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Employment Discrimination

EMPLOYMENT DISCRIMINATION

The Eighth Circuit Court of Appeals decided numerous employment discrimination cases from July 1984 to March 1985.[1] This Survey inspects the court's significant decisions regarding sex, race, and age discrimination in the workplace. The Survey focuses primarily on issues relating to liability, including types and burdens of proof, theories of liability, and the relationship between section 1981 of title 42 of the United States Code and title VII. The Survey also addresses the Eighth Circuit's rulings on procedural issues and remedies related to employment discrimination.

I. LIABILITY

A. Race and Sex Discrimination

1. Types and Burdens of Proof

In individual employment discrimination suits alleging disparate treatment[2] brought under title VII of the Civil Rights Act of 1964,[3] the causation issue is a major hurdle for discrimination litigants. The United States Supreme Court established the basic allocation of burdens and order of presentation of proof in *McDonnell Douglas Corp. v. Green.*[4] Under the *McDonnell Douglas* test, a plaintiff has the initial

1. The Eighth Circuit Court of Appeals handed down employment discrimination decisions construing one or more of the following federal statutes: the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982) [hereinafter referred to as title VII], the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982) [hereinafter referred to as ADEA].

2. The Supreme Court recognizes two basic types of discrimination under title VII. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 2 (2d ed. 1983). Disparate treatment exists when "the employer simply treats some people less favorably than others because of their race, sex, color, religion, or national origin." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), *quoted in* B. SCHLEI & P. GROSSMAN, *supra*, at 13. Disparate treatment discrimination is distinguishable from disparate impact discrimination. Disparate impact discrimination exists when employment practices are facially neutral in their treatment of different groups but in effect discriminate against certain groups in ways which cannot be justified by business necessity. *See, e.g., International Bhd. of Teamsters*, 431 U.S. at 335 n.15; Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-68 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The methods of proof necessary to establish each of these claims differs. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 567-80 (1978). *See generally* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713 n.1 (1983) (noting the varied treatment of disparate treatment and disparate impact cases).

3. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

4. 411 U.S. 792 (1973).

burden of proving a prima facie case of discrimination.[5] Establishing a prima facie case creates a presumption of unlawful discrimination.[6] If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.[7] If the defendant meets this burden, the plaintiff has an opportunity to prove that the reasons proffered by the defendant were not the actual reasons, but were a pretext for discrimination.[8] In *Texas Department of Community Affairs v. Burdine,*[9] the Supreme Court reaffirmed the *McDonnell Douglas* tripartite analysis. The Court stated unequivocally that the plaintiff always retains the burden of proof to persuade the trier of fact of intentional discrimination.[10]

The Eighth Circuit applied the *McDonnell Douglas/Burdine* principles in two noteworthy title VII cases decided during the survey period.[11] In *Goodwin v. Circuit Court,*[12] the plaintiff, a female attorney, brought a title VII claim against the circuit court alleging that she was removed from her position as a hearing officer because of her sex.[13] The federal district court issued declaratory judgment in the plaintiff's favor.[14]

The Eighth Circuit held that the district court reached this conclusion improperly.[15] The court of appeals held that the district court erred in stating that the burden of proof shifts to the defendant to show a nondiscriminatory purpose after the plaintiff establishes her

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5. *Id.* at 802. The plaintiff may establish a prima facie case by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. By establishing a prima facie case, the plaintiff creates a presumption that the employer unlawfully discriminated against him. *Id.* at 802-03.

6. *See id.*

7. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); *McDonnell Douglas,* 411 U.S. at 102-03.

8. *Burdine,* 450 U.S. at 255-56.

9. 450 U.S. 248 (1981).

10. *Id.* at 256.

11. Bibbs v. Block, 749 F.2d 508 (8th Cir. 1984); Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir. 1984). Note that *Goodwin* was originally decided by the appellate court on March 6, 1984, but was reviewed again during the survey period after being remanded. *See* Goodwin v. Circuit Court, 741 F.2d 1087 (8th Cir. 1984).

12. 729 F.2d 541 (8th Cir. 1984).

13. *Id.* at 542. The plaintiff also brought a § 1983 action against the judge of the circuit court for removing her to another position. *Id.*

14. Goodwin v. Circuit Court, 555 F. Supp. 658, 663 (E.D. Mo. 1982).

15. *Goodwin,* 729 F.2d at 543.

prima facie case.[16] The *Goodwin* court, after asserting that the burden of persuasion remains on the plaintiff at all times, noted that the only burden that shifts to the employer-defendant in title VII actions is the burden of production.[17]

Goodwin emphasizes the subtle, yet important, distinction between the burden of proof and the burden of production. The defendant does not have to prove a legitimate, nondiscriminatory reason for its action against the employee. The Supreme Court has held that this burden would be too onerous.[18] *Goodwin* instead affirms that the defendant need only initially produce a legitimate, nondiscriminatory explanation for its conduct, not persuade the court of its intent.[19]

Bibbs v. Block,[20] a case of first impression, provided the Eighth Circuit with its second significant title VII controversy. The case involved the appropriate standard of causation to be used at the third stage of the *McDonnell Douglas/Burdine* analysis when an employer acts against its employee with a mixed motive.[21] The *Bibbs* court, relying heavily on *Burdine,* held that a title VII plaintiff establishes the defendant's liability for unlawful discrimination "by showing that 'a discriminatory reason more likely [than not] motivated the employer.' "[22]

In *Bibbs,* the plaintiff, a black male employee, sought a promotion.[23] As one of seven applicants, the plaintiff was interviewed by a committee comprised of three white males.[24] The key person on the promotion selection committee was found to be racially biased,[25] and the committee, as a result, denied the plaintiff a promotion.[26]

The district court found that the selection committee also lacked

16. *Id.*

17. *Id.* at 549.

