliation Act (No FEAR Act) took effect, Pub. L. No. 107-174, 116 Stat. 566 (2002), ushering in a new chapter in American civil rights law. It is clear that the objective of the No FEAR Act is to bring bite back to federal employment discrimination law, *i.e.*, to make federal managers and agencies more accountable to their employees when allegations of discrimination, retaliation, and harassment are made. Experience will demonstrate whether or not the law deters actual discriminatory behavior. In the short term, however, attorneys for the United States must adjust their practice to account for the new requirements of the No FEAR Act and to assist federal agencies in navigating through the law's various requirements in making litigation decisions.

This article will address three main topics. First, the substantive provisions of the No FEAR Act will be presented. Second, the impact on pretrial strategies, including motions and discovery, will be considered. Finally, the discussion will turn to the implications of the No FEAR Act upon settlement and trial. Each of the last two sections will include some practical pointers for Department of Justice (Department) attorneys defending federal agencies through the litigation process.

II. Substantive provisions of the No FEAR Act

There are three main components of the No FEAR Act: (1) employee notification; (2) reimbursement of judgments and settlements; and (3) reporting both to Congress and to the public. First, federal agencies are affirmatively required to notify their employees and applicants of their rights and protections under federal anti-discrimination statutes and whistleblower protection acts. No FEAR Act § 202. It is not sufficient for a federal employer to hang an Equal Employment Opportunity (EEO) poster up in the breakroom. Rather, the agency must also post the rights and protections provided by federal anti-discrimination and whistleblower protection laws on its internet site. *Id.* at § 202(b). Furthermore, federal agencies must also train current employees not only about the existence of federal anti-discrimination and whistleblower protection programs, but also about their rights and remedies under such laws. *Id.* at § 202(c).

Second, federal agencies are required to reimburse the Judgment Fund within a reasonable time for judgments, awards, and settlements made to any federal employee, former federal employee, or applicant for federal employment, in connection with a lawsuit brought under the federal anti-discrimination and whistleblower laws. *Id.* at § 201(b). Those reimbursements may not be made out of funds appropriated for enforcement, nor may the agency jeopardize its mission through reductions in force or furloughs in order to compensate for the reimbursements. *Id.* at § 102(6)(B).

Third, each year, the agencies must submit to Congress, the Attorney General, and the Equal Employment Opportunity Commission (EEOC), an annual report that states: (1) the number of cases arising under each type of anti-discrimination and/or whistleblower law; (2) the status or disposition of each of those cases; (3) the amount of reimbursement, separately identifying the aggregate amount of attorney's fees; (4) the number of employees disciplined for discrimination, retaliation, or harassment; (5) the total number of administrative complaints pending against the agency in the fiscal year and the total number of complaints where the agency did not

complete an appropriate EEO investigation within 180 days; (6) a detailed description of the policy implemented by the agency to discipline its employees for discrimination, retaliation, or harassment; and (7) an analysis of trends and data. *Id.* at § 203(a). The first report must also include data for each of the items delineated for the previous five years, if available. *Id.* at § 203(b).

There are also other provisions of the No FEAR Act that do not have specific ramifications upon current litigation strategies. For instance, the law authorizes several studies. The General Accounting Office (GAO) is tasked with conducting a study relating to the effects of eliminating the exhaustion of administrative remedies requirement that now is a prerequisite to filing a formal complaint with the EEOC and a discrimination lawsuit in federal court. *Id.* at § 206(a)(1). The GAO is also charged with studying whether there are methods to ascertain the personnel and administrative costs incurred by the Department in defending discrimination suits, *id.* at § 206(b)(1), the effects of the reimbursement requirements on the operations of federal agencies, *id.* at § 206(c)(1)(A), and the costs of compliance to the Department of the Treasury, *id.* at § 206(d).

In addition, federal agencies are required to post data on their public Web site regarding the total number of complaints, as opposed to the number of federal cases referred to in § 203, filed with the agency within the fiscal year; the number of individuals filing those complaints; the number of individuals who filed two or more complaints in a fiscal year; the number of complaints for each alleged basis for discrimination; and the length of time it took the agency to process such complaints. *Id.* at § 301(b). While these various sections may not have the immediate effect upon federal agencies as the notice or reimbursement requirements, they do underline Congress' intent to make the discrimination complaint process more streamlined and transparent to both agency employees and the public.

The Office of Personnel Management (OPM) was tasked with creating regulations to carry out the No FEAR Act's reimbursement provisions. 69 Fed. Reg. 2997 (Jan. 22, 2004) (to be codified at 5 C.F.R. § 724.101 *et seq.*). The EEOC separately issued implementing rules under the No FEAR Act regarding the posting of EEO complaint processing data. 69 Fed. Reg. 3483 (Jan. 26, 2004) (to be codified at 29 C.F.R. § 1614.701 *et seq.*). As of the writing of this article, the OPM and EEOC are respectively soliciting comments to the interim rules. Because both agencies are still in the process of gathering comments, the rules are subject to change based on the public comments received. Nevertheless, the interim rules provide valuable insight into the interpretation of the No FEAR Act and its possible ramifications on the defense of employment discrimination lawsuits.

III. Impact of the No FEAR Act upon pretrial litigation

Because of the ultimate responsibility of an agency to bear the cost of litigation–both through reimbursement and reporting–pretrial litigation becomes even more important in the context of an employment litigation case. Indeed, the most important phase of pretrial litigation may take place even before a federal lawsuit is filed.

A. Administrative proceedings

On a most basic level, the No FEAR Act eliminates any incentive that the Judgment Fund may have inadvertently created for a federal agency to proceed to federal court. Now, a federal agency is liable for the cost of settlement or judgment at either the administrative level or the federal court level. Under the federal anti-discrimination and whistleblower protection laws, successful plaintiffs may also recover costs and fees associated with the administrative phase and the federal litigation of their discrimination complaints. Accordingly, federal agencies should be encouraged to settle appropriate discrimination complaints during the administrative process. Such settlements would benefit the agencies in two significant ways: (1) costs and attorneys' fees associated with a compromise at the administrative level might be considerably less than at the federal court level; and (2) the reporting requirements to Congress, the Attorney General, and the EEOC that are associated with the No FEAR Act do not appear to attach to resolutions reached during administrative proceedings. In fact, under the interim rule, complaints that are resolved at the informal stage of the administrative process are not only exempt from reporting to Congress, the Attorney General, and the EEOC, they are also excluded from the statistics collected and posted on the agency's internet website about complaints. 69 Fed. Reg. at 3488.

B. Dispositive motions as responsive pleadings

Even if the discrimination complaint cannot be resolved at the administrative level, the administrative proceedings are still consequential. Evidence gathered in the administrative forum is a critical component of defending a subsequent federal lawsuit, particularly in the early stages. It

is imperative for Department attorneys and AUSAs to encourage thorough administrative discovery, as the statements, depositions, and administrative hearings transcripts in that process will form the basis of a trial attorney's litigation strategy. That evidence may be sufficient to allow the trial attorney to file a dispositive motion as a responsive pleading, particularly for jurisdictional or statute of limitations defenses. In turn, some courts may be amenable to staying discovery upon defendant's motion when there is a dispositive motion pending. Aggressive motions practice as an initial response, particularly if the administrative record is clear and well-developed, is now even more desirable than allowing a case to proceed through discovery, incurring costs and fees, and then filing a subsequent motion for summary judgment.

C. Discovery

While Department attorneys and AUSAs are ultimately responsible for litigation decisions made during the defense of federal lawsuits, the No FEAR Act will require more coordination with the client agencies. On one hand, discovery should be as complete as possible in order to flesh out any basis for a motion for summary judgment and to prepare for trial. On the other hand, because plaintiff's litigation costs are borne by an agency, and perhaps a suborganization of that agency for purposes of appropriations, a trial attorney must now, more than ever, be sensitive to the cost of discovery. In order to minimize costs, a trial attorney may consider not duplicating depositions taken at the administrative level; appearing by telephone, instead of in person, at depositions of less significant witnesses; or producing documents with the use of CD-Roms instead of incurring copying charges for multiple sets of voluminous documents.

IV. Impact of the No FEAR Act upon settlement and trial

As part of the supplementary information to the interim rule governing reimbursement, OPM states that "it is essential that the rights of employees, former employees and applicants for Federal employment under discrimination, whistleblower, and retaliation laws be steadfastly protected and that agencies that violate these rights be held accountable." 69 Fed. Reg. at 2997. OPM further opines that, through the No FEAR Act, "Congress has created a financial incentive to foster a Federal workplace that is free of discrimination and retaliation." *Id.*

A. Settlements entered before October 1, 2003 but paid from the Judgment Fund after that date

As an initial matter, the interim rule, if implemented, will have an immediate and unforeseen impact upon settlements that have already been negotiated. OPM interprets the No FEAR Act to apply to any payment from the Judgment Fund, on or after October 1, 2003, for violations or alleged violations of federal discrimination laws, federal whistleblower protection laws, and/or retaliation claims arising from the assertion of rights under these laws. 69 Fed. Reg. at 2997. Under the terms of this interim rule, agencies are required to reimburse the Judgment Fund for settlements that were reached before the effective date of the No FEAR Act, but that were not fully processed by the Judgment Fund until after October 1, 2004. For cases that may have been settled in anticipation of the No FEAR Act, without the guidance of implementing regulations, the agencies will face an unanticipated reimbursement cost of settlement—a cost that, in reality, may have significantly affected an agency's litigation decisions and willingness to settle. Similarly, for cases where judgment was entered against a federal agency before October 1, 2003, but payment was delayed due to a variety of reasons (*e.g.*, bifurcation of liability and damage portions of trials, disputes over attorneys' fees), agencies will again have the unanticipated requirement of reimbursement.

B. No FEAR Act as a disincentive to monetary settlements

Unfortunately, through the No FEAR Act and the interim rule, Congress has created a long-term disincentive for monetary settlement or alternative dispute resolution (ADR). Because reimbursement and reporting requirements attach whether there is an admission of liability or not, or whether there is a settlement or judgment, an agency has more incentive than ever to take a case to trial. This is particularly true for underfunded agencies that now must not only budget for their programs, but also account for possible settlements and judgments from lawsuits. Indeed, much of the cost of litigation for federal agencies has already been expended once discovery is completed, since the agencies do not directly bear the costs of Department attorneys or AUSAs.

One way to encourage settlement may be to enter into an agreement with the plaintiff that costs and fees associated with settlement negotiations not be assessed, should the case either settle or result in judgment against the

United States. While many parties and their counsel may not be amenable to such an approach, others may be receptive if they understand that the alternative is no settlement discussions at all. Furthermore, the Department of Justice still provides funds for ADR in cases handled by both Department attorneys and AUSAs. Consequently, the out-of-pocket cost to the federal agency to engage in ADR is minimal in most cases.

C. No FEAR Act as an incentive for creative, non-monetary settlements

Often, discrimination cases have arisen from volatile interactions in the workplace. Due to the personal nature of these cases, trial attorneys and agencies have often shied away from remedies like reinstatement and promotions due to concern over the repercussions of introducing a complainant back into the work environment that gave rise to the discrimination charge. The No FEAR Act gives both federal agencies and trial attorneys reasons to reconsider their approach to non-monetary settlements.

Non-selections for positions or promotions form the basis of a significant percentage of employment discrimination matters. If the complainant is still in the workplace, a federal agency may consider offering additional training or a detail to address concerns regarding a non-selection. If the complainant was an applicant for employment, the agency might offer to send the complainant all the vacancy announcements for a period of time in exchange for settlement. In all cases, trial attorneys should encourage federal agencies: (1) to be as methodical as possible in their selection procedures; (2) to maintain accurate records of any ratings or rankings by selection panels and officials; (3) to use and maintain a standard set of interview questions; and (4) to follow up with individual applicants who were not selected and explain the selection criteria and the specific reasons why they were not selected.

In addressing sexual harassment claims, federal agencies may want to consider schedule or shift changes to separate the alleged victim of sexual harassment from the alleged perpetrator(s). Although any workplace with unions and/or other seniority policies will need to be cognizant of the limitations of such policies in affecting a person's schedule or shift, this solution might be viable in workplaces with flexible schedules or other set procedures that can accommodate off-site work.

Of course, in all cases where a trial attorney discovers during pretrial investigation that actual discrimination likely occurred, he should encourage the agency to take appropriate action, including disciplining the discriminating official, if warranted. However, a trial attorney should never recommend any type of action or discipline. This prevents the attorney from injecting himself into the workplace and possibly becoming a witness, rather than the advocate, at trial.

V. Conclusion

Because the No FEAR Act only became effective October 1, 2003, and the permanent regulations implementing the Act either have not been finalized or have not yet been proposed, the law's effect on litigation cannot yet be measured. This article only seeks to touch upon the issues that the No FEAR Act presents, and suggests some considerations as Department attorneys and AUSAs defend employment discrimination matters in the post-No FEAR era. It is, however, by no means exhaustive. It is only an initial step in responding to the No FEAR Act and in harmonizing a trial attorney's duty to zealously advocate on the part of the federal employer with the government's ultimate goal of creating and ensuring a workplace that is devoid of discrimination and retaliation.❖

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The No FEAR Act: What Department of Justice Attorneys Need to Know

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I. Introduction

On May 15, 2002, Congress enacted the Notification and Federal Employee Anti-discrimination Act (the No FEAR Act), Pub. L. No. 107-174, 116 Stat. 566. The purpose of the Act, which became effective October 1, 2003, is to hold federal agencies more accountable for discrimination and retaliation against employees, former employees, and applicants for employment (hereinafter collectively referred to as "federal employees"). The principal means by which the statute effectuates this purpose is twofold: (1) through a requirement that federal agencies reimburse the Judgment Fund for payments made to federal employees as a result of settlements, court judgments, or awards; and (2) by imposition of reporting requirements regarding the nature and disposition of discrimination and retaliation claims.

II. Questions and answers

This article provides an overview of the statute through a question and answer format. The questions are derived from the topics on which Assistant United States Attorneys (AUSAs) and agency counsel have sought frequent advice.

A. What is No FEAR's reimbursement requirement?

Section 201 of the Act provides that agencies shall reimburse the Judgment Fund for payments made from the Fund as a result of judgments, awards, or settlements in discrimination and retaliation cases. Significantly, the statute does not authorize federal agencies to make payments directly to federal employees. Consequently, the Judgment Fund continues to pay the amount of a judgment, award, or settlement to the plaintiff(s) in the first instance.

In an interim final rule, the Office of Personnel Management (OPM) addresses the reimbursement requirement. *See* 69 Fed. Reg. 2997 (Jan. 22, 2004) (OPM will promulgate regulations implementing the other provisions of Title II of the No FEAR Act at a future time). The interim final rule, which will appear at 5 C.F.R. Part 724, describes agency obligations and the procedure for reimbursement and compliance with section 201 of the No FEAR Act.

The interim final rule further incorporates the statute's requirement that agencies must reimburse the Judgment Fund for payments covered by the No FEAR Act "within a reasonable time." 5 C.F.R. § 724.103. Section 201(b) requires that an agency's reimbursement be paid out of operating expenses, but allows agencies to extend the reimbursement over several years in order to avoid reductions in force, furloughs, other reductions in employee benefits or compensation, or an adverse effect on the mission of the agency. In other words, agencies cannot make work force related changes in order to satisfy the reimbursement requirement. No FEAR Act § 102(3)-(4). Rather, Congress intended agencies to face some tough decisions in determining how to make the reimbursements under the statute. As discussed later, the difficulties agencies will face in allocating funds to reimburse the Judgment Fund may impact attorney-client interactions between the Department of Justice (Department) and federal agencies, particularly with respect to settlement considerations.

Consistent with the statute, the interim final rule does not explicitly provide the Department of the Treasury (Treasury), which administers the Judgment Fund, with any authority to compel an agency to comply with the reimbursement requirement. The rule provides that the Financial Management Service (FMS) within Treasury will send a notice to an agency's Chief Financial Officer within fifteen business days after payment from the Judgment Fund. 5 C.F.R. § 724.104(a). Within forty-five business days of the notice from FMS, agencies must either remit a reimbursement or "contact FMS to make arrangements in writing for reimbursement." *Id.* at § 724.104(b). An agency's failure to either reimburse the Judgment Fund or contact FMS within forty-five business days of receiving notice of a payment "will be recorded on an annual basis and posted on the FMS Web site." *Id.* at § 724.105. In addition, under the reporting requirements set forth in section 203(a)(3), agencies shall have to include, in an annual report submitted to Congress, the

amount of money the agency is required to reimburse the Judgment Fund under section 201 of the Act.

