

**TIMBY'S
EMPLOYMENT LAW
HANDBOOK
FOR THE PENNSYLVANIA
EMPLOYER**

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1

AN EMPLOYEE'S RIGHTS TO EMPLOYMENT

§1.01 - INTRODUCTION

This Unit will discuss the right of an employee to employment and also the right of employer to terminate that employment – rights that all employers should be aware of and understand.

§1.02 - THE EMPLOYMENT “AT WILL” RULE

[1] *Does an Employee have a legally protected right to employment?*

As a rule “No” – Pennsylvania, and most of the rest of the United States, follows the rule that in most cases employment is “at-will.”¹ This means that, with certain significant exceptions, either the employer or the employee may terminate an employment relationship for any reason or for no reason at all.²

[2] *What are the exceptions to the “At-Will” Rule?*

There are a number of exceptions to the “At-Will” Rule.

- One important exception is when a *contract of employment* exists between the employer and the employee.
- The existence of a contract may be implied in certain case – for example if the employee provided *substantial additional consideration* to the employer.

- Also, there are certain situations when the *law prevents termination* of employment.

[3] ***The Contract Exception***

- *When does a Contract of Employment exist?*

Employment is presumptively at will - existence of the employment contract itself generally cannot be implied except in limited cases –see below.

This means that the party attempting to establish a contract of employment must do so by producing clear and convincing evidence that an employment contract actually exists.³ Obviously a written document executed by both the employer and the employee would generally prove sufficient. Oral contracts, if the terms can be proven, are also enforceable.

If a contract exists the employment is no longer at will, and the employee may only be discharged pursuant to the terms of the contract. For example, the contract could provide for discharge only for “just cause” or other reasons specified in the contract such as losing a professional license.⁴

- *Are there any circumstances when the existence of a Contract will be implied?*

Yes, although Pennsylvania Courts generally are reluctant to find that a contract is implied based on circumstances.

Oral representations by the employer, for example, regarding the terms of employment have been held insufficient to overcome the “*at-will*” presumption. Courts have, however, recognized two situations which can provide a sufficient basis to find that an implied contract of employment exists. First, when the employer has issued an employee handbook or manual. Second, when the employee has

provided substantial additional consideration to the employer beyond what might be otherwise expected under the terms of his or her employment?

- *When may issuing an Employee Handbook create a Contract of Employment?*

Employees have sometimes argued that provisions set forth in an employee handbook, manual or policy statement written and provided by the employer actually form a contract of employment. Pennsylvania Courts have held, however, that a handbook or manual only legally binds the parties if the handbook clearly states that it is to have that effect⁵. The mere publishing of a handbook does not in itself create the contract.

Generally, if an employer reserves the right in the handbook, manual, or policy statement to make unilateral changes, or has included an appropriate disclaimer it will be generally sufficient to overcome an employee's argument that the handbook creates a contract for employment. As a result, an employee handbook may contain policy statements about the terms of employment that are not contractually binding, so long as such statements are accompanied with "an appropriate, conspicuous disclaimer."⁶

However, there is at least one circumstance when a contract could be recognized based on provisions in an employee handbook. If the employer and its employees have actually bargained for the particular handbook provisions affecting employment terms, the courts could also find that a contract of employment as to those terms has been created.⁷

[4] ***The "Substantial Additional Consideration" Exception***

The presumption of "at-will" employment may also be overcome in another situation. This may arise in cases when the employee provided substantial additional consideration to

the employer. If it can also be shown that termination of employment would result in great hardship or loss to the employee and was known to both the employer and employee, a contract of employment could be recognized.⁸ In such a case, if an implied contract of employment is found to exist, the employee may not be fired during the contract term, absent just cause.⁹

For example, when an employer induced the employee to leave his job with promises of future opportunity, and the employee undergoes significant hardship in response to the promise, it has been found that an implied contract was created, and that the employer breached its contractual obligations.¹⁰

In order for an implied contract to be created, the additional consideration given to the employer must be substantial. The at-will presumption is not overcome every time a worker sacrifices theoretical rights or privileges.¹¹ Agreeing to a confidentiality clause, a restrictive covenant, or giving the employer the right to inventions created on company time does not constitute additional consideration.¹² Nor is detrimental reliance on a promise “relevant in determining whether an employee had a property interest in his employment.”¹³

§1.03 - THEORIES THAT DO NOT OVERCOME THE PRESUMPTION

There are facts and circumstances which have been found by the courts not to overcome the “at will” rule and as a result employment could still be terminated.

[1] *Specific Intent to Harm*

Pennsylvania state and federal courts have indicated there is no viable claim for wrongful discharge using a “specific intent to harm” exception, which implies that the employer

discharged the employee in bad faith and with the intent to harm him.¹⁴

[2] ***Implied Covenant of Good Faith and Fair Dealings***

Pennsylvania appellate courts have consistently held there is no implied duty of good faith and fair dealing that applies to termination of a pure at-will employment relationship.¹⁵ The Supreme Court held “an at-will employee has no cause of action against his employer for termination of the at-will relationship except where that termination threatened clear mandates of public policy.”¹⁶ A number of federal cases have squarely held that Pennsylvania recognizes no cause of action for wrongful discharge based upon breach of the duty of good faith and fair dealing in an at-will employment contract.¹⁷ The *McDaniel* court further held that although the duty of good faith and fair dealing exists in an at-will employment contract, there is no bad faith when an employer discharges an at-will employee for good reason, bad reason or no reason at all, so long as no statute or public policy is implicated.

[3] ***Public Policy Exceptions***

The public policy exception is currently the most controversial exception to the At-Will Employment Doctrine. Pennsylvania courts espouse extreme reluctance to expand the list of public policy exceptions and yet the list has continued to grow. Exceptions to the At-Will Employment Doctrine have been recognized in only in the most limited circumstances, where it discharges at-will employees with threatened clear mandates of public policy.¹⁸ In *Cisco v. United Parcel Serv., Inc.*, 328 Pa. Super. 300, 476 A.2d 1340 (1984), the Pennsylvania Superior Court noted:

“The sources of public policy which may limit the employer's right of discharge include legislation; administrative rules, regulation,

or decision; and judicial decision. In certain instances, a professional code of ethics may contain an expression of public policy. Absent legislation the judiciary must define the cause of action in case-by-case determinations. The courts have established a body of cases that illustrate when a Public Policy Exception will be found.”

§1.04 - WHEN DOES THE LAW PREVENT TERMINATION?

Even absent of contract of employment, the law may prevent termination of employment in certain situations. The following are some of the more significant statutes which may apply to protect employment in certain situations:

- The Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601-2654 (West 2003) - prevents termination for taking defined leave for most industries.
- The Employee Polygraph Protection Act, 29 U.S.C.A. §§ 2001-2009 (West 2003) - prevents termination for refusing a polygraph examination.
- The Jury System Improvement Act of 1978, 28 U.S.C.A. §1875 (West 2003) - prevents termination for serving jury duty.
- The Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C.A. §§ 4301-4333 (West 2003) - prevents termination of military personnel for fulfilling military duties.

§1.05 - WHAT OTHER FACTORS COME INTO PLAY WHEN SOMEONE IS FIRED?

There are several other factors which may come into play and should be considered when an employee is terminated. These include the following:

- **Workers' Compensation Act** - In *Schick v. Shirey*, 552 Pa. 590; 716 A.2d 1231 (1998) the Pennsylvania Supreme court held that discharging an employee in retaliation for filing a workers' compensation claim was a violation of public policy.
- **Unemployment Compensation Act** - The Pennsylvania Superior Court held in *Highhouse v. Avery Transp.*, 443 Pa. Super. 120, 660 A.2d 1374 (1995) and *Raykovitz v. K-Mart, Corp.*, 445 Pa. Super. 378, 665 A.2d 8833 (1995) that discharging an employee in retaliation for filing an unemployment compensation claim was a violation of public policy.
- **Occupational Safety and Healthy Act (OSHA)** - In *McLaughlin v. Gastrointestinal Specialist*, 561 Pa. 307, 750 A.2d 283 (2000), the Pennsylvania Supreme Court held that discharging an employee in retaliation for reporting a safety violation of OSHA was not a violation of public policy. In *Source v. Wright's Nitwear Corp.*, 832 F. Supp. 118 (E.D. Pa. 1993) discharging an employee in retaliation for reporting to OSHA was a violation of public policy.
- **Jury Duty** - In *Ruther v. Faller and Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978) the Pennsylvania Superior Court held that discharging an employee for attending jury duty was a violation of public policy. A statutory prohibition from preventing the termination of

an employee based upon the employee's attendance or scheduled attendance for jury duty is located at 28 U.S.C. § 1875(a) (West 2003), see above.

- **Criminal Background History** - In Hunter v. Port Kauth of Allegany Cty., 277 Pa. Super. 4, 419 A.2d 631 (1980) - the Pennsylvania Superior Court held that denying employment based upon prior criminal conviction not related to the position was a violation of public policy. A statutory provision that permits an employer to consider felony and misdemeanor convictions only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied. 18 Pa. Cons. Stat. Ann. § 9125(b) (West 2003).
- **Polygraph Test** - In Kroen v. Bedway Sec. Agency, Inc., 430 Pa. Super. 83, 633 A.2d 628 (1993) the Pennsylvania Superior Court held that discharging an employee for refusal to take a polygraph test was a violation of public policy. A statutory prohibition that prevents an employer from discharging, disciplining or discriminating in any manner against an employee or prospective employee who refuses, declines or fails to take or submit to a lie detector test is located at 29 U.S.C. § 2002(3) (West 2003).
- **Pennsylvania Human Relations Act** - Nazar v. Clark Distrib. Sys., Inc., 46 Pa. D. & C. 4th 28 (2000) the Lackawanna Court of Common Pleas held that discharging an employee for making a PHRA complaint was a violation of public policy. Statutory prohibition preventing retaliation for a filing a charge of discrimination pursuant to the Pennsylvania Human Relations Act is located at 43 Pa. Cons. Stat. Ann. § 955(b)(5)(d) (West 2003).

- **Wage Payment and Collection Law** - In Fialla-Dertani v. Pennysaver Publications of Pa., Inc., 45 Pa. D. & C. 4th 122 (2000) the Allegheny Court of Common Pleas held that discharging an employee for making a complaint under the WPCL was in violation of public policy.
- **Illegal Activity**- A number of cases determined it was a violation of public policy to discharge or take job action against the employee for refusing to engage in illegal activity or to testify against the employer who engaged in illegal activity.¹⁹
- **Work Related Incidents** - Courts have found that most day-to-day work-related incidents, that is disputes that arise over terms and conditions of employment, work rules, or company policy do not provide a basis for a Public Policy Exception.
- **Privacy** - Issues of personal privacy are among the exceptions Pennsylvania courts have yet to clearly define. A violation of public policy was found when an employee was discharged for refusal to consent to urinalysis and property search that constituted an invasion of privacy.²⁰ No violation of public policy was found when an employee was discharged for inappropriate e-mail despite employee's reasonable expectation of privacy.
- **Free Speech** - An emergent exception to the At-Will Doctrine is in the area of free speech, and whether an employer may terminate an at-will employee based upon the employee's exercise of his or her free speech rights in the workplace. In Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983), the Third Circuit held an at-will employee who was allegedly discharged for his refusal to participate in his former employer's lobbying effort and

the employee's privately stated opposition to the company's political position had stated a claim for wrongful discharge under Pennsylvania law.