18. *See Burdine,* 450 U.S. at 257; Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978).

19. *See Goodwin,* 729 F.2d at 549; *see also Burdine,* 450 U.S. at 257-58.

20. 749 F.2d 508 (8th Cir. 1984).

21. *Id.* at 510. A "mixed-motive" describes a situation where the employer seems to have been motivated by both lawful and unlawful considerations. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective,* 82 COLUM. L. REV. 292, 293 (1982). At issue is "how large a part the discriminatory factor must play" before a court holds that the prohibited criterion was the basis for the decision against the employee. *Id.*

22. *Bibbs,* 749 F.2d at 511 (citing *Burdine,* 450 U.S. at 256).

23. *Id.* at 509. Bibbs was employed by the Department of Agriculture as an offset press operator and had applied for a supervisory position in that department. *Id.*

24. *Id.* Bibbs was the only black applicant. *Id.*

25. *Id.* at 509, 512. The court found that the most influential member of the selection committee was Joseph Tresnack. *Id.* at 509. Tresnack was the only committee member familiar with the print shop and the employees with whom Bibbs would be dealing. *Id.*

26. *See id.* at 509-10.

credibility because each committee member used different decisional factors in evaluating the plaintiff.[27] The plaintiff's expertise and knowledge were considered along with rumors about his reputation, some of which were supplied by the committee member whom the district court found to be racially biased.[28] In reviewing the employer's decision to promote a candidate other than the plaintiff, the district court found that race was a discernible but not determining factor, and thus the denial was not improper.[29] The district court reached this conclusion by applying the same-decision test, a rule used in cases involving employment decisions based on protected conduct.[30] Under this test, and unlike *Burdine,* once the plaintiff has established his or her prima facie case, the burden of persuasion shifts to the employer.[31] The employer must then show by a preponderance of the evidence "that it would have reached the same decision . . . even in the absence of the protected conduct."[32]

The Eighth Circuit, however, rejected this standard for mixed-motive cases.[33] As noted, the district court found race to be a discernible factor in the employment decision.[34] Based on this finding, the court of appeals concluded that the same-decision test is inappropriate under the principles of *Burdine.*[35] To the contrary, the court held that, under *Burdine,* a "plaintiff need only show that racial reasons more likely than not influenced the employment decision."[36] The *Bibbs* court reasoned:

> We find it inherently inconsistent to say that race was a discernible factor in the decision, but the same decision would have been made absent racial considerations. Thus, we think that once race is shown to be a causative factor in the employment decision, it is clearly erroneous to find that racial considerations did not affect the outcome of the decision.[37]

The court stated two additional reasons for rejecting the same-decision test. First, the language of title VII itself recognizes the broad purpose of eliminating all discrimination in employment.[38] Second, the court noted that the practical effect of the same-decision test un-

27. *Id.* at 510.
28. *Id.* at 509. Tresnack referred to Bibbs as a "black militant." *Id.*
29. *Id.* at 511.
30. *See id.; see also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286-87 (1977); Williams v. Boorstin, 663 F.2d 109, 117 (D.C. Cir. 1980).
31. *See Mt. Healthy,* 429 U.S. at 287.
32. *Id.*
33. *Bibbs,* 749 F.2d at 511.
34. *Id.*
35. *Id.*
36. *Id.* at 513.
37. *Id.* at 512.
38. *Id.; see McDonnell Douglas,* 411 U.S. at 800-01; 42 U.S.C. §§ 2000e-2 to -3.

necessarily requires the plaintiff to disprove the defendant's allegations of the defendant's subjective intent.[39] The court believed that such an onerous burden is unreasonable when race has been shown to be a factor in the employer's decision.[40]

The *Bibbs* result is reasonable and necessary.[41] Any attempt to quantify race as a minor factor is neither practically possible nor desirable. The Supreme Court has previously emphasized, "Discriminatory intent is simply not amenable to calibration."[42] Consequently, the *Bibbs* court properly rejected the same-decision test unequivocally.[43] To hold otherwise in cases where race is found to be a discernible factor would be to disregard the letter and spirit of title VII.

In an area where the decisions of the Eighth Circuit and other circuits have shown little consistency, *Bibbs* is a useful tool for future litigants. The "more likely than not" standard is, however, slightly elusive. While the Supreme Court has not addressed the issue of which standard is appropriate in mixed-motive cases, one scholar believes that the Supreme Court's previous teachings in title VII cases point toward the Court's adoption of the same-decision test for mixed-motive cases.[44] Thus, while *Bibbs* is useful and reasonable, its value may be short-lived.

2. *Theories of Liability*

In *Benson v. Little Rock Hilton Inn,*[45] the Eighth Circuit lessened the possibility that employers will be held liable for discrimination on a retaliation theory.[46] In *Benson,* the plaintiff, a black woman, worked as a chambermaid prior to her discharge.[47] While cleaning the hotel general manager's office, the plaintiff found a mock employment application which contained racial slurs.[48] Shortly thereafter, the plaintiff filed a class action suit against the defendant under section 1981

39. *Bibbs,* 749 F.2d at 512-13.
40. *Id.* at 513.
41. *See* Brodin, *supra* note 21, at 320-22.
42. Personnel Adm'r v. Feeney, 442 U.S. 256, 277 (1979).
43. 749 F.2d at 512.
44. *See* Brodin, *supra* note 21, at 324-25.
45. 742 F.2d 414 (8th Cir. 1984).
46. Title VII provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).
47. *Benson,* 742 F.2d at 415.
48. *Id.*

of title 42 of the United States Code.[49] The complaint alleged that the defendant required black female employees to fill out the application and, therefore, maintained policies and practices which adversely affected black female employees.[50] After speaking with the plaintiff concerning the lawsuit, the hotel manager fired her.[51]