B. Does the reimbursement provision apply to cases filed before October 1, 2003?

OPM's interim final rule defines payment as a "disbursement from the Judgment Fund after October 1, 2003, to [a federal employee], in accordance with 28 U.S.C. §§ 2414, 2517, 2672, 2677, or with 31 U.S.C. § 1304, that involves discriminatory conduct described in 5 U.S.C. §§ 2302(b)(1) and (b)(8) or (b)(9) as applied to discriminatory conduct." 5 C.F.R. § 724.102. Under this definition, the No FEAR Act applies to cases pending before October 1, 2003 (but in which no payments were made from the Judgment Fund). In other words, the applicability of the statute is tied to the date of payment by the Judgment Fund, not to the date a case was filed in a United States District Court.

Basically, the Act applies with respect to disbursements made under any of the federal statutes prohibiting discrimination or retaliation against federal employees. Some questions remain about the precise scope of the statute. For example, there is a question about the extent to which claims under the Federal Torts Claim Act, 28 U.S.C. §§ 2672 and 2677, are subject to the No FEAR Act. These questions should be resolved when OPM issues regulations implementing the Title II reporting requirements.

C. Is there any change in the way we process payments for judgments, awards, or settlements?

As stated earlier, the amount of a judgment, award, or settlement will be paid by the Judgment Fund to the plaintiff in a particular case. Therefore, the procedures Department attorneys follow upon execution of a judgment, award, or settlement do not change. We will still submit the same paperwork (FMS forms 194, 196, 197, and 198) directly to the Department of Treasury's Financial Management Service.

D. What is the statute's notice requirement?

Section 202 of the Act provides that written notification of the laws prohibiting discrimination and retaliation must be given to federal employees. Such written notification shall include posting on the internet. Each agency is required to provide training to its employees regarding their rights and remedies under the anti-discrimination and anti-retaliation laws. OPM is in the process of promulgating regulations relating to the No FEAR Act's notice requirement.

E. What are the reporting requirements under Title II of the Act?

Section 203(b) of the No FEAR Act requires each agency to submit an annual report to Congress, the Equal Employment Opportunity Commission (EEOC), and the Attorney General. The report shall include:

(1) the number of cases arising under each of the laws prohibiting discrimination or retaliation in which discrimination is alleged;

(2) the status or disposition of such cases;

(3) the amount of money required to be reimbursed to the Judgment Fund for each case, separately identifying the aggregate amount of such reimbursements attributable to the payment of attorney fees;

(4) the number of employees disciplined for discrimination, retaliation, harassment, or any other infraction of any provision of the laws preventing discrimination or retaliation;

(5) the final year-end data posted under section 301(c)(1)(B) for each fiscal year (*see infra*);

(6) a detailed description of the policy implemented by the agency relating to appropriate disciplinary actions against a federal employee who discriminated against any individual or committed another prohibited personnel practice that was revealed in the investigation of the complaint;

(7) an evaluation of the information delineated above, including an examination of trends, causal analysis, practical knowledge gained through experience, and any actions planned or taken to improve the agency's EEO processes; and

(8) any adjustments (to the extent the adjustment can be ascertained) in the budget of the agency to comply with the reimbursement requirement. The first report shall include data for each of the five immediately preceding fiscal years (to the extent such data is available).

Again, OPM will issue regulations relating to agencies' obligations under this section. The future regulations should assist in defining the scope of some of the critical terms included in section 203(a), such as "cases," "discipline," and the "policy" relating to "appropriate disciplinary actions" for employees who have "discriminated."

F. How do the reporting requirements set forth in Title III differ from those in Title II?

Reporting requirements under Title III, Section 301, relate solely to administrative claims, as distinguished from the "cases" noted in section

203. The Title III reports are to be posted on each agency's public Web site, whereas the Title II reports are to be submitted only to Congress, the EEOC, and the Attorney General. Title III does not require the posting of the number of employees disciplined on the agency's Web site.

The EEOC has issued an interim final rule (69 Fed. Reg. 3483 (Jan. 26, 2004)) setting forth the requirements under section 301. Under the interim final rule, which will be promulgated at 29 C.F.R. 1614 Subpart G, an agency's Title III reports shall include data relating to:

(1) the number of complaints filed with the agency;

(2) the number of individuals filing those complaints (including as class agents);

(3) the number of individuals who filed two or more complaints;

(4) the number of complaints in which each of the various bases of discrimination (e.g., race, color, religion, sex, national origin, disability, or retaliation) is alleged;

(5) the number of complaints in which each of the various issues of discrimination (e.g., challenged agency action such as appointments, assignment of duties, disciplinary action, harassment, reasonable accommodation, training, etc.) is alleged;

(6) the average length of time each step in the process takes the agency to complete;

(7) the total number of final agency actions rendered in a fiscal year involving a finding of discrimination. Of that number, include the number and percentage of each of the respective bases of discrimination and the number and percentage of such cases in which decisions were rendered, either with or without a hearing, by an Administrative Law Judge;

(8) of the total number of final agency actions rendered involving a finding of discrimination, the number and percentage involving a finding of discrimination based on each of the respective bases of discrimination, and the number rendered with or without a hearing before an Administrative Law Judge;

(9) of the total number of final agency actions rendered involving a finding of discrimination, the number and percentage involving a finding of discrimination based on each of the respective issues of discrimination, and the number rendered with or without a hearing before an Administrative Law Judge; and

(10) of the total number of complaints pending in such fiscal year, the number that were first filed before the start of the then current fiscal year. Data posted for the then current fiscal year shall include both interim year-to-date data, updated quarterly, and final year-end data. The data posted for a fiscal year shall include data for each of the five fiscal years immediately preceding.

In addition, Title III requires the EEOC to post data on its Web site relating to complaints in which hearings have been requested before an Administrative Law Judge and appeals have been taken from final agency decisions. The EEOC is required to include data for each of the categories set forth above.

G. Who has settlement authority under No FEAR?

The No FEAR Act does not change the regulations governing settlement authority. Under 28 C.F.R. Subpart Y, the Department has the authority to compromise and close civil claims. Under section 0.160(a), the Assistant Attorney General for the Civil Division has the authority for settlements up to $2 million. This authority has been delegated to United States Attorneys pursuant to section 0.168(a). If, however, there is a disagreement between the U.S. Attorney and a client agency over a proposed settlement, section 0.168(a) requires that the dispute be presented to the Assistant Attorney General and, if still not resolved, to the Associate Attorney General.

Prior to the enactment of the No FEAR Act, the Subpart Y procedures were invoked only rarely, at least with respect to discrimination and retaliation cases involving single plaintiffs. It is expected that, because agencies now have to reimburse the Judgment Fund, there may be an increase in the number of disputes between client agencies and Department attorneys regarding whether a Title VII case should be settled. If it is determined that a dispute should be referred to Main Justice for a decision, please give the Employment Discrimination Task Force in the Federal Programs Branch advance notice of the issue.

H. What documentation should the AUSA have from an agency client before a settlement agreement is signed?

It is always good practice for the Department attorney to make sure there is something in writing to indicate that the agency agrees with, or authorizes, the settlement. An e-mail from the agency's Office of General Counsel attorney to the Assistant U.S. Attorney should suffice, so long as it refers to the specific case and states an

agreement to settle on the particular terms being offered. This may prove even more important because of No FEAR's reimbursement requirement.

I. What if, based on an AUSA's settlement memorandum or recommendation to the client agency, agency counsel asks if the management official accused of discrimination or retaliation should be disciplined?

Settlement memoranda or other recommendations represent litigation risk analyses. They weigh the benefits versus the risks of proceeding with a case through a jury trial, assessing factors relating to the legal validity of the government's defenses, and the expected credibility of witnesses in the eyes of the jury. The analysis undertaken in this context is very distinct from the analysis undertaken in determining whether an individual agency employee should be disciplined. That determination is based on agency policy and personnel rules and guidelines. Therefore, if asked, the AUSA should clearly state that the settlement memorandum or recommendation should not serve as the basis for assessing whether discipline should be imposed with respect to a management official accused of discrimination or retaliation. It is a good idea, somewhere in the settlement memorandum, to emphasize the limited purpose of the litigation risk analysis. The last thing an AUSA wants is to be considered a potential witness for the agency in the disciplinary proceeding. Consequently, it is advisable to consistently maintain the distinction between an employee's discrimination or retaliation case and any proposed or actual disciplinary proceeding against that employee's manager.

J. Does No FEAR require that an agency official accused of discrimination or retaliation be disciplined?

The Act does not contain such a requirement. Instead, in section 203(a)(4), the statute requires each agency to include in its annual report the "number of employees disciplined for discrimination, retaliation, harassment, or any other infraction of any provision of law" covered by the Act. Further, under section 203(a)(6), the annual report must include a "detailed description" of the agency's policy relating to appropriate discipline of federal employees who have been found to have discriminated against an individual, and the number of employees who have been disciplined pursuant to such policies. Thus, the only requirements in No FEAR regarding discipline relate to the reporting requirements. Moreover, the Sense of Congress, section 102(5)(A), cautions that "accountability" under the Act is not "furthered if Federal agencies react . . . by taking unfounded disciplinary actions against managers or by violating the procedural rights of managers who have been accused of discrimination."

Keep in mind, however, that even though No FEAR does not require disciplinary action per se, the reality of the public reporting requirements and the scrutiny of agencies' actions (or inactions) that inevitably will ensue may result in more frequent consideration of the question of whether it is appropriate to impose discipline. Also, note that, under section 204, OPM is to conduct a "comprehensive" study to determine the "best practices relating to appropriate disciplinary actions against" federal employees who have been found to have discriminated or retaliated against another federal employee. Based on the study, OPM will then issue "advisory guidelines incorporating best practices that agencies may follow to take such actions against such employees." The best practices referred to in section 204 appear to relate only to section 203(a)(6), which deals with the discipline of federal employees who have been found to have discriminated or retaliated. A fair reading of this section would seem to exclude managers accused of discrimination or retaliation in cases where settlements have been reached, inasmuch as there generally is no admission of liability or wrongdoing in settlement agreements.

K. How is "discipline" defined under the No FEAR Act?

The statute does not define the term "discipline." It is possible that OPM will provide a broad definition which may include verbal counseling or an oral or written reprimand. It is also possible that OPM will leave the definition up to each agency and later issue "best practices" guidance. Agencies should already be documenting their considerations and bases for their decisions regarding discipline.

L. Is there a private right of action under the No FEAR Act, such that an employee can demand that his supervisor be disciplined?

There is no private right of action under the statute for a plaintiff to demand that his supervisor or manager be disciplined under the No FEAR Act. The No FEAR Act does not change, increase, or modify the remedies available under the various federal employment statutes, none of which mandate disciplinary action against the supervisor. The No FEAR Act only creates an internal executive branch procedure to reimburse

the Judgment Fund, which pays the plaintiff any award, settlement, or attorney's fees, and requires the publication of statistical data. It encourages agencies to take appropriate discipline, but does not require them to do so. Disciplinary action against the supervisor should not be on the negotiating table in settlement discussions with the plaintiff.

M. What should AUSAs tell accused agency managers during the initial interview? How should Department attorneys respond if the manager asks whether he will be disciplined if a jury finds discrimination or retaliation, or if the agency settles the case?

AUSAs need to explain that they do not represent the individual manager. AUSAs represent the United States and the agency counsel who will be working with the AUSA represents the agency. The AUSA does not represent the personal interests of the accused manager. If the manager tells you confidential information, it does not have to be disclosed to the "outside world," but the AUSA is obligated to bring it to the attention of agency counsel and the agency chain of command.

Whether discipline should be imposed will depend on the disciplinary policies of the agency. The agency will make a decision about discipline, not the AUSA. If the case is settled, a settlement agreement ordinarily will have a specific provision that admits no liability. A settlement agreement, however, should not bind the agency one way or the other with respect to disciplinary action. At most, in appropriate cases, the Department attorney may say that the possibility of disciplinary action is speculative at this point.

N. What should an AUSA's response be to a manager's question about whether he needs to hire his own lawyer?

The AUSA should tell the manager that he is not a party to the litigation. Only the head of the agency is named in the complaint. If the AUSA knows that no disciplinary action has been initiated against the manager, he may say so. The AUSA can also say, "to the extent that your (the manager's) interests are consistent with those of the agency, I see no need for separate representation, but ultimately it is your decision."

O. What studies does the Act require the General Accounting Office (GAO) to perform?

In section 206, the No FEAR Act requires the GAO to conduct several studies, some of which are ongoing and none of which, to our knowledge, have yet been finalized. The first study relates to the effects of eliminating the requirement that federal employees exhaust administrative remedies before filing complaints with the EEOC. Another is designed to ascertain the costs to the Department in defending discrimination and whistleblower cases. A third study relates to the effects of the statute on agency operations. Finally, the fourth study will review the administrative and personnel costs incurred by the Department of the Treasury as a result of the statute.

III. Conclusion

As delineated above, the No FEAR Act is likely to affect the handling of discrimination and retaliation cases. It is impossible to determine whether the statute will accomplish the intended purpose of making federal agencies more accountable for the discriminatory and retaliatory acts of their employees. Nevertheless, it appears that, due to the Act's reimbursement requirement, the process for making litigation-related decisions between a client agency and the Department attorney representing the agency in court will be altered. In addition, ethical issues relating to such representation will become even more predominant. For the most part, however, the manner in which Department attorneys litigate employment discrimination and retaliation cases remains unchanged, even after the No FEAR Act.❖

ABOUT THE AUTHOR

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Analyzing Racial Classifications in Employment Discrimination Litigation

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I. Introduction

Within the last year, the Civil Division and the U.S. Attorneys' Offices have handled nearly seventy reverse discrimination cases involving government equal employment opportunity (EEO) policies. The plaintiffs, usually white male employees, maintained that the policies discriminated against them because the policies allegedly accorded preferences to minorities and women. Most of these are individual "as-applied" cases, but twenty-one cases, including several significant cases, assert systemic facial challenges to government EEO systems. The gravamen of all of the systemic challenges is an alleged violation of equal protection rights. The equal protection doctrine requires strict scrutiny of racial classifications. One of the most difficult analytical components of these cases is determining whether a racial classification is implicated.

II. Affirmative action in the federal government

A. Title VII and the Equal Employment Opportunity Commission (EEOC)

Affirmative action in the federal government dates to 1969 when President Richard Nixon issued Executive Order 11748, requiring federal agencies to establish Federal Affirmative Employment Programs to foster equal employment opportunity for minorities and women. 34 Fed. Reg. 12985 (Aug. 8, 1969). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin, was extended to most federal employees in 1972. Federal agencies are required to maintain an affirmative program of equal employment opportunity for all employees and applicants for employment. Since 1978, the EEOC has had oversight authority for these affirmative employment functions, including the responsibility to review and approve each agency's annual equal opportunity program.

The EEOC has implemented the various federal affirmative employment program requirements through a series of Management Directives (MDs) commencing in 1981. In 1987, the EEOC issued MD-714, which required federal agencies to identify instances of "manifest imbalance and conspicuous absence" of women and racial minorities, and to establish "goals" and "target dates" to eliminate "under representation" at all organizational levels." *Available at* http://www.doi.gov/diversity/doc/md_714/md_714_part1.htm. The EEOC intended that agencies "develop a systematic multifaceted methodology for affirmative employment programs which require . . . [m]anagement accountability systems for holding Senior Managers responsible for achieving Agency EEO objectives." *Id.*

On August 25, 2003, the EEOC issued MD-715, which became effective on October 1, 2003. *Available at* http://www.eeoc.gov/federal/eeomd715.html. MD-715 explicitly supersedes MD-714. MD-715 makes no mention of "under representation" of minorities and women, nor does it require agencies to examine their workforces for "manifest imbalances" or "conspicuous absences." In addition, MD-715 does not provide for "numerical goals." Finally, MD-715 provides that "[a] model Title VII . . . program will hold managers, supervisors, EEO officials and personnel officers accountable for the effective implementation and management of the agency's program" relating to the removal of discriminatory barriers, rather than the elimination of underrepresentation and the achievement of numerical goals. On March 30, 2004, the EEOC issued instructions to agencies for the application of MD-715 (www.eeoc.gov/federal/715instruct/index.html), so the manner of its implementation remains to be determined. Nevertheless, most claims pending in court and in the administrative pipeline pertain to policies under MD-714.