- **Whistleblowing** - Pennsylvania law does not recognize the right of action of a private employee for whistleblowing activities. The statutory language of the Whistleblower Law, 43 Pa. Cons. Stat. Ann. §§ 1421-1428 (West 2003) is clear; it applies, without exception only to the public employees. In Clark v. Modern Group an Ltd., 9 F.3d 321 (3d Cir. 1993), the Third Circuit held that the Whistleblower Law is not an indicator of public policy in private discharge cases. There is no general public policy of protecting whistleblowers who are not employed in the public sector.

2

DISCRIMINATION IN THE WORK PLACE

§2.01 - INTRODUCTION

The law in the United States establishes a simple and basic premise: “It is illegal for an employer to ‘discriminate’ in the workplace.” But what does that mean exactly? *First, what does “discrimination” mean? Who does the law protect? In which aspects of employment is it illegal to discriminate? What are the potential penalties for employers who do discriminate?* All of these questions will be addressed in this Unit.

§2.02 - THE LAW

The following laws prohibit various forms of “discrimination” in the work place:

- **Federal Statutes – The Civil Rights Acts**

- ✓ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et. seq. (“Title VII”), prohibits discrimination against employees and applicants for employment on the basis of race, color, religion, sex (including pregnancy, childbirth, abortion, and related conditions) and national origin.

- ✓ The Civil Rights Act of 1866, 42 U.S.C. § 1981, prohibits discrimination on the basis of race, color and ancestry or ethnic characteristics.

✓ The Civil Rights Act of 1871, 42 U.S.C. § 1983, prohibits anyone acting under color of state law from depriving applicants and employees of rights, privileges or immunities protected by the Constitution and laws.

✓ The Civil Rights Act of 1871, 42 U.S.C. § 1985(3) and 1986, prohibits two or more persons from conspiring to deprive others, on the basis of their race or other invidiously discriminatory animus, of rights and privileges secured by the Constitution.

✓ Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employment discrimination based on genetic information about an applicant, employee, or former employee.

- **Pennsylvania Statutes**

✓ *The Pennsylvania Human Relations Act*, 43 P.S. §§ 951, *et seq.* (“PHRA”), prohibits the same types of discrimination as Title VII, but also prohibits discrimination on the basis of ancestry, age, and non-job-related disabilities and the use of a guide or support animal. In addition to protecting applicants and employees from discrimination, it protects independent contractors licensed by the *Bureau of Professional and Occupational Affairs*. Notably, employer liability under the PHRA follows the standards set out for employer liability under Title VII.²¹ If the court finds that an employer has discriminated against an employee in violation of the PHRA, the Court may issue an injunction against further engagement in the practice, and may order affirmative action which may include, but is not

limited to, reinstatement or hiring, back pay accruing up to three years prior to the filing of the complaint, and any other legal or equitable relief that the Court deems appropriate.²² There is no cap on damages. The Court may award punitive and compensatory damages, including damages for mental anguish and humiliation.²³

✓ *The Whistleblower Law*, 43 P.S. §§ 1421-28, prohibits retaliation, including retaliatory discharge, against employees of “public bodies” who report instances of wrongdoing to appropriate authorities or who participate in such authorities’ investigation of wrongdoing.

- **Pittsburgh**

✓ *The Pittsburgh Code*, §§651.01-02, prohibits discrimination in employment on the basis of race, color, religion, ancestry, national origin, place of birth, sex, sexual orientation, familial status, non-job related handicap and disability.

- **Philadelphia**

✓ *The Philadelphia Fair Practices Ordinance*, §9-1101 of the Philadelphia Code, prohibits discrimination in employment on the basis of race, color, sex, sexual orientation, religion, national origin, ancestry, age, handicap or marital status.

§2.03 - TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

[1] *The Act*

Perhaps the most important law in the area of workplace

discrimination is Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991, 42 U.S.C.A. §§2000e et seq. Title VII of the Act, codified as Subchapter VI of Chapter 21 of title 42 of the United States Code, prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin (the “protected classes”) (see 42 U.S.C. § 2000e-2^[35]).

- **Who does it apply to?**

Title VII applies to and covers an employer *"who has fifteen (15) or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"* as written in the Definitions section under 42 U.S.C. §2000e(b). Title VII also prohibits discrimination against an individual because of his or her association with another individual of a particular race, color, religion, sex, or national origin. An employer is also prohibited from discriminating against a person because of his interracial association with another, such as by an interracial marriage.

- **What does it apply to?**

Under Title VII, it is illegal to discriminate in any aspect of employment, including:

- ✓ Hiring and firing;
- ✓ Compensation, assignment, or classification of employees;
- ✓ Transfer, promotion, layoff, or recall;
- ✓ Job advertisements;
- ✓ Recruitment;
- ✓ Testing;

- ✓ Use of company facilities;
- ✓ Training and apprenticeship programs;
- ✓ Fringe benefits;
- ✓ Pay, retirement plans, and disability leave; or
- ✓ Other terms and conditions of employment.

[2] ***How is “Discrimination” defined?***

Title VII does not explicitly define the term “*discriminate*”, rather its meaning has evolved through interpretation by the Federal and State courts. Under this case by case or common law definition “*discrimination*” is generally found to occur in one of two ways - “*disparate treatment*”, or “*disparate impact*.”

- **“*Disparate Treatment*”** - Under Title VII, “*disparate treatment*” involves treating individuals differently on the basis of their race, color, national origin or religion (the “protected class”).²⁴ Disparate treatment focuses on the employer’s discriminatory motive.²⁵ The Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), articulated the framework for proving disparate treatment discrimination in regard to firing practices. The *McDonnell Douglas* four-part test requires that a plaintiff establish a prima facie case by showing that he or she (1) belongs to a protected class, (2) is qualified for the position, (3) suffered an adverse employment action, and (4) was replaced with someone outside the protected class. In addition, the plaintiff must also show that a discriminatory reason more likely than not motivated the employer; or by demonstrating that the employer’s asserted reason for his or action is not credible.²⁶
- **“*Disparate Impact*”** - Title VII prohibits an employer from using an employment practice which does not appear to be discriminatory on its face; but is discriminatory in its

application or effect, (i.e., has a “*disparate impact*”)

The Supreme Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), articulated the “*disparate impact*” theory and constructed a model of proof that the plaintiff and defendant must use in presenting their cases.

In the model defined by the *Griggs* Court, the plaintiff must first prove that a specific employment practice adversely affects the employment opportunities of Title VII protected classes. If the plaintiff fails to meet this burden, the court will dismiss the action under Rule 41(b) of the Federal Rules of Civil Procedure.

If the plaintiff can establish a disparate impact, the employer must demonstrate that the challenged practice is justified by “*business necessity*” or that the practice is “*manifestly related*” to job duties. If the employer does not prove business necessity, the plaintiff prevails. If on the other hand the employer does meet this burden, the plaintiff must demonstrate that alternative practices exist that would meet the business needs of the employer yet would not have a discriminatory effect.

- ***Discrimination in Hiring*** - In order to sustain a case based on discrimination in hiring practices, a plaintiff must prove: (1) membership in a protected class; (2) that he or she applied and was qualified for the position; (3) that he or she was rejected; and (4) the position remained open and the employer continued to see applicants.

✓ *Pretext Plus* - Under *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993), the Supreme Court held that in order to prevail in a case based on discrimination in hiring practices under Title VII, the plaintiff must first prove that the employer's stated reasons for not hiring the plaintiff are false. In addition, the plaintiff must

also prove that the plaintiff's membership in the protected class was the real reason ("pretext plus") for he or she not being hired, and finally that all other possible nondiscriminatory reasons were not influential factors in the employer's hiring decision.²⁷ The Third Circuit does not require strict adherence to the *Hicks* "pretext plus" model. Instead, the Third Circuit has ruled that, while the rejection of the employer's nondiscriminatory reasons does not compel a verdict in favor of the plaintiff, it does permit the trier of fact to infer discrimination and find for the plaintiff on the basis of the allegations of discrimination in the plaintiff's prima facie case.²⁸

✓ *Motivating Factor* - The Civil Rights Act of 1991, 42 U.S.C. 2000e-2(m), provides that "an unlawful employment practice is established when the complaining party demonstrates race, color, religion, or natural origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Thus, even if the employer proves that it would have made the same decision without the unlawful factor, if the employee proves that the unlawful factor was a motivating factor, then the employee is entitled to a finding of liability and can receive full damages under the Civil Rights Act. Those damages could include compensatory and punitive damages, legal relief, back pay, front pay, and reinstatement, hiring, or promotion. Under the *Price-Waterhouse case*, the defendant will be found liable for employment discrimination in violation of Title VII only if the plaintiff can show not only that the unlawful factor motivated the employment decision, but also that it had a "determinative effect" upon that decision.²⁹

Subsequent Third Circuit Decisions have held that the 1991 Act is not retroactive, and therefore does not apply to pre-Act conduct. The Third Circuit has therefore applied the *Price-Waterhouse* standard for "mixed motive" in those cases whose conduct occurred before the enactment of §107 of the

Civil Rights Act of 1991.³⁰ The Third Circuit has not yet addressed the question of whether a *Price-Waterhouse* “determinative effect” instruction is appropriate in pretext cases wherein the unlawful conduct occurred subsequent to the 1991 Act. *Watson v. “Septa”*, 1998 U.S. Dist. LEXIS 14390 at p. 28, has acknowledged that the intent of §107 was to legislatively overrule the standard of liability established in *Price-Waterhouse* for mixed motive cases.³¹ In a recent Pennsylvania District Court case, the Court decided that since the question has not yet been addressed by the Third Circuit, the Court will permit the *Price-Waterhouse* “determinative effect” instruction in a pretext case.³²

✓ *Pattern or Practice Class Actions* - Where the employer presents numerous examples of unlawful employment decisions against other members of the same protected class, it is possible to pursue a class action under the disparate treatment theory. The claim in a disparate treatment class action is that the employer’s differential treatment of the plaintiff is part of a “pattern or practice” of discriminatory treatment toward other members of plaintiff’s protected group.³³

In *Teamsters*, the Court held that the plaintiff must “establish by a preponderance of the evidence that racial discrimination was the company’s standard operating procedure - the regular rather than the unusual practice.”³⁴ Pattern and practice plaintiffs generally establish a prima facie case upon presentation of statistical evidence that creates an inference of systemic, class-wide discrimination. Gross disparities between the percentage of the protected class in the general population and the percentage in the employer’s work force support such a finding.³⁵ Evidence of individual disparate treatment further supports the plaintiff’s claim.³⁶ The defendant can attempt to attack the validity of the statistics by demonstrating that the proof is unreliable because it is inaccurate or inappropriate, or that the disparities are not

statistically significant.³⁷

✓ ***Bona Fide Occupational Qualifications*** - In very narrowly defined situations, an employer is permitted to discriminate on the basis of a protected trait where the trait is a “bona fide occupational qualification” (“BFOQ”) reasonably necessary to the normal operation of that particular business or enterprise. To prove the BFOQ defense, an employer must prove three elements: (1) a direct relationship between sex and the ability to perform the duties of the job, (2) the BFOQ relates to the “essence” or “central mission of the employer's business,” and (3) there is no less-restrictive or reasonable alternative (*United Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991)).

The BFOQ exception is an extremely narrow exception to the general prohibition of discrimination based on sex (*Dothard v. Rawlinson*, 433 U.S. 321 (1977)). An employer or customer's preference for an individual of a particular religion is not sufficient to establish a BFOQ (*Equal Employment Opportunity Commission v. Kamehameha School — Bishop Estate*, 990 F.2d 458 (9th Cir. 1993)).

