1-1-1995

Current Developments in Federal Employment Discrimination Law, 15 N. Ill. U. L. Rev. 307 (1995)

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INTRODUCTION

The Americans With Disabilities Act (ADA),[1] which was enacted in 1990, and the Civil Rights Act of 1991 (1991 Act)[2] created sweeping changes in federal employment discrimination law, the effects of which are just beginning to be felt.[3] The ADA both provided new rights and expand-

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1. 42 U.S.C. §§ 12101-12134 (Supp. IV 1992). Title I (§§ 12111-12117) of the ADA specifically prohibits discrimination by private employers who engage in an industry affecting commerce and who employ 15 or more employees for 20 or more weeks within the current or preceding calendar year. § 12111(5)(A). Pursuant to Title I, the definition of an employer also includes employment agencies, labor organizations, and joint labor-management committees. § 12111(2). Because the components of the definition of an employer under Title VII have been expressly incorporated into Title I of the ADA, it appears likely that state and local employees are protected under Title I. § 12111(7). In addition, Title II of the ADA forbids employment discrimination by state and local governments. §§ 12131-12134. However, the United States, a United States corporation, an Indian tribe, and a bona fide private membership club are expressly excluded from employment discrimination coverage under the ADA. § 12111(5)(B).

2. The amendments created by the Civil Rights Act of 1991 appear in Title VII as follows: 42 U.S.C. §§ 2000e(l),(m),(n); 2000e-1(b),(c)(1)-(3); 2000e-2(k)-(n); 2000e-4(h)(2)-(j); 2000e-5(e)(2),(g)(2)(B); 2000e-16(d) (Supp. IV 1992). The Age Discrimination in Employment Act was amended at 29 U.S.C. § 626(e) (Supp. IV 1992). The 1991 Act also added 42 U.S.C. §§ 1981(b),(c) (Supp. IV 1992). The compensatory and punitive damage provisions created by the 1991 Act appear at 42 U.S.C. § 1981a (Supp. IV 1992).

3. One reason for this delayed effect is that although the ADA became effective on July 26, 1992, for the first two years after its effective date, coverage did not extend to the very small employer as it now does in conformity with the language of Title VII: any employer who employs 15 or more employees during 20 weeks of the current or preceding calendar year may be subject to liability. Pub. L. 101-336 § 108; 42 U.S.C. § 12111(5)(A) (Supp. IV 1992). Another reason for the delayed impact is that the major changes to federal employment discrimination law which were brought about by the 1991 Act have very recently been ruled to have a prospective application only. Landgraf v. USI Film Prod., 114 S. Ct. 1483 (1994) (holding that both the punitive and compensatory damages provisions of

ed existing rights for disabled employees under federal law.[4] The 1991 Act was intended by Congress primarily to reverse several Supreme Court decisions and to expand the relief available to successful claimants under existing federal anti-discrimination statutes.[5] The United States Supreme Court has since had an opportunity to interpret some of this legislation and, apparently undaunted by recent congressional disapproval, has also taken an active part in attempting to clarify some employment discrimination issues which were not affected by either of these statutes.[6]

The result has been considerable expansion by a liberal Congress of some longstanding doctrines in federal employment discrimination law. The expansion has seemed to erode, however, under recent interpretations by a conservative Supreme Court whose opinions have collapsed or contracted other areas of federal employment discrimination law. This trend has created a decided tension between the Court and Congress and left a vestige of uncertainty looming on the horizon for those as-of-yet uninterpreted provisions.[7] The purpose of this paper is modest: to provide an overview and summary of the present, albeit conflicting, state of federal employment discrimination law with special emphasis on recent decisions within the Seventh Circuit.

Part I of this paper discusses the newest, most expansive piece of federal employment discrimination legislation, the ADA, its scope, its

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Title VII should not apply retroactively to litigation which was pending on or before the effective date of the 1991 Act).

4. Prior to enactment of the ADA, the most comprehensive federal remedy for disabled individuals was the Rehabilitation Act of 1973 which protects the disabled from discrimination in any program or activity receiving federal financial assistance. 29 U.S.C. §§ 701-795 (1988). The Rehabilitation Act also requires that federal contractors make affirmative efforts to employ and promote the disabled. § 791(b). Thus, the Rehabilitation Act covers substantially fewer numbers of employers than does the ADA.

5. Pursuant to sections 2 (Findings) and 3 (Purposes) of Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat.) 556, Congress articulated a need to respond to recent Supreme Court decisions, referring specifically to the case, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), as a decision which weakened federal civil rights protections. The amendments to 42 U.S.C. § 1981 (Supp. IV 1992) were designed to reverse in part another Supreme Court decision, Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

6. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993); Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993).

7. Given the very recent changes in the political affiliation of a majority of the members of Congress and the somewhat recent changes in the composition of the Supreme Court, it has become even more difficult to predict the future direction of the law in this volatile area and perhaps even more difficult to know the current direction of the statutory law along with the current binding effect of some recent Supreme Court decisions. Thus, practitioners and litigants cannot be certain as to how the past tension which existed between Congress and the Court will likely be played out.

relationship to the Rehabilitation Act, and the limited available judicial interpretation of the ADA within the Seventh Circuit.[8] Part II assesses the current status of Title VII in terms of general burdens and methods of proof,[9] changes in available relief for prevailing plaintiffs under Title VII,[10] the limited retroactive application of the 1991 Act,[11] and the current scope of sexual harassment hostile environment law.[12] Part III provides an overview of the Age Discrimination in Employment Act (ADEA) and describes Congress' movement toward unifying interpretation of ADEA claims with the interpretation afforded under Title VII.[13] Finally, Part IV of this paper summarizes the return under 42 U.S.C. § 1981 to the analytical format existing under the statute for claims of racial discrimination in employment prior to June 15, 1989.[14]

I. THE AMERICANS WITH DISABILITIES ACT

As of July 26, 1994, pursuant to Title I of the ADA,[15] all employers[16] who employ fifteen or more persons are prohibited from discriminat-