B. The Schmidt Memorandum

On February 29, 1996, Associate Attorney General John R. Schmidt issued a Memorandum to all agency General Counsels entitled "Post-*Adarand* Guidance on Affirmative Action in Federal Employment." *Available at* http://eeoa.army.pentagon.mil/web/doc_library/ACF8B0B.TXT. The Schmidt Memo concludes that "what *Adarand*[*Constructors, Inc. v. Peña*, 515 U.S. 200

(1995)] requires is that in order for race or ethnicity to be used as a basis for decision making, an agency must have a demonstrable factual predicate for its actions." *Id.* at 18. It is important to note that the constitutional standard for justifying racial preferences is more stringent than the Title VII standard. *See Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). The Schmidt Memo recognizes that most lawsuits alleging discrimination in federal employment must be brought pursuant to Title VII, (*see Brown v. General Services Administration*, 425 U.S. 820 (1976)), but nevertheless commits the federal government, as a matter of policy, to act in accordance with the Constitution and the *Adarand* standards. *See* Schmidt Memo at 2-3. This article assumes that federal employment decisions are constrained by both Title VII and the equal protection standard incorporated by the Fifth Amendment.

III. Determining whether a policy constitutes a racial classification

Under the equal protection standard of the Fifth Amendment:

> [A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Adarand, 515 U.S. at 227. The threshold question, therefore, is whether a policy constitutes a racial classification. Policies that affect actual employment decisions, such as hiring, promotions, and layoffs, have been treated differently than policies that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to ensure compliance with anti-discrimination laws.

IV. Policies that affect employment decisions

A policy that, on its face, distinguishes between, or treats people differently, based on race, is a racial classification. A quota is a policy that mandates a particular numerical outcome based on race. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to minority-owned businesses is a racial classification on its face).

A policy that does not explicitly classify or treat people differently based on race, may still constitute a racial classification, subjecting the policy to strict scrutiny, if it encourages, pressures, or induces a governmental actor to consider race or grant a race-based preference in its decision-making. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 352 (D.C. Cir. 1998) ("*Lutheran Church I*") (FCC regulations that "pressure stations to maintain a workforce that mirrors the racial breakdown of their metropolitan statistical area" deemed a racial classification); *id.* at 351-52 ("The crucial point is . . . whether [the challenged regulations] oblige stations to grant some degree of preference to minorities in hiring."); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 492 (D.C. Cir. 1998) ("*Lutheran Church II*") ("the regulations here must be subjected to strict scrutiny because they encourage racial preferences in hiring and as such treat people differently according to race"); *id.* at 491 ("Because the FCC's regulations at issue here indisputably pressure—even if they do not explicitly direct or require—stations to make race-based hiring decisions . . . they too must be subjected to strict scrutiny"); *Schurr v. Resorts Int'l Hotel,* 196 F.3d 486, 494 (3d Cir. 1999) (strict scrutiny applies where a regulation has "the practical effect of encouraging . . . discriminatory hiring"); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 711 (1997) (strict scrutiny applies where a statute "authorizes or encourages" a racial preference) (quoting *Bras v. California Pub. Utilities Comm'n*, 59 F.3d 869, 875 (9th Cir. 1995).

In the context of facial constitutional challenges, there are two lines of authority regarding the applicable legal standard. First, under *United States v. Salerno*, 481 U.S. 739 (1987), the party bringing a facial constitutional challenge bears a very heavy burden. "A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [challenged statute] would be valid." *Id.* at 745. "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* Instead, a statute is invalid on its face only when it is "apparent that" it "could *never* be applied in a valid manner." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984) (emphasis added). The same principle applies to facial challenges of regulations. *See INS v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991). Under this line of authority, evidence

that a challenged statute or regulation has, in fact, been applied constitutionally would not only be relevant, but would necessarily defeat a facial challenge. It is important to note, however, that the Supreme Court has not specifically prescribed the legal standard to be applied to a facial constitutional challenge under an equal protection theory in the employment context, and the applicability of the *Salerno* standard is the subject of heated debate in the Supreme Court. *See United States v. Frandsen*, 212 F.3d 1231, 1236 n.3 (11th Cir. 2000) (citing to opinions by various Justices).

Second, a separate line of authority suggests that evidence of how a policy is applied is irrelevant to a facial constitutional challenge to the policy. In determining whether a policy constitutes a racial classification triggering strict scrutiny, a court must determine whether the policy encourages or pressures the consideration of race without requiring evidence that a racial preference was, in fact, used in a hiring decision. That is, courts will determine the likely effect of the policy on government decisionmakers without examining how the policy is actually applied. *Lutheran Church II*, 154 F.3d at 492 (to trigger strict scrutiny, a litigant is not required to make a showing that the government made use of a racial preference in a particular hiring decision); *Berkley v. United States*, 287 F.3d 1076, 1086 (Fed. Cir. 2002) ("In order to establish the existence of a suspect racial classification, [the challengers] are not required to demonstrate that the [challenged policy], as interpreted or applied, was the actual 'but for' cause of their selection or involuntary termination."); *see also Lutheran Church I*, 141 F.3d at 353 (applying "common sense" in concluding that the effect of numerical goals used by the FCC to determine whether to conduct an EEO review pressured licensees to grant racial preferences, stating that a licensee "can assume that a hard-edged factor like statistics is bound to be one of the more noticed screening criteria"); *MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13, 19-20 (D.C. Cir. 2001) (determining that licensees "reasonably might (and prudently would) conclude" from an FCC rule requiring broad outreach in recruitment that the FCC intended for licensees to focus recruitment efforts on women and minorities; note, however, that the Department of Justice (Department) took the position that the court should have applied *Salerno* and erred by relying on inferences about the conduct regulations would induce); *Saunders v. White*, 191 F. Supp. 2d 95, 125 (D.D.C. 2002) (examining memorandum of the U.S. Army governing promotions on its face and concluding that it "strongly suggests that the [selecting officials] felt 'oblige[d] to grant some degree of preference to minorities'") (citing *Lutheran Church I*, 141 F.3d at 351).

Under this second line of authority, labels such as "goals" or "guidelines," or language requiring only "good faith compliance" with a policy do not govern whether a policy constitutes a racial classification. *Lutheran Church I*, 141 F.3d at 354 ("[W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race."); *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 209 (5th Cir. 1999) (applying strict scrutiny to a program of Jackson, Mississippi that established "goals" for the utilization of minority-owned businesses in city contracts or "good-faith efforts" to meet the goals); *Safeco Ins. of America v. City of White House, Tennessee*, 191 F.3d 675, 689 (6th Cir. 1999) (statement in an Environmental Protection Agency (EPA) contracting regulation that it does not impose numerical quotas for the use of minority- and women-owned businesses, but rather asks only for a "good-faith effort" does not, standing alone, insulate the regulation from strict scrutiny); *Wessmann v. Gittens*, 160 F.3d 790, 794 (1st Cir. 1998) ("[W]hether the policy is truly a quota or whether it is best described as otherwise is entirely irrelevant for the purpose of equal protection analysis. Attractive labeling cannot alter the fact that any program which induces schools to grant preferences based on race and ethnicity is constitutionally suspect."); *Concrete Works of Colorado v. City & County of Denver*, 36 F.3d 1513 (10th Cir. 1994).

Courts also will not necessarily defer to language in a policy that cautions against its interpretation as a quota, or prohibits the granting of preferential treatment based on race, in determining whether it constitutes a racial classification. *Lutheran Church I*, 141 F.3d at 353-54 (FCC regulations constituted a racial classification despite the FCC's emphasis that regulations should not be interpreted as a quota); *Lutheran Church II*, 154 F.3d at 493 (language such as "nothing in [the regulations] shall be interpreted . . . to grant preferential treatment to any individual or any group because of race" would not save the regulations from strict scrutiny); *Safeco Ins. Co.*, 191 F.3d at 690 ("The government cannot omit the word 'quota' and thereby insulate its regulations from strict

scrutiny."); *Christian v. United States*, 46 Fed. Cl. 793, 803 (2000); *Saunders*, 191 F. Supp. 2d at 124.

Under this second line of authority, the prospect of administrative review or other oversight and enforcement mechanisms for failure to meet a numerical goal increases the likelihood that a policy will be deemed a racial classification. *Lutheran Church I*, 141 F.3d at 353 (concluding that the FCC, by examining whether a licensee met a numerical goal in determining whether to conduct an EEO review of the licensee, combined with the prospect of the FCC sending a letter recommending any necessary improvements to licensees whose minority representation falls below the numerical goals, "has used enforcement to harden the suggestion already present in its EEO program"); *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 19-20 ("the threat of being investigated [by the FCC when a licensee reports few or no applications from women or minorities] creates an even more powerful incentive for licensees to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications"); *Berkley*, 287 F.3d at 1086 (instructions of the U.S. Air Force to the board charged with selecting officers for termination pursuant to a reduction in force, constituted a racial classification where the instructions directed the board to prepare a report of minority and female officer selections, as compared to the selection rates for all officers considered by the board, stating that the "unavoidable reading of the reporting requirement is that [the board's] selections regarding minorities and women would be monitored for specific results"); *Christian*, 46 Fed. Cl. at 803 (memorandum of the U.S. Army to the board charged with selecting officers for early retirement was a racial classification where it instructed the board to "identify" and "explain" instances where a particular minority group did not "fare well" in comparison to the overall population, stating that the requirement was "a coercive accountability measure, not an innocuous statistical compilation").

Finally, where "numerical goals" for minorities are based on "proportional representation" as measured by their availability in the relevant labor market, such goals are likely to be deemed a racial classification. *Lutheran Church I*, 141 F.3d at 351-52 (applying strict scrutiny where the challenged FCC regulations were "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation"); *Lutheran Church II*, 154 F.3d at 492 ("The imposition of numerical norms based on proportional representation—which is the core element to what are often referred to as affirmative action, set aside, or quota programs—is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny."); *Saunders*, 191 F. Supp. 2d at 124 (applying strict scrutiny to the memorandum of the U.S. Army governing promotions that established an "equal opportunity selection goal" for certain minority groups that "is not less than the selection rate for all officers in the promotion zone," even where the overall goal for minorities was met, concluding that the policy implied that disproportionate promotion was a disfavored result that should be avoided).

V. Policies that do not affect employment decisions

A. Targeted recruitment and outreach

Targeted recruitment and outreach policies typically include attending job fairs and minority professional association meetings, using media with a primarily minority audience, and publicizing vacancies at schools with substantial minority enrollment. The circuits appear to disagree whether these practices, designed to increase the number of minorities in the pool of qualified applicants, but in which race is not used as a basis for making employment decisions, constitute racial classifications. The Seventh, Eighth, Ninth, and Eleventh Circuits have concluded that such policies do not fall under the "narrow tailoring" prong of strict scrutiny. *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997) ("An employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination"); *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994) (describing active encouragement of blacks to apply for jobs as "race-neutral"); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (describing a fire department's high school and college recruiting program to provide information and to solicit applications from minorities, outreach programs which minority firefighters spearheaded, and presentations at job fairs and career days at local colleges designed to apprise minorities of fire service career opportunities as "race-neutral"); *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992) (describing "aggressive recruiting" of minorities as "race-neutral"), *rev'd on other grounds*, 989 F.2d 890 (7th Cir. 1993) (en banc); *Coral Const. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991) (county's voluntary program

that provides training sessions for small businesses in order to increase minority participation in municipal contracting constitutes race-neutral outreach); *see also Honadle v. University of Vermont and State Agricultural College*, 56 F. Supp. 2d 419, 428 (D. Vt. 1999); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1552 (M.D. Ala. 1995). The Sixth Circuit has held that whether outreach efforts constitute racial classifications subject to strict scrutiny turns on whether they operate as a racial preference in actual *hiring* decisions, that is whether they "indisputably pressure" the *hiring* of minorities. *Safeco Ins. Co.,* 191 F.3d at 692.

The D.C. Circuit, however, has concluded that the effect of the FCC rule requiring licensees to conduct "broad outreach" when seeking to fill vacancies was to pressure licensees to recruit minorities, and that such affirmative outreach constituted a racial classification subject to strict scrutiny. *MD/DC/DE Broadcasters Ass'n,* 236 F.3d at 17. In so doing, the court rejected the argument that only a policy that affects an actual employment decision (such as hiring) can constitute a racial classification. Rather, the court concluded that targeted minority recruiting can disadvantage non-minority individuals by depriving them of the opportunity to learn about a job opening and compete for it. ("Under Option B the Commission has compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates. As a result, some prospective non-minority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race."). *Id.* at 20-21.

The Department took the position before the Supreme Court that *MD/DC/DE Broadcasters Ass'n* was wrongly decided because the court failed to apply the appropriate legal standard of *Salerno* and *Taxpayers for Vincent* in resolving facial constitutional challenges. *See* Brief for the Federal Respondents in Opposition to Petitions for a Writ of Certiorari, at 12-17, *Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Ass'n.*, Nos. 01-639 and 01-662, *available at* http://www.usdoj.gov/osg/briefs/2001/0responses/2001-0639.resp.html. In addition, the Department disagreed with the court's conclusion that by requiring licensees to reach out to the entire community, the FCC rules would necessarily deprive non-minorities of job availability information they otherwise would have received. Rather, the Department stated that "[t]he distribution of information about job openings is not necessarily a zero-sum game in which providing the information to one group automatically results in the exclusion of others." *Id.* at 16.

B. Data collection

The mere collection and statistical analysis of workforce data to ensure compliance with anti-discrimination laws does not, in and of itself, trigger strict scrutiny. *Sussman v. Tanoue*, 39 F. Supp. 2d 13, 25-27 (D.D.C. 1999) (FDIC's affirmative action plan that required collection of statistical information on the racial and gender make-up of its workforce was not subject to strict scrutiny because it did not create racial preferences in hiring); *cf. Scott v. Pasadena Unified School District*, 306 F.3d 646, 658-59 (9th Cir. 2002) (rejecting the argument that a public school district "subject[ed] the plaintiffs to a race- and gender-based admissions process when it monitored the racial and gender composition of the applicant pools" in order to determine if race should be used as a factor in admissions), *cert. denied*, 123 S. Ct. 2071 (2003).

VI. Conclusion

The EEOC's new management directive concerning agency EEO programs (MD-715), and the recently issued instructions for the implementation of MD-715, may shift the paradigm for cases that implicate the analysis of racial classifications. Nevertheless, challenges exploring the permissible limits of agency employment and outreach and recruitment programs seem inevitable. The analytical framework discussed here should provide a useful foundation upon which to base an appraisal of classifications in agency programs.❖

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Mixed-Motive Discrimination Cases in the Wake of *Desert Palace v. Costa* and the Impact on Summary Judgment

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I. Introduction

In *Desert Palace v. Costa*, 123 S. Ct. 2148 (2003), the Supreme Court considered whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive jury instruction under 42 U.S.C. § 2000e-2(m), thereby shifting the burden to the defendant to prove that it would have made the same decision absent discrimination. Relying upon the plain language of Title VII, the Court held that direct evidence is not required. A plaintiff is entitled to a mixed-motive jury instruction upon the presentation of sufficient evidence, be it circumstantial or direct, for a reasonable jury to conclude that race, color, religion, sex, or national origin was a motivating factor in the employment decision, even if other legitimate considerations also motivated the decision.

The *Costa* decision is the Court's first interpretation of 42 U.S.C. § 2000e-2(m), which was added to Title VII as part of the Civil Rights Act of 1991. That section provides:

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

In holding that this section does not require direct evidence, the Court observed that it was not deciding whether § 2000e-2(m) applies outside of the mixed-motive context. 123 S. Ct. at 2151, n.1. Nevertheless, the *Costa* decision already has prompted one district court to opine that the order of proof articulated in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), is now meaningless and that all discrimination cases involve a mixed-motive analysis. Other lower courts also have grappled with the impact of *Costa* on summary judgment and how the mixed-motive issue interfaces with the well-settled pretext analysis. After an overview of the mixed-motive theory and the *Costa* decision, this article addresses the likely impact the decision will have on Title VII litigation.

II. Mixed-motive cases and the 1991 Civil Rights Act

Congress added § 2000e-2(m) in response to the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where the Supreme Court first considered the issue of causation under Title VII when faced with an employment decision motivated by both legitimate and illegitimate considerations. Hopkins had been passed over for partnership because of her gender and other considerations, including poor interpersonal skills. Faced with dual motives, a plurality of the Court held that, once the plaintiff establishes that an unlawful reason was a motivating factor in an employment decision, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even in the absence of gender. If the defendant carries its burden on this "same decision" affirmative defense, it avoids a finding of liability. *Id.* at 258.

In her concurrence, Justice O'Connor largely agreed with the plurality's holding that the same decision defense is a bar to liability. However, she was unwilling to shift the burden of persuasion to the employer in every case where the evidence established both legitimate and illegitimate motivations. She held that "the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation," *id.* at 262, should be shifted to the employer only when the plaintiff demonstrates "by direct evidence that an illegitimate factor played a substantial role" in the action. *Id.* at 275.