[3] ***Remedies***

- The Civil Rights Act of 1991 Title VII

The purpose of remedies under Title VII is to make a plaintiff whole for any injuries suffered as a result of the unlawful employment action.³⁸

✓ ***Back Pay*** - Because of the “make whole” and deterrent intent at the core of Title VII, a finding of a Title VII violation presumptively entitles the victim of the discrimination to back pay.³⁹ Back pay includes not only salary loss, but also compensation

for lost overtime, shift differentials, anticipated raises, and fringe benefits. Generally, if a victim of discrimination lost an economic benefit, that loss is recoverable. Back pay awards cannot extend back more than two years before the date the initial charge was filed with the EEOC.⁴⁰

✓ **Front Pay** - Courts would prefer to make an employee whole by awarding back pay coupled with an order for reinstatement, immediate hiring, or immediate promotion, since they are the remedies that involve the least amount of speculation. However, where the Court makes a finding that reinstatement or promotion is not possible, due to irreparable animosity between the parties or changed circumstances, the alternate remedy of front pay may be used to make the employee whole.⁴¹

✓ **Compensatory and Punitive Damages** - The Civil Rights Act of 1991 allows the complaining party in a Title VII action to recover compensatory and punitive damages against the defendant who has engaged in unlawful intentional discrimination.⁴² Compensatory damages, which include damages for emotional pain and suffering or other non-pecuniary losses, were not available under Title VII before the 1991 amendments to the Civil Rights Act of 1964. Under the 1991 amendments, limited compensatory damages are available to victims of race, sex, religion and disability discrimination against private or public employers, but only in cases of intentional discrimination.⁴³ Discrimination was intentional if defendant “engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”⁴⁴

✓ **Damages Caps** - The Civil Rights Act of 1991 imposes caps on the combined amount of compensatory and punitive damages available to the plaintiff. The damages caps under the 1991 amendments to Title VII are as follows: (1) \$50,000 for an employer with 15 to 100 employees; (2) \$100,000 for an employer with between 101 and 200 employees; (3) \$200,000 for an employer with between 201 and 500 employees; and \$300,000 for an employer with more than 500 employees.⁴⁵ These limits do not cover back pay, interest on back pay and front pay. Punitive damages are not recoverable against a government, a government agency, or a political subdivision.⁴⁶

✓ **Remedies Which Do Not Apply** - The following remedies do not apply to disparate impact cases.⁴⁷

- **Mitigation** - Plaintiffs have a general duty to mitigate damages. The duty to mitigate damages includes an obligation to seek other appropriate employment. Back pay will be reduced by other earnings which the plaintiff received during the back pay period. Among various earnings which will offset back pay are: wages and salaries earned at other employment; earnings from self-employment; severance pay; retirement benefits; and disability payments. The Third Circuit has held that unemployment benefits, as well as payments under Social Security and welfare programs, should not be deducted from a Title VII back pay award.⁴⁸

- ***Pre-Judgment Interest*** - Title VII authorizes pre-judgment interest from the date of the discrimination to the date of judgment.⁴⁹
- ***Equitable Relief*** - Equitable relief is generally sought by the charging party or by the EEOC to maintain the status quo or to return the parties to the position they were in before the claimed discrimination occurred. Before granting a temporary or preliminary injunction, Courts generally require evidence that: (1) there is a threat of irreparable harm to the party seeking relief; (2) this threatened injury outweighs whatever damage the proposed injunction may cause to the other parties; (3) there is a probability that the party seeking the preliminary relief will ultimately succeed at trial; and (4) the injunction will not be adverse to the public interest.⁵⁰

The United States Supreme Court has ruled that loss of income, claims of humiliation, and loss of reputation do not constitute irreparable harm for the purposes of equitable relief, since such claims can be compensated by monetary damages if the employee succeeds at trial.⁵¹ The likelihood of success without a showing of irreparable harm is not sufficient to obtain a preliminary injunction, because the employee can be made whole with money damages.⁵²

- The Civil Rights Acts of 1866, § 1981 and

§ 1983

✓ **Damages** - Compensatory and punitive damages are permissible types of relief in race discrimination claims under the Civil Rights Acts of 1866 (§1981) and 1871 (§1983). Unlike Title VII however, these sections do not impose caps on compensatory and punitive damage awards. Under §1981 and §1983 actions, Courts have ordered such equitable relief as reinstatement, hiring and promotion, and have awarded front pay.⁵³ Compensatory damages under these sections do not include back pay, interest on back pay, or any other type of relief authorized under §706(g).⁵⁴

§2.04 - THE PENNSYLVANIA HUMAN RELATIONS ACT

[1] *The Act*

The Pennsylvania Human Relations Act (PHRA) is broader than the Federal Employment Discrimination Laws and prohibits discrimination in a wide range of employment areas. The PHRA prohibits discrimination on the basis of race, color, religious creed, ancestry, handicap and disability, use of guide dogs because of blindness or deafness of the user, use of support animals because of blindness or deafness, association with a person with a handicap or disability, age, sex, natural original or possession of a GED as opposed to a high school diploma.⁵⁵

The scope of the PHRA is also broader than that of the Federal Anti-Discrimination statutes in that it protects certain independent contractors as well as employees.⁵⁶ However, the PHRA definition of “independent contractor” differs from the common law definition. Under the PHRA, the term “independent contractor” includes any person who is subject to the provisions governing any of the professions and

occupations regulated by State licensing laws enforced by the Bureau of Professional and Occupational Affairs in the Department of State, or is included in the Fair Housing Act.⁵⁷

[2] *Who is covered?*

The PHRA covers employers of 4 or more persons within the Commonwealth.⁵⁸ The definition of “employer” also includes employees of the Commonwealth and any of its subdivisions, boards, departments, commissions or school districts. Religious, fraternal, charitable or sectarian corporations or associations which are not supported in whole or in part by governmental appropriations are exempt from certain provisions of the Act. These organizations, however, are defined as “employers” for purposes of the prohibition on discriminatory practices based upon race, color, age, sex, national origin or disability.⁵⁹

Under the PHRA, individuals as well as employers can be found liable for acts of employment discrimination. Further, under the PHRA, it is an unlawful employment practice for any person to “aid, abet, instigate, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice.”⁶⁰ The EEOC defers to the administrative and investigative procedures of state agencies, such as the Pennsylvania Human Relations Commission, when a charge is timely filed under state law.⁶¹

The Pennsylvania Human Relations Commission is the agency primarily responsible for the enforcement of the Pennsylvania Human Relations Act (“PHRA”). The PHRC’s authority to investigate and calculate charges of discrimination is similar to the authority of the EEOC.

GENDER BASED DISCRIMINATION

§3.01 - INTRODUCTION

In addition to the protections provided in Title VII, the law provides for additional protection for gender based discrimination in the Equal Pay Act and the Pregnancy Discrimination Act. Although not strictly gender based, the Family Medical Leave Act will also be discussed in this Unit.

§3.02 - THE EQUAL PAY ACT (“EPA”)

[1] *The Act*

The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (“EPA”), requires employers to pay males and females equal wages for equal work in jobs of equal skills, effort and responsibility performed at the same establishment under similar working conditions, except where a difference in pay is based on a seniority system, a system which awards pay on the basis of quality or quantity of work, or any other factor other than sex.

[2] *Administrative Remedies Available*

29 U.S.C. §206(d), proscribes gender-based pay discrimination among employees. The Act applies to employees of federal, state, and local governments and their agencies, as well as to labor unions and other private sector employees. Responsibility for the enforcement and administration of the Act is vested in the EEOC.⁶² The EEOC has issued regulations setting forth its interpretation of the various provisions of the Equal Pay Act.⁶³ Although the Courts afford substantial deference to these regulations, they

are not binding.⁶⁴ The employee may petition the EEOC to investigate the matter.⁶⁵ There are no mandatory administrative procedures with which an employee must comply before filing a complaint in Court for a trial de novo.⁶⁶

[3] **Damages**

Employees who have prevailed in an EPA case are entitled to back pay as a result of the initial wage differential, in addition to an amount equal to the back pay as liquidated damages.⁶⁷ A Court may award double damages as liquidated damages unless the defendant proves that it acted in a sincere and reasonable belief that its conduct was lawful.⁶⁸

A trial court may also award prejudgment interest to make the injured party whole.⁶⁹ Back pay is normally limited to wages due for two years preceding suit but may be extended to three years for a willful violation.⁷⁰

[4] **Burden of Proof**

- Overview

The plaintiff in an EPA case has the initial burden of proving a violation by demonstrating that: *An employer pays or paid different wages to employees of the opposite sex when they are doing equal work on jobs, the performance of which requires equal skill, effort, and responsibility under similar working conditions.*⁷¹

Once plaintiff has established a prima facie case, the burden falls upon the defendant to show that the wage differential resulted from a legitimate factor and was not based on sex.

- **“Equal Work”** - In order to be considered “equal work” the jobs need not be identical, but only substantially equal.⁷²

- **“Similar Working Conditions”** - The test of “similar working conditions” is a flexible standard requiring only similarity, not equality as in the other three factors.⁷³
- **Statute of Limitations** - The statute of limitations for filing a complaint under the Equal Pay Act is two years after the cause of action accrues. If the defendant has acted “willfully or intentionally” in violating the Act, the suit may be filed within three years of the accrual of the cause of action.⁷⁴ For the three year limitations period to apply to actions arising out of “willful” violations to apply, the standard of willfulness adopted in *Trans World Airlines, Inc. v. Thurston*, that the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the statute must be satisfied. An employer’s conduct is willful if it knew that the statute was “in the picture”.⁷⁵
- **Jury Trial** - A private plaintiff seeking legal relief has the right to a jury trial in an Equal Pay Act suit.⁷⁶ If the claim, however, is based on equitable relief, such as an EEOC injunction proceeding under 29 U.S.C. §217, there is no right to a jury trial.⁷⁷
- **Exceptions** - The exceptions under the EPA are (1) a bona fide seniority system; (2) a bona fide merit system; (3) a system based on quantity or quality of production; or (4) a system based on any factor “other than sex”.

The exceptions are affirmative defenses on which the employer has the burden of production and proof by a preponderance of the evidence.⁷⁸ The “catch-all” exception in which a number of different concerns have been litigated,

such as whether night work falls under the category of “factors other than sex” rather than under a determination of the similarity of working conditions.⁷⁹ The *Corning case* clearly established that night work is to be considered under the “factors other than sex” exception to the Act. The Third Circuit held that “economic benefit” may be a factor other than sex within the meaning of the fourth exception.⁸⁰ Any nonsexual factor based on an employer’s legitimate business judgment may be a “factor other than sex”.⁸¹

- ***Pretext Defense*** - An employee may rebut an employer’s affirmative defense with evidence that the asserted defense is merely a pretext for discrimination. To show pretext, an employee must show that the employer did not use the assertive nondiscriminatory factor “reasonably in light of the employer’s stated purpose as well as its other practices.”⁸²

- ***The Bennett Amendment*** - Equal Pay Act claims are frequently involved in companion claims of sex discrimination under Title VII. The Bennett Amendment to Title VII sets forth the rule for interpreting the relationship between these two statutes: “It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of 206(d) of Title 29.”⁸³

The Equal Pay Act authorizes the payment of a wage differential where such wages are paid pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex, these practices are also exempted from Title VII’s prohibitions by the Bennett Amendment.⁸⁴

- ***Equal Pay Act Versus Affirmative Action*** - The Eastern District has held that a challenge by male

professors to a university's implementation of an affirmative action clause in a collective bargaining agreement, whereby female and minority faculty members were eligible for salary increases not available to non-minority male faculty members, states a cause of action under the Equal Pay Act.⁸⁵

§3.03 - PREGNANCY DISCRIMINATION ACT

[1] *The Act*

The Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000(e)(k), prohibits discrimination on the basis of childbirth, pregnancy, or related medical conditions, or in the provision of medical fringe benefits.