8. *See infra* notes 15-61 and accompanying text.
9. *See infra* notes 62-85 and accompanying text.
10. *See infra* notes 86-95 and accompanying text.
11. *See infra* notes 96-107 and accompanying text.
12. *See infra* notes 108-127 and accompanying text.
13. *See infra* notes 128-141 and accompanying text.
14. *See infra* notes 142-147 and accompanying text.
15. 42 U.S.C.A. §§ 12101-12117 (Supp. IV 1992). Title I of the ADA requires exhaustion of administrative remedies parallel to the procedure under Title VII; that is, a claimant must first file a charge of discrimination with the Equal Employment Opportunity Commission, and in states such as Illinois (deferral states), a claimant must file with the state agency. § 12117. *But see* Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279-80 (W.D. Wis. 1993) (holding that a claimant pursuing relief under Title II of the ADA--governmental programs and services--would not be required to exhaust administrative remedies prior to filing a suit in federal court even when the claimant alleged employment discrimination as the basis of the claim because the exhaustion language in the EEOC regulations referred specifically to Title I claims).
16. In Janopoulos v. Harvey L. Walner & Assocs., 835 F. Supp. 459, 461-62 (N.D. Ill. 1993), the district court interpreted the word "employer" under the ADA in conformity with the interpretation given under Title VII and held that the owner of a professional corporation was the corporation's alter ego and thus was subject to liability under the ADA. It should be noted, however, that the United States Court of Appeals for the Seventh Circuit has not expressly addressed the question of individual liability under Title VII, that the federal circuit courts of appeals are divided on this issue, and that, in fact, the district courts within the Seventh Circuit are not in agreement. *Id.* at 461. The Seventh Circuit has, however, held that a supervisor may be personally liable under Title VII. Gaddy v. Abex Corp., 884 F.2d 312, 318-19 (7th Cir. 1989).

ing against any "qualified individual with a disability."[17] The definition of "disability" is quite broad and includes:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.[18]

In describing forbidden employment practices, the ADA language is substantially similar to the language of Title VII and thus can be presumed to be as far-reaching as Title VII.[19]

Although the ADA is expansive, Congress also made explicit exceptions to coverage. An employer may prohibit the illegal use of drugs and alcohol at the workplace.[20] Thus, an "employee or applicant who is currently engaging in the illegal use of drugs" is not considered to be a "qualified individual with a disability."[21] However, an individual who is enrolled in or who has successfully completed a drug rehabilitation program

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17. 42 U.S.C. § 12112(a) (Supp. IV 1992).

18. *Id.* § 12102(2).

19. The ADA expressly declares that: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). This language closely parallels Title VII. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (1982).

Under the ADA, it is also unlawful for an employer to engage in the following practices: to limit, segregate, or classify an individual because of a disability; to use qualifications, standards, or employment tests or other criteria that screen out disabled individuals unless the standards or tests are known to be job-related and consistent with business necessity; to fail to use tests in such a way to ensure that the results reflect abilities rather than disabilities; to fail to make reasonable accommodations to the known disability of a qualified individual; to discriminate against a qualified individual because that individual associates with or has a relationship with a disabled individual; or to take part in a collective bargaining agreement that has the effect of discriminating against a qualified individual with a disability. 42 U.S.C. § 12112(b). For similar language in Title VII, see 42 U.S.C. § 2000e-2(a)(2) (1982).

One unique aspect of the ADA prohibitions is their complete ban upon administration of medical examinations or inquiries about disabilities prior to an initial offer of employment. 42 U.S.C. § 12112(d)(2)(A). An employer may only inquire into an individual's ability "to perform job-related functions." *Id.* § 12112(d)(2)(B).

20. 42 U.S.C. § 12114(c)(1). Nicotine addiction is neither expressly included nor explicitly excluded as a disability under the ADA. For a general discussion of this issue see Mark W. Pugsley, *Nonsmoking Hiring Policies: Examining the Status of Smokers Under the Americans With Disabilities Act of 1990*, 43 DUKE L.J. 1089 (1994).

21. 42 U.S.C. § 12114(a).

and is not currently taking illegal drugs may be a qualified individual with a disability.[22] Other specific congressional exceptions to disability coverage include: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders due to the current use of illegal drugs.[23]

As might be expected, litigation issues generally revolve around three aspects of the statute: whether an individual is "disabled" within the meaning of the statute; if so, whether a disabled individual is "qualified" within the meaning of the ADA; and, finally, whether an employer has made "reasonable accommodations" to the known disability of the otherwise qualified yet disabled individual.[24] First, as to the meaning of the word "disabled" under the ADA, there are no published opinions from the United States Court of Appeals for the Seventh Circuit or from district courts within the Seventh Circuit which address this particular issue. The regulations promulgated pursuant to the ADA, however, make clear that a lesser standard should not be applied to claims pursued under the ADA than to claims brought via the Rehabilitation Act of 1973 and the regulations promulgated pursuant to that Act.[25]

Under the Rehabilitation Act and similar federal statutes, courts and legislatures have defined disability as including the following:

> epilepsy, cardiovascular disease, former drug use, psychiatric problems, legal blindness, manic depressive syndrome, ankylosing spondylitis, which causes stiffening of the joints, nervous and heart conditions, multiple sclerosis, blindness in one eye, a heart condition, osteoarthritis of the knee joints, cerebral palsy and dyslexia, right leg amputation, and unusual sensitivity to tobacco smoke. The legislative history of the ADA makes clear that Congress also meant "disability" to include such additional conditions as muscular dystrophy, infection with the AIDS virus (HIV), mental retardation, alcoholism, and emotional illness.[26]

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22. *Id.* § 12114(b).
23. *Id.* § 12211.
24. *Id.* § 12111(8), (9).
25. 29 C.F.R. § 1630.1(c) (1994).
26. Lawrence D. Postol & David D. Kadue, *An Employer's Guide to the Americans With Disabilities Act: From Job Qualifications to Reasonable Accommodations*, 24 J. MARSHALL L. REV. 693, 696 (1991) (footnotes omitted).