In the wake of *Price Waterhouse*, Congress amended Title VII to include 42 U.S.C. § 2000e-2(m), cited above. Under this provision, if a plaintiff establishes that an illegitimate motive was a motivating factor in an employment decision, then the burden shifts to the employer to demonstrate that it would have made the same decision even in the absence of discrimination. Unlike the holding of *Price Waterhouse*,

successful proof of that affirmative defense does not avoid liability; the statute provides that it only insulates the defendant from damages and certain types of injunctive relief. 42 U.S.C. § 2000e-5(g)(2)(B).

Considering mixed-motive cases after the enactment of § 2000e-2(m), most Courts of Appeal held that the statute only overruled *Price Waterhouse* to the extent that decision permitted an employer to avoid liability by proving the same decision defense. The statute did not alter the evidentiary hurdle a plaintiff must meet before shifting the burden to the defendant. *See Watson v. Southeastern Pennsylvania Transp. Authority*, 207 F.3d 207, 216 (3d Cir. 2000). Lower courts then reasoned that Justice O'Connor's concurrence, offering the narrowest grounds of a splintered Court, was properly viewed as the holding of *Price Waterhouse*. Accordingly, Justice O'Connor's concurrence lead to an extensive body of case law assessing the type and quantum of "direct evidence" that a plaintiff must present before shifting the burden to the defendant.

Interpreting Justice O'Connor's analysis, most Courts of Appeal agreed that a plaintiff must meet a heightened burden of proof before requesting a mixed-motive instruction. At a minimum, the plaintiff's proof must include evidence of discriminatory animus on the part of the official actually involved in the decision-making process. Without that evidence, a mixed-motive instruction was improper and, more importantly, the burden of persuasion did not shift to the employer. *See Watson*, 207 F.3d at 217-20; *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("What is required . . . is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision."). This common ground evaporated, however, when the circuits considered the specifics of the plaintiff's evidence. Some courts permitted the trier of fact to draw inferences from the evidence. Others precluded such inductive reasoning, requiring statements from the decisionmaker that unequivocally evidenced a discriminatory animus.

In *Costa*, the Ninth Circuit refused to become bogged down in the evidentiary quagmire of whether or not evidence is sufficiently "direct" to warrant a mixed-motive instruction. "We believe that the best way out of this morass is a return to the language of the statute, which imposes no special requirement and does not reference 'direct evidence.'" *Costa v. Desert Palace*, 299 F.3d 838, 853 (9th Cir. 2002)(en banc). The en banc majority found that the 1991 amendments obviated *Price Waterhouse* in its entirety, including Justice O'Connor's requirement of "direct evidence" before shifting the burden of persuasion to the employer. Under the plain language of the statute, the trial judge must, "[a]fter hearing both parties' evidence, . . . decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly." *Id.* at 856.

The Supreme Court agreed with the Ninth Circuit, basing its ruling entirely upon the plain language of the 1991 amendments. As Justice Thomas observed, the statute contained no special evidentiary burden as part of a mixed-motive claim under § 2000e-2(m). Congress expressly defined "demonstrates" as "meeting the burden of production and persuasion," and that definition makes no reference to the type of proof needed to warrant a mixed-motive instruction. 42 U.S.C. § 2000e-2(m). The plain language of the statute, and its "silence with respect to the type of evidenced required in mixed-motive cases," 123 S. Ct. at 2154, suggested to the Court that no departure was warranted from the traditional rule in civil cases that a party must prove its case by a preponderance of the evidence, doing so through direct evidence, circumstantial evidence, or a combination thereof. *Id.*

Against the plain language of the statute, the Court held that "[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" *Id.* at 2155.

III. The single-motive and mixed-motive distinction after *Costa*

In the wake of *Costa*, several courts have questioned the continuing viability of the distinction between a single-motive (or pretext) case and a mixed-motive case, and, in that regard, whether the *McDonnell Douglas* framework survives. *See Love-Lane v. Martin*, 355 F.3d 766, 786-87 (4th Cir. 2004) (identifying but not deciding "the extent that the Supreme Court's recent decision in *Desert Palace* . . . might change the role that the *McDonnell Douglas* burden-shifting framework plays in race discrimination cases"); *Allen v. City of Pocahontas, Ark.*, 340 F.3d 551, 557 n.5 (8th Cir. 2003) (identifying but not reaching the question whether *Costa* and § 2000e-2(m) "alters the burden shifting analysis of *McDonnell Douglas*").

One of the first decisions to consider *Costa's* impact on disparate treatment cases was *Dare v.*

Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003), where the court found that the *McDonnell Douglas* test was of limited utility after the enactment of § 2000e-2(m). According to the court, *McDonnell Douglas* presents a false dichotomy between the defendant's articulation of a legitimate non-discriminatory reason and the plaintiff's proof of pretext. The court found that the single-motive analysis ignores the fact that "most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate." *Id.* at 991. The court thus held that "a plaintiff's unsuccessful challenge to the defendant's non-discriminatory rationale should not automatically allow the defendant to escape liability. Instead, it should merely subject the defendant to the mixed-motive analysis dictated by the Civil Rights Act of 1991." *Id.* at 992.

A discrimination case, however, cannot be categorized as mixed-motive unless an illegitimate factor influences the employment decision. In that regard, by interpreting 42 U.S.C. § 2000e-2(m) as requiring a mixed-motive analysis in every case, the *Dare* opinion improvidently assumes that an illegitimate factor plays a part in every employment decision, an assumption that is unquestionably wrong. Based upon this faulty premise, the court arrived at its conclusion that the "same decision test functions better than the alternative *McDonnell Douglas* pretext analysis." *Id.*

Furthermore, the *Dare* court's conclusion that *McDonnell Douglas* should be jettisoned in favor of a mixed-motive analysis overlooks the narrow issue decided by the Supreme Court in *Costa*. Throughout its opinion, the Supreme Court observed that it was only considering the evidentiary burdens in a mixed-motive case under § 2000e-2(m). As the Court stated in the first paragraph of its opinion, "[t]he question before us in this case is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII." 123 S. Ct. at 2150. It again emphasized the limited nature of its inquiry in a footnote: "This case does not require us to decide when, if ever, [§2000e-(2)(m)] applies outside of the mixed-motive context." *Id.* at 2151, n.1. Justice O'Connor's concurrence also noted that § 2000e-2(m) "codified a new evidentiary rule for mixed-motive cases arising under Title VII." *Id.* at 2155.

More recently, the Court reiterated the *McDonnell Douglas* paradigm in *Raytheon Co. v. Hernandez*, 124 S. Ct. 513 (2003). While that case arose under the Americans with Disabilities Act, the Court spoke at length about the burden shifting scheme of *McDonnell Douglas* without referring to *Costa*, acknowledging that Courts of Appeal "have consistently utilized [the *McDonnell Douglas*] burden-shifting approach when reviewing motions for summary judgment in disparate treatment cases." *Id.* at 518 n.3. The Court's recent opinion in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), further reinforced the importance of the *McDonnell Douglas* framework.

Accordingly, both single-motive and mixed-motive cases are alive and well after *Costa*. How a case is categorized depends entirely on the type of evidence developed during discovery and offered at trial. If the evidence supports only one reason for the employer's decision, the case should be analyzed as a pretext case, with the plaintiff bearing the burden of showing that the employer's articulated reason is false and that discrimination was the real reason. On the other hand, if the evidence shows that an illegitimate factor played a part in the decision, even though other factors also influenced the decision, the case warrants a mixed-motive analysis. As the Ninth Circuit observed in its en banc decision in *Costa*, "'single-motive' and 'mixed-motive' cases [are not] fundamentally different categories of cases. Both require the employee to prove discrimination; they simply reflect the type of evidence offered." 299 F.3d at 857. *See Bryant v. Aiken Regional Medical Centers Inc.*, 333 F.3d 536, 545 (4th Cir. 2003) (in discussing the burden in a pretext case, the court cited *Costa* only as addressing the evidentiary standard for a mixed-motive jury instruction); *Gibson v. City of Louisville*, 336 F.3d 511, 513 (6th Cir. 2003) (citing to *Costa* as a mixed motive case and reaffirming pretext analysis in the context of an FMLA case).

Of course, while it is easy enough to articulate this evidentiary distinction between single-motive and mixed-motive cases, in practice "the analytic difference between these two types of cases is razor-thin, which has made the area a particularly difficult one for the courts. . . ." *Russell v. Microdyne Corp.*, 65 F.3d 1229, 1237 (4th Cir. 1995). This difficulty is readily seen in decisions assessing summary judgment motions after *Costa*.

IV. *Costa* and summary judgment

Prompted by the analysis in *Dare*, the court in *Dunbar v. Pepsi-Cola General Bottlers of Iowa*, 285 F. Supp. 2d 1180 (N.D. Iowa 2003), also considered the *McDonnell Douglas* framework in light of *Costa* and § 2000e-2(m). However, instead of adding more rhetoric to *Dare's* eulogy of *McDonnell Douglas*, the court in *Dunbar* choose to modify the inquiry at the pretext stage:

a plaintiff must offer sufficient evidence to create a genuine issue of material fact "either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative), . . . or (2) that the defendant's reason, while true, is only *one* of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive alternative)." *Id.* at 1198. Relying upon *Dunbar*, similar modifications were made in *Richel v. Nationwide Mut. Ins.*, 297 F. Supp. 2d 854, 866 (M.D. N.C. 2003) and *Walker v. Northwest Airlines*, 2004 WL 114977 (D. Minn. Jan. 14, 2004).

While *Dunbar* offers an interesting post-*Costa* analysis of summary judgment, nothing in *Costa* should be read as altering the landscape of a Rule 56 motion. By removing the requirement of direct evidence, *Costa* arguably lessens the plaintiff's evidentiary burden in opposing summary judgment where discovery has uncovered facts supporting a mixed-motive. However, that does not alter the basic inquiry at summary judgment. Whether the evidence supports a single-motive (or pretext case) or a mixed-motive case, the ultimate question is the same: is there a triable issue of fact as to whether the plaintiff was the victim of intentional discrimination. The disjunctive test posed by *Dunbar* does not suggest anything new. To the contrary, both prongs focus on the ultimate question of intentional discrimination. As the Fourth Circuit recently observed:

> Although the Supreme Court eliminated any heightened requirement of direct evidence to establish a mixed-motive sex discrimination claim under Title VII, [citing *Costa*], the fundamental basis for the district court's decision has not been affected. Regardless of the type of evidence offered by a plaintiff as support for her discrimination claim (direct, circumstantial, or evidence of pretext), or whether she proceeds under a mixed-motive or single-motive theory, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." [citing *Reeves*, 530 U.S. at 153]. To demonstrate such an intent to discriminate on the part of the employer, an individual alleging disparate treatment based upon a protected trait must produce sufficient evidence upon which one could find that "the protected trait . . . actually motivated the employer's decision." [citing *Reeves*, 530 U.S. at 141].

Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 286 (4th Cir. 2004).

In pretext cases prior to *Costa*, the plaintiff did not have to prove that an illegitimate factor was the *sole* reason for the defendant's decision. The illegitimate consideration only had to be *a* reason; it only had to motivate or be a determinative factor in the employer's decision. *See Reeves*, 530 U.S. at 141; *Watson*, 207 F.3d at 212 n.3 (jury must decide whether the plaintiff's sex was a determining factor in the employment decision). Nothing about that analysis changes after *Costa*, even if evidence adduced during discovery supports a mixed-motive case. The only real difference in a mixed-motive case is the plaintiff's option not to challenge defendant's articulated reason for the decision. Instead, accepting the defendant's articulated reason, a plaintiff may rely upon other evidence to show that gender or race also motivated the decision. As such,

> in order to survive summary judgment, a plaintiff is not limited to demonstrating pretext. . . . Rather a plaintiff need only present sufficient evidence, of any type, for a jury to conclude that a protected characteristic was a "motivating factor" for the employment practice, even though the defendant's legitimate reason may also be true or have played some role.

Brown v. Westaff (USA), Inc., 301 F. Supp. 2d 1011, 1017 (D. Minn. 2004). The defendant's analysis at summary judgment, however, should not change. Defendant's goal is still to establish that plaintiff's evidence does not raise a triable issue that an illegitimate factor motivated the employment decision or, stated differently, that discrimination was not the real reason.

This analysis is borne out by recent Courts of Appeal decisions that review summary judgments. For instance, in *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061 (9th Cir. 2004), the Ninth Circuit reversed summary judgment for the employer in a discharge case based upon sex discrimination and retaliation. The defendant articulated two separate reasons for the plaintiff's termination, and there also was evidence of sexually derogatory comments by a decisionmaker. Given this evidence, the court reviewed the summary judgment pursuant to both a pretext and a mixed-motive analysis, finding that the plaintiff raised a triable issue under either approach. For all practical purposes, the evidence the court considered under both modes of analyses was the same. The court found that Stegall's evidence of pretext, which she used to attack the

legitimacy of the defendant's articulated reasons for her termination, also established that her gender was a motivating factor in the employer's decision. *Id.* at 1071-72. *See also Hill*, 354 F.3d 277 (upholding summary judgment for the defendant where, based upon the same evidence, plaintiff's termination was not motivated by her sex and age, and the evidence did not establish that defendant's articulated reason was a pretext for her removal).

Similarly, in *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004), the Fourth Circuit, much like its decision in *Hill*, held that *Costa* did not change the outcome of the trial court's ruling on summary judgment. Reviewing the facts under the *McDonnell Douglas* framework, the court found no evidence of pretext. The defendant had articulated a legitimate reason for the plaintiff's reassignment, which was the plaintiff's inability to work effectively under her supervisor. The court then turned to plaintiff's evidence of pretext, and, adhering to the settled principle of *Reeves*, observed that establishing falsity is not enough; the plaintiff must offer evidence that her race was the real reason for the decision. This she did not do, only offering her own conclusory allegations of racism. As such, the court found insufficient "evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race . . . was a motivating factor'" in the employment decision. *Id.* at 787, citing *Costa*. Whether viewed as a single-motive or a mixed-motive case, summary judgment was proper.

V. *Costa* and jury instructions

While *Costa* does not affect the analysis at the summary judgment stage, whether a case is single-motive or mixed-motive does impact jury instructions and, more importantly, whether the burden to prove the same decision defense shifts to the employer. As the *Stegall* court observed, "[t]he significance of the distinction between 'single motive' and 'mixed motive' is most often seen towards the end of a trial when the district court must instruct the jury." 350 F.3d at 1067. Prior to *Costa*, a trial court could only instruct the jury on a mixed-motive theory if the plaintiff offered direct evidence of discrimination. That heightened evidentiary standard is now gone. Instead, at the conclusion of the trial, a court must determine what reasonable inferences may be drawn from the evidence. If there is sufficient evidence that an illegitimate factor motivated the employer's decision, in addition to legitimate considerations, then a mixed-motive instruction is proper.

While a mixed-motive instruction does not relieve the government of liability, if the same decision defense is successfully established, the defendant can significantly restrict the plaintiff's remedies, obviating the recovery of any monetary relief, including back pay, front pay, and compensatory damages. *See* 42 U.S.C. § 2000e-5(g)(2)(B). As such, government counsel should assess the merits of a mixed-motive instruction in every case that survives summary judgment. Since evidence adduced during discovery will usually indicate if both legitimate and illegitimate motives influenced the employment action, the decision to submit a mixed-motive jury instruction can usually be made well before the final pretrial conference. To preserve the possibility that the evidence warrants a pretext analysis, however, both a pretext and a mixed-motive instruction should be included in proposed jury instructions.

VI. Conclusion

Despite the recent interest in how *Costa* impacts the disparate treatment formula articulated in *McDonnell Douglas*, it does no such thing. Not only do single-motive or pretext cases survive *Costa*, but the summary judgment analysis remains largely unchanged, whether the evidence adduced during discovery supports one reason for the employment action or dual motives. In either case, the ultimate question we must ask in a Rule 56 motion remains unchanged–was the plaintiff the victim of intentional discrimination. *Costa's* only real impact is to remove the direct evidence requirement that took on a life of its own after *Price Waterhouse*.❖

ABOUT THE AUTHOR

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Being There

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I. Introduction

An oft-litigated issue under the Americans with Disabilities Act (ADA) (and its federal employment counterpart, the Rehabilitation Act) is whether an employee's regular attendance at work is an "essential function[ ]" of the employee's position, such that the employee's inability to be at work on a regular basis renders the employee not "qualified" under the ADA. *See* 42 U.S.C. §§ 12111(8), 12112(a). These issues may arise in cases in one of two contexts, or both simultaneously. Either the employee may seek to work from home as an accommodation or the employee may seek an indefinite absence from work as an accommodation. Some circuits have held that being at work is generally an essential function of a position. While such statements are helpful for employers, a defense against a disability claim will ultimately rise or fall on arguments that are based on the specific facts of the employee's position and the employer's response to any request for accommodation. In *School Bd. of Nassau County v. Arline*, the Supreme Court counseled that, in most cases, a district court's determination of whether a disabled person is otherwise qualified for a position will require an individualized inquiry. 480 U.S. 273, 287 (1987). Although a pat pro-employer position concerning attendance at work is easy to state, it is no substitute for providing a fact-specific argument as to why the defendant agency needed a particular employee in a specific position to be at work.