The plaintiff's initial complaint was dismissed by the district court for failure to state a claim.[52] The plaintiff amended her complaint by alleging that her discharge was in retaliation for filing her section 1981 claim.[53] Her amended complaint invoked both section 1981 and title VII.[54] The district court found that the plaintiff lied to her lawyer regarding the mock application requirement.[55] The district court concluded that the plaintiff was fired because she had falsely libeled the hotel, lied to the manager, and stolen the document.[56] The lower court stated that no racial considerations entered the employer's decision.[57]

The court of appeals found that, despite the broad protection traditionally afforded employees filing discrimination claims against their employers,[58] the plaintiff failed to establish a retaliation claim.[59] Specifically, the court upheld the district court's finding that the plaintiff failed to establish that the defendant retaliated against her for opposing conduct which the plaintiff reasonably believed constituted unlawful discrimination.[60]

In reaching its decision, the court of appeals relied in part on the standard established in *Womack v. Munson,*[61] a strikingly similar case. In *Womack,* the court determined that a dismissed employee's post-complaint statements were similar to the allegations in his title VII complaint.[62] Consequently, the *Womack* court found that the employee's statements were "so inextricably related to the allegation in the complaint that they [could not] be considered independently of

49. *Id.* The plaintiff also alleged violation of 42 U.S.C. §§ 1985, 1988 and the thirteenth amendment. *Id.*

50. *Id.*

51. *Id.* The manager approached the plaintiff after having read a newspaper article that discussed the lawsuit and the plaintiff's allegation that employees were required to complete the mock application. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 415-16.

55. *Id.* at 416.

56. *Id.*

57. *Id.*

58. *See* 42 U.S.C. § 2000e-3(a).

59. *Benson,* 742 F.2d at 418.

60. *See id.*

61. 619 F.2d 1292 (8th Cir. 1980), *cert. denied,* 450 U.S. 979 (1981).

62. *See id.* at 1297.

one another."[63] On that basis, the court upheld the plaintiff's retaliation claim.[64] *Womack* can be contrasted with *Benson,* where the court of appeals found that the discussion the manager had with the plaintiff the day after she filed her complaint was motivated by events independent of her complaint.[65]

Judge Heaney dissented in *Benson.* He argued forcefully that the essence of the majority's argument rested on mere technical differences between filing an action under title VII and section 1981.[66] As noted, the plaintiff initially filed suit pursuant only to section 1981. Two major problems arose because of that decision. First, section 1981 does not explicitly prohibit an employer from terminating an employee in retaliation for charging the employer with unlawful discrimination.[67] The court has, however, overcome this problem by treating retaliation claims under section 1981 as though they were brought under title VII.[68] Second, the *Benson* majority did not give the plaintiff the same protection she would have had if her complaint was formally filed with the Equal Employment Opportunity Commission (EEOC).[69] This approach, Judge Heaney concluded, unfairly penalized the plaintiff for her lawyer's decision to file under section 1981 rather than under title VII.[70] Furthermore, the majority's decision dishonored the federal anti-discrimination law's overall purpose of protecting employee assertions of discrimination claims against retaliation.[71]

Although the factual findings in *Benson* might be acceptable, the majority's legal analysis is disturbing. It is illogical to create a retaliation action for section 1981 and fail to give a litigant absolute protection from retaliatory conduct. The policy of protecting individuals who file discrimination suits is not served by this decision. Moreover, the dissent correctly noted that filing a section 1981 lawsuit closely resembles a title VII proceeding, as opposed to a truly informal opposition which affords slightly less protection from retaliation.[72] Finally, a section 1981 suit is a nondisruptive remedy estab-

63. *Id.*
64. *Id.* at 1299.
65. *Benson,* 742 F.2d at 417-18.
66. *See id.* at 419 (Heaney, J., dissenting).
67. *Id.* at 416.
68. *See* Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied,* 455 U.S. 976 (1982); Setser v. Novack Inv. Co., 638 F.2d 1137, 1146-47 (8th Cir.), *modified on other grounds,* 657 F.2d 962 (8th Cir.) (en banc), *cert. denied,* 454 U.S. 1064 (1981).
69. 742 F.2d at 421 (Heaney, J., dissenting).
70. *Id.*
71. *See id.*
72. *Id.* Most courts protect informal opposition conduct from retaliation so long as the employee has a reasonable and good faith belief that the opposed employer practice is unlawful. *Sisco,* 655 F.2d at 150. By contrast, courts generally grant em-

lished by Congress. Given these considerations, *Benson* indicates that the court is unwilling to look beyond minor distinctions to protect complainants alleging retaliatory conduct.