Additionally, the ADA regulations state that the term disability does not include physical characteristics, such as height, weight, or muscle tone, personality traits, including poor judgment or quick temper, and environmental, cultural, or economic deprivations, such as indigence, poor education, or a record of imprisonment.[27] Similarly, "temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities."[28] Thus, sprained or broken joints and limbs do not normally meet the definition of disability.[29] The regulations also expressly state that "except in rare circumstances, obesity is not considered a disabling impairment."[30]

Second, in order to be qualified, a disabled employee or prospective employee must be able to "perform the essential functions of the employment position."[31] In assessing whether particular aspects of a job are essential, a court is permitted to consider the employer's judgment or opinion as to the essential job functions.[32] Additionally, if an employer has created a written job description before soliciting and interviewing job candidates, the description is to be considered as evidence of the essential functions of the job.[33]

In *E.E.O.C. v. AIC Security Investigation, Ltd.*,[34] the United States District Court for the Northern District of Illinois recently held that a factual issue existed as to whether an individual who missed work due to surgery and treatments for cancer was a qualified, although disabled, individual within the meaning of the ADA. The defendant, a provider of commercial security services, did not dispute the fact that the plaintiff's cancer met the definition of disability under the ADA.[35] However, the defendant's main contention was that the plaintiff, who served as the defendant's chief executive of the security guard division, was not able to perform the essential functions of his job due to absences from work for medical care.[36]

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27. 29 C.F.R. § 1630.2(h) app.

28. *Id.* § 1630.2(j) app.

29. *Id.*

30. *Id. But see* Cook v. Rhode Island Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 25 (1st Cir. 1993) (upholding verdict for obese plaintiff because employer treated plaintiff as though her condition substantially limited her ability to perform a job which required no unique physical skills).

31. 42 U.S.C. § 12111(8) (Supp. IV 1992).

32. *Id.*

33. *Id.*

34. 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

35. *See id.* at 1063-67.

36. *Id.* at 1063. Another argument made by the defendant was that the plaintiff's short-term memory loss rendered him incapable of performing the central functions of his

In his capacity as chief executive, the plaintiff supervised approximately 300 employees and hundreds of security guards, dealt with labor unions, established price rates, and monitored and disciplined employees.[37] The employer argued that during the last twelve months of his employment, the plaintiff missed work as much as twenty-five percent of the time.[38]

The court ruled that although the plaintiff sometimes left work as early as 2:30 in the afternoon for radiation treatments, as long as he was able to fulfill his job duties, he would be found qualified.[39] The court so concluded despite evidence which established that the plaintiff's "normal" workday prior to the advent of his illness began between 8:00 and 8:30 a.m. and ended at approximately 6:00 or 6:30 p.m.[40] Finding evidence demonstrating that, after the plaintiff became ill, he continued to work long hours, that he even worked on Saturdays, and that he also accomplished a great deal of his work at home,[41] the court reasoned that:

> To be sure, attendance is necessary to any job, but the degree of such, especially in an upper management position such as Wessel's [the plaintiff's], where a number of tasks are effectively delegated to other employees requires close scrutiny. Further, an executive such as Wessel more than likely handled a number of his business matters through customer contact, and this usually is done by phone or in person at the customer's site. Whether a phone call is made from the office, a car phone, or a home is immaterial. Whether a contract is negotiated in the office or out of the office is immaterial. What is material is that the job gets done. Therefore, a genuine issue of fact remains as to whether Wessel was meeting that threshold of both attendance and regularity necessary

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job. *Id.* at 1064-65. The court ruled that a genuine issue of fact existed which precluded summary judgment. *Id.* at 1065. The defendant also argued that the plaintiff could not perform his work without risking harm to both himself and others based upon the plaintiff's physician's recommendation that the plaintiff abstain from driving his car because of the potential for a seizure. *Id.* at 1066. The court disposed of this argument summarily, concluding that there was no evidence which indicated that the ability to drive a car was an essential function of the plaintiff's job. *Id.*

37. *Id.* at 1061.

38. *Id.* at 1063.

39. E.E.O.C. v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060, 1061, 1064 (N.D. Ill. 1993).

40. *Id.* at 1063.

41. *Id.* at 1064.

> to perform his job successfully at the time he was discharged.[42]

The court thus indicated a need to inquire into the individual components of a particular job as determinative of an individual's qualifications rather than focusing on how that individual performed the job prior to becoming disabled.[43] In the context of the professional or executive position, this method of assessing an individual's qualifications greatly favors the employee who may be unable to perform the job in the same manner, where, for example, sustained periods of work may become impossible due to easy fatiguability, or due to appointments during working hours for treatment or therapy, so long as the employee can accomplish the required tasks.

Third, as to the employer's duty to accommodate under the ADA, there are no published opinions within the Seventh Circuit. Congress has provided some guidance in the form of a nonexclusive list of reasonable accommodations which an employer *must* make for an otherwise qualified disabled employee or prospective employee:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
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> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[44]

An employer is not, however, required to make accommodations which would create an "undue hardship"[45] which Congress has defined as "requiring significant difficulty or expense"[46] when considered in light of the following factors:

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42. *Id.*

43. E.E.O.C. v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

44. 42 U.S.C. § 12111(9) (Supp. IV 1992).

45. *Id.* § 12112(b)(5)(A). *See also* Louis C. Rabaut, *The Americans With Disabilities Act and the Duty of Reasonable Accommodation*, 70 U. DET. MERCY L. REV. 721 (1993); David Harger, Comment, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act: Reducing the Effects of Ambiguity on Small Businesses*, 41 KAN. L. REV. 783 (1993).

46. 42 U.S.C. § 12111(10)(A) (Supp. IV 1992).

> (i) the nature and cost of the accommodation needed under this chapter;
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> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
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> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[47]

Again, because ADA regulations mandate that a lesser standard not be applied to ADA claims than is applied to Rehabilitation Act claims,[48] a recent decision of the Seventh Circuit construing the duty to accommodate under the Rehabilitation Act merits consideration. In *Fedro v. Reno*,[49] the court ruled that regulations[50] which require as a reasonable accommodation

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47. 42 U.S.C. § 12111(10)(B) (Supp. IV 1992).