II. Working at home

One of the elements of a reasonable accommodation claim under the ADA is that an employee is qualified, with an accommodation, to perform the essential functions of the employee's job (or one that the employee seeks). *E.g.*, *Mason v. Avaya Communications*, 357 F.3d 1114,1119 (10th Cir. 2004). The first step in analyzing whether this element is met is to determine the essential functions of the job. There are three Equal Employment Opportunity Commission (EEOC) regulations that form this inquiry. The first defines essential functions as "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n)(1). The second regulation deals with what it means for a job function to be essential. According to the EEOC, a job function may be considered essential if, for example:

(i) the position exists to perform that function;

(ii) there are a limited number of employees available who can perform that function; and/or

(iii) the function is highly specialized.

29 C.F.R. § 1630.2(n)(2).

The third EEOC regulation provides a non-exclusive list of relevant types of evidence to determine whether a particular function is essential. This list includes:

(i) the employer's judgment;

(ii) written job descriptions;

(iii) the amount of time spent performing the function;

(iv) the consequences of not requiring the employee to perform the function;

(v) the terms of a collective bargaining agreement;

(vi) the work experience of past incumbents in the job; and/or

(vii) the current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

Although not in the EEOC regulations, the EEOC has issued guidance taking the position that regular attendance at work is not an essential function because it is not a fundamental duty of a position. Rather, essential functions are duties to be performed. EEOC, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, at n.65 (2002) (citing 29 C.F.R. § 1630.2(n)(1)) *at* www.eeoc.gov/policy/ /docs/accommodation.html). However, a number of circuits have ruled that physical presence in the workplace is an essential function of a job. *See Mason*, 353 F.3d at 1119 (citing *Hypes v. First Commerce*, 134 F.3d 721, 727 (5th Cir.1998) (per curiam) (loan analyst); *Gantt v. Wilson Sporting Goods*, 143 F.3d 1042, 1047 (6th Cir. 1998) (unspecified position at sporting goods plant); *Tyndall v. Nat'l Educ. Centers*, 31 F.3d 209, 213 (4th Cir. 1994) (teacher); *Vande Zande v.*

Wisconsin Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (program assistant with administrative duties). Whether the EEOC is correct that physical presence is not an essential function seems to depend on the position at issue. Certain jobs, such as night watchman, prison guard, groundskeeper, and dental hygienist, appear to require attendance. The harder question is whether office jobs, in this era of computers, e-mail, fax, and telecommuting, require regular attendance. Again, generalizations are no substitute for a detailed showing that regular attendance at the office is an essential function of a particular position.

Mason, decided earlier this year, provides a tour of the legal landscape. The case has its origins in the plaintiff's witnessing of the murder of several co-workers at a postal facility in 1986. Plaintiff was subsequently diagnosed with post-traumatic stress disorder (PTSD). 357 F.3d at 1117. Years later, while working as a service coordinator for Avaya, a communications company, she heard about a co-worker who had brandished a knife during a verbal dispute with another employee. As a result, the plaintiff's PTSD was triggered. *Id*. After the knife-wielding employee's week-long suspension ended, plaintiff was unable to work, and she requested (among other accommodations not relevant here) that she be permitted to work from home. Avaya refused. Plaintiff never returned to work and was discharged. *Id* at 1117-18.

Avaya, Mason's employer, argued that Mason could not work from home because her service coordination position required supervision and teamwork. *Id*. at 1120. The evidence that Avaya submitted included a showing that all of the service coordinators work at the administration center, and none have been permitted to work elsewhere. *Id*. Although Mason argued that existing information technologies would permit her to work at home, she was not able to rebut Avaya's position that it could not adequately supervise her from home because, although Avaya could ascertain whether she was logged onto her computer, it could not tell whether she was actually working. *Id*. 1120-21. In determining that physical presence was an essential function of Mason's service coordinator position, the Tenth Circuit relied on the ADA's mandate that the employer's judgment as to which functions of the job are essential must be taken into account. The general rule is that an employer's business judgments are not to be second-guessed, and the "self-serving" nature of an employee's statements concerning the essential functions of her position are not determinative. *Id*. at 1122 (citations omitted). Although employers may appreciate the court's rhetoric, it may have gone a bit too far in stating that "[a]t a time when employers are justifiably concerned with productivity at the workplace, we are in no position to second guess Avaya's desire to directly supervise its lower level employees." *Id*. at 1121. Given that it is difficult to conceive of any time in the past or the future in which an employer would not be concerned with its employees' productivity, this statement is unpersuasive.

Having ruled that physical presence was an essential function of the service coordinator position, the court then went on to rule that working from home was not a reasonable accommodation for Mason. *Id*. at 1124. This ruling was inevitable given the Tenth Circuit's recognition that the elimination of an essential function is per se not a reasonable accommodation. *Id*. at 1122. The court then reviewed a number of decisions, most mentioned above, in which working at home was held not to be reasonable. *Id*. at 1122-23 (citing also *Kvorjak v. Maine*, 259 F.3d 48, 51 (1st Cir. 2001) (claims adjuster); *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997) (sales representative)).

The Tenth Circuit distinguished *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001), in which the Ninth Circuit found a triable issue existed as to whether a medical transcriptionist's request to work at home was reasonable. In that case, however, the employer had allowed some of the other transcriptionists to work at home. *Mason*, 353 F.3d at 1123 (citing 239 F.3d at 1136). Similarly, in *Langon v. HHS*, the D.C. Circuit found a triable issue as to whether the request of a computer programmer with multiple sclerosis to work at home was reasonable. 959 F.2d 1053, 1061 (D.D.C. 1992). *Langon* was decided under the Rehabilitation Act, and the underlying facts arose before the ADA (with its more clearly articulated standards and burdens of proof) had been enacted. In *Langon*, there was a dispute of fact as to whether HHS had a policy permitting disabled employees to work at home. HHS submitted little, if any, admissible evidence that permitting the plaintiff to work at home would constitute an undue hardship. *Id*. at 1055, 1060.

The Seventh Circuit in *Vande Zande*, 44 F.3d at 544-45, characterized the D.C. Circuit as disagreeing with the "majority rule" that working at home without supervision is not a reasonable accommodation. It is unclear that the employer in *Langon* relied on the inability to supervise the employee at home as the reason for denying her request, or why such an accommodation would

create an undue hardship. *See Langon*, 959 F.2d at 1055 (agency stated that computer programming position "requires a great deal of exactness" and the assignments "most often require face-to-face contact with report requestors"). Although the D.C. Circuit has since stated that the government must consider allowing an employee to work at home in appropriate cases, it has ruled that a U.S. Attorney's Office properly rejected such an option for a coding clerk who faced tight deadlines. *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994). Thus, there is no clear circuit split on this issue.

Judge Posner described the telecommuting issue in terms that are helpful to the employer:

> Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not required to accommodate a disability by allowing the disabled worker to work, without supervision, at home.
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> An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. No doubt to this as to any generalization about so complex and varied an activity as employment there are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home.

Vande Zande, 44 F.3d at 544. *But see Hernandez v. City of Hartford*, 959 F. Supp. 125, 132 (D. Conn. 1997) (criticizing *Vande Zande* as flying in the face of the requirement that inquiries under the ADA are to be made on a case-by-case basis). *Vande Zande* is particularly helpful in the Rehabilitation Act context because it states that when a government agency goes further than the law requires by permitting a disabled worker to work at home, "it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation." 44 F.3d at 538. Such language can, in some contexts, be used to counter language (based on pre-ADA legislative history) that the federal government is supposed to be a "model employer" of disabled individuals with duties that exceed those of private employers. *See*, *e.g.*, *Woodman v. Runyon*, 132 F.3d 1330, 1343 & n.13 (10th Cir. 1997).

Despite almost a decade of advances in communications technology, *Mason* demonstrates that the rule set forth in *Vande Zande* still holds in the general run of cases. There is, however, an important caveat. To the extent an employer provides an across-the-board policy that permits telecommuting, it will have a more difficult time arguing that physical presence is an essential function, and that working at home is not a reasonable accommodation. In *Mason*, 353 F.3d at 1120, the employer made a showing that all of its service coordinators worked their entire shift at the administration center, and that it had never permitted a service coordinator to work anywhere other than at an administration center. The experience of past and current employees with the same or similar positions is relevant evidence as to what an essential function is. *See* 29 C.F.R. § 1630.2(n)(3)(vi), (vii).

If non-disabled individuals in a particular position are telecommuting full-time, it will be difficult, if not impossible, for an employer to argue that physical presence is an essential function. At that point, a disabled individual may be able to demonstrate that he should be permitted to work from home as a reasonable accommodation. Indeed, in that situation, the disabled employee may be able to make a disparate impact claim without having to deal with the reasonable accommodation issue. Under both theories, the employer can potentially prevail by demonstrating that, although it can trust some of its employees to work at home, it cannot trust the plaintiff. That will be a more fact-specific case, and one that is the employer's burden. By the same token, a request to work at home some of the time may be more likely to be a reasonable accommodation than a request to work at home all the time. *See Rauen v. United States Tobacco*, 319 F.3d 891, 896 (7th Cir. 2003) (plaintiff rejected employer's suggestion that she come into the office once a week). On the other hand, to the extent that an employer does not offer telecommuting as an option for its employees, the employer will likely prevail on whether physical presence is an essential function of a position.

III. Medical leaves of absence

The other frequently litigated issue regarding absence from the workplace has to do with whether granting leave can be a reasonable accommodation under the ADA. The law is clear that indefinite leave is not a reasonable accommodation because an indefinite absence renders an employee not "qualified" to carry out

the position. *Byrne v. Avon Products.*, 328 F.3d 379, 381 (7th Cir. 2003). In other words, an indefinite absence does not carry out the purpose of an accommodation, which is to put the employee in a position to carry out the essential functions of a position. *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003).

Although leave for a definite period of time can be a reasonable accommodation, *id.*, a case may not present clear facts as to whether the leave requested is going to be for a definite period of time or not. In *Haschmann v. Time Warner Entertainment*, 151 F.3d 591 (7th Cir. 1998), the plaintiff was granted medical leave of approximately three weeks for conditions related to lupus. *Id.* at 595. When the plaintiff had a relapse, the employer rejected plaintiff's request for an additional period of two to four weeks of medical leave under both the ADA and the Family and Medical Leave Act (FMLA), and discharged her. *Id.* Plaintiff received a jury verdict under both the ADA and the FMLA. (See Debra Richards' article in this issue discussing limitations on private rights of action against the government under the FMLA. Debra G. Richards, *Family Medical Leave Act—What is in a Title?,* 52 UNITED STATES ATTORNEYS' BULLETIN, 25-28 (2004)). On appeal, the employer argued that it was not required to accommodate a plaintiff suffering a prolonged, disabling medical condition by allowing an indefinite leave of absence. The Seventh Circuit ruled that the leave of absence sought was a clearly defined period of two to four weeks, and upheld the jury's finding that the second medical leave would have been a reasonable accommodation. 151 F.3d at 602. In determining that granting the leave would not have unduly burdened the company, the court noted evidence that the position had been open for months before plaintiff filled it, that the company's medical leave policy promised up to twelve weeks of medical leave, and that the position was open after the plaintiff's doctor cleared her to return to work. *Id.* at 602-03. The court upheld the jury's verdict on the FMLA claim as well, in part because plaintiff's termination came just days after she had requested FMLA leave. *Id.* at 604-05.

The application of the ADA and the FMLA need not yield the same result in the same case. In *Spangler v. Federal Home Loan Bank Bd. of Des Moines*, 278 F.3d 847 (8th Cir. 2002), a bank fired the plaintiff because her depression led to multiple absences. The court began with stating its prior holding that "regular and reliable attendance is a necessary element of most jobs." *Id.* at 850 (quotation omitted). Because plaintiff's frequent and unplanned absences prevented her from carrying out the essential functions of her position, including taking daily phone calls, answering inquiries from other banks, and completing transactions in a timely manner, the court upheld summary judgment against plaintiff on her ADA claim. *Id.* However, the court reversed summary judgment on the FMLA claim, holding that plaintiff's explanation for an absence as "depression again," which led to her termination the next day, raised a triable issue as to whether she gave sufficient notice that she would need time off under the FMLA. *Id.* at 852 (citing *Collins v. NTN-Bower*, 272 F.3d 1106 (7th Cir. 2001)). The court made it clear that because depression undermines an individual's ability to communicate, a jury could consider her depression in determining whether the amount and manner of notice satisfied the FMLA. *Id.* at 853. *See also Byrne*, 328 F.3d at 382 (affirming summary judgment under the ADA but finding a triable issue on whether depressed employee gave adequate notice under the FMLA).

The mirror image of *Spangler* is *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1996). There, the court, relying on *Arline*, rejected the proposition that there is a presumption that uninterrupted attendance is an essential job requirement. *Id.* at 782-83. In that case, the plaintiff was fired for filing a request for an extension of medical leave. Because her employer routinely granted medical leave to employees, and because Cehrs had not previously requested medical leave, the court reversed the grant of summary judgment in the employer's favor. *Id.* at 783. The court treated the case as a disparate treatment/pretext case, *see id.* at 779, but nevertheless determined that medical leave was a reasonable accommodation for the plaintiff. *Id.* at 783. Completing the contrast with *Spangler*, the Sixth Circuit affirmed summary judgment on Cehrs' FMLA claim because she was fired after the twelve-week period during which she could have taken FMLA leave. *Id.* at 784-85. *Spangler* and *Cehrs* thus counsel that ADA claims involving requests for medical leave must be analyzed separately from FMLA claims. Here again, the only applicable generalization is that generalizations may not apply.

IV. Requests for accommodation and retaliation

A recurrent theme in employment discrimination litigation is that retaliation claims often pose greater problems than the underlying claim of discrimination that led to the retaliation claim. This dynamic is no less true in the

disability context than under Title VII. Moreover, most disability claims are failure to accommodate rather than disparate impact claims. As a result, a retaliation claim can inject the volatile issue of pretext into a disability discrimination case. A retaliation claim may turn on the believability of the reasons given by an employer for its actions, as opposed to the drier issue of whether or not an accommodation is reasonable. One continuing trend in ADA cases is that employees can state retaliation claims that are not even based on prior claims of discrimination at all, but rather on requests for accommodation. It is unclear, under the doctrine of sovereign immunity, whether such claims can be made under the Rehabilitation Act.

In *Wright v. CompUSA*, the First Circuit reviewed a summary judgment granted to the employer on an ADA reasonable accommodation and retaliation case brought by a district manager with attention deficit disorder (ADD). 352 F.3d 472 (2003). The manager was fired after not reporting, as his supervisor had directed, to a meeting at a particular store. His firing occurred after he submitted a request for accommodation accompanied by a doctor's letter. *Id*. at 474-75. (By way of a common theme, one of plaintiff's requests was to work from home. It was denied. *Id*. at 474.) Because the plaintiff's ADD was held not to raise a triable fact as to whether he was substantially limited in reading and other major life activities, the First Circuit affirmed on the reasonable accommodation claim. *Id*. at 477. The court then invoked the rule that plaintiff's failure to prevail on his underlying discrimination claim did not foreclose his retaliation claim. *Id*.

The prima facie case for retaliation includes the element that the plaintiff has engaged in protected conduct. *Id*. at 478. The ADA's retaliation provision prohibits discrimination "against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). Wright had neither opposed an act of disability discrimination nor made a charge or otherwise engaged in activity protected by the statute. Nevertheless, the First Circuit held that he could proceed with his retaliation claim because he had made a request for an accommodation. 352 F.3d at 477-78. The court reasoned that it would be anomalous for Congress not to have intended to protect employees against retaliation for requesting a reasonable accommodation unless they also filed a formal charge of discrimination. *Id*. at 477 (citing *Soileau v. Guilford of Maine,* 105 F.3d 12, 16 (1st Cir. 1997)). Because the insubordination ground for Wright's firing raised a triable fact as to whether it was pretextual, the First Circuit reversed on the retaliation claim. *Id*. at 478. In reaching its holding that a request for an accommodation could be the basis for a retaliation claim, the court aligned itself with four other circuits. *Id*. at 477-78 (citing *Shellenberger v. Summit Bancorp,* 318 F.3d 183, 191 (3d Cir. 2003); *Haulbrook v. Michelin N. Am.,* 252 F.3d 696, 706 (4th Cir. 2001); *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249, 1265 (10th Cir. 2001); *Silk v. City of Chicago*, 194 F.3d 788, 799-801 (7th Cir. 1999)).