[2] *Prima Facie Case*

A plaintiff can establish a prima facie case of pregnancy discrimination under Title VII by showing that: (1) she is a member of a protected class, (2) she satisfactorily performed the duties required by the position, (3) she was discharged; and (4) the position remained open and was ultimately filled by a nonpregnant employee.⁸⁶

[3] *Burden of Proof*

If a prima facie case is established, the burden of proof shifts to the employer to articulate a legitimate, clear, specific and nondiscriminatory reason for discharging the employee.⁸⁷ If this is done, the plaintiff has the ultimate burden to prove that the employer's reason was merely a pretext for pregnancy discrimination.⁸⁸ An employer may not exclude pregnant women and women who can become pregnant from certain jobs on the basis of "fetal protection".⁸⁹ It is not a violation of the Pregnancy Discrimination Act for an employer to consider an employee's absence on maternity leave in making an adverse employment decision due to the

need for a reduction in force if the employer would have considered the absence of an employee on a different type of disability leave in the same manner.⁹⁰

§3.04 - FAMILY MEDICAL LEAVE ACT ("FMLA")

[1] *The Act*

§107 of the FMLA provides that an employer who violates the FMLA shall be liable for damages including wages, employment benefits, other compensation denied or lost, or actual monetary loss sustained by the employee as a direct result of the violation (e.g. cost of providing care) up to a sum equal to 12 weeks of wages for the employee. In addition, an employee may be awarded liquidated damages equal to the foregoing amounts, plus interest, reasonable attorney's fees and expert witness fees. Punitive damages are not available under the FMLA.⁹¹ The Court may also award equitable relief, including employment, restitution or promotion.

[2] *Who It Covers*

The FMLA covers only employers employing 50 or more employees working within 75 miles of an employee's work site. Id. The Family Medical Leave Act ("FMLA") entitles an eligible employee to a total of 12 work weeks of leave during any twelve month period for one or more of the following: (1) birth of a child of the employee and in order to care for such child; (2) placement of a child with the employee for adoption or foster care; (3) to care for the spouse, or a child or parent of the employee, if such spouse, child or parent has a "serious health" condition; and (4) a serious health condition that makes the employee unable to perform the functions of the position of such employee.⁹²

An eligible employee is defined in the FMLA as “an employee who has been employed for at least twelve months by the employer with respect to whom leave is requested ...; and for at least 1,250 hours of service with such employer during the previous twelve month period.”⁹³

[3] ***Serious Health Condition***

A "serious health condition" is an "illness, injury, impairment, or physical or mental condition that involves any period of incapacity or treatment connected with inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider."⁹⁴ Generally the FMLA provides that an action may be brought under this section not later than two years after the date of the last event constituting the alleged violation for which the action is brought.⁹⁵

If the action is brought for a willful violation of the FMLA, such action may be brought within three years of the date of the last event constituting the alleged violation for which such action is brought.⁹⁶ A complaint may be filed with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions which are believed to constitute the violation.⁹⁷

[4] ***Elements of Discrimination Based on FMLA***

The elements of a cause of action in an FMLA discrimination suit will follow the guidelines of other employment discrimination suits as discussed above, since nothing in the FMLA or any amendment made by the FMLA “shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability.”⁹⁸

4

AGE DISCRIMINATION

§4.01 - INTRODUCTION

This Unit will discuss the issue of age discrimination as governed by the Age Discrimination in Employment Act.

§4.02 - THE AGE DISCRIMINATION IN EMPLOYMENT ACT

[1] *The Act*

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-637 (“ADEA”), prohibits discrimination against applicants and employees who are age 40 or over. The ADEA also provides the following to be unlawful act under ADEA: (1) discrimination or retaliation based on the assertion of rights under the Act⁹⁹; (2) publication of notices or advertisements related to employment that express age preference or limitation¹⁰⁰; and (3) forced retirement of non-federal employees.¹⁰¹

[2] *Who It Applies To*

Until the 1986 amendments, the Act protected individuals in the private federal and non-federal sectors between the ages of 40 and 70 from discrimination on the basis of age.¹⁰² The 1986 amendments extended coverage to most non-federal employees age 70 and above as well. The prohibitory language of the ADEA is almost identical to that of Title VII, and Courts have relied upon Title VII precedent in interpreting comparable ADEA provisions.¹⁰³

[3] ***When it Applies***

- ***The McDonnell Douglas Test*** - Using the *McDonnell Douglas* four-element test as a guideline, a prima facie case of age discrimination can be established when: (1) plaintiff was in the age group protected by the ADEA; (2) he was discharged or demoted; (3) at the time of his discharge or demotion he was performing his job at a level that met his employer's legitimate expectations; and (4) he was discharged or demoted on the basis of age.¹⁰⁴

Plaintiff must show not only that he or she was within the protected age group, and adversely affected by a management decision, but also that age was a factor in the adverse decision.¹⁰⁵

- ***Exhaustion of Administrative Remedies*** - Before filing a federal court action for age discrimination, a non-federal employee must initiate administrative proceedings with the EEOC.¹⁰⁶ No Civil Action may be commenced until sixty days after the individual has filed a charge of unlawful discrimination with the EEOC.¹⁰⁷ In deferral states such as Pennsylvania, a second time requirement is imposed. No Civil Action may be commenced until sixty days after the commencement of proceedings under State law.¹⁰⁸

- ***Reduction in Work Force (RIF)*** - In reduction in work force cases, the Third Circuit has held that, in order to prevail, a plaintiff must present evidence showing that the defendant did not treat age as a neutral factor in its decision to terminate plaintiff's employment.¹⁰⁹ The plaintiff must provide direct, circumstantial or statistical evidence tending to indicate that the employer discharged the plaintiff for

impermissible reasons.¹¹⁰

[4] **Remedies**

- **Back Pay** - The ADEA incorporates the civil remedies that are allowed under the Equal Pay Act, 29 U.S.C.A. §626(b), such as back pay and liquidated damages, in an amount equal to the back pay award. Unlike Title VII, which provides back pay availability as a matter of equitable discretion, the ADEA provides back pay as a matter of right.¹¹¹ It is also well settled that successful plaintiffs under the ADEA are entitled to a reimbursement for fringe benefits, including savings plans, social security and pensions.¹¹²

Liquidated damages, in an amount equivalent to the plaintiff's award for back pay and benefits, are given in cases of "willful violations."¹¹³ Thus, a finding of willfulness results in a doubling of damages. The Supreme Court has defined "willfulness" in this context as a situation where "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."¹¹⁴

- **Front Pay** - Front pay can also be awarded in cases where reinstatement is not possible.¹¹⁵ The Eastern District has held that an award of front pay for three years of future salary was "reasonable and sufficient."¹¹⁶
- **Equitable Relief** - The Courts are also given jurisdiction to grant other appropriate relief, such as compelling employment, reinstatement, or promotion.¹¹⁷

- ***Pain and Suffering*** - Every Circuit Court that has confronted the issue has disallowed compensatory damages for pain and suffering under the ADEA.¹¹⁸
- ***Punitive Damages*** - Several District Courts have allowed recovery of punitive damages. However, every Circuit Court that has decided the issue has disallowed punitive damages.¹¹⁹ An employee has a duty to seek other employment to mitigate damages.¹²⁰ Courts have unanimously held that an employer found in violation of the ADEA is not entitled to prove its “good faith” to the Court in order to reduce an award of liquidated damages.¹²¹
- ***Defenses*** - The ADEA expressly provides five defenses: (1) bona fide occupational qualification; (2) bona fide employee benefit plans; (3) bona fide seniority systems; (4) good cause; and (5) reasonable factors other than age.¹²² Exceptions to these defenses include the allowance of mandatory retirement for firefighters, law enforcement officers and tenured professors.¹²³

✓ ***Bona Fide Occupational Qualification*** - The Supreme Court in Western Airline, Inc. v. Criswell, 472 U.S. 400, 412 (1985), approved the test set out by the EEOC for the employer asserting a bona fide occupational qualification (“BFOQ”) defense. The employer asserting a BFOQ defense has the burden of proving that: (1) the age limit is reasonably necessary to the essence of the business, and either, (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by

reference to age.¹²⁴

✓ ***Bona Fide Employee Benefit Plan*** - The Older Workers Benefit Projection Act of 1990 (OWBPA), Bona Fide Employee Benefit Plan, Pub. L. No. 101-433, 104 Stat. 978, 101 St. Cong., 2d Sess. (1990) provides that it shall not be unlawful for an employer to take any action otherwise prohibited to: (a) observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act; (b) to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker; or (c) that is a voluntary early retirement incentive plan consistent with the relevant purposes of this Act.¹²⁵

✓ ***Bona Fide Seniority Systems*** -Bona fide seniority systems, §4(f)(2), as amended, provides that “it shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act.”¹²⁶

✓ ***Good Cause*** - The ADEA expressly states that it is not unlawful for an employer to discharge or otherwise discipline an individual for “good cause”.¹²⁷ Unlike the affirmative defense of BFOQ exception,¹²⁸ the burden in a “good cause” defense is not shifted to the defendant, but rather is a “denial of the plaintiff’s prima facie case”.¹²⁹ Thus, the defendant has only the burden of going forward with evidence to demonstrate “good cause” for the plaintiff’s discharge.¹³⁰

✓ ***Reasonable Factors Other Than Age*** -

Reasonable factors other than age (RFOA) and the good cause affirmative defense: §4(f)(1) of the ADEA states that “it shall not be unlawful of an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . .” 29 U.S.C. §623(f)(1), §4(f)(1). §4(f)(3) states that it is not unlawful for an employer to discharge or otherwise discipline an individual for good cause. An RFOA defense is very fact specific. The Third Circuit considering an RFOA defense concluded that an employee’s eligibility for early retirement cannot constitute an RFOA since “early retirement is too closely related to age to be given credence as a valid justification.”¹³¹

5

DISCRIMINATION BASED ON DISABILITY

§5.01 - INTRODUCTION

This Unit will discuss the issue of discrimination based on “disability” as governed by the Americans with Disabilities Act.

§5.02 - THE AMERICANS WITH DISABILITIES ACT

[1] *The Act*

The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12111 (“ADA”), prohibits discrimination against qualified individuals with a disability, against individuals who are regarded as having a disability, and against individuals who have a record of such a disability. The statute requires that reasonable accommodations be made for qualified individuals with a disability, unless to do so would be an undue hardship. The Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. 12101 et seq., aims to eliminate discrimination against individuals with disabilities in the areas of employment, public service, public accommodation and telecommunications.

[2] *Who it Applies To*

The employment provisions of the Act (Title I), which went into effect on July 26, 1992, prohibit not only discrimination by employers in all employment related

activities, but also impose additional obligations relating to the manner in which employers treat both their employees and applicants for employment. The ADA applies to employers who employ fifteen or more employees. The employment provisions of the ADA apply to private employers, employment agencies, labor organizations, labor management committees, and state and local governments.¹³²

- ***Prima Facie Case*** - A plaintiff presents a prima facie case of discrimination under the ADA by demonstrating that he or she: (1) is a disabled person within the meaning of the ADA; (2) is otherwise qualified to perform the essential functions of the job; and (3) has suffered an adverse employment decision as a result of discrimination.¹³³

The ADA defines a “qualified individual with a disability” as someone who, “with or without reasonable accommodation, can perform the essential functions of the job position in question.” 42 U.S.C. §12111. Congress responded to the Supreme Court’s development of a strict definition of disabled which precluded those whose conditions were readily corrected with medicine. Congress expressly disagreed with the Court and in 2008 it passed the ADA Amendments Act which clarified the intent of Congress and made it clear that the Act should have as broad an application as necessary.