The Eighth Circuit reviewed the denial of another retaliation claim in *Clay v. Consumer Programs, Inc.*[73] The court of appeals affirmed, per curiam, the district court on the basis of the lower court's published opinion.[74]

In *Clay,* the plaintiff, a black male employed by the defendant, applied as one of several candidates for a management position.[75] The defendant-employer did not promote the plaintiff.[76] The court found that the plaintiff's attempt to demonstrate a prima facie case of racial discrimination was unsupported because the plaintiff was unqualified for the management position.[77] After failing to be promoted, the plaintiff filed a discrimination claim with the EEOC.[78] The plaintiff alleged that the employer then retaliated because of the EEOC filing.[79]

The *Clay* court affirmed that the *McDonnell Douglas/Burdine* burdens and orders of proof apply to retaliation claims, and set forth the elements necessary to establish a prima facie case.[80] The plaintiff must show: "(1) statutorily protected participation; (2) adverse employment action, and (3) a causal connection between the two."[81] The court found that the plaintiff failed to satisfy the third element.[82]

The plaintiff claimed that certain attendance procedures, derogatory language, and his eventual termination were retaliatory.[83] The defendant established, however, that those procedures were uniform and offered legitimate reasons for each action.[84] The plaintiff's failure to discount the employer's proferred motives resulted in judgment for the defendant.[85]

Beyond the retaliation theory of liability, the Eighth Circuit addressed a novel sex discrimination claim in *Gilreath v. Butler Manufacturing Co.*[86] In *Gilreath,* the plaintiff was employed by the defendant

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ployees involved in participation conduct absolute protection. *See, e.g.,* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1006 (5th Cir. 1969).

73. 745 F.2d 501 (8th Cir. 1984).
74. *Id.; see* Clay v. Consumer Programs, Inc., 576 F. Supp. 185 (E.D. Mo. 1983).
75. *Clay,* 576 F. Supp. at 186, 187-88.
76. *Id.* at 188.
77. *Id.* at 187, 188-89.
78. *Id.* at 189.
79. *Id.*
80. *Id.*
81. *Id.* (citing *Womack,* 619 F.2d at 1296).
82. *Id.*
83. *Id.* at 189-90.
84. *Id.*
85. *Id.* at 190.
86. 750 F.2d 701 (8th Cir. 1984).

to perform numerous labor-related jobs.[87] He injured his hand, but was able to return to work wearing a protective dressing.[88] One week later, the plaintiff was assigned to replace a female employee at a machine because she had difficulty performing her task.[89] The plaintiff refused to report, allegedly because his injury prevented him from operating the machine.[90] The employer dismissed the plaintiff for insubordinate conduct.[91]

The plaintiff brought suit alleging that termination of his employment constituted disparate treatment on the basis of sex because the female employee was not discharged for her inability to perform the work.[92] The district court dismissed the claim, finding that the plaintiff had failed to state a sex discrimination claim.[93]

The court of appeals affirmed the district court's decision.[94] The plaintiff had apparently established a prima facie discrimination case.[95] The *Gilreath* court noted, however, that "[w]hen a claim of discrimination rests on a particular act such as a discharge, proof of a discriminatory motive is critical."[96] By failing to show a similarity between his conduct and that of the female employee who was not discharged, the plaintiff failed to establish his burden of proof under the third stage of the *McDonnell Douglas/Burdine* test.[97]

3. Procedural Issues

In *Briseno v. Central Technical Community College Area,*[98] the Eighth Circuit adhered to *Johnson v. Yellow Freight System, Inc.,*[99] holding that admission of administrative findings in employment discrimination trials should be left to the sound discretion of the trial court.[100] In *Briseno,* the plaintiff, a Mexican-American, was allegedly denied a teaching position because of his race.[101] Seeking relief, the plaintiff

87. *Id.* at 702.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 701. The district court found no evidence of disparate treatment based on the plaintiff's gender. *Id.*
94. *Id.* at 703.
95. *Id.* at 702.
96. *Id.* (citing *International Bhd. of Teamsters*, 431 U.S. at 335 n.15).
97. *See id.* at 702-03; *see also* Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253-57 (8th Cir. 1981). For a discussion of the *McDonnell Douglas/Burdine* test, see *supra* notes 4-10 and accompanying text.
98. 739 F.2d 344 (8th Cir. 1984).
99. 734 F.2d 1304, 1309 (8th Cir. 1984).
100. *Briseno,* 739 F.2d at 347.
101. *Id.* at 346.

exhausted state and federal administrative remedies.[102] He then filed a race discrimination suit based on title VII and sections 1981 and 1983.[103]

The trial court excluded from evidence letters and determinations by state and federal employment opportunity commissions.[104] These administrative documents stated that there was "no reasonable cause to believe the defendants discriminated against the plaintiff."[105] Although the circuit courts have split on the question of admitting administrative findings into evidence,[106] the *Briseno* court found that the district court's denial of admittance did not constitute an abuse of discretion under the *Johnson* standard.[107] Thus, in *Briseno,* the Eighth Circuit chose not to defer to the findings of federal and state administrative agencies.

In *Hickman v. Electronic Keyboarding, Inc.,*[108] on the other hand, the Eighth Circuit deferred to state agency and state court findings on a similar discrimination issue. The appellate court upheld summary judgment for the defendant-employer stating that the plaintiff-employee's race discrimination cause of action was properly barred by res judicata.[109] After the employee prevailed at the agency level, the employer appealed the agency decision to a county court.[110] At the county court, the employer successfully argued that the employee had failed to prove his case.[111] The employee then sued under title VII and section 1981 in federal district court.[112]

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102. *Id.*

103. *Id.*

104. *Id.* at 347.

105. *Id.*

106. *Compare* Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 504 (9th Cir. 1981) (not binding, but admissible) *and* Heard v. Mueller Co., 464 F.2d 190, 194 (6th Cir. 1972) (within the court's discretion to admit) *and* Smith v. Universal Servs., Inc., 454 F.2d 154, 158 (5th Cir. 1972) (not self-serving, therefore admissible) *with* Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977) (not admissible) *and* Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15 (4th Cir. 1972) (not reversible error to refuse admittance).

107. *Id.* Even assuming that the defendant's proffered evidence should have been admitted, the lower court's finding of inadmissibility would have been harmless error in light of the de novo evidence of discrimination presented at trial. *Id.*

108. 741 F.2d 230 (8th Cir. 1984).

109. The plaintiff was a black man who alleged discrimination concerning his wages and the denial of a promotion. *Id.* at 231.