Does this holding mean that claims of retaliation for requesting an accommodation can be brought against the federal government under the Rehabilitation Act? The Rehabilitation Act incorporates the standards "applied under" a number of provisions of the ADA, including § 12203. 29 U.S.C. § 794a(g). Section 12203(a), however, does not include in its prohibition against retaliation a request for an accommodation. That prohibition, in *Wright* and the cases it cites, is a judge-made rule. Accordingly, given the rule that waivers of sovereign immunity must be explicit in the statute and are to be strictly construed, there is some doubt that the government could be liable under the Rehabilitation Act solely for retaliation for an employee's request for an accommodation. Nevertheless, given the perceived harshness of the result that an employee could be subject to an adverse employment action— even firing, as was the case in *Wright*—for requesting an accommodation, courts can be expected to strain to allow retaliation claims based on requests for accommodation to proceed.❖

ABOUT THE AUTHOR

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Family Medical Leave Act–What is in a Title?

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I. Introduction

Claims under the Family and Medical Leave Act (FMLA) are increasing. United States Department of Labor (DOL) statistics indicate that workers have filed 25 percent more FMLA complaints in fiscal year (FY) 2002 than in the prior twelve-month period. In fact, according to the DOL figures, there has been a steady rise in the number of complaints since the FMLA's enactment in 1993. There is every reason to believe that complaints against federal employers have likewise increased.

There are several likely reasons for the increase in the number of FMLA complaints. One reason may be the complexity of the FMLA and its interaction with other statutes such as the pregnancy leave and workers' compensation laws, as well as with the Americans with Disabilities Act (ADA). Other reasons may include the relative newness of the FMLA, which can result in employers not being as familiar with the law when leave decisions are being made. In addition, the facts of each particular leave situation tend to be unique. This means that an employee's lawyer can always second-guess whether the actions taken in a particular employee's situation were proper. Finally, plaintiff's counsel will often "throw in" an FMLA claim when bringing other claims, such as employment discrimination charges.

In addition to the increase in the number of complaints, the DOL also reported that the number of invalid FMLA complaints has increased by one-third in FY 2002 over the number found invalid in FY 2001. This article discusses two areas that every government attorney will want to consider early in a case involving FMLA claims in order to determine their validity:

- whether the federal employee even has a right to file a private cause of action, and
- whether the employee has suffered compensable damages so as to support a viable claim.

II. Scope of the FMLA as applied to federal employees

Enacted in 1993, the FMLA was designed to allow employees to take periods of leave from their jobs for various health and family related reasons. As enacted, the FMLA contains two Titles: Title I, codified at 29 U.S.C. §§ 2601-2916 and Title II, codified at 5 U.S.C. §§ 6381-6387. Title I governs leave for private employees and federal employees not covered by Title II, and it provides for up to twelve weeks per year of unpaid leave for workers who give adequate notice, 29 U.S.C. § 2612(a), and obtain medical certification of the need to take time off for a qualifying personal or family medical condition. 29 U.S.C. § 2613. Federal employees covered by Title I include postal service employees. 5 U.S.C. § 2105(e). Another category specifically excluded under Title II are federal employees employed on a temporary or intermittent basis. 5 U.S.C. § 6381(1)(A). Additional categories of employees who are not considered an employee under Title II include, among others, certain District of Columbia employees, and physicians, dentists, and nurses in the Veterans Health Administration of the Department of Veterans Affairs. *See* 5 U.S.C. § 6301(2)(B).

Title II of the FMLA guarantees the same substantive rights given private and Title I federal employees to qualifying federal civil service employees. 5 U.S.C. §§ 6381-6387. Through a series of nested definitions, Congress has determined which federal employees fall under Title II of the FMLA. Under Title II, "the term 'employee' means any individual who–(A) is an 'employee' as defined by section 6301(2) . . . and (B) has completed at least 12 months of service as an employee . . . ." 5 U.S.C. § 6381(1)(A). Section 6301(2) of the United States Code refers to 5 U.S.C. § 2105 for the definition of an "employee." Section 2105 defines an "employee" as generally anyone appointed to a federal service position, who is performing a federal function, and who is being supervised by another appointed employee or other persons identified in that statute. 5 U.S.C. § 2105(a).

A Title II employee is any federal civil service employee who has worked more than twelve months in civil service, who is not a postal employee, and who does not meet the narrow

exceptions identified in 5 U.S.C. § 2105(a). Essentially, employees covered under Title II will encompass the majority of federal civil service employees. For instance, in the following cases, each of the employees were found to be covered by Title II of the FMLA: *Russell v. United States Dep't of Army*, 191 F.3d 1016 (9th Cir. 1999) (Army Corps of Engineers employee); *Mann v. Haigh*, 120 F.3d 34 (4th Cir. 1997) (Non-appropriated fund employee); *Keen v. Brown*, 958 F. Supp. 70 (D. Conn. 1997) (Department of Veterans Affairs laundry service worker); *Sutherland v. Bowles*, 1995 WL 367937 (E.D. Mich. 1995) (United States Small Business Administration employee under a temporary appointment for a period exceeding one year).

III. Title II employees - it all comes down to sovereign immunity

It is particularly interesting that while Title I and Title II employees under the FMLA are afforded equivalent rights to leave time, Title I contains two sections which have no counterpart in Title II. Section 105 of Title I prohibits an employer from interfering with or denying the exercise of an employee's rights under the FMLA. 29 U.S.C. § 2615. Section 107 of Title I provides that employers who violate section 105 will be liable to aggrieved employees for monetary damages and equitable relief. 29 U.S.C. § 2617. To that end, section 107 authorizes the Secretary of Labor or the aggrieved employee to bring a civil action against an employer in federal or state court. 29 U.S.C. § 2617(a)(2). Title II of the FMLA contains no analogous provisions to sections 105 and 107 of Title I. 5 U.S.C. §§ 6381-6387.

To date, the Fourth and Ninth Circuits have considered whether Title II of the FMLA provides federal employees with a private right of action, as is provided under Title I. Both circuits have held that it does not. *See Russell*, 191 F.3d 1018-19 (federal employee's FMLA claims brought against the Department of Army were correctly dismissed because a private suit could not be brought for violation of the FMLA's Title II); *Mann*, 120 F.3d at 37 (affirming dismissal of federal employee's FMLA claims because Title II of the FMLA does not provide a private right of action whereby federal employees may obtain judicial review of adverse employment decisions under FMLA). Similarly, the three district courts that have considered the issue have also held that Title II employees do not have a private right of action. *See Keen*, 958 F. Supp. at 72-75 and *Sutherland*, 1995 WL 367937 (E.D. Mich. 1995). In *Niimi-Montalbo v. White*, the Hawaii District Court determined that the Merit Systems Protection Board (MSPB) had applied Title I standards to the Board's decision regarding the plaintiff's FMLA claim. 243 F. Supp. 2d 1109, 1120 (D. Haw. 2003). In footnote four, the court opined that it had jurisdiction over the FMLA claim because the claim came to the court as an appeal from a decision by MSPB. *Id.* at 1120 n.4. However, in its later Order Granting Plaintiff's Motion to Remand FMLA Claim to MSPB, the court specifically held that because the plaintiff was a Title II employee, she did not have a private right of action and the court did not have jurisdiction to hear the FMLA claim. *See Niimi-Montalbo v. Brownlee*, United States District Court for the District of Hawaii, Civil No. 00-00635-KSC, Order Granting Plaintiff's Motion to Remand FMLA Claim to MSPB, dated August 5, 2003, p. 5.

The crux of the courts' analyses is based upon sovereign immunity. In observing that Title II of the FMLA contains no provisions for a private cause of action, such as contained in Title I, the courts have uniformly held that Congress did not intend to waive the government's sovereign immunity. Indeed, the absence of express statutory authorization for such suits under Title II supports this premise in that before sovereign immunity is waived, there must be an unequivocally expressed waiver. "Absent [a] waiver, sovereign immunity shields [the] federal government and its agencies from suit." *Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 476 (1994); *see also Army and. Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 734 (1982) (stating that suits against the government may proceed "only if Congress has consented to suit; 'a waiver of the traditional sovereign immunity' cannot be implied but must be unequivocally expressed"). In further support of this premise, the *Keen* court reviewed the House Report proceedings concerning Title II and found that the Report also indicated that Congress did not intend to give federal employees a judicial remedy. *Keen*, 958 F. Supp. at 73-74. The Report states that, "[t]he Committee believes the provision of Title II affecting federal employees can be adequately enforced using existing grievance procedures established by a collective-bargaining agreement or by agency management." *See* H.R. REP. NO. 8(II), 103d Cong., 1st Sess., pt. 1, at 24 (1993); *Keen*, 958 F. Supp. at 73-74.

As the *Mann* court held, because "[n]o unequivocal waiver of immunity exists in Title II . . . the omission of a provision in Title II similar to that in Title I creating a private right of action is treated as an affirmative congressional decision

that the employees covered by Title II of the FMLA should not have a right to judicial review of their FMLA claims through the FMLA." *Mann*, 120 F.3d at 37. Where two sections of the same statute contain different language, federal courts have traditionally honored the canon that Congress intended the difference. *Russello v. United States*, 464 U.S. 16, 23 (1983). Accordingly, Title II of the FMLA creates neither an express nor an implied right of action whereby federal employees may obtain judicial review of adverse FMLA decisions. *Mann*, 120 F.3d at 37.

Title II federal employees are not without recourse for alleged violations of the FMLA. Instead of bringing a civil action, a federal employee covered by Title II of the FMLA, seeking to redress a violation of the FMLA, may file an administrative grievance, where provided for by the union agreement or other internal grievance procedures. *See Mann*, 120 F.3d at 38. After proceeding through the administrative grievance procedures, an employee may pursue arbitration as provided for under the agreement. *Id.* Further, as provided for in 31 U.S.C. § 3702(a)(2) and 5 C.F.R. §§ 178.101-178.107, an employee may also file an administrative claim concerning an FMLA leave dispute with the Office of Personnel Management (OPM).

IV. Title I employees – available damages

Another area in which FMLA complaints may be vulnerable is the area of damages. Title I of the FMLA provides for monetary damages, including compensatory back pay and other lost compensation, interest thereon, and liquidated damages doubling that amount. Specifically, if a violation is established, Title I of the FMLA provides that an employee could recover damages equal to the amount of:

(1) any wages, salary, employment benefits or other compensation denied or lost to such employee by reason of the violation; *or*

(2) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee.

29 U.S.C. § 2617(a)(1)(A)(i) and (ii). The FMLA also provides for equitable remedies, such as employment, reinstatement, and promotion. 29 U.S.C. § 2617(a)(1)(B).

Because the FMLA is a remedial statute, there are limits to the types of damages an employee may recover. Significantly, under the FMLA, plaintiffs *may not* assert claims for punitive damages or non-economic compensatory damages such as emotional distress and humiliation. *See Nero v. Industrial Molding*, 167 F.3d 921, 929-30 (5th Cir. 1999) (no out-of-pocket expenses or mental anguish); *Cavin v. Honda of Am. Mfg.*, 138 F. Supp. 2d 987, 992 (S.D. Ohio 2001) (no punitives); *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 772 (M.D.N.C. 2000) (no punitives); *Rogers v. AC Humko*, 56 F. Supp. 2d 972, 979 (W.D. Tenn. 1999) (collecting cases; no emotional distress); *Hite v. Biomet*, 53 F. Supp. 2d 1013, 1024 n.13 (N.D. Ind. 1999) (no punitives or emotional damages); *Dawson v. Leewood Nursing Home* 14 F. Supp. 2d 828, 833 (E.D. Va. 1998) (no medical damages caused by the stress of the FMLA violation).

V. Show me the money

Early in the life of the case, counsel for the federal agency should comprehensively review the compensable damages available to the plaintiff. The plaintiff may have suffered no compensable damages under the FMLA. Several courts have found on summary judgment that, under the FMLA, nominal damages may not be awarded and the claim should be dismissed.

In *Walker v. United Parcel Service,* the plaintiff's claim was based upon a five-day suspension she received for excessive absenteeism and job abandonment. However, the suspension ran concurrently with her disability leave and she therefore lost no wages or benefits as a result. The court held that "because Walker has . . . suffered no actual monetary losses as a result of UPS' asserted violation of the FMLA and has no claim for equitable relief, she has no grounds for relief under that statute" including "nominal damages." 240 F.3d 1268, 1278 (10th Cir. 2001).

In *Williams v. Toyota Motor Mfg., Kentucky,* the plaintiff was placed under a "no work of any kind restriction" by her doctor and could never have returned to work. Because the plaintiff could not offer any evidence of compensable damages, the court affirmed the dismissal of plaintiff's FMLA claim. 224 F.3d 840, 844-45 (6th Cir. 2000), *aff'd on other grounds,* 532 U.S. 970 (2001).

In *Cianci v. Pettibone,* the court affirmed summary judgment for the defendant on plaintiff's FMLA claim. In February 1994, the plaintiff requested FMLA leave for June 1994. The employer denied the leave, and the plaintiff was fired in April 1994, before she could take the leave. As the plaintiff was not employed at the

time she was to take the requested leave and could not demonstrate any loss, the court found that she had not suffered any diminution of income and had not incurred any costs as a result of the alleged FMLA violation. 152 F.3d 723, 728-29 (7th Cir. 1998).

In *Spurlock v. Postmaster General*, the court affirmed the district court's dismissal of the plaintiff's FMLA claim because the plaintiff did not identify any actual monetary loss she sustained after the United States Postal Service denied her leave and docked her for one week's pay. The Postal Service remedied the shortage by providing plaintiff with a money order in compensation for the error. 2001 WL 1141410 *2 (6th Cir. 2001).

In *Dawson*, the employer paid the plaintiff full salary and benefits for a period of nearly nine months, during which she worked only a fraction of the time. The plaintiff then became completely and permanently incapacitated and was unable to return to her job. However, because the plaintiff received all pay and benefits to which she was entitled, including all leave benefits through the date she was fired, she suffered no compensable damages and the claim was dismissed. 14 F. Supp. 2d at 834.

Other situations where an FMLA complaint might be subject to challenge for lack of compensable damages are cases where the plaintiff had no available sick or annual leave and requested leave without pay during the FMLA period. Unless the plaintiff suffered other repercussions because of the absence, the plaintiff will have suffered no actual monetary loss. As these cases indicate, "once it becomes clear that a plaintiff can recover nothing but a symbolic victory in that the defendant violated a statute, the lawsuit should be terminated." *Dawson*, 14 F. Supp. 2d at 823.

VI. Conclusion

It is not expected that every FMLA claim that is filed against a federal employer will be vulnerable to these defenses. However, with the increase of FMLA claims, attention should be given to every area that may support an early dismissal of the plaintiff's claims without discussing the substantiative issues surrounding the allegations.❖

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Amtrak v. Morgan: The Use of Time-Barred Acts

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I. Introduction

The continuing violation doctrine met its demise with the decision in *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101 (2002). *Morgan* requires that trial courts undertake a separate timeliness analysis for disparate treatment claims and hostile work environment claims. Briefly, discrete acts, such as a denied promotion or failure to hire, are considered separate unlawful employment practices within the meaning of Title VII and must be raised with an Equal Employment Opportunity (EEO) counselor within forty-five days. If not, they are time barred and cannot be made actionable because they are related to a timely act. A hostile work environment, even if it encompasses component acts that extend outside of the limitations period, is still considered a single unlawful employment practice within the meaning of Title VII. As such, a hostile work environment is timely so long as one act that comprises part of the actionable claim falls within forty-five days of plaintiff's EEO contact.

Lower courts have consistently applied these basic rules, and the fundamental timeliness analysis of *Morgan* appears well accepted. Moving beyond the central holding of that decision, however, there are certain devils in the details that are not so easily applied. After an overview of *Morgan*, this article will consider three areas where plaintiffs will continue to raise time-barred acts in support of their cases. The first area concerns the issue of timeliness in the context of a pattern-or-practice case challenging discrete discriminatory acts. While holding that discrete acts are barred unless challenged within the applicable limitations period, *Morgan* expressly left open the issue of timeliness in pattern-or-practice cases. *Id.* at 115, n.9. Plaintiffs have already latched onto that open question, framing their allegations as pattern-or-practice cases in an effort to save untimely allegations. So far, this argument has been rejected by several Courts of Appeal.