Although the Amendments do not alter the definition of “disability,” they do make it easier for plaintiffs to state a claim under the Act without easy defeat at summary judgment.¹³⁴ Greater importance is now placed on the employer’s efforts to reasonably accommodate disabled individuals.¹³⁵

Application of ADA is also fairly technical and fact specific, but administrative guidelines may be found at 29 C.F.R. §1630.2 et. seq., including EEOC Interpretive Guide, §1630.2(h).

- ***The Definition of “Disability”*** - “Disability” is defined under the ADA as a “physical or mental impairment” which “substantially limits” one or more of the “major life activities” of an individual.¹³⁶ “Disability can also mean having a record of a physical or mental impairment which substantially limits a major life activity, or being regarded as having such impairment.”¹³⁷ An individual is regarded as having a physical or mental impairment which substantially limits one or more major life activities when that individual: (1) has an impairment which is not substantially limiting, but is treated by a covered entity as if he or she had a substantially limiting impairment; or (2) has a physical or mental impairment that is substantially limiting only because of the attitudes of others; or (3) has no physical or mental impairment at all, but is treated by a covered entity as if he or she has a substantially limiting impairment.¹³⁸

A physical impairment is defined under the statute as “any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss, affecting one or more of the following body systems: neurological, muscular skeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hermic and lymphatic, skin and endocrine.”¹³⁹

Major life activities are described as those basic activities that the average person can perform with little or no difficulty, such as: caring for oneself, performing manual tasks, walking, seeing, breathing, learning, working, sitting, standing, lifting and reaching.”¹⁴⁰

- ***Excluded Conditions*** - The ADA specifically excludes the following conditions from its coverage to eliminate or avoid any debate about whether they are disabilities: current illegal drug use, homosexuality and bisexuality, sexual behavior and gender identity disorders, compulsive gambling, kleptomania, pyromania, predisposition to illness, temporary non- chronic impairments, personality traits, environmental, cultural or economic disadvantages, advanced age and pregnancy.¹⁴¹ A person who is unable to work is not covered under the ADA.¹⁴²
- ***"Substantially Limits"*** - The EEOC has adopted a multi-pronged definition of the term "substantially limits" as follows: (1) unable, because of single physical or mental impairment, or because of the combined effect of several different physical or mental impairments, to perform a major life activity that the average person in the general population can perform; or (2) significantly restricted as to the conditions, manner or duration under which the individual can perform a major life activity as compared to average persons in the general population.¹⁴³ Factors to be considered include the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment.¹⁴⁴
- ***Essential Functions*** - A qualified individual with a disability is one who "with or without reasonable accommodation, can perform the "essential functions" of the employment position that such individual holds or desires."¹⁴⁵

The term “essential functions” is broadly defined as meaning “the fundamental job duties of the employment position the individual with the disability holds or desires. The term does not include the marginal functions of the job.”¹⁴⁶ The ADA specifies that consideration is to be given to the employer’s judgment as to what functions of a job are essential, and a written job description shall be considered evidence of the essential functions of the job.¹⁴⁷

- **“Reasonable Accommodations”** - Title I of the ADA prohibits employers from failing to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified” employee with a disability, unless the employer can prove that the accommodation would impose an “undue hardship” on its operations.¹⁴⁸

The ADA imposes on employers the duty to make reasonable accommodations to the known needs of individuals who are qualified for the job in question.¹⁴⁹ The accommodation obligation does not arise until the employee or applicant makes the need for accommodation known.¹⁵⁰ Under ADA §105, employers are obligated to notify applicants and employees of their duty to make reasonable accommodations.

Under the ADA, accommodations are to be individually tailored, on a case by case basis, to meet the specific needs of both the disabled individual and the job.¹⁵¹ Employees can modify jobs, the work environment, and the manner or circumstances in which the job is performed, in order to enable an otherwise qualified individual to participate in the essential functions of the job. An accommodation is reasonable if the associated costs are not disproportionate to the financial and administrative burdens it would produce.¹⁵² The accommodation does not have to be the best accommodation possible so long as it is

sufficient to meet the related needs of the individual being accommodated. Employers have the ultimate discretion to choose between effective accommodations.

- **Remedies** - The ADA provides remedies for victims of discrimination, including front and back pay, attorneys' fees, compensatory and punitive damages, as well as injunctive relief such as reinstatement, hiring or promotion.¹⁵³ Compensatory and punitive damages under Title I are subject to caps under the Civil Rights Act of 1991, 42 U.S.C. §1981(a) depending upon the number of employees, as outlined above.
- **Defenses** - Similar to a Title VII disparate treatment charge, the employer may justify the challenged action by showing that it was taken for a legitimate, nondiscriminatory reason.¹⁵⁴ In the case of a disparate impact claim, the employer may defend its use of selective criteria that have the disparate impact of screening out individuals with disabilities by showing that the criteria are job-related and consistent with business necessity.¹⁵⁵ The employer, however, cannot exclude an individual with a disability if the criteria could be met or job performance accomplished with a reasonable accommodation.¹⁵⁶
 - ✓ **Undue hardship** - An undue hardship on the operation of the employer's business is a defense to a claim of discrimination or necessary accommodation.¹⁵⁷ "Undue hardship" means an action which requires significant difficulty or expense.¹⁵⁸ Some factors which may be considered include: (1) nature and cost of the accommodation; (2) the overall financial resources of the covered entity, and (3) the overall size of the business of a covered entity.¹⁵⁹
 - ✓ **Direct threat** - Finally, an employer may

defend against a claim of discrimination in violation of the ADA by showing that the plaintiff does not meet the job qualifications standards since he or she poses a direct threat to the health or safety of other individuals in the work place.¹⁶⁰ “Direct threat” is defined as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”¹⁶¹

✓ This defense arose out of the Supreme Court case in which the Court found that the qualification of an employee who is disabled by a contagious disease would depend on certain considerations regarding the risk of the disease to the health and safety of others.¹⁶² To determine whether such an individual is otherwise qualified, an inquiry should be conducted which would include an assessment of: “(a) *the nature of the risk (how the disease is transmitted)*; (b) *the duration of the risk (how long the carrier is infectious)*; (c) *the severity of the risk (what is the potential harm to third parties)*; and (d) *the probabilities the disease will be transmitted and will cause varying degrees of harm.*”¹⁶³

6

COMPLAINTS AND PROCEDURE IN DISCRIMINATION CASES

§6.01 - INTRODUCTION

All complaints and claims of discrimination are initially filed with either the federal agency, EEOC or the state agency responsible for investigation of claims of discrimination.

§6.02 - THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[1] *The Act*

Title VII of 1964 applies to employers with fifteen or more employees involving race, color, religion, sex, national origin, and retaliation- Equal Protection Act, Age Discrimination in Employment, Americans with Disability.

The EEOC has the power to investigate and bring court actions and cooperate with the State Agencies. The Philadelphia District Offices handles the Eastern District of Pennsylvania, Delaware, West Virginia and South Jersey Office.

[2] *Filing a Charge*

An employee who believes he has a claim of discrimination must file a charge with the EEOC within 300 days of the discriminatory act if also filed with the state

agency, The Pennsylvania Human Relations Commission. The complainant will need to complete questionnaires and advise the investigator of details of discrimination. Investigators draft the charge or complaint based on the information received from the employee/ complainant.

The employer is notified within ten (10) days of the date of the charge by being provided a copy of the charge, notice about settlement and or an invitation to mediate the charges. The notice may also be accompanied by a request for a position statement and document production to the employer by EEOC.

[3] ***Mediation***

An invitation to mediation is usually extended but both parties must agree and the mediation is sent to a separate division for handling by EEOC Mediators. The Mediation is confidential and mediators will destroy all notes once the Mediation is concluded. The investigators are not advised of the Mediation results.

[4] ***Investigation***

The investigations are usually conducted by way of paper, position statements, document responses and affidavits of witnesses, which are not considered confidential by the EEOC and copies are provided to the complainant for rebuttal. A fact finding conference or site visit by the investigator can occur.

[5] ***Findings***

The findings of the EEOC fall within two categories – “Cause” or “No Cause”.

- **Cause** - Cause may be based on completed investigation which can result in the following occurring:
 - ✓ *Decision to Prosecute* - Decision to prosecute or issue a Right to Sue Letter, permitting the Complainant to sue individually in federal Court; or
 - ✓ *Decisions Not to Sue* - Decision not to sue based on factors such as a matter that is a part of practice or pattern and whether the issue is one of particular importance to EEOC, or
 - ✓ *Conciliation* - This option which may result in a conciliation agreement regarding the issues from face to face meetings and negotiations. Under this option the Employer agrees to abide by the anti-discrimination laws. Publicity is often an issue as the findings and conciliations can be published on the EEOC website.
- **No Cause** - No Cause is based on a completed investigation or on a request from the complainant after 60 days for a Right to Sue Letter. The Right to Sue Letter gives the complainant 90 days from receipt of the letter to file a Complaint in Federal Court.

§6.03 -THE PENNSYLVANIA HUMAN RELATIONS COMMISSION

[1] Overview

The Pennsylvania Human Relations Commission (PHRC) is the state counterpart to the Federal EEOC. The PHRC applies to employers with four or more employees and involving claims of discrimination race, color, religious creed, sex, national origin, handicap or disability and retaliation and

Fair Education Opportunities Act. PHRC and EEOC have agreements that PHRC may investigate claims filed with EEOC. There are three District offices, Philadelphia, Pittsburgh and Harrisburg.

[2] ***Filing a Charge***

An employee who believes he has a claim of discrimination must file a charge with PHRC within 180 days of the discriminatory act. The complainant will need to complete questionnaires and advise the investigator of details of discrimination. Investigators or Counsel for the Complainant may draft the complaint based on the information received from the employee/ complainant. The Complaint may also be cross-filed with the EEOC.

The employer is notified within thirty (30) days of the date of the Complaint by being provided a copy of the Complaint, Notice to Defend, Invitation to a no-fault-predetermination settlement, notice of appearance and request for documents including standard requests such as state contracts collective bargaining agreements and employee handbooks. Employer will also receive notice of a Fact Finding Conference.

[3] ***Answer to the Complaint***

The employer must file a verified answer to the Complaint within thirty (30) days of service. Extensions may be granted for only an additional thirty (30) days. If no Answer is filed, PHRC Commissioner may file a Petition for an Order to Show Cause for failure to file an Answer which may result in entry of judgment for complainant.

[4] ***Investigation***

PHRC has tools available in the investigative process including use of subpoena to secure documents, request for documents, position statements and affidavits of witnesses. A Fact Finding Conference is voluntary on both sides but it is not a Hearing. Investigators conduct the conferences and ask the questions and request parties to present their sides. There is no right to cross examine witnesses and testimony is not given under oath. Attorneys may not direct questions to the witnesses.

[5] ***Findings***

The findings of the PHRC also fall within two categories - "*Probable Cause*" or "*No Probable Cause*".

- *No Probable Cause* is based on completed investigation results in PHRC closing its file and notice to the parties. A Complainant may request a preliminary hearing not as a matter of right and it must be based on after acquired evidence or new evidence. If the hearing is granted testimony under oath and issuance of a finding or referral back for additional investigation may be ordered.

- *Probable Cause* is based on completed investigation and may result in a Conciliation Agreement or the Complainant may bring claims before a public hearing before the PHRC or file a Complaint in state court.