110. *Id.* at 231-32.

111. *Id.* at 232.

112. *Id.* at 231. While granting summary judgment to the employer, the district court cited Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) as controlling. *Hickman,* 741 F.2d at 232. *Kremer* states that 28 U.S.C. § 1738 requires federal courts to give preclusive effect to a state court's review of the state administrative agency's decision. *Kremer,* 456 U.S. at 466. In essence, *Kremer* requires that federal courts give res judicata effect to state court judgments whenever the courts of the state of judg-

The employee in *Hickman* argued that res judicata did not apply "because he was not a party nor in privity with a party in the state administrative and judicial proceedings."[113] The court of appeals disagreed,[114] noting that the agency appeared and actively defended the plaintiff's interests in state court.[115] The agency also fulfilled its statutory duty by appearing in state court to eliminate discrimination in employment.[116] The *Hickman* court concluded that the relationship between the plaintiff and the agency was sufficiently close to satisfy the privity requirement.[117]

In addition, the court stated an alternative ground for affirming the judgment. The caption of the case named the plaintiff as a "defendant," and he was served with a copy of the opinion.[118] Consequently, the court reasoned that the plaintiff "was a named party in the full and formal sense" and was bound by the judgment regardless of privity.[119]

The Eighth Circuit, in *Sedlacek v. Hach,*[120] addressed the jurisdictional prerequisites to a title VII lawsuit. In *Sedlacek,* the plaintiff had filed complaints with the EEOC and local and state civil rights commissions, but each agency dismissed her complaint without investigating.[121] Relying on longstanding precedent[122] holding that attempted conciliation by the EEOC is neither "a jurisdictional prerequisite nor a condition precedent" to judicial review of the Commission's determination of a title VII action, the court reversed the

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ment would do so. *Hickman,* 741 F.2d at 232. In Missouri, res judicata requires: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made." Prentzler v. Schneider, 411 S.W.2d 135, 138 (Mo. 1966), *quoted in Hickman,* 741 F.2d at 232.

113. 741 F.2d at 232.

114. *Id.*

115. *Id.* at 233.

116. *Id.*

117. *Id.* The *Hickman* court acknowledged the plaintiff's argument that the agency may not necessarily have been motivated solely by a desire to defend his personal interests. *Id.* Nevertheless, the agency did appear in court solely for the purpose of representing the plaintiff.

118. *Id.* at 233-34.

119. *Id.* at 234.

120. 752 F.2d 333 (8th Cir. 1985).

121. *Id.* at 334. These agencies determined that the defendant corporation employed fewer than the 15 employees required to give the agencies jurisdiction over the action. *Id.*

122. *See, e.g.,* Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711, 727 (D.C. Cir. 1978); Hicks v. ABT Assocs., Inc., 572 F.2d 960, 966 (3d Cir. 1978); Waters v. Heublein, Inc., 547 F.2d 466, 468 (9th Cir. 1976), *cert. denied,* 433 U.S. 915 (1977); Gamble v. Birmingham S. R.R., 514 F.2d 678, 688 (5th Cir. 1975); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 361 (7th Cir. 1968).

district court's order of dismissal.[123] The EEOC's failure to act thus cannot affect a complainant's substantive rights under title VII.[124]

Sedlacek also formally approved application of the substantial identity test to overcome the general rule[125] that a complainant must file a charge against a party with the EEOC before she can sue that party under title VII.[126] In *Sedlacek,* the plaintiff worked for a small subsidiary of a parent company.[127] The plaintiff failed to name the parent company in the EEOC charge.[128] Because the two companies shared common management and ownership, however, substantial identity existed between the defendants.[129] Thus, the court held that the defendants were a single employer for jurisdictional purposes under title VII.[130]

4. *The Relationship Between Section 1981 and Title VII*

The Eighth Circuit twice addressed the jury's role when section 1981 and title VII claims are tried jointly.[131] In a joint trial, the section 1981 theory is generally tried to a jury and the title VII theory is tried to the court.[132] A litigant normally raises collateral estoppel pursuant to the jury verdict. If the court upholds the motion, the litigant is bound by the jury verdict on the factual question of discrimination vel non.[133]

Ironically, in both *King v. Alco Controls Division of Emerson Electric Co.*[134] and *Goodwin v. Circuit Court,*[135] estoppel was not raised after jury verdicts decided the section 1981 issue. In *King,* the defendant won the jury verdict and decided the collateral estoppel argument was unnecessary for the title VII claim.[136] This decision ultimately

123. *Sedlacek,* 752 F.2d at 335. The Supreme Court has held that the only jurisdictional prerequisites to a federal action under title VII are: (1) filing timely charges of employment discrimination with the EEOC; and (2) receiving and acting upon the Commission's statutory notice of the right to sue. *McDonnell Douglas,* 411 U.S. 798.

124. *Sedlacek,* 752 F.2d at 335.

125. *See, e.g.,* EEOC v. McLean Trucking Co., 525 F.2d 1007, 1011 (6th Cir. 1975); Evans v. Sheraton Park Hotel, 503 F.2d 177, 181 (D.C. Cir. 1974); Williams v. General Foods Corp., 492 F.2d 399, 404 (7th Cir. 1974).

126. *Sedlacek,* 752 F.2d at 336.

127. *Id.* at 334.

128. *Id.* at 335.

129. *Id.* at 336.

130. *Id.* While dismissing the defendant's arguments, the court reasoned that aggrieved complainants should not be charged with knowledge of the legal intricacies of closely held corporations. *Id.*

131. King v. Alco Controls Div. of Emerson Elec. Co., 746 F.2d 1331 (8th Cir. 1984); *Goodwin,* 729 F.2d 541 (8th Cir. 1984).