The second question concerns the evidentiary use of time-barred discrete acts. *Morgan* observed that untimely discrete employment decisions, although not independently actionable, may serve as relevant background evidence. *Id.* at 113. Given this observation, the Ninth Circuit has already ruled that time-barred acts may be considered on summary judgment as evidence of pretext. As such, while a defendant may succeed in dismissing an untimely discrete act, evidence of that claim may still be used by the plaintiff to create a triable issue as to timely claims. After *Morgan*, a defendant must consider making a motion to strike any time-barred acts that a plaintiff may reassert under the guise of "background evidence."

Finally, faced with untimely discrete acts, plaintiffs may try to save those claims by wrapping them into a timely hostile workplace claim. This strategy appears foreclosed by language in *Morgan*. Nevertheless, what remains unclear is how the constellation of facts that accompany a discrete act might play into a hostile workplace claim, such as a gender-based comment or other abusive act by a supervisor that occurred concomitantly with a denied promotion or disciplinary act. While the plaintiff is not entitled to relief for the time-barred discrete act, the events surrounding that act may well be part of the evidence of the hostile workplace.

II. Synopsis of the *Morgan* decision

Morgan was hired by Amtrak in 1990. He filed a charge of discrimination on February 27, 1995, alleging retaliation, race discrimination, and harassment. Morgan's complaint identified various acts of discrimination, including written counselings, denial of career opportunities, termination, and racial slurs. Since private sector EEO procedures apply to Amtrak, Morgan had 300 days from an act of discrimination to file a charge. The district court held that Morgan could not recover for acts outside of the limitations period. The Ninth Circuit reversed, finding that all of Morgan's claims were timely, reasoning that the "pre-limitations conduct at issue in this case is sufficiently related to the post-limitations conduct to invoke the continuing violation doctrine." 232 F.3d 1008, 1016 (9th Cir. 2000). Based upon this "sufficiently related" test, the circuit held that all of Morgan's untimely claims, whether adverse personnel actions or acts that contributed to a hostile workplace, were actionable.

The Supreme Court rejected this analysis, observing that timeliness must be analyzed separately for discrete discriminatory acts and hostile work environment claims. *Morgan*, 536 U.S. at 109-10. As for discrete discriminatory acts, the Court held that, based upon the plain language of Title VII, the continuing violation doctrine cannot save untimely employment actions. The statute refers to an "unlawful employment practice," and "[t]here is simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." *Id.* at 110. Each discrete act and retaliatory adverse action is a separate wrong within the meaning of the statute. *Id.* at 114. Based upon *Morgan*, a federal employee must contact an EEO counselor within forty-five days of each discriminatory personnel action.

Turning to the hostile work environment claim, the Court held that a plaintiff may rely upon acts outside of the limitations period so long as that conduct is part of an actionable hostile workplace that continues into the filing period. The Court again based this result on the language of the statute, noting that a "hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.' . . . It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period." *Id.* at 117. After *Morgan*, plaintiffs essentially retain the benefit of the continuing violation doctrine in hostile environment cases, but not because of equity, the basis previously relied upon by some courts. Instead, a plaintiff may rely upon acts outside of the limitations period because of the plain meaning of an "unlawful employment practice" in the statute.

The Court then fashioned a two part inquiry: "A court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period." *Id.* at 120.

This articulation of the issue focuses the inquiry on the totality of the circumstances approach of *Harris v. Forklift Systems*, 510 U.S. 17 (1993), which requires an examination of the conduct's frequency, severity, and impact on an employee's work performance. Accordingly, the first step in assessing timeliness is to consider whether the conduct, taken as a whole, rises to the level of an actionable hostile work environment. If the answer to that question is yes, the next step is to determine whether an act that is part of the hostile environment falls within the statutory period.

III. Timeliness of discrete acts in pattern-or-practice claims

While *Morgan* requires that a federal employee contact an EEO counselor within forty-five days of a discrete discriminatory act, the Court did not address the timeliness question in the context of a pattern-or-practice case. As stated in a footnote: "We have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none are at issue here." 536 U.S. at 115 n.9. As expected, plaintiffs have turned to this footnote to save untimely claims, arguing that untimely discrete acts are part of a discriminatory policy maintained by the employer and, therefore, actionable as a pattern-or-practice case. This argument, however, has not yet persuaded the Court of Appeals.

One of the first circuit decisions to consider this argument was *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002), a disparate treatment case filed against the Navy alleging that the promotion policies at a naval shipyard operated to deny advancement opportunities to African-Americans. The plaintiffs in *Lyons*, who contacted an EEO counselor in 1996, tried to save adverse actions dating back to 1991 by insisting that the Navy had "intentionally engaged in the systematic elimination of Black Males from the GS-13 and GS-14 levels of management." *Id.* at 1104. The court rejected this argument, finding that the plaintiffs had not brought their claim as a class action pattern-or-practice case:

> We must conclude from the [*Morgan*] Court's statements that when, as in the present case, a plaintiff pursues several disparate treatment claims, based on discrete discriminatory acts, the limitations period will begin to run for each individual claim from the date on which the underlying act occurs. If a plaintiff chooses to bring separate claims based on each discriminatory act, his assertion that this series of discrete acts flows from a company-wide, or systematic, discriminatory practice will not succeed in establishing the employer's liability for acts occurring outside the limitations period because the Supreme Court has determined that each incident of discrimination constitutes a separate actionable unlawful employment practice.

Id. at 1106-07.

The Ninth Circuit rejected a similar pattern-or-practice claim in *Cherosky v. Henderson*, 330 F.3d 1243 (9th Cir. 2003), where the plaintiffs alleged that the Postal Service had a policy of denying employee requests to wear respirators. The court held that the plaintiffs were not challenging the legitimacy of the policy itself, but the application of that policy on an individualized basis. Plaintiffs cannot save untimely claims merely by asserting a company-wide policy when the challenged discriminatory practice "remains divisible into a set of discrete acts. . . ." *Id.* at 1247, citing *Lyons*, 307 F.3d at 1108; *see also Davidson v. American Online*, 337 F.3d 1179, 1186 (10th Cir. 2003) (the "essence of [plaintiff's] complaint does not stem from the hiring policy, but rather from the individualized refusals to hire that resulted from implementation of the policy.").

These decisions send a strong message that a plaintiff cannot simply assert a policy of discrimination in an effort to salvage untimely claims, thereby taking advantage of footnote 9 in *Morgan*. A pattern-or-practice case is usually brought as a class action that challenges the discriminatory policy itself. The plaintiffs in cases like *Lyons* and *Cherosky*, however, did not bring their claims as class actions. Moreover, they sought what amounted to individualized relief; they were not challenging the policy, but only the policy as applied to them. *See Sharpe v. Cureton*, 319 F.3d 259, 269 (6th Cir. 2003) (rejecting the continuing violation doctrine as it applied to a systemic policy, the court noted that "the plaintiffs do not represent a class, and have otherwise failed to allege class-wide discriminatory action"); *Haynie v. Veneman*, 272 F. Supp. 2d 10, 17 n.4 (D.D.C. 2003) (observing that footnote 9 of *Morgan* "likely refers only to allegations of *systemic* discrimination against a protected *class*

of individuals where the alleged acts reflect an intent to discriminate against all persons in the class"). Interestingly, given the overwhelming evidence of the shipyard's policies, the Ninth Circuit in *Lyons* suggested that on remand the district court consider allowing the plaintiffs to amend their case as a class action. 307 F.3d at 1107 n.8. In all likelihood, the full impact of footnote 9 in *Morgan* will not be considered until a timeliness issue is raised by a class action case that challenges a discriminatory policy.

IV. The use of time-barred evidence after *Morgan*

The holding in *Morgan* that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act," *id.* at 113, benefits an agency defendant faced with an EEO complaint that challenges several adverse personnel actions. Each of those discrete acts must be timely brought to the attention of an EEO counselor, and the continuing violation doctrine no longer operates to salvage the untimely claims on the grounds that they are somehow interrelated. However, the Court then observed that Title VII does not "bar an employee from using the prior acts as background evidence in support of a timely claim." *Id.* This evidentiary use of time-barred acts not only provides a plaintiff with potential ammunition to defeat a motion for summary judgment, but it also raises concerns over the type of evidence that can be wrapped into a timely hostile workplace claim.

A. Time-barred evidence and disparate treatment claims

The first court to undertake an in-depth discussion of the admissibility of time-barred "background evidence" was *Lyons*, 307 F.3d 1092, where the plaintiffs initiated EEO contact in 1996 and then sought to recover for a pattern of discrimination back to 1991. Citing *Morgan*, the court dismissed all of the adverse employment actions outside of the forty-five day contact period. As discussed above, the court rejected the pattern-or-practice theory, finding that the plaintiffs were challenging a series of discrete discriminatory acts, each of which was actionable and required a separate EEO contact. *Id.* at 1105-08.

This finding of untimeliness, however, did not end the inquiry. As the court continued, "[w]e must now determine whether and to what extent [plaintiffs] can make use of evidence of discrimination occurring before the limitations period in order to prove that the [Navy] discriminated against them in awarding the challenged 1996 and 1997 promotions." *Id.* at 1108. The *Lyons* court concluded that the admissibility of background evidence is governed by Rule 401 of the Federal Rules of Evidence, with the trial court assessing the probative value of the untimely acts.

The court then addressed how these time-barred claims can come into play at the summary judgment stage:

> At the initial stage of a case of disparate treatment, appropriate background evidence will be evidence, either direct or circumstantial, that, when combined with evidence of the employer's present conduct, 'give[s] rise to an inference of unlawful discrimination.' [citing *Burdine*]. Once the employer has proffered a legitimate, nondiscriminatory reason to rebut the plaintiff's *prima facie* case, appropriate background evidence will be any evidence that tends to prove the employer's discriminatory intent or otherwise to disprove the proffered legitimate reason.

Id. at 1110-11. In assessing the merits of the plaintiffs' timely claims of non-promotions in 1996 and 1997, the court relied upon evidence of denied promotions and exclusions from detail assignments that were otherwise time barred. While acknowledging that these claims were not actionable, the court found this evidence sufficient to raise triable issues of fact about the timely 1996 and 1997 non-selection decisions that affected the plaintiffs. *Id.* at 1111-12. Similarly, in *Raad v. Fairbanks North Star Borough School District*, 323 F.3d 1185 (9th Cir. 2003), the Ninth Circuit again found it appropriate, after *Morgan*, to "look to the [defendant's] past treatment of [plaintiff's] candidacy for full-time positions as background evidence of intent to discriminate." *Id.* at 1195. As in *Lyons*, the evidence of a time-barred act against Raad was one fact used to defeat summary judgment.

After *Lyons*, a defendant with a meritorious timeliness argument as to a discrete act may win the battle but lose the war. While a defendant may succeed in dismissing discrete acts outside the forty-five day limitation period, a plaintiff will likely reassert those acts in opposition to the remaining summary judgment arguments that challenge timely claims, insisting that the time-barred acts are admissible evidence of pretext and discriminatory intent. Accordingly, a government defendant may be successful in dismissing stale claims, only to have them reappear as grounds for denying a Rule 56 motion on the merits.

The discussion in *Lyons*, however, does not mean that all background evidence is admissible. The touchstone is relevancy, and the evidence must be assessed pursuant to Rule 401 of the Federal Rules of Evidence. When preparing a motion for summary judgment, part of which seeks to dismiss stale claims, government counsel should sketch out arguments for a motion to strike, anticipating that the plaintiff's opposition will reassert the untimely claims as background evidence. If a plaintiff takes that approach, defendant should move to strike such evidence as irrelevant. If those time-barred acts are too remote, involve different bases of discrimination, involve a different supervisor, or took place at a different facility, the probative value of such background facts as proof of discriminatory intent is greatly diminished, and the court may decide to disregard the untimely claims. *Compare McGinest v. GTE Service Corp.*, 2004 WL 439876 (9th Cir. Mar 11, 2004) (citing *Lyons* and suggesting that untimely and stale acts may be considered as background evidence in a hostile work environment claim).

B. Time-barred evidence and a hostile workplace

A plaintiff may also attempt to salvage an untimely discrete act by merging it into a timely hostile work environment claim. This approach is precluded by language in *Morgan*, which states unequivocally that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. at 113. This holding is based on the proposition that a discrete discriminatory act is a separate unlawful employment practice within the meaning of Title VII, and, under the plain language of the statute, if such discrete acts are not timely challenged, they are lost. Pointing to the mandatory language of the statute, the Court reasoned that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 108. If a plaintiff could resurrect a time-barred discrete act simply by recasting it as part of a hostile workplace, the first part of the *Morgan* decision and the congressionally mandated time frames would be eviscerated. *See also Thomas v. Alabama Council on Human Relations*, 248 F. Supp. 2d. 1105, 1116 (M.D. Ala. 2003)("An untimely discrete act claim cannot be saved by including it in a lawsuit with a hostile environment claim.").

Moreover, wrapping discrete acts into a hostile workplace is inconsistent with the theory underlying a hostile work environment. The hostile workplace theory was developed as a way to extend the protections of Title VII to a series of acts which, standing alone, are not adverse actions but, when viewed as a whole, materially change the terms and conditions of employment. As *Morgan* observed, "[h]ostile environment claims are different in kind from discrete acts." 536 U.S. at 115. This difference was used in pre-*Morgan* decisions as a basis for not considering discrete acts as part of a hostile workplace claim. For example, in *Parker v. State of Del. Dep't of Public Safety*, 11 F. Supp. 2d 467 (D. Del. 1998), the court refused to allow the plaintiff to base a hostile workplace claim upon acts more properly categorized as disparate treatment claims. Doing so, the court held, "would significantly blur the distinctions between both the elements that underpin each cause of action and the kinds of harm each cause of action was designed to address." *Id.* at 475.

Situations may arise, however, where the facts surrounding a time-barred discrete act may be admissible as part of an actionable hostile workplace. For instance, if a supervisor uses racial or gender epithets in connection with suspending or terminating an employee, those facts are probably admissible as part of a timely hostile environment claim, even though the suspension or termination is time barred. In such cases, the court can consider the facts surrounding the discrete act in assessing whether, under the totality of the circumstances, the work environment violates Title VII. Nevertheless, the plaintiff is not entitled to relief for the untimely act, including economic and compensatory damages. In that regard, if the case proceeds to trial, the defendant should request a limiting instruction advising the jury that the facts surrounding the adverse employment action may be relevant in assessing whether the plaintiff has established a hostile working environment, but the jury is not to award any damages in connection with the discrete act.

V. Conclusion

The decision in *Morgan* altered the way courts approach timeliness. The continuing violation doctrine is no longer a basis for saving stale claims. Discrete discriminatory acts must be challenged within forty-five days, and a hostile work environment claim will be timely so long as a component act of the claim falls within the limitations period. While these rules seem straightforward enough, it was the Court's cryptic comments about the use of time-barred acts as background evidence and the open question about pattern-or-practice cases, that have left the law unsettled. For now, the decisions on the pattern-

or-practice argument in single plaintiff cases are favorable to the defense. The use of time-barred acts as background evidence of discriminatory intent, however, is more problematic, and that issue must be kept in mind in preparing a case for summary judgment or trial.❖

ABOUT THE AUTHOR

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Religious Accommodations: An Overview

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I. Introduction

Most federal employees are aware that employers are required under the Rehabilitation Act to accommodate, or attempt to accommodate, the legitimate workplace needs of disabled employees. Less well known is the duty under Title VII to accommodate, or attempt to accommodate, an employee's sincerely held religious practice that conflicts with a workplace rule. This article is designed to provide an overview of the basic issues that arise in religious accommodation cases under Title VII. As discussed below, it is easier for employees to meet the threshold issues in a religious accommodation case than in a disability accommodation case. However, an employer's resulting duty to accommodate religious practices is much lighter than the duty to accommodate disabled employees.

II. The duty to accommodate religious practices

When Title VII was originally passed in 1964, it contained no affirmative requirement that employers accommodate their employees' religious practices. Rather, it prohibited disparate treatment on the basis of race, color, sex, national origin, and religion. The duty to accommodate religious practices originated in regulations promulgated by the Equal Employment Opportunity Commission (EEOC). In 1967 those regulations required an employer to accommodate an employee's or prospective employee's religious practices unless the employer could demonstrate that accommodation would result in "undue hardship on the conduct of the business." 29 C.F.R. §1605.1(b)(c) (1967). Current EEOC regulations maintain this same language. *See* 29 C.F.R. § 1605.2(b); *see generally* 29 C.F.R. §1605, Appendix A.