- ***Public Hearing Before PHRC*** - If conciliation fails a new complaint is served on the employer and a hearing takes place in county where discrimination took place. PHRC will establish rules for pleadings and discovery with a permanent hearing examiner assigned.

All testimony is under oath and transcribed. PHRC will issue findings of fact and if probable cause is found issue a cease and desist order damages, civil penalties, attorney fees and costs.

7

SEXUAL HARASSMENT IN THE WORKPLACE

§7.01 - INTRODUCTION

This Unit will examine the issue of sexual harassment in the workplace.

§7.02 - WHAT CONSTITUTES “SEXUAL HARASSMENT”

[1] *What Conduct?*

Two types of conduct which may constitute sexual harassment are: (1) “quid pro quo” sexual harassment and (2) sexual harassment that creates a “hostile work environment.”

[2] *Quid Pro Quo*

Quid pro quo sexual harassment consists of verbal or physical behavior or conduct of a sexual nature that is “unwelcome” and, is commonly persistent. Submission to or rejection of these unwelcome advances or requests forms the basis for an employment decision that affects an individual or becomes a condition of an individual’s employment.¹⁶⁴ A common example is where an employee rejects persistent sexual advances; and suddenly, that individual receives a poor work performance evaluation; or the individual is subsequently terminated. Courts have held employers strictly liable for quid pro quo harassment initiated by supervisory employees.¹⁶⁵

[3] ***Hostile Work Environment***

Sexual harassment that creates an intimidating, hostile or offensive work environment consists of verbal or physical behavior of a sexual nature that has the purpose or effect of substantially interfering with an individual's work performance, although it may not result in tangible or economic job consequences.¹⁶⁶

In hostile work environment cases, a plaintiff must prove that: (1) he or she suffered intentional discrimination because of his or her gender; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected him or her, and (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position.¹⁶⁷ In addition, the employer must have actual or constructive knowledge of the harassment for liability to attach to the employer.¹⁶⁸

- ***Pervasive*** - To determine whether the harassment was “pervasive and regular”, the Courts look at the totality of circumstances.¹⁶⁹ A single incident of sexual harassment is insufficient to show the requisite pervasiveness of the action.¹⁷⁰ Merely uttering epithets which cause an employee to feel offended does not create a hostile work environment.¹⁷¹
- ***Detrimental Effect*** - The Supreme Court held that a Plaintiff need not show that the offensive conduct seriously affected her psychological well being.¹⁷² “Title VII comes into play before the harassing conduct leads to a nervous breakdown....certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to

be psychologically injurious."¹⁷³ In the Third Circuit, the relevant question in determining detrimental effect is whether the discrimination would have detrimentally affected a reasonable person of plaintiff's sex.¹⁷⁴

[4] ***Threat Cases - Supervisors***

In 1998 the United States Supreme Court dealt with "threat" cases, i.e., those situations where plaintiff submits to the supervisor's advances to maintain her employment, due to either explicit or implied threats that things will get bad or worse if she does not cooperate. In these cases no tangible adverse employment action has taken place.

In the United States Supreme Court cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2275 (1998), and *Farragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2257 (1998), the Court ruled that in threat cases, where no tangible adverse employment action has taken place, and where the perpetrator is a supervisor with immediate or higher authority, the employer is subject to vicarious liability, unless it can prevail on a two-pronged affirmative defense that: (1) it acted reasonably to prevent or correct the harassment; and (2) the plaintiff acted unreasonably, either by failing to use the measures made available by the employer, or by failing to avoid the harm.¹⁷⁵ If the harasser is not above the victim in the chain of command, then the Courts will revert to the above-described "severe and pervasive" inquiry under *Stair v. Lehigh Valley Carpenters Local 600* and *Garvey v. Dickinson*.

The Third Circuit interpreted these two Supreme Court opinions and pointed out that there is a potential overlap between the two categories of supervisory harassment (falling within the scope of employment) and non-supervisory harassment (falling outside the scope of employment). These two areas overlap when non-supervisory personnel engage in sexual harassment against an employee with the belief that by

doing so he is serving his employer, and thus is "aided by the agency relationship."¹⁷⁶ These "overlap" cases would turn on the fact finder's perception of the harasser's intent.¹⁷⁷ If the harasser believed that he was acting, at least in part, in his employer's interests, then the acts might be considered within the scope of employment, and the employer could be held vicariously liable.¹⁷⁸

[5] ***Same-Sex Harassment***

The United States Supreme Court also recently determined that same-sex sexual harassment is actionable under Title VII, so long as the harassment is because of the victim's sex.¹⁷⁹ Oncale also dispensed with the presumption that when the perpetrator belongs to the same category as that of the victim, there was no intent to discriminate.

8

OTHER CAUSES OF ACTION

§8.01 - INTRODUCTION

A number of state courts have carved out exceptions to the employment-at-will doctrine based upon theories of tort law. These common law causes of action are increasingly being utilized as claims pendent to an employment discrimination claim.

§8.02 - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

[1] *The Cause of Action*

Although termination, by itself, will not give rise to the tort of intentional infliction of emotional distress, a terminated employee may recover for this claim when the circumstances surrounding the discharge are particularly egregious.¹⁸⁰ Moreover, on-the-job harassment may suffice to state a claim an employee need not be wrongfully terminated to state a claim for intentional infliction of emotional distress.¹⁸¹

Intentional infliction of emotional distress has been defined as follows: “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”¹⁸²

[2] ***What Must be Proven***

To prove intentional infliction of emotional distress, the plaintiff must show: (1) that the defendant intended to inflict emotional distress upon plaintiff, or the defendant knew or should have known that plaintiff's emotional distress was likely the result of his or her conduct; (2) defendant's conduct was "extreme and outrageous" and proximately caused plaintiff severe and substantial emotional distress; and (3) plaintiff's emotional distress resulted in damages.¹⁸³

"*Extreme and outrageous*", in most states, is not defined as mere insult, annoyance or conduct causing stress but rather, the conduct must "go beyond all possible bounds of decency, and...be regarded as atrocious, and utterly intolerable in a civilized community."¹⁸⁴ The plaintiff need not have experienced physical injury in order to recover for intentional infliction of emotional distress, but the severity should be such that "no reasonable person could be expected to endure it."¹⁸⁵ The intensity and duration of the distress are factors which are considered in determining its severity.¹⁸⁶

[3] ***Defenses***

Under Pennsylvania law, a plaintiff cannot recover for intentional infliction of emotional distress if the employer succeeds in showing that its conduct was not outrageous¹⁸⁷ or that plaintiff's emotional distress was not sufficiently severe.¹⁸⁸ Further, an employer is not held liable if its exercise of its legal rights in a permissible way caused the plaintiff's emotional distress.¹⁸⁹

§8.03 - DEFAMATION

[1] ***The Cause of Action***

A cause of action for defamation may arise if an employer has communicated a false statement about an employee to a third person that could be harmful to the

employee's reputation.

In order to establish a cause of action for defamation, the employee must show: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm to the plaintiff; and (7) abuse of a conditionally privileged occasion.¹⁹⁰

[2] ***Special Harm***

The plaintiff need not prove actual injury if the allegedly defamatory statement was made with knowledge of its falsity or with reckless disregard for its truth.¹⁹¹

[3] ***Remedies***

Successful plaintiffs may recover the full range of tort remedies, including punitive damages when the employee is found to have acted with malice.¹⁹² Successful plaintiffs may recover general damages. Adopting §569 of the Restatement (Second) of Torts, the Pennsylvania Superior Court has abolished the requirement that the plaintiff prove special harm (monetary loss) in libel actions in order to recover.¹⁹³ Likewise, a slander per se (words, falsely spoken, imputing criminal offense, loathsome disease, business misconduct or serious sexual misconduct), is actionable without proof of special damages.¹⁹⁴

[4] ***Defenses***

When relevant to the defense, the defendant has the burden of proving either (1) the truth of the allegedly defamatory communication; (2) the privileged character of the occasion on which it was published; or (3) the character of the allegedly defamatory subject matter as being of public

concern.¹⁹⁵

[5] ***Employer’s Qualified Privilege***

Pennsylvania Courts recognize the absolute privilege of the employer to publish defamatory information in notices of employee termination which is published only to the employee¹⁹⁶ in warning letters¹⁹⁷ and in employee evaluations, which are deemed consented to by the employee.¹⁹⁸ Consent is an absolute privilege.¹⁹⁹

Some employer communications are conditionally privileged, and as such are protected from legal action. A communication is conditionally privileged when: (1) some interest of the person who publishes the defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved; or (3) a recognized interest of the public is involved.²⁰⁰

One example of a conditionally privileged communication is the employer job reference. In many states, including Pennsylvania, employers enjoy a “qualified privilege” to give a defamatory reference provided that the reference is not made with malice, is limited to legitimate business interests, and is made only to persons with a legitimate interest in hearing the reference.²⁰¹ Plaintiff can overcome an employer's conditional privilege defense by showing that the privilege was abused, through publication resulting from malice or improper purpose.²⁰²

§8.04 - INVASION OF PRIVACY

[1] ***The Cause of Action***

A dismissed employee may be able to maintain a cause of action for invasion of privacy if his or her employer improperly obtained information related to the dismissal.

[2] ***Intrusion***

A plaintiff can establish a cause of action for intrusion if he or she can show: (1) an intentional intrusion, physical or otherwise, upon the solitude or seclusion of the employee's private affairs or concerns; (2) such intrusion would be offensive to a reasonable person; and (3) such intrusion proximately caused plaintiff damage.²⁰³

Most intrusion cases involve the employer's intrusion into a physical area in which the employee had a reasonable expectation of privacy, in order to obtain information about the employee.²⁰⁴

[3] ***Remedies***

A plaintiff may recover general and special damages for pain, discomfort, emotional distress, medical bills and loss of wages.

[4] ***Defenses***

Consent and waiver of rights are two of the most common defenses to this cause of action.²⁰⁵ The absolute privileges applicable to defamatory statements apply to intrusion.²⁰⁶

[5] ***Public Disclosure of Private Facts***

A plaintiff can establish a cause of action by showing that: (1) the defendant publicized a private matter about the plaintiff; (2) the publicity would be "highly offensive" to a reasonable person; (3) the matter is not of legitimate public concern; and (4) disclosure proximately caused damage to plaintiff and injured plaintiff's feelings.²⁰⁷ In order to be actionable, the publicity must involve communication to the public at large, or to so many individuals that the matter is substantially certain to become one of public knowledge.²⁰⁸

Defenses include waiver, consent, and showing that the disclosed information was of legitimate general interest. The absolute and qualified privileges used as defenses in defamation cases may also be used here.

§8.05 - ATTORNEY'S FEES

[1] *In General*

Each of the federal statutes discussed above contains a specific provision authorizing the awarding of attorney's fees to the prevailing party. The Court may allow the prevailing party, other than the Commission or the United States, a reasonable attorney fee, witness fee, and costs.²⁰⁹

[2] *Plaintiff*

The plaintiff must be a "prevailing party" in order to be eligible for a fee award under the above statutes. Plaintiffs are considered "prevailing parties" if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.²¹⁰ The Third Circuit regards a plaintiff as prevailing if he or she has obtained some of the benefits sought by the suit, and there is a causal connection between the suit and the fact that the relief was obtained.²¹¹ A plaintiff who has entered into a favorable pre-judgment settlement of an employment discrimination claim is no longer regarded as a prevailing party.²¹²

Under the "catalyst theory," the plaintiff is deemed to have prevailed, even despite the absence of a favorable final judgment after a full trial, when the lawsuit produces a voluntary action by the defendant that affords the plaintiff some or all of the relief sought.²¹³ If a suit is groundless and is settled for nuisance value, no attorney's fees will be awarded to the Plaintiffs.²¹⁴ Although a plaintiff who wins only nominal fees is a prevailing party, he or she should receive no attorney's fees award, since the degree of the

plaintiff's overall success bears heavily upon the reasonableness of any fee award.²¹⁵

[3] ***Defendant***

Prevailing defendants can recover fees under Title VII and the ADA. A Court may also award attorney's fees to a prevailing defendant if the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.²¹⁶

The Third Circuit has applied Christiansburg Garment in determining whether a plaintiff's claim is frivolous, unreasonable, or groundless.²¹⁷ An action is frivolous only if the plaintiff can make no rational argument in law or fact to support his or her claim for relief.²¹⁸ An action is not frivolous when supported by evidence which, if believed, would support a verdict.²¹⁹ There is no provision for an award of attorney's fees to a defendant in cases under the ADEA.