132. *See Goodwin,* 729 F.2d at 549 n.11.

133. *Id.* at 549-50.

134. 746 F.2d 1331 (8th Cir. 1984).

135. 729 F.2d 541 (8th Cir. 1984).

136. 746 F.2d at 1332 n.2.

benefited the defendant because the case was upheld on appeal, based in part on the magistrate's meticulous findings and conclusions of law on the title VII claim.[137]

In *Goodwin,* the court declined to affirm the title VII judgment on a collateral estoppel basis.[138] Counsel had assumed that the court would determine discrimination vel non regardless of the jury verdict on the section 1983 issue.[139] The district court had incorrectly apportioned the burden of proof in *Goodwin.*[140] Thus, in addition to neither attorney raising the estoppel by judgment argument, it would have been unfair to apply estoppel against the defendant because of the erroneous allocation of proof.[141]

B. Age Discrimination

1. Types and Burdens of Proof

The Eighth Circuit in *EEOC v. Missouri State Highway Patrol*[142] erased any doubt that retirement age and hiring age limits are bona fide occupational qualifications (BFOQs) for public safety personnel.[143] In *Missouri State Highway Patrol,* the Missouri Legislature established a mandatory retirement age of sixty years for all uniformed members[144] and a maximum hiring age of thirty-two for radio operators and patrol officers.[145] At trial, each side presented expert medical witnesses who produced conflicting evidence.[146]

The district court ruled that Missouri failed to prove that the age requirements were reasonably necessary under the *Usery v. Tamiami Trail Tours, Inc.* test.[147] The appellate court found, however, that the

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137. *Id.*

138. 729 F.2d at 549 n.11.

139. *Id.*

140. *Id.* at 543; *see supra* notes 16-17 and accompanying text.

141. *Goodwin,* 729 F.2d at 549.

142. 748 F.2d 447 (8th Cir. 1984).

143. *Id.* at 450. The ADEA forbids employment restrictions based on age unless "age is a [BFOQ] reasonably necessary to the normal operation of the particular business . . . ." 29 U.S.C. § 623(f)(1).

144. 748 F.2d at 449 n.3.

145. *Id.* at 448-50.

146. *Id.* at 451-55.

147. 531 F.2d 224, 234-36 (5th Cir. 1976).

Applying the *Tamiami* test to *Missouri State Highway Patrol,* the Patrol had the burden of establishing:

> (1) a correlation between age limitations in question and the safe and efficient performance of the Patrol's functions . . . and (2) that it has a factual basis for believing either that substantially all older uniformed Patrol members are unable to perform their duties safely and efficiently, or that some older Patrol members possess traits which preclude safe and efficient job performance and which cannot practically be ascertained other than through knowledge of a Patrol member's age.

Missouri State Highway Patrol, 748 F.2d at 449.

district court's emphasis on certain facts and its investigation of the patrol's subjective motives were incorrect.[148] The Eighth Circuit noted that the *Tamiami* test focuses on objective evidence in support of the BFOQ.[149] This objective analysis was particularly pertinent given the abundant medical evidence involved.

The court of appeals, in a tersely worded decision, held that the district court's factual findings were erroneous.[150] The court based this conclusion on Missouri's expert witness and other evidence which showed: (1) that substantially all members over sixty years lack sufficient aerobic capacity to perform their physically and emotionally strenuous duties safely and efficiently; (2) that testing would be an ineffective alternative to age as a means of distinguishing among individuals over sixty years; and (3) that a maximum hiring age ensures that the highway patrol can take advantage of the physical skills and abilities of younger persons.[151]

In approving the age requirements, the court of appeals noted that Congress has established age requirements for federal law enforcement personnel.[152] In addition, the First and Fourth Circuits have found similar state age requirements to be BFOQs.[153] In essence, the unequivocal language in *Missouri State Highway Patrol* demonstrates that the Eighth Circuit is receptive to age BFOQs in public safety occupations.

In a second age discrimination case, the Eighth Circuit reviewed the burden of proof required to establish a prima facie case. In *Crimm v. Missouri Pacific Railroad Co.*,[154] the plaintiff-employee contested the district court's requirement that he prove compliance with the defendant's employment rules and regulations as part of his prima facie case, claiming inconsistency with the *McDonnell Douglas/Burdine* principles.[155] The court of appeals agreed, and held that a plaintiff "need not anticipate and refute the employer's legitimate, nondiscriminatory reasons in order to establish a prima facie

148. *Missouri State Highway Patrol,* 748 F.2d at 454.

149. *Id.*

150. *Id.* at 453-55. For example, the court stated, "Although the District Court discounted the Patrol's expert evidence as 'not persuasive' and 'often contradictory,' . . . we find this conclusion wholly unsupported by the record." *Id.* at 453.

151. *Id.* at 455.

152. *Id.* at 455-56. *See generally* 5 U.S.C. §§ 8335(b), 8336(c).

153. Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984) (mandatory retirement age of 50 for state police upheld); Johnson v. Mayor of Baltimore, 731 F.2d 209 (4th Cir. 1984) (mandatory retirement age of 55 for firefighters upheld).

154. 750 F.2d 703 (8th Cir. 1984).