In 1972 Congress followed the EEOC's lead by amending Title VII to include a provision requiring reasonable accommodation for religious practices. The accommodation provision was oddly incorporated into the definition of religion section (§ 701(j)). That section provides that the term "'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

III. Elements of a religious accommodation claim

The traditional three-part burden shifting analysis used for disparate treatment claims under Title VII, provided for in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), is inapplicable to religious accommodation cases. Rather, a two-step analysis is typically used. First, to make out a prima facie case for denial of a religious accommodation, an employee must show that he or she "(1) ... held a bona fide religious belief conflicting with an employment requirement; (2) ... informed [his or her] employer of this belief; and (3) ... [was] disciplined for failing to comply with the conflicting employment requirement." *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002) (internal quotations omitted); *see also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65 (1986).

If an employee can establish these elements of the prima facie case, the employer then has the burden to either show that it offered a reasonable accommodation that effectively resolved the conflict, or that any of the accommodations suggested by the employee would pose an undue hardship to the employer. *Tiano v. Dillard Dep't Stores,* 139 F.3d 679, 681 (9th Cir. 1998); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 398 (9th Cir. 1978).

Whether an employment rule conflicts with an employee's religious practice, whether the employee did or did not inform his or her employer of the religious belief at issue, and whether and how the employee was disciplined for failing to comply with an employment rule are typically questions of fact, and are not discussed herein. Rather, the discussion below focuses on the legal framework in two areas, how to analyze what is a religious practice, and what is the scope of the duty to accommodate, assuming that the other elements are met.

IV. What is a sincerely held religious belief or practice?

The first step in establishing a prima facie case for religious accommodation requires that the practice at issue be "religious" in nature. In disability accommodation cases, the analogous first step typically requires a showing that the plaintiff is a person with a disability. Generally speaking, the Supreme Court has been narrowing the definition of who is a disabled person. *E.g., Sutton v. United Air Lines*, 527 U.S. 471 (1999) (must take corrective measures into account when considering whether a person has a disability). Moreover, physical and mental disabilities are evidenced through a variety of objective criteria and medical reports. Showing that a given practice is "religious," however, is based largely on plaintiff's own subjective evidence and is therefore an easier showing to make.

First, we are, of course, free to believe what we will, and the courts will not attempt to determine the truth of an employee's religious beliefs. The judiciary is "ill-equipped to sit in judgment on the verity of an adherent's religious beliefs." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). The Supreme Court has wisely recognized that the existence of an individual's religion or religious belief is not subject to proof. *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("[People] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."). Yet it is intuitive that not every action or practice that may be labeled "religious" is actually religious. What constitutes "religious" belief in the first place? What if an organized religion disavows the plaintiff's putative religious practices carried out in its name?

Congress gave virtually no guidance to the courts in determining the parameters of religious practice to be protected under Title VII. *Redmond v. GAF*, 574 F.2d 897, 900 (7th Cir. 1978). Legislative history for the 1972 amendment regarding the duty to accommodate is sparse and unhelpful. 18 CONG. REC. 705-06 (1972); *Philbrook*, 479 U.S. at 69.

A framework has emerged, however, in which to address these issues. Title VII jurisprudence uses the same analysis of religion and religious belief found in cases arising under the Free Exercise Clause of the First Amendment. *Eatman v. United Parcel Serv.*, 194 F.Supp. 2d 256, 268 (S.D.N.Y. 2002). Rather than examine the objective content of the employee's belief system, courts will consider "whether the beliefs professed ... are sincerely held and whether they are, in [the employee's] own scheme of things, religious." *Id.* (citations omitted); *see also Welsh v. United States*, 398 U.S. 333, 340 (1970) ("religious" belief can stem from ethical or moral beliefs if those beliefs "occupy ... a place parallel to that filled by God in traditionally religious persons"); *Redmond v. GAF*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) (same); *Peterson v. Wilbur Communications,* 205 F. Supp. 2d. 1014, 1018 (E.D. Wis. 2002) (rather than attempting to determine the content of a religion, courts will take a functional approach and ask if a belief "functions as" religion to the individual).

This analysis largely avoids examining the content of a plaintiff's religious beliefs. Although

a few courts have examined belief content, *e.g.*, *Slater v. King Soopers,* 809 F. Supp. 809, 810 (D.Colo. 1992) (KKK is not a religion under Title VII, due to its political and social character); *Bellamy v. Mason's Stores*, 508 F.2d 504, 505 (4th Cir. 1974) (same), the better analysis is to examine whether the beliefs, whatever they may be, function as a religion to the plaintiff. Do they play a central role in the plaintiff's life? Do they help order the plaintiff's world? Does the plaintiff say that they do? Thus, beliefs that may be objectively characterized as political may still operate as religious beliefs to the plaintiff if they are sincerely held. *See Peterson*, 205 F. Supp. 2d at 1021.

Examining the sincerity of plaintiff's beliefs within his or her "scheme of things" is critical in determining if the belief system functions as a religion to the plaintiff, especially in the absence of any analysis of belief content. *See Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985), *remanded on other grounds*, 479 U.S. 60 (1986). In addition to whether or not the belief plays a central role in plaintiff's life, factors that indicate insincerity include acting in a manner inconsistent with the beliefs or an incentive to hide secular interests behind a veil of religious doctrine. *Id.*; *see also Bailey v. The Associated Press*, 2003 WL 22232967 (S.D.N.Y. Sept. 29, 2003) (plaintiff had no explanation for why his religion suddenly required him not to work on Sundays when he had done so for years and when he did not attend church every Sunday even when not working); *Hussein v. Waldorf Astoria*, 134 F. Supp. 2d 591, 597 (S.D.N.Y. 2001) (claim that plaintiff's religion required him to wear a beard found to be insincere when he had never worn a beard to work in prior fourteen years, and when he shaved it off three months later).

Sincere religious belief is not static, however, and past conduct is not always determinative of the sincerity of present beliefs. *EEOC v. IBP,* 824 F. Supp. 147, 151 (C.D. Ill. 1993)("Plaintiff's absence of faith prior to December 1988 and his loss of faith in 1990 do not prove that his beliefs [prohibiting him from working on the Sabbath] were insincere in April 1989.").

A related question is whether, even within the plaintiff's own "scheme of things," the practice at issue is a personal choice or a religious act. Title VII does not protect personal secular preferences. *Tiano*, 139 F.3d at 682. Title VII does, however, protect more than simply those practices that are mandated by the objective tenets of the plaintiff's religion. To do otherwise would require courts to analyze and interpret the internal tenets of religious law and doctrine, something that courts are ill-equipped to do. *Heller v. EBB Auto*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Redmond*, 574 F.2d at 900. Drawing a distinction between those unprotected practices that are merely personal, non-religious preferences, and protected practices that are religious within the plaintiff's "scheme of things," yet beyond the apparent requirements of organized religion, is difficult.

Typically, plaintiff's own evidence as to what is religious for him will carry the day. *EEOC v. Arlington Transit Mix,* 734 F. Supp. 804, 807 (E.D. Mich. 1990), *rev'd on other grounds*, 957 F.2d 219 (6th Cir. 1991) (where Fundamentalist Baptist plaintiff was sincere in his belief that the Bible mandated his attendance at services on both Sunday and Wednesday, it was irrelevant whether or not his church agreed with him); *see also* 29 C.F.R. §1605.1 ("The fact that no religious group espouses such beliefs ... [or that fact that plaintiff's own religious group] may not accept such belief" is not determinative of religious sincerity.).

Sometimes plaintiff's own evidence supports a finding that the practice at issue is not, in fact, religious to the plaintiff. *See Dachman v. Shalala*, 2001 WL 533760 *4, (4th Cir. May 18, 2001) (Orthodox Jewish employee's own testimony confirmed that her decision to leave work early, prior to commencement of Sabbath, in order to make arrangements and to shop, was a personal preference rather than a religious practice); *Eatman*, 194 F. Supp. 2d at 268 (court found, based on plaintiff's own statement, that his decision to wear dreadlocks was a personal choice not mandated by his religion); *Wessling v. Kroger*, 554 F. Supp. 548 (E.D. Mich. 1982) (leaving work early to set up for a church play was not protected religious activity).

Occasionally plaintiffs and courts will refer to objective evidence either to support or refute the religious nature or sincerity of the practice at issue. *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991) (1983 U.S. Bishops' Pastoral Letter on War and Peace cited as support for plaintiff's sincere belief that his religion precluded him, as a Roman Catholic FBI agent, from investigating a group that was alleged to have destroyed government property at a military recruiting facility); *Tiano*, 139 F.3d at 682 (Catholic employee's statement that she had to go on religious pilgrimage at a specific time was outweighed by other evidence showing that the *timing* of the trip was not religiously mandated).

Although the foundational issue of what is a religious practice presents a number of interesting questions, given the utter subjectivity of the issue,

many defendants in both accommodation cases and disparate treatment cases simply choose not to challenge the validity of the plaintiff's religious beliefs. *Van Koten v. Family Health Management,* 955 F. Supp. 898, 902 (N.D. Ill 1997), *aff'd*, 134 F.3d 379 (7th Cir. 1998) (defendant did not challenge plaintiff's religious belief in "Wicca," which was a "shamanistic, nature based ...[religion] ... predicated on ... brotherly love and harmony...." and according to which plaintiff professed to be a vegetarian, have psychic abilities, and believe in astrology, reincarnation, and that Halloween was a holy day).

V. Scope of the duty to accommodate religious practices

Most religious accommodation cases turn not on whether the practices at issue are "religious," but rather on the scope of the duty to accommodate and whether there is an "undue hardship" to the employer. As an initial matter, it is clear that once the employee raises the issue of religious accommodation, the employer has a duty to engage in a discussion with the employee to evaluate what accommodation, if any, should be made. *American Postal Workers Union, San Francisco Local v. Postmaster General*, 781 F.2d 772, 777 (9th Cir. 1986); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145 (5th Cir. 1982) ("bilateral cooperation is appropriate in the search for reconciliation"). This duty to engage in a discussion is similar to the obligation to engage in the interactive process in disability accommodation cases.

Congress has offered essentially no guidance on the scope of the duty to accommodate religious practices. *Philbrook*, 479 U.S. at 69. The only direction written into the statute is that an accommodation must be "reasonable." 42 U.S.C. § 2000e (j). The Supreme Court has, however, established two primary principles that delimit the scope of the requirement. First, a religious accommodation imposes an undue hardship, and therefore need not be offered, if it requires the employer to sustain more than a *de minimis* cost. *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). Second, the employee is not entitled to the accommodation of his or her preference. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986).

In *Trans World Airlines v. Hardison*, the complainant, after working at TWA as a clerk for about one year, became an adherent to the Worldwide Church of God. As a result, he asserted he could no longer work on his Sabbath, which was from sunset on Friday until sunset on Saturday. Hardison worked at TWA's maintenance and overhaul base in Kansas City, which operated twenty-four hours a day, 365 days a year. Initially Hardison worked a midnight shift position in which he had sufficient seniority to permit him to have Saturdays off. The problem arose when Hardison bid on and received a day job for which he had less seniority. Because he had, under a collective bargaining agreement, lower seniority at the new job, he was no longer exempt from working on Saturday, his Sabbath. He failed to report to work on Saturdays and was ultimately terminated for insubordination. *Hardison*, 432 U.S. at 66-69.

The accommodation options available to TWA were: (1) to permit Hardison to work a four day week (part time) and to have supervisory personnel or personnel from other sections of the company perform his job on Saturdays, or (2) to require other co-workers, with greater seniority, to work Saturdays in order to permit Hardison to observe his Saturday Sabbath. The Court held that neither was required. Congress never intended for companies to break collective bargaining agreements in order to accommodate employees' religious needs. Similarly, the Court held that it was an undue hardship to require TWA to pay overtime or premium wages to supervisors or personnel from other departments to fill in for Hardison on Saturdays. The Court went even further and plainly stated that requiring TWA "to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. Thus, under *Hardison*, any accommodation that creates more than a *de minimis* cost will create an undue hardship.

The "undue hardship" standard for disability accommodations is radically different. In the disability context, an employer "must show substantially more difficulty or expense than would be needed to satisfy the undue hardship requirement for religious accommodation." *Bryant v. Better Business Bureau of Maryland*, 923 F. Supp. 720, 740 (D. Md. 1996) (citations omitted). Indeed, "it is clear from the [legislative history] that Congress intended to reject the *de minimis* rule of *Hardison*" in connection with the undue hardship standard under the Americans with Disabilities Act (ADA). *Eckles v. Consolidated Rail*, 94 F.3d 1041, 1049 (7th Cir. 1996) (noting ADA legislative history stating that accommodations under the ADA must be provided unless significant difficulty or expense was shown). Although the Federal Government falls under the ambit of the Rehabilitation Act, rather than the ADA, the same standards apply under both laws. *See* 29 C.F.R. § 1614.203.

Finally, a reasonable accommodation proposed by the employer may burden the employee so long as it does not include an unexplained diminution of employee status or benefits. In *Philbrook*, the Court noted that requiring the plaintiff to take unpaid leave for church attendance on his Sabbath appeared to be reasonable so long as it had "no direct effect upon either employment opportunities or job status." *Philbrook*, 479 U.S. at 70-71; *see also Wright v. Runyon,* 2 F.3d 214, 216 (7th Cir. 1993) (accommodation required plaintiff to accept "nonpreferrable position" but was reasonable because it did not require reduction in pay or benefits); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (employee has burden to explore employer's flexible scheduling policies before requesting additional accommodations); *Greenfield v. City of Miami,* 844 F. Supp. 1519, 1524 (S.D. Fla.1992) (removal of flex time and unpaid leave was reasonable accommodation where plaintiff had abused flexible scheduling option). Even a reduction in benefits may be an acceptable burden on an employee when it is temporary. *Cosme v. Henderson*, 287 F.3d at 160 (reasonable accommodation included offer to transfer employee that carried with it a temporary ninety day loss of seniority).

The second primary principle of undue hardship for religious accommodations is that the plaintiff is not entitled to the accommodation of his choice. Rather, if the employer offers one accommodation that resolves the conflict between the employee's religious practice and the employment rule at issue, then the employer has done enough. This issue was decided in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 69.

The plaintiff in *Philbrook*, as in *Hardison*, was a member of the Worldwide Church of God. His religious practices required him to take six school days off per year. The school's collective bargaining agreement permitted employees to take up to three days of leave, not charged against annual leave, for mandatory religious holidays. The school board also prohibited personal leave for uses that were otherwise specified in the collective bargaining agreement, such as religious holidays. Thus, plaintiff was forced to take three days of unpaid leave to attend to the full complement of his religious duties. Plaintiff believed this was unfair and argued that he be permitted to either use his personal leave for religious purposes or pay for a substitute teacher in his stead on the days when he was away from the school for religious purposes. *Id.* at 64-65.

Although the Supreme Court remanded the case for further factual findings, it held that where an employer has offered a reasonable accommodation, the statutory inquiry is at an end. *Id.* at 68-69. That is, the fact that the employee would prefer a different reasonable accommodation than the one offered by the employer is irrelevant. If the employer offers one reasonable accommodation that resolves the conflict, it need not analyze whether the accommodations suggested by the employee would or would not cause the employer undue hardship. *Id.* Undue hardship only enters the picture when the employer claims that it cannot offer any accommodation without undue hardship. *Id.*

The EEOC suggests a variety of accommodations that employers should consider in religious accommodation cases. These include voluntary job swapping or substituting and flexible scheduling. *See* 29 C.F.R. § 1605.2(d). In addition, in the federal workplace, 5 U.S.C. § 5550a grants compensatory time off to employees "whose personal religious beliefs require the abstention from work during certain periods of time." Because this statute also provides for an exception "as may be necessary to efficiently carry out the mission of the agency," it is not clear how, if at all, this statute changes the accommodation analysis.

In reaching its decision, the *Philbrook* court reviewed EEOC guidelines that state that an employer should "offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." *Philbrook*, 479 U.S. at 69 n.6 (quoting 29 C.F.R. § 1605.2(c)(ii)). The Court noted that this provision was inconsistent with the plain language of Title VII to the extent that it required employers "to accept any alternative favored by the employee short of undue hardship." *Id.* Subsequent to *Philbrook*, the EEOC has asserted that the provision "does not require an employer to provide any alternative favored by an employee," and thus it is consistent with Title VII as interpreted in *Philbrook. See EEOC Policy Statement on Ansonia v. Philbrook*, May 9, 1988, *available at* http://www.eeoc.gov/types/religion.html.

VI. Conclusion

Most plaintiffs, if they are sincere in their beliefs, will be able to establish the first step in a prima facie case of religious accommodation. Assuming that such employees notify their employer of their religious practices, and that such practices actually conflict with workplace rules, then such a plaintiff will be entitled to a

reasonable accommodation. That accommodation need not be the plaintiff's first choice, and it may impose certain burdens upon the plaintiff and still be considered reasonable. Moreover, if the accommodation imposes an undue hardship on the employer, defined as a *de minimis* cost, the plaintiff should not count on being accommodated.❖

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Notes

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