[4] ***Pro Se Plaintiff***

Attorney's fees awards are awarded against a pro se plaintiff only when it is clear that the plaintiff should have recognized the frivolity of the claim.²²⁰ Pro se litigants are not entitled to attorney's fees, even if the litigant is an attorney.²²¹

[5] ***Computation of Fees***

The United States Supreme Court has held that the attorney's fees should be calculated according to the number of hours reasonably expended on the litigation, times a reasonable hourly rate.²²² The result of this computation, called the "lodestar," is "strongly presumed to yield a reasonable fee."²²³ The reasonable hourly rate is calculated according to the "prevailing market rate."²²⁴ The Third Circuit has adopted the "community market rate" rule for determining a reasonable billing rate.²²⁵ Under the community market rate rule, the fee is to be based upon

affidavits of other plaintiff civil rights attorneys in the community.²²⁶ The burden is upon the defendant to counter this evidence.²²⁷

Notes

¹ Paul v. Lankenau Hospital, 524 Pa. 90, 569 A.2d 346 (1990); Clay v. Advanced Computer Applications, Inc., 522 Pa 86 559 A.2d 917 (1989); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

² McLaughlin v. Gastrointestinal Specialists, Inc., 696 A.2d 173 (Pa. Super. 1997); Pipkin v. Pennsylvania State Police, 548 Pa. 1, 693 A.2d 190 (1997)

³ See Gorwarav. AEL Indus., Inc., 784 F. Supp. 329, 242 (E.D. Pa. 1992).

⁴ Holewinski v. Children's Host of Pittsburgh, 437 Pa. Super. 174, 649 A.2d 712 (1994), allocator support denied, 540 Pa. 641, 659 A.2d 560 (1995).

⁵ Anderson v. Haverford College, 851 F.Supp. 179, 182 (E.D. Pa. 1994); Martin v. Capital Cities Media, Inc., 354 Pa. Super. 199, 511 A.2d 830 (1986), Allocutor denied, 514 Pa. 643, 523 A.2d 1132 (1987)

⁶ Morten v. Cities Media, Inc., 354 Pa. Super. 119, 511 A.2d 830 (1986), allocutor denied, 514 Pa. 643, 523 A.2d 1132 (1987).

⁷ Martin, supra.

⁸ Permenter v. Crown Court & Seal Co., Inc., 38 F. Supp. 2d 372 (1999), Aff'd 210 F.3d 358 (3d Cir. 2000); Darlington v. General Electric, 350 Pa. Super. 183, 504 A.2d 306 (1986), overruled on other grounds by Clay v. Advanced Comp. Applications, Inc., 522 Pa. 86, 559 A.2d 917 (1989).

⁹ Curran v. Children's Service Center of Wycoming Cty., Inc., 396 Pa. Super. 29, 578 A.2d 8 (1990).

¹⁰ Cashdollar v. Mercy Hospital of Pittsburgh, 460 Pa. Super. 606, 595 A.2d 70 (1991).

¹¹ Scott v. Extra Corporeal, Inc., 376 Pa. Super. 101, 545 A.2d 334, 339 (1988).

¹² Luteran at 217.

¹³ Paul v. Lankenau Hospital, 524 Pa. 90, 569 A.2d 346, 348 (1990); Stumpp at 335.

¹⁴ See Donahue v. Federal Exp. Corp., 753 A.2d 238 (Pa. Super. 2000); Brosso v. Devices for Vascular Intervention, Inc., 879 F. Supp. 473 (E.D. Pa.), aff'd 74 F.3d 1225 (3d Cir. 1995).

¹⁵ Donahue v. Federal Exp. Corp., 753 A.2d 238 (Pa. Super. 2000).

¹⁶ Pipkin v. Pennsylvania State Police, 548 Pa. 1, 693 A.2d 190 (1997).

¹⁷ McDaniel v. American Red Cross, 58 F. Supp. 2d 628 (W.D. Pa. 1999).

¹⁸ Clay v. Advanced Computer Applications, Inc., 522 Pa. 86, 559 A.2d 917 (1989).

¹⁹ Perry v. Tioga Cty., 694 A.2d 1176 (Pa. Commw. 1996) (employee discharged for refusal to perform illegal activity); Brown v. Hammond, 810 S. Supp. 644 (E.D. Pa. 1993) (employee discharged for refusing to bill paralegal time as attorney's time); Hanson v. Gishner Sys. Group, Inc., 831 F. Supp. 403 (M.D. 1993) (employee discharged for refusal to lie to federal investigators).

²⁰ Borse v. Pierce Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992); Symth v. Pillsbury, 914 F. Supp. 97 (E.D. Pa. 1996).

²¹ Ogden v. Keystone Residence, 226 F.Supp.2d 588 (M.D. Pa. 2002) (citing Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313 (3d Cir. 2000)).

²² 43 P.S. §962(c).

²³ Cain v. Hyatt, 734 F.Supp. 671 (E.D.Pa. 1990).

²⁴ International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

²⁵ Id.

²⁶ Burdine at 254-6.

²⁷ Id. at 2747.

²⁸ Fuentes, at 764; Seman, at 433.

²⁹ Id.

³⁰ Hood v. Ernst & Young, 28 F.3d 366, 371 (3d Cir. 1994); Starceski v. Westinghouse, 54 F.3d 1089, 1095-96 (3d Cir. 1995).

³¹ Woodson v. Scott Paper, 109 F.3d 913, 935 n.29 (3d Cir. 1997).

³² Watson, at 29.

³³ Teamsters v. United States, 431 U.S. 324 (1977).

³⁴ Id. at 336.

³⁵ Id.

³⁶ Id. at 360.

³⁷ Id.

³⁸ Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 45 L.Ed. 280, 95 S.Ct. 2363 (1975).

³⁹ Id. at 422.

⁴⁰ 42 U.S.C. §2000(e)-5(g).

⁴¹ Feldman v. Philadelphia Housing Authority, 43 F.3d 823 (3d Cir. 1994).

⁴² 42 U.S.C.A. §1981a(a)(1).

⁴³ 42 U.S. §1981(a)(b)(2).

⁴⁴ 42 U.S.C.A. §1981a(b)(1).

⁴⁵ 42 U.S.C. §1981a(b)(3).

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 82-83 (3d Cir. 1983).
See also Gelof v. Papineau, 829 F.2d 452, 454-55 (3d Cir. 1987)
(accord in ADEA cases).

⁴⁹ Loeffler v. Frank, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed. 2d 549 (1988).

⁵⁰ County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L.Ed. 2d 642, 99 S.Ct. 1379 (1979).

⁵¹ Sampson v. Murray, 415 U.S. 61 (1972)

⁵² Marxe v. Jackson, 833 F.2d 1121 (3d Cir. 1987).

⁵³ Gurmankin v. Constanzo, 626 F.2d 1115 (3d Cir. 1980), cert. denied, 450 U.S. 923, 101 S.Ct. 1375 (1981).

⁵⁴ 42 U.S.C.A. §1981a(b)(2).

⁵⁵ 43 P.S. §952.

⁵⁶ 43 P.S. §955(a).

⁵⁷ 43 P.S. §954(x).

⁵⁸ 43 P.S. §954(b).

⁵⁹ 43 P.S. §954(b).

⁶⁰ 43 P.S. §955(e); Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552-53 (3d Cir. 1996).

⁶¹ 32 U.S.S. §2000e-5(c), (d) and (e); Equal Emp't Opport'y Comm'n v. Arabian American Oil Co., 499 U.S. 244, 111 S.Ct. 1227 (1991).

⁶² Pub.L. No. 98-532, 98 Stat. 2705(1984).

⁶³ 29 C.F.R. §§1620.1-1620.34, (1992).

⁶⁴ Federal Elec. Co. v. Gilbert, 429 U.S. 125, 50 L.Ed. 2d 343, 97 S.Ct. 401 (1976); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 91 L.Ed. 2d 49, 106 S.Ct. 2399 (1986).

⁶⁵ 29 CFR §§1620.30-1620.31 (1992).

⁶⁶ 29 U.S.C. §216(b).

⁶⁷ 29 U.S.C. §§216-217.

⁶⁸ 29 U.S.C. §260.

⁶⁹ EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1074 (4th Cir. 1982).

⁷⁰ 29 U.S.C. §255.

⁷¹ 29 U.S.C. §206(d)(1). Wetzell v. Liberty Mut. Ins. Co., 449 F.Supp. 397 (W.D.Pa. 1978).

⁷² Schultz v. Wheaton Glassco, 421 F.2d 259, 359 (3d Cir. 1970); cert. denied, 398 U.S. 905 (1970).

⁷³ 29 CFR §1620.18(a)(1992); Corning Glass Works v. Brennan, 417 U.S. 188, 41 L.Ed. 2d 1, 94 S.Ct. 2223 (1974).

⁷⁴ 29 U.S.C. §255(a).

⁷⁵ Trans World Airlines, Inc. v. Thurston, 469 U.S. 111(1985); McLaughlin v. Richland Shoe Company, 486 U.S. 128, 108 S.Ct. 1677 (1988)

⁷⁶ Lorillard v. Pons, 434 U.S. 575, 580, 55 L.Ed. 2d 40, 98 S.Ct. 866 (1978).

⁷⁷ Sullivan v. Wirtz, 359 F.2d 426 (5th Cir.), cert. denied, 385 U.S. 852 (1966).

⁷⁸ 29 U.S.C. §206(d)(1); Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir. 1973), cert. denied, 414 U.S. 866 (1973).

⁷⁹ Corning, *supra*

⁸⁰ Hodgson, *supra*,

⁸¹ Hodgson at 594.

⁸² Aldrich v. Randolph Cent. School Dist., 9613 F.2d 520, 526 (2d Cir. 1992).

⁸³ 42 U.S.C. §2000e-2(h).

⁸⁴ County of Washington v. Gunther, 452 U.S. 161, 169, 68 L.Ed.2d 751, 101 S.Ct. 2242.

⁸⁵ Lyon v. Temple Univ., 543 F.Supp. 1372 (E.D.Pa. 1982).

⁸⁶ Geraci v. Moody-Tottrup, Intern, Inc., 82 F.3d 578 (3d Cir. 1996).

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ International Union, United Auto., and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 113 L.Ed. 2d 158, 111 S.Ct. 1196 (1991).

⁹⁰ In re Carnegie Center Assoc., 129 F.3d 290 (3d Cir. 1997).

⁹¹ 29 U.S.C. §2617.

⁹² 29 U.S.C. §2612(a)(1).

⁹³ 29 U.S.C. §2611(2).

⁹⁴ Id. at §2611(11).

⁹⁵ 29 U.S.C.A. §2617(c)(1).

⁹⁶ 29 U.S.C.A. §2617(c)(2).

⁹⁷ 29 C.F.R. §8125.401.