48. 29 C.F.R. § 1630.1(c) (1994).

49. 21 F.3d 1391, 1396 (7th Cir. 1994).

50. 29 C.F.R. § 1613.704 was in effect at the time of the court's decision. It has since been superseded by 29 C.F.R. § 1614.203(g) (1993) which provides:

> When a nonprobationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. 8337 or 5 U.S.C. 8451
> . . . .

that federal employers reassign disabled employees to vacant positions would not be interpreted to mandate that an otherwise part-time position be changed into a full-time position or be consolidated with another part-time position to create a full-time position. Mr. Fedro's mild chronic hepatitis B precluded him from working in any position in which a likelihood of violent confrontation existed.[51] As such, he could not be restored to his original position as a Criminal Investigator/Deputy Marshall.[52] He thus sought priority placement within the Department of Justice.[53] When Mr. Fedro was offered a part-time position at the level he had requested, he rejected the offer and argued that a part-time position was not a reasonable accommodation.[54] The Department of Justice declined to place him in a full-time position because under its then existing policies all such positions within his general geographic location were being performed by part-time employees.[55] The court agreed with the Department and reasoned that the accommodation requirement had always been interpreted by courts in reference to an individual employee's disability.[56] Because Mr. Fedro wanted the United States Marshall Service "to modify its staffing policies to create a new position by 'restructuring' two of its existing positions," so that he could enjoy a greater earning potential than non-disabled employees enjoyed in that position, the court concluded that such accommodations were not required.[57] Thus, according to the Seventh Circuit, under the Rehabilitation Act and its regulations, an accommodation in the nature of a modified work schedule is only required if that accommodation "makes it possible for the employee to perform a job that he or she would be otherwise incapable of doing because of a handicap."[58]

The regulation governing the federal employment reassignment requirements is much more detailed than is the law governing reassignment under the ADA.[59] The highly structured job classification system and salary schedule are the probable reasons for such a detailed federal regulation. This difference, however, does not preclude application of the

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The court stated that this change did not affect its decision. *Fedro*, 21 F.3d at 1395 n.5.

51. *Fedro*, 21 F.3d at 1393.

52. *Id.* at 1392-93.

53. *Id.* at 1392.

54. *Id.* at 1393.

55. *Id.*

56. *Fedro*, 21 F.3d at 1396.

57. *Id.*

58. *Id.*

59. Pursuant to 42 U.S.C. § 12111(9)(B) (Supp. IV 1992) and 29 C.F.R. § 1630.2(O)-(2)(ii) (1994), an employer's accommodation requirements include "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . ."

court's reasoning in *Fedro* to claims brought under the ADA. In fact, the language of the ADA regarding reassignment appears consistent with the *Fedro* court's reasoning. The ADA does not define job-restructuring to include the consolidation of two part-time positions or the creation of a full-time position.[60] Consistent with the reasoning of the *Fedro* court, the ADA refers specifically only to job-restructuring in the form of part-time employment.[61] Absent a request for the creation of a full-time position from a part-time position as a necessary response to a disability, such accommodations may not be required under the ADA within the Seventh Circuit, especially when an employer has a highly structured job classification and salary system (e.g., a collective bargaining agreement). To create a full-time position from two part-time positions under these circumstances would not accommodate the disabled employee, but instead would elevate the disabled employee over all non-disabled employees.

II. TITLE VII

The most drastic changes via statutory amendment and judicial interpretation have been to Title VII. This certainly is understandable since Title VII is the single most comprehensive legislative vehicle for redress of discrimination in employment. These changes include a restructuring of both the method and the burden of proof for certain types of claims, additional monetary relief to a prevailing litigant, and the right to a jury trial for some types of claims.

A. BURDEN AND METHOD OF PROOF

The 1991 Act reversed in part a 1989 United States Supreme Court decision, *Wards Cove Packing Co., Inc. v. Atonio,*[62] and restored the burden shifting approach for disparate impact cases which had been initially adopted by the Supreme Court in *Griggs v. Duke Power Co.*[63] Pursuant to the 1991 Act, a claim that an employment practice, although neutral on its face, has a discriminatory effect on a protected class must proceed as follows: (1) the plaintiff must identify the specific component(s)[64] of an

60. 42 U.S.C. § 12111(9)(B).

61. *Id.*

62. 490 U.S. 642 (1989).

63. 401 U.S. 424 (1971).

64. Under the 1991 Act, a plaintiff is excused from identifying each particular employment practice if the plaintiff "can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis . . . ." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. IV 1992).

employment practice which cause a disparate impact and demonstrate[65] by statistical comparisons that the practice or practices have a disparate impact; (2) if the plaintiff meets the first step, a prima facie case of disparate impact discrimination has been established and the defendant must also *demonstrate* that the employment practices or criteria are job related; and (3) if the defendant meets the second step, the plaintiff retains the opportunity to demonstrate that less discriminatory alternatives are available to the defendant which are equally predictive of successful job performance.[66]

Although Congress did not alter the method or burden of proof for claims of intentional employment discrimination under Title VII, in a decision rendered after the effective date of the 1991 Act, the Supreme Court may have effectively altered the burden of proof.[67] Since direct evidence of discrimination is rarely available, most individual disparate treatment claims under Title VII are made using the inferential method and burdens established more than twenty years ago in *McDonnell Douglas Corp. v. Green*.[68]

To establish a prima facie case of discrimination, a plaintiff must initially prove by a preponderance of the evidence that the plaintiff is a member of a protected class; that the plaintiff was qualified for the position in question; that the plaintiff was terminated, demoted, or not hired; and that the position remained available and was later filled by a qualified applicant.[69] If the plaintiff establishes these factors, the plaintiff has succeeded in demonstrating or proving a prima facie case of discrimination.[70]

The burden of proof remains with the plaintiff, however, and the defendant must then satisfy only a burden of production by offering a legitimate nondiscriminatory reason for its actions.[71] If the defendant proffers a nondiscriminatory reason for its decision, the plaintiff may still succeed if the plaintiff can demonstrate that the proffered explanation is a

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65. Under the 1991 Act, the word "demonstrates" is defined as meeting "the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

66. *Id.* § 2000e-2(k)(1)(A)(i)-(C). It should be noted that in the 1991 Act, Congress explicitly declared that the only legislative history to be utilized in the interpretation of the *Wards Cove* disparate impact line of cases is the interpretive memorandum found at 137 CONG. REC. § 15276 (daily ed. Oct. 25, 1991). For a discussion of the business necessity defense under disparate impact analysis, see Philip S. Runkel, Note, *The Civil Rights Act of 1991: A Continuation of the* Wards Cove *Business Necessity?*, 35 WM. & MARY L. REV. 1177 (1994).

67. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993).

68. 411 U.S. 792, 802-03 (1973).

69. *Id.* at 802.

70. *Id.*

71. *Id.* at 802-03.

pretext for discrimination, that is, that it is not the reason that motivated the defendant's decision or that the proffered reason is not worthy of credence.[72]

The majority in *Hicks* did not disturb the order of proof or the allocation of the burden of proof in a disparate treatment case. The Court, however, interpreted the defendant's burden of production as requiring no credibility assessment.[73] Thus, the Court concluded that the rejection of the defendant's proffered reasons does not compel judgment as a matter of law for the plaintiff.[74] Instead, the Court stated that all that is required is that the defendant "'clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action."[75] The Court explained that the burden of production involves no credibility assessment of the defendant's proffered explanation for the adverse employment action.[76] The Court thus concluded that the presumption disappears and cannot be later resurrected to compel judgment for the plaintiff.[77] The fact finder must then determine whether the plaintiff has succeeded in proving that the defendant's actions were discriminatory within the meaning of Title VII.[78]

In his dissenting opinion, Justice Souter, who was joined by Justices White, Blackmun, and Stevens, argued that this reasoning is a departure from the *McDonnell Douglas* framework because it allows the fact finder to rely for its decision on reasons not clearly articulated by the defendant or not articulated at all by the defendant.[79] The dissent argued that the very purpose of the defendant's burden of production is to narrow the issues so that the plaintiff has a meaningful opportunity to demonstrate that the proffered explanation is a pretext for discrimination.[80] The dissent found that the majority's interpretation of the *McDonnell Douglas* framework made the whole burden-shifting construct meaningless if it did not bind the employer to its proffered explanation.[81] The dissent thus concluded that

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72. *Id.* at 804.

73. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2748 (1993).

74. *Id.* at 2749.

75. *Id.* at 2747 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

76. *Id.* at 2748.

77. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993).

78. *Id.*

79. *Id.* at 2764 (Souter, J., dissenting).

80. *Id.* at 2761.

81. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2759 (1993) (Souter, J., dissenting).

if the employer's burden of production is not interpreted to make the inquiry more specific, the plaintiff's burden of proof is enhanced, and this interpretation of the inferential method of proof "greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent."[82]

Although the *Hicks* case represents the first time that the Supreme Court has ever interpreted the defendant's burden of production in such a manner, the *Hicks* decision will not dramatically affect decisions within the Seventh Circuit.[83] As early as 1991, in *Visser v. Packer Engineering Ass'n,*[84] the United States Court of Appeals for the Seventh Circuit clearly held that if the employer's proffered explanation is found to be a pretext "-a phony reason- for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason [is]" discriminatory. The entire effect of the *Hicks* decision upon the courts within the Seventh Circuit, however, remains to be seen.[85]

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82. *Id.*

83. Indeed, decisions rendered after the *Hicks* opinion have not altered the Court's analysis. *See, e.g.*, Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123 (7th Cir. 1994); McNabola v. Chicago Transit Auth., 10 F.3d 501, 513-14 (7th Cir. 1993); Rennie v. Dalton, 3 F.3d 1100, 1108 n.7 (7th Cir. 1993).

84. 924 F.2d 655, 657 (7th Cir. 1991).

85. The most interesting application of the *Hicks* rationale may well be at the summary judgment stage of the proceedings. Without a credibility assessment or a narrowing of the issues at the summary judgment phase, judgment may be entered more frequently against plaintiffs. Because the Seventh Circuit has applied the *Hicks* rationale prior to the Supreme Court's decision in that case, the impact may be greater in other circuits. Moore v. Nutrasweet Co., 836 F. Supp. 1387, 1395-1402 (N.D. Ill. 1993) (holding that raising only a possible doubt as to defendant's proffered explanation is insufficient as a matter of law to ensure the plaintiff will escape summary judgment and proceed to trial). In *Moore*, the district court relied on the reasoning provided by the Seventh Circuit in an earlier opinion:

> [I]t does not follow from all this, as [plaintiff] appears to believe, that if the plaintiff *does* rebut the employer's rebuttal--not in the sense of demolishing it but in the sense of contesting it with his own, contrary evidence--he automatically defeats summary judgment and secures his right to a trial. The district court must still make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff. If not, the court must grant the employer's motion for summary judgment.

Id. at 1396 (quoting Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989)).

B. RELIEF[86]

In addition to traditional equitable remedies in the form of back pay and interest on back pay, a Title VII claimant who alleges intentional discrimination is now entitled to both compensatory and punitive damages, and because the relief is no longer solely equitable, a claimant also has the right to a jury trial.[87] Limits have been created for both compensatory and punitive damages based on the size of an employer's workforce.[88] In order to recover punitive damages, a plaintiff must demonstrate that the employer

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86. The compensatory and punitive damages and the caps which were made available under the 1991 Act, were also made available for ADA claimants alleging intentional discrimination. 42 U.S.C. § 1981a(a)(2) (Supp. IV 1992).

87. *Id.* § 1981a(b)(2)-(3),(c). In a mixed motive case of intentional discrimination, damages are not available when a defendant "demonstrates that the respondent [defendant] would have taken the same action in the absence of the impermissible motivating factor . . . ." 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (Supp. IV 1992). In such cases, in addition to not awarding damages the court "shall not . . . issue an order requiring any admission, reinstatement, hiring, promotion . . . ." *Id.* § 2000e-5(g)(2)(B)(i). Instead, the plaintiff is limited to declaratory and injunctive relief and attorney's fees and costs which are "directly attributable only to the pursuit of" the disparate treatment, mixed motive claim. *Id.* § 2000e-5(g)(2)(B)(i).