155. *Id.* at 711. *McDonnell Douglas* requires that the plaintiff demonstrate minority status, that he applied for and was qualified for the posted position, that he was rejected for the position, and that despite his rejection, the position remained open. 411 U.S. at 802.

case."[156] That holding reflects the significant precept that while the *McDonnell Douglas/Burdine* principles apply in age discrimination cases, they are not rigid or mechanical.[157] Rather, the scheme is but one way of establishing a case of employment discrimination.[158]

In *Crimm,* the plaintiff, a sixty-year-old male, claimed that he was forced to resign because of his age.[159] The defendant-employer alleged that the employee was terminated because he sexually harrassed a subordinate.[160] The court held that in discharge cases, unlike hiring cases, the issue of whether the plaintiff was satisfactorily performing his job permeates his prima facie case.[161] Thus, in order to establish a prima facie case, the plaintiff need only prove that "he [or she] was doing his [or her] job well enough to rule out the possibilities that he [or she] was fired for inadequate job performance."[162]

Surprisingly, the *Crimm* court wavered from its previous position on similar types of errors,[163] and found the error harmless.[164] The court found that the evidence demonstrating that the employee was discharged for a legitimate, nondiscriminatory reason was strong, thereby undermining any inference of discrimination.[165]

The court raised, but declined to answer, a separate question of whether an employer's good cause for discharge in a case brought under the Age Discrimination in Employment Act (ADEA)[166] may be based on good faith alone.[167] Thus, the open question signals the court's struggle to establish concrete rules in this area of discrimination jurisprudence.

2. *Procedural Issues*

In *Kriegesmann v. Barry-Wehmiller Co.,*[168] the Eighth Circuit rejected an employee's argument that the late filing of his age discrimination

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 706.
160. *Id.*
161. *Id.* at 711. This issue formulation was adopted by the Eighth Circuit in Halsell v. Kimberly Clark Corp., 683 F.2d 285, 290 (8th Cir. 1982), *cert. denied,* 459 U.S. 1205 (1983). It was initially implemented by the First Circuit. Loeb v. Textron, Inc., 600 F.2d 1003, 1013-14 (1st Cir. 1979).
162. *Crimm,* 750 F.2d at 711 (quoting *Loeb,* 600 F.2d at 1013).
163. *See Goodwin,* 729 F.2d 541.
164. *Crimm,* 750 F.2d at 712.
165. *Id.*
166. 29 U.S.C. §§ 621-634 (1982).
167. *Crimm,* 750 F.2d at 713.
168. 739 F.2d 357 (8th Cir. 1984).

charge with the EEOC did not prejudice the employer.[169] In *Kriegesmann,* the appellant-employee claimed that the employer constructively misrepresented facts to him.[170] The appellant argued that by extending his severance benefits over a twenty-five week period and offering to assist him in finding a new job, "the employer lulled him into sleeping on his rights."[171] The court rejected this argument and stated that as a matter of law:

> the attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel. The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.[172]

The court reaffirmed prior case law which held "ADEA's 180-day filing requirement is in the nature of a statute of limitations and subject to equitable tolling."[173] The equitable tolling doctrine, however, is applied only in instances where positive misconduct is perpetrated by the party against whom the doctrine is asserted. As noted, no positive misconduct by the employer was present here.

Another significant decision by the Eighth Circuit foreclosed the district court and plaintiff's counsel from notifying putative class members of an ADEA class action suit. In *McKenna v. Champion International Corp.,*[174] the plaintiff, a former executive, brought suit alleging that he was discharged because of his age. The district court granted the plaintiff's motion to file a class action,[175] directed the employer to furnish the names of all persons within the class, and

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169. *Id.* at 359. Section 626(d) of title 29 of the United States Code provides in pertinent part:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred . . . .

29 U.S.C. § 626(d).

The employee in *Kriegesmann* filed with the EEOC 272 days after his alleged discriminatory termination. 739 F.2d at 358.

170. 739 F.2d at 358.

171. *Id.*

172. *Id.* at 358-59 (quoting Price v. Litton Business Sys., Inc., 694 F.2d 963, 965 (4th Cir. 1982)).

173. *Id.* at 359.

174. 747 F.2d 1211 (8th Cir. 1984).

175. *Id.* at 1212. ADEA specifically incorporates § 16 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216, for enforcement purposes. Section 216(b) provides in pertinent part:

> An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such

ordered that all prospective members be notified.[176]

The court of appeals' initial analysis of the notice issue compared Rule 23 of the Federal Rules of Civil Procedure and section 216(b) of title 29 of the United States Code.[177] The court recognized the fundamental difference that exists between the two procedures.[178] Rule 23 authorizes a district court in a class action to "direct notice to the members who can be identified through reasonable effort."[179] Thus, in a rule 23 class action, each person within the description is considered to be a class member, bound by judgment, unless the person "opts out."[180] Under section 216(b), to the contrary, no person can become a plaintiff or be bound by judgment unless the person affirmatively "opts into" the class by filing written consent.[181] In this light, section 216(b) tends to discourage collective litigation because it requires "an affirmative act by each plaintiff."[182]

Other circuit courts are split as to whether district courts have the power to authorize notice to prospective class members.[183] According to the *McKenna* court, the Second Circuit, which held that district courts have the power to authorize notice, addressed the issue in a conclusory fashion and relied on a liberal construction of the Fair Labor Standards Act[184] and its desire to avoid a multiplicity of

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action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Id.

176. 747 F.2d at 1212. The notice was directed to all employees who were over 40 years old either currently or as of 1977. *Id.*

177. *Id.* at 1213.

178. *Id.*

179. FED. R. CIV. P. 23.

180. *McKenna,* 747 F.2d at 1213 (citing Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 (8th Cir. 1975)).

181. *Id.*

182. *Id.* (citing Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267 (10th Cir. 1984)).