⁹⁸ 29 U.S.C.A. §2651(a).

⁹⁹ 29 U.S.C.A. §623(d)

¹⁰⁰ 29 U.S.C.A. §623(e)

¹⁰¹ 29 U.S.C.A. §623(f)(2).

¹⁰² 29 U.S.C. §631(a), 29 U.S.C. §633a(a).

¹⁰³ Oscar Mayer Co. v. Evans, 441 U.S. 750, 756, 60 L.Ed. 2d 609, 99 S.Ct. 2066 (1979).

¹⁰⁴ O'Connor v. Consolidated Coin Caterer's Corp., 517 U.S. 308, 134 L.Ed. 2d 433, 116 S.Ct. 1307 (1996).

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- ¹⁰⁵ Hazen Paper Co. v. Biggins, 507 U.S. 604, 123 L.Ed. 2d 338, 113 S.Ct. 1701, 1705, (1993).
- ¹⁰⁶ 29 U.S.C. §626(d).
- ¹⁰⁷ 29 U.S.C. §626(d).
- ¹⁰⁸ 29 U.S.C. §633(b). Oscar Mayer & Co. at 750.
- ¹⁰⁹ Berndt v. Kaiser Aluminum and Chem. Sales, Inc., 789 F.2d 253 (3d Cir. 1986).
- ¹¹⁰ Marzano v. Computer Science Corp., 91 F.3d 497 (3d Cir. 1996).
- ¹¹¹ Lorillard v. Pons, 434 U.S. 575, 55 L.Ed. 2d 40, 98 S.Ct. 866 (1978).
- ¹¹² Kelly v. Matlack, 903 F.2d 978, 985 (3d Cir. 1990).
- ¹¹³ 29 U.S.C.A. §626(b).
- ¹¹⁴ Trans World Airlines v. Thurston, 469 U.S. 111, 83 L.Ed. 2d 523, 105 S.Ct. 613(1985).
- ¹¹⁵ Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1099 (3d Cir. 1995).
- ¹¹⁶ Woodyatt v. Bethlehem Steel Corp., 1996 WL 34427 *1 (E.D.Pa.).
- ¹¹⁷ 29 U.S.C.A. §626(b).
- ¹¹⁸ Espinueva v. Garrett, 895 F.2d 1164 (7th Cir. 1990).
- ¹¹⁹ Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982), cert. denied, 459 U.S. 1039 (1982).
- ¹²⁰ Anastasio v. Schering Corp., 838 F.2d 701 (3d Cir. 1988).
- ¹²¹ Wehr v. Burroughs Corp., 619 F.2d 276, 279 (3d Cir. 1980).

¹²² 29 U.S.C. §623(f)(1)-(3), §4(f)(1)-(3).

¹²³ 29 U.S.C. §622.2(2)(c).

¹²⁴ Criswell, at 412.

¹²⁵ Id. at §103.

¹²⁶ OWBPA §103, 29 U.S.C. §623(f)(2).

¹²⁷ 29 U.S.C.A. § 623(f)(3).

¹²⁸ §§ 260 et seq.

¹²⁹ Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978).

¹³⁰ Id.

¹³¹ In EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 222 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984),

¹³² Id. at §12111.

¹³³ Gaul v. Lucent Technologies, Inc., 134 F.3d 576 (3d Cir. 1998).

¹³⁴ “Americans with Disabilities: Practice and Compliance Manual,” Chapter 12A (Database updated August 2012).

¹³⁵ Id.

¹³⁶ 42 U.S.C. §12102(2); Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3d Cir. 1997).

¹³⁷ Id.

¹³⁸ 29 C.F.R §1630.2(l).

¹³⁹ 29 C.F.R. §1630.2(h).

¹⁴⁰ Olson v. General Elec. Astrospace, 101 F.3d 947 (3d Cir. 1996).

¹⁴¹ 42 U.S.C. §12210(a) and (b).

¹⁴² McNemar v. Disney Store, Inc., 91 F.3d 610, cert. denied 117 S.Ct. 958, 136 L.Ed. 2d 845.

¹⁴³ 29 U.S.C. §1630.2(j).

¹⁴⁴ Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996).

¹⁴⁵ 42 U.S.C. §12111(8).

¹⁴⁶ 29 C.F.R. §1630.2(n).

¹⁴⁷ Id.

¹⁴⁸ 42 U.S.C. § 12112.

¹⁴⁹ Id.

¹⁵⁰ 56 Fed. Reg. 35744 (1991).

¹⁵¹ 42 U.S.C. §12111(a).

¹⁵² Gaul at 580-81.

¹⁵³ 42 U.S.C. §12117(a); 29 U.S.C. §794a.

¹⁵⁴ 29 C.F.R. §1630.15(a).

¹⁵⁵ 29 C.F.R. §1630.15(b) and (c).

¹⁵⁶ Id.

¹⁵⁷ 29 C.F.R. §1630.15(d).

¹⁵⁸ 42 U.S.C.A. §12111(10)(a).

¹⁵⁹ 42 U.S.C. §12111(10)(b).

¹⁶⁰ 42 U.S.C.A. §12113(b).

¹⁶¹ 42 U.S.C.A. §12113(b).

¹⁶² School Bd. Of Nassau County v. Arline, 480 U.S. 273, 94 L.Ed. 2d 307, 107 S.Ct. 1123 (1987)

¹⁶³ Arline at 1131 (quoting Brief for American Medical Association as Amicus Curiae 19).

¹⁶⁴ 29 C.F.R. §1604.11(a)(2) (1991).

¹⁶⁵ Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 78 (3d Cir. 1983).

¹⁶⁶ 29 C.F.R. §1604.11(a)(3); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

¹⁶⁷ Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Brown v. Continental Baking Co., 891 F.Supp 238, 242-43 (E.D.Pa. 1995).

¹⁶⁸ Id.

¹⁶⁹ Stair v. Lehigh Valley Carpenters Local 600, 813 F.Supp.1116, 1119 (E.D.Pa. 1993); Garvey v. Dickinson, 763 F.Supp. 799 (M.D.Pa. 1991).

¹⁷⁰ Kuhn v. Philip Morris U.S.A., Inc., 814 F.Supp. 450, 454 (E.D.Pa. 1993).

¹⁷¹ Harris v. Forklift Sys., Inc., 510 U.S. 17, 126 L.Ed.2d 295, 114 S.Ct. 367 (1993).

¹⁷² Id. at 370-71.

¹⁷³ Id.

¹⁷⁴ Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

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- ¹⁷⁵ Ellerth, see also Farragher at 2292-93.
- ¹⁷⁶ Durham Life Insurance Co. v. Evans, 166 F.3d 139 (1997).
- ¹⁷⁷ Id.
- ¹⁷⁸ Id. at 18.
- ¹⁷⁹ Oncale v. Sundowner Offshort Services, Inc., 118 S.Ct. 998 (1998).
- ¹⁸⁰ Briec v. Harbison-Walker Refractories, 624 F.Supp. 363, 367 (W.D.Pa. 1985).
- ¹⁸¹ Shaffer v. National Car Corp., 565 F.Supp. 909 (E.D.Pa. 1983).
- ¹⁸² Shaffer v. National Car Corp., supra.
- ¹⁸³ Briec at 367.
- ¹⁸⁴ Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C. App.), cert. denied, 459 U.S. 912 (1982).
- ¹⁸⁵ Restatement (Second) of Torts §46 comment j at 77-78 (1977).
- ¹⁸⁶ Id.
- ¹⁸⁷ D'Ambrosio v. Pa. Nat. Mut. Cas. Ins. Co., 396 A.2d 780, 787 (Pa.Super. 1979),
- ¹⁸⁸ Alexander v. Polk, 750 F.2d 250, 265 (3d Cir. 1984).
- ¹⁸⁹ Restatement (Second) of Torts §46 comment g at 76 (1977).
- ¹⁹⁰ Miketic v. Baron, 675 A.2d 324, 327 (Pa. Super. 1996).
- ¹⁹¹ Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L.Ed. 2d 789, 94 S.Ct. 2997 (1974).

¹⁹² Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1285 (3d Cir. 1979); Clemente v. Espinosa, 749 F. Supp. 672 (E.D. Pa. 1990).

¹⁹³ Agriss at 474.

¹⁹⁴ Walker v. Grand Cent. Sanitation, Inc., 634 A.2d 237, 244 (Pa. Super. 1993); Clemente v. Espinosa, 749 F. Supp. 672, 677 (E.D. Pa. 1990).

¹⁹⁵ Elia v. Erie Ins. Exchange, 634 A.2d 657, 659 (1993), allocutur denied, 644 A.2d 1200 (1994).

¹⁹⁶ Yetter v. Ward Trucking Co., 585 A.2d 1022, 1024 (1991).

¹⁹⁷ Agriss v. Roadway Exp., Inc., 483 A.2d 456, 461 (1984).

¹⁹⁸ Baker v. Lafayette College, 504 A.2d 247 (1986).

¹⁹⁹ Id.

²⁰⁰ Beckman v. Dunn, 419 A.2d 583, 587-88 (1980).

²⁰¹ Daywalt v. Montgomery Hosp., 573 A.2d 1116 (1990).

²⁰² Id.

²⁰³ Restatement (Second) of Torts Sect. 652 B (1977).

²⁰⁴ Rogers v. IBM Corp., 500 F.Supp. 867, 870 (W.D. Pa. 1980).

²⁰⁵ Restatement (Second) of Torts §652F (1977).

²⁰⁶ Id.

²⁰⁷ Restatement (Second) of Torts §652D (1977).

²⁰⁸ Rogers at 870.

²⁰⁹ 42 U.S.C. §2000e-5(k).

²¹⁰ Farrar v. Hobby, 506 U.S. 103, 121 L.Ed.2d 494, 113 S.Ct. 566, 573 (1992).

²¹¹ Ashley v. Atlantic Richfield Co., 794 F.2d 128, 131 (3d Cir. 1986) (aff'd by legislative act PL 110-175 Dec. 31, 2007)).

²¹² Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244 (3d Cir. 1992); Ashley at 131.

²¹³ Hewitt v. Helms, 482 U.S. 755, 760-761, 96 L.Ed. 654, 107 S.Ct. 2672 (1987); Baumgartner v. Harrisburg Housing Authority, 21 F.3d 541 (3d Cir. 1994).

²¹⁴ Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 103 L.Ed.2d 866, 109 S.Ct. 1486, 1493 (1989).

²¹⁵ Farrar at 112-114.

²¹⁶ Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 54 L.Ed.2d 648, 98 S.Ct. 694 (1978).

²¹⁷ Quiroga v. Hasbro, Inc., 934 F.2d 497, 503 (3d Cir. 1991).

²¹⁸ Story v. Morgan, 786 F.Supp. 523, 524 (W.D. Pa. 1992).

²¹⁹ EEOC v. L.B. Foster Co., 123 F.3d 749, 753 (3d Cir. 1997).

²²⁰ Hughes v. Rowe, 449 U.S. 5, 15, 66 L.Ed.2d 163, 101 S.Ct. 173 (1980).

²²¹ Kay v. Ehrler, 499 U.S. 432, 113 L.Ed. 486, 111 S.Ct. 1435 (1991).

²²² Blum v. Stevenson, 465 U.S. 886, 79 L.Ed.2d 891, 104 S.Ct. 1541 (1984).

²²³ Washington v. Philadelphia Co. Ct. of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996).

²²⁴ Blum at 895 n. 11.

²²⁵ Student Public Interest Group v. AT&T Bell Lab. ("SPRIG"), 842 F.2d 1436, 1447 (3d Cir. 1988).

²²⁶ Washington at 1036.

²²⁷ Id.