88. The sum of the amount awarded for compensatory damages ("future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses") and for punitive damages cannot exceed the following limitations:

> (A) in the case of respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; and
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Id. § 1981a(b)(3).

It is true that the addition of a damage remedy under Title VII is a dramatic shift from the traditional equitable remedies which served as the only available relief under the statute for more than 25 years. The upper limitations on damage awards, however, provide some balance, especially for the small employer who could be bankrupt after a single successful lawsuit in which punitive damages are awarded, while recognizing that discrimination causes tangible harm to the victim. As such, the addition of the potential monetary relief should create an incentive for employers to pay greater attention to discrimination in the workplace.

acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights."[89] Certain limitations apply to these monetary remedies. For instance, a plaintiff may not recover punitive damages from a governmental employer.[90] Additionally, the damages awarded to a prevailing plaintiff cannot be duplicative of relief pursued and received under § 1981.[91] Due to the limited scope of § 1981, this restriction applies only to claims of race discrimination.[92]

A prevailing disparate impact litigant is limited to traditional Title VII equitable remedies and consequently has no right to a jury trial.[93] In addition to the longstanding entitlement to attorneys fees[94] (except in a case in which the EEOC or the United States is the prevailing party), all successful Title VII litigants, whether plaintiff or defendant, whether claims are based on impact or intentional discrimination, are entitled to expert witness fees within the discretion of the trial court.[95]

C. RETROACTIVITY

Although the 1991 Act is not retroactive as to disparate impact claims;[96] or as to court-ordered remedies, affirmative action, or conciliation agreements which were in effect and which were made in accordance with existing law;[97] or as to the Title VII provisions extending overseas;[98] or as to the Technical Assistance Institute,[99] the language of the 1991 Act provides no specific guidance for other types of claims. The general effective date provision of the 1991 Act simply states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."[100] This ambiguous language

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89. 42 U.S.C. § 1981a(b)(1).

90. *Id.*

91. *Id.* § 1981a(a)(1).

92. *Id.* § 1981(a).

93. *Id.* § 1981a(a)(1).

94. A "prevailing party" is entitled to "a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k) (Supp. IV 1992).

95. *Id.* This amendment reversed the Supreme Court's opinion in West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1146-48 (1991) (holding that language of attorney fee statute, 42 U.S.C. § 1988, is "plain and unambiguous" providing no authority to shift expert witness fees as part of attorney fee award). The question that remains is whether an award of expert witness fees will include non-testimonial as well as testimonial experts.

96. Pub. L. No. 102-166, Section 402(b), 105 Stat. 1099 (1991).

97. Pub. L. No. 102-166, Section 116, 105 Stat. 1099 (1991).

98. Pub. L. No. 102-166, Section 109(c), 105 Stat. 1099 (1991).

99. Pub. L. No. 102-166, Section 110(b), 105 Stat. 1099 (1991).

100. Pub. L. No. 102-166, Section 402(a), 105 Stat. 1099 (1991). For a general

provided problems for litigants whose claims were filed before the effective date of the 1991 Act but were still pending at that time. Many disparate treatment litigants wished to amend their claims to request compensatory and punitive damages.

These litigants' problems were compounded by two seemingly contradictory lines of Supreme Court authority on the retroactive effect of civil statutes. One line of Supreme Court doctrine makes clear that a court must apply the law in effect at the time it renders its decision.[101] In another line of cases, the Court declared that the retroactive application of a civil statute is not favored.[102]

On April 26, 1994, the Supreme Court ruled that the damage provisions under the 1991 Act are not to be applied retroactively to claims pending on or before November 21, 1991, the effective date.[103] Initially, the Court clarified that there was no conflicting Supreme Court precedent, that there is a presumption against retroactivity unless the statute unambiguously requires such application.[104] Upon examining the 1991 Act, the Court found that it did not clearly call for retroactive application of its terms.[105] The Court reasoned that the newly enacted punitive damages provision shares "key characteristics of criminal sanctions" and therefore would raise a serious question under the Ex Post Facto Clause if retroactively imposed.[106] The Court also found that because the compensatory damage provision created a new right to damages and substantially increased an employer's potential liability under Title VII, it too should apply prospectively.[107]

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discussion of the retroactivity issue under the 1991 Act, see Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035 (1992); Daniel Patrick Tokaji, Note, *The Persistence of Prejudice: Process Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567 (1993).

101. Bradley v. School Bd. of Richmond, 416 U.S. 696, 717 (1974) (ruling that statute authorizing attorney's fee award to successful civil rights litigants would be applied retroactively to cases pending on appeal at time of statute's enactment).

102. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (ruling that Department of Health and Human Services was without authority to promulgate rule mandating refund of payments for services provided before effective date of rule).

103. Landgraf v. USI Film Prod., 114 S. Ct. 1483 (1994).

104. *Id.* at 1500-01.

105. *Id.* at 1493.

106. *Id.* at 1505.

107. Landgraf v. USI Film Prod., 114 S. Ct. 1483, 1506 (1994). In a decision issued before *Landgraf*, the United States Court of Appeals for the Seventh Circuit ruled that the portion of the 1991 Act which amended 42 U.S.C. § 1981 should not apply retroactively. Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 229 (7th Cir. 1992). The court prohibited litigants whose cases were filed prior to the effective date of the 1991 Act from relying on

D. SEXUAL HARASSMENT

The 1991 Act did not directly affect claims of sexual harassment (with the exception of creating additional relief for successful disparate treatment claimants). Sexual harassment violates Title VII's prohibition of discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex."[108] Courts recognize two forms of sexual harassment: hostile work environment sexual harassment and quid pro quo sexual harassment.[109]

Hostile environment claims are created when an employer's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."[110] To prevail in a claim of sexual harassment, the plaintiff must show only that the conduct in question was unwelcome and was sufficiently severe and pervasive so as to alter the terms and conditions of employment.[111]

In *Meritor Sav. Bank v. Vinson*,[112] the Supreme Court was presented with the opportunity to definitively resolve the issue of employer liability for sexual harassment committed by a supervisor. The Court declined ruling on the issue because it found the record deficient as to whether a hostile environment had been created. The Court did, however, agree with the EEOC's position that agency principles should govern resolution of the issue.[113]

The Court left open whether 29 C.F.R. § 1604.11(c), a guideline issued by the EEOC, is entitled to deference.[114] In a concurring opinion in

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the amendments. The court reasoned that this particular amendment overruled a decision of the United States Supreme Court which meant that the amendment created a new rule of law. *Id.* This reasoning seems to conform to the conservative reading afforded the 1991 Act by the Court in *Landgraf*.