183. The Second Circuit holds that district courts have the power to authorize notice. Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978). The Ninth Circuit has ruled that the district courts have no authority under § 216(b) to direct or permit potential claimants to be notified of the pending suit. Partlow v. Jewish Orphans' Home, 645 F.2d 757, 758-59 (9th Cir. 1981); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977). The Seventh Circuit has also determined that district courts lack authority to send out notice containing indicia that might be misinterpreted as judicial endorsement of the claim, such as court letterhead or official signatures. Woods v. New York Life Ins. Co., 686 F.2d 578, 581 (7th Cir. 1982). The Tenth Circuit also holds that district courts lack the authority to send or direct notice. *Dolan,* 725 F.2d at 1268. The Tenth and Seventh Circuits grant plaintiff's counsel, however, a right of reasonable communication with potential class members. *McKenna,* 747 F.2d at 1213 n.1.

184. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982)).

suits.[185] The *McKenna* court found that the Seventh, Ninth, and Tenth Circuits had carefully considered the issue and that their reasoning was therefore persuasive.[186] Consequently, the Eighth Circuit held that the power to give notice "is neither legislatively granted nor constitutionally required."[187]

The *McKenna* court prohibited plaintiff's counsel from sending notice to potential ADEA class members.[188] Analyzing notice as commercial speech, the court found that the judiciary has a substantial interest in regulating the practice of attorneys.[189] Further, the court found that the notice fell within the prohibition of DR 2-103(A) of the Code of Professional Responsibility, which states that a "lawyer shall not . . . recommend employment . . . of himself . . . to a layperson who has not sought his advice regarding employment of a lawyer."[190] The concern over conflicts of interest, as reflected in DR 2-103(A), becomes even more important in a class action situation because of the large number of actual and potential clients.[191]

In his concurring opinion, Judge McMillian noted an important distinction which provides some practical guidance for future litigants attempting to overcome the notice issue. His concurrence points out that the court's holding "is specifically directed to plaintiff's *counsel.*"[192] Judge McMillian stated that the majority opinion does not "prohibit the *plaintiff* in a § 216(b) action from communicating with other potential members of the class."[193] Judge McMillian would also permit district courts to direct the defendant to provide the plaintiff with the necessary names and addresses for notice purposes.[194]

II. REMEDIES

A. Reinstatement and Back Pay

In *Briseno v. Central Technical Community College Area,*[195] the plaintiff proved that he was denied a full-time teaching position in 1979 because of his national origin.[196] The district court awarded the plain-

185. 747 F.2d at 1213-14.
186. *Id.*
187. *Id.* at 1214.
188. *Id.*
189. *Id.* at 1215.
190. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1980).
191. *McKenna,* 747 F.2d at 1215.
192. *Id.* at 1217 (McMillian, J., concurring in part and dissenting in part) (emphasis in original).
193. *Id.* (emphasis in original).
194. *Id.*
195. 739 F.2d 344 (8th Cir. 1984).
196. *Id.* at 346.

tiff over $52,000 in back pay, reinstatement for at least four years by the college at a salary no less than the person who received the position, and placement in a full-time teaching position.[197]

On appeal, the court found the award uniquely too broad and too narrow.[198] The award was too broad in the court's view because it appeared to give the plaintiff "immediate status as a permanent employee rather than a probationary one."[199] The award was too narrow in that it appeared to limit the "plaintiff's right to employment or 'front pay' to a period of four years."[200] In essence, the court reasoned that the plaintiff is entitled simply to a position comparable to the one denied him.[201]

B. Wages During Litigation

The Eighth Circuit refused to accept the plaintiff's argument in *Burrows v. Chemed Corp.*[202] that her employer retaliated against her by failing to grant her leave of absence with pay during title VII litigation. The plaintiff in *Burrows* also claimed that the defendant's failure to pay the plaintiff's witnesses, her co-employees, for lost wages while in court was a penalty against her.[203] The court similarly rejected this claim.

The plaintiff relied on *Kyriazi v. Western Electric Co.*,[204] but the *Burrows* court distinguished this case. The litigants in *Kyriazi* were involved in a class action suit that had reached a stage-two proceeding for a class action suit to determine individual damage awards.[205] The plaintiff in *Burrows* was simply not in such a posture. She was only in a stage-one proceeding for determining initial liability.[206] The court held that litigants who are unsuccessful in establishing liability are not entitled to such expenses.[207]

C. Punitive Damages

In *Goodwin v. Circuit Court*,[208] the Eighth Circuit upheld an award of punitive damages in a section 1983 sex discrimination action even

197. *Id.*
198. *Id.* at 348.
199. *Id.*
200. *Id.*
201. *Id.* In the event that no teaching position was available for the plaintiff immediately, the court awarded the plaintiff the difference between what he would have earned in his teaching position and what he earned in mitigation of damages. *Id.*
202. 743 F.2d 612 (8th Cir. 1984).
203. *Id.* at 617.
204. 469 F. Supp. 672 (D.N.J. 1979).
205. *Id.* at 673.
206. *Burrows*, 743 F.2d at 618.
207. *Id.*
208. 729 F.2d 541 (8th Cir. 1984).

though only nominal damages were shown at trial.[209] The court restated its punitive damages standard: "Punitive damages may . . . be awarded in civil rights actions where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff."[210] The *Goodwin* court noted specifically that such conduct may be sanctioned by a punitive award under section 1983.[211] In addition, the court stated emphatically that actual damages need not be proven for an award of punitive damages, and that punitive damages may be awarded in addition to nominal damages.[212] By affirming the availability of punitive damages, the court ensured that an employee will be adequately compensated if he or she is able to establish the employer's liability.

209. *Id.* at 542-43.
210. Id. at 547 (quoting Guzman v. Western State Bank, 540 F.2d 948, 953 (8th Cir. 1976)).
211. *Goodwin*, 729 F.2d at 547.
212. *Id.* at 548.