108. 42 U.S.C. § 2000e-2(a)(1) (1988). *See also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986).

109. *Vinson*, 477 U.S. at 65-66. For a discussion of the similarities and distinctions of these two legal theories and general litigation strategies for sexual harassment claims, see Marian C. Haney, *Litigation of a Sexual Harassment Case After the Civil Rights Act of 1991*, 68 NOTRE DAME L. REV. 1037 (1993).

110. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

111. *Id.* In contrast, quid pro quo sexual harassment occurs when an employer alters the conditions of employment for an employee when that employee refuses to submit to sexual demands. Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 531 (7th Cir. 1993).

112. 477 U.S. at 72-73.

113. *Id.* at 72.

114. *Id.* at 71.

Vinson, Justice Marshall, who was joined by Justices Brennan, Blackmun, and Stevens, argued that this guideline is entitled to great deference:[115]

> Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission [EEOC] will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.[116]

Justice Marshall stated that in promulgating this guideline, the EEOC conformed to "the general standard of employer strict liability with respect to agents and supervisory employees . . . ."[117] Justice Marshall also pointed out that Title VII penalties are often imposed against the employer for the acts of individual employees (reinstatement, back pay, etc.).[118]

In *Horn v. Duke Homes,*[119] prior to the Supreme Court's decision in *Vinson,* the Seventh Circuit had independently decided to adopt the EEOC's guidelines on strict liability for sexual harassment committed by a supervisory employee. In *Horn,* however, the claim involved quid pro quo harassment and not a hostile environment claim.[120] It thus remains an open question in the Seventh Circuit whether strict liability will be imposed for a hostile work environment sexual harassment claim, but it appears that agency principles will be applied to the particular employment situation to

115. *Id.* at 74.

116. *Vinson,* 477 U.S. at 74; 29 C.F.R. § 1604.11(c) (1993).

117. *Id.* at 74-75 (quoting 45 Fed. Reg. 74676 (1980)).

118. *Id.* at 75.

119. 755 F.2d 599, 606 (7th Cir. 1985).

120. *Id.* at 603. *But see* North v. Madison Area Ass'n for Retarded Citizens, 844 F.2d 401, 407-08 (7th Cir. 1988). Although the *North* decision did not involve sexual harassment, the Seventh Circuit ruled, in reliance on the *Vinson* decision, that strict liability of an employer is not mandated for the discriminatory acts of a supervisory employee unless that employee either "controlled or influenced" the employer's decision. *Id.* at 408. The Seventh Circuit clarified that in order for an employer to be held liable for the acts of a supervisory employee, the supervisor must either have committed the acts of discrimination within the apparent scope of the authority entrusted to the supervisor by the employer or the employer must have known or should have known of the supervisor's discriminatory actions and failed to take appropriate remedial measures. *Id.* at 407.

determine liability.[121] Of course, the stakes would be much higher if strict liability were imposed in such a setting given the compensatory and punitive damages provisions which are now available under Title VII for claims of disparate treatment.

In its most recent consideration of a sexual harassment claim, the Supreme Court reaffirmed its decision in *Vinson* as to the appropriate test: "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated."[122] The Court clarified that an employee's psychological well being need not seriously be affected before liability will attach, that the question "is not whether work has been impaired, but whether working conditions have been discriminatorily altered."[123] The Court thus cautioned that the individual employee's psychological well being is relevant but that all circumstances must be taken into consideration.[124] Thus, the inquiry in a hostile environment claim proceeds from both a subjective and an objective viewpoint.[125] Finally, the Court clarified that the objective portion of the inquiry should invoke the traditional reasonable person test.[126] The Court did not seize the opportunity to adopt the reasonable woman standard utilized by some of the lower federal courts but, at the same time, did not explicitly rule out such a standard.[127]

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121. *Horn*, 755 F.2d at 603.

122. Harris v. Forklift Systems Inc., 114 S. Ct. 367, 370 (1993) (quoting *Vinson*, 477 U.S. at 65, 67)).

123. *Id.* at 372.

124. *Id.*

125. *Id.* at 371.

126. Harris v. Forklift Systems Inc., 114 S. Ct. 367, 371 (1993).

127. *See* Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1455 (7th Cir. 1994) (ruling that the evidence should be viewed in the plaintiff's favor, focusing on what "a woman in her position would" do). *Cf.* Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534 & n.13 (7th Cir. 1993): "We are not called upon to decide here whether it might be more appropriate to evaluate the plaintiff's work environment from the perspective of a reasonable *woman* as opposed to a genderless reasonable person." The court in this case concluded that its decision would be the same under either standard. *Id.* For an assessment of the arguments regarding the appropriateness of the reasonable woman standard in sexual harassment litigation, see Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619 (1993); Jolynn Childers, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854 (1993).

III. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The 1991 Act made some changes to the Age Discrimination in Employment Act (ADEA) which bring it closer to Title VII in terms of administrative exhaustion requirements and procedural prerequisites to filing a lawsuit. The 1991 Act specifically eliminated the two and three-year statutes of limitation for ADEA claims and substituted the Title VII requirement that suit must be filed within ninety days of receipt of a right to sue notice from the EEOC.[128] The 1991 Act did not extend the punitive damages remedies under Title VII to ADEA claims, leaving intact the liquidated damages provision available under the ADEA for wilful violations.[129]

Additionally, the Supreme Court appeared to severely limit an ADEA claimant's ability to prove disparate treatment discrimination. In *Hazen Paper Co. v. Biggins,*[130] the Court ruled that the employer does not violate the ADEA by discharging an employee who is within the protected age group if the purpose of the discharge is to interfere with an employee's pension benefits that would have vested due to a particular number of years of service. The Court found that pension status when it is tied to years of service, although "empirically correlated with age," is a factor other than age.[131] The Court concluded that in order to be successful in an ADEA disparate treatment claim, a litigant must prove that he or she was evaluated not upon performance but upon the basis of age: "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity declines with age."[132] The Court stated that the proper remedy for a claim that an employer fired an employee to prevent pension benefits from vesting is § 510 of ERISA.[133]

What is troubling about this decision is that the same general principles are applied to disparate treatment discrimination under the ADEA as are applied under Title VII.[134] Consequently, this unanimous Supreme Court opinion can be read as an evisceration of the *McDonnell Douglas* inferential method of proving intentional discrimination not just pursuant to the ADEA

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128. 29 U.S.C. § 626(e) (Supp. IV 1992). For an overview of the ADEA, its history, and the bona fide occupational qualification defense, see Tracy Karen Finkelstein, *Judicial and Administrative Interpretations of the BFOQ as Applied to the Age Discrimination in Employment Act,* 40 CLEV. ST. L. REV. 217 (1992).

129. 29 U.S.C. § 626(b) (1988).

130. 113 S. Ct. 1701 (1993).

131. *Id.* at 1705.

132. *Id.* at 1706.

133. *Id.* at 1707.

134. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1705-06 (1993).

but under Title VII.[135] The theory underlying the *McDonnell Douglas* prima facie case, however, is that intent to discriminate is sometimes very difficult to prove.[136] The prima facie case incorporates the two most common legitimate reasons for an adverse employment decision: the employee or prospective employee was not qualified for the position or there were no available positions.[137] If the reasoning in *Biggins* were extended to claims of sex and race discrimination, many claims of discrimination which would survive the initial burden imposed by *McDonnell Douglas* would not survive the scrutiny applied by the Court in *Biggins*.

In fact, the Seventh Circuit has made the extension, holding, in conformity with *Biggins,* that an employee who was terminated for excessive tardiness on the day before her maternity leave was scheduled to begin had failed to show that the termination violated the Pregnancy Discrimination Act.[138] The court reasoned that "employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."[139] Relying on *Biggins,* the court concluded that an employer is required only to ignore an employee's pregnancy, not an employee's absences from work, even if those absences are due to pregnancy-related conditions.[140] Because the plaintiff failed to persuade the court that in the absence of her pregnancy, she would not have been fired, her discrimination claim failed.[141] The entire impact of the *Biggins* decision is yet to be played out within this circuit, but it appears that this Supreme Court ruling may place greater restrictions on plaintiffs than have been imposed in more than twenty years.

IV. 42 U.S.C. § 1981

Prior to its recent amendment, 42 U.S.C. § 1981[142] read in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to

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135. The Seventh Circuit has already followed the reasoning in *Biggins* in a fairly recent decision construing the ADEA. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125 (7th Cir. 1994) (ruling in conformity with *Biggins* that an older employee who was fired in order to reduce salary costs failed to establish intent to discriminate on the basis of age).

136. Teamsters v. United States, 431 U.S. 324, 358 & n.44 (1977).

137. *Id.*

138. Troupe v. May Dep't Stores, 20 F.3d 734, 738 (7th Cir. 1994).

139. *Id.*

140. *Id.*

141. *Id.*

142. This section is now 42 U.S.C. § 1981(a) (Supp. IV 1992).

> make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[143]

The purpose of the amendment was to reverse a recent Supreme Court decision in which the Court ruled that § 1981 prohibited discrimination only in the "making" of a contract and could not be invoked for "post-formation" discrimination such as racial harassment, demotion, or termination.[144] This congressional amendment effectively reinstates case law existing within the Seventh Circuit before 1989, the date of the Supreme Court decision in *Patterson.*

The 1991 Act retains the language of the Civil Rights Act of 1866 and adds the following language for purposes of clarification:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.[145]

Nothing about the amendment restricts this rather substantial body of pre-*Patterson* case law addressing claims of intentional race discrimination in the employment setting.[146] The amendments explicitly state that § 1981 claims may be brought against both private and public employers.[147]

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143. 42 U.S.C. § 1981 (1988).

144. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

145. 42 U.S.C. § 1981(b) (Supp. IV 1992).

146. In 1975, the Supreme Court clarified that § 1981 was not restricted to governmental employers. Johnson v. Ry. Express Agency, Inc. 421 U.S. 454, 459-60 (1975) (holding "it is well settled among the Federal Courts of Appeals--and we now join them--that § 1981 affords a federal remedy against discrimination in private employment on the basis of race"). Until the United States Supreme Court decision in *Patterson* in 1989, the United States Court of Appeals for the Seventh Circuit had applied § 1981 to private and public employment discrimination claims based on hiring and post-hiring decisions. North v. Madison Area Ass'n for Retarded Citizens, 844 F.2d 401 (7th Cir. 1988); Anooya v. Hilton Hotels Corp., 733 F.2d 48 (7th Cir. 1984); Burlington Inc. v. E.E.O.C., 582 F.2d 1097 (7th Cir. 1978).

147. "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c).

CONCLUSION

The changes to the law of federal employment discrimination have been substantial over the past several years. What is most interesting is that some of the changes have produced a liberalization of this area of the law, while others can be read as greatly restricting the available rights and remedies of victims of discrimination in the workplace. Some of the new legislation has not been meaningfully interpreted as of yet, and some of the recent decisions of the Supreme Court have not been applied by the lower courts to enough fact scenarios to provide the full flavor or impact of these decisions upon claims of discrimination. As such, much more interpretation of this law must be made before any definitive conclusions can be drawn about the course and direction of federal employment discrimination law. The assessments regarding the present state of the law and the projections made in this article about the future direction of the law are, of necessity, only provisional.