



governmentattic.org

"Rummaging in the government's attic"

Description of document:	US Equal Employment Opportunity Commission (EEOC) EEOC OGC Trial Brief Bank Index (November 1998)
Released date:	14-Feb-2001
Posted date:	30-June-2008
Title of Document	Index of Brief Bank Topics - November 1998 (through Doc. No. 438)
Source of document:	Office of Legal Counsel U.S. Equal Employment Opportunity Commission 1801 L Street N.W. Washington, D.C. 20507 Fax: 202/663-4639 E-mail: FOIA@EEOC.gov

The governmentattic.org web site ("the site") is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

FEB 14 2001

Re: FOIA No. A1-04-FOIA-137

Your Freedom of Information Act (FOIA) request has been processed.
The paragraph(s) checked below apply:

- ☐ A portion of your request is neither granted nor denied because:
- ☐ Your request does not reasonably describe the records you wish disclosed or ☐ No records fitting the description of the records you seek disclosed exist or could be located after a thorough search. Otherwise,
- ☒ Your request is granted.
- ☐ Your request is denied pursuant to the subsections of the FOIA indicated at the end of this letter. An attachment to this letter explains the use of these exemptions in more detail.
- ☐ Your request is granted in part and denied in part. Portions not released are being withheld pursuant to the subsections of the FOIA indicated at the end of this letter. An attachment to this letter explains the use of these exemptions in more detail.
- ☐ You must send a check for made payable to the United States Treasurer and mail to the above address. Professional search and review time is billed at a rate of \$17.00 per hour, and clerical search and review time at \$7.00 per hour, and photocopying at \$.15 per page. 29 C.F.R. § 1610.15. Address your correspondence to the attention of Jessie R. Armstrong, Advice & External Litigation Division, Legal Counsel. The fee has been computed as follows:
- ☐ Commercial requests: pages of photocopying; hours of clerical review time; hours of professional review time; hours of clerical search time; and hours of professional search time.

- ☐ Requests by educational or noncommercial scientific institutions or representatives of the news media: ____ pages of photocopying. The first 100 pages are provided free of charge.
- ☐ All other requests: pages of photocopying; hours of clerical search time; and hours of professional search time. The first 100 pages and 2 hours of search time are provided free of charge.
- ☒ The disclosed records are enclosed. No fee is charged because the cost of collecting and processing the chargeable fee equals or exceeds the amount of the fee. 29 C.F.R. § 1610.15(d).
- ☐ The disclosed records are enclosed. Photocopying and search fees have been waived pursuant to 29 C.F.R. § 1610.14.
- ☐ You may appeal the denial or partial denial of your request by writing within thirty days of receipt of this letter to Ellen J. Vargyas, Legal Counsel, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507. Your appeal will be governed by 29 C.F.R. § 1610.11.
- ☒ See attached Comments page for further information.

Sincerely,



A. Jacy Thurmond, Jr.
Assistant Legal Counsel/FOIA

Applicable Sections of the Freedom of Information Act,
5 U.S.C. § 552(b):

- | | |
|--|----------------------------------|
| <input type="checkbox"/> (2) | <input type="checkbox"/> (6) |
| <input type="checkbox"/> (3) | <input type="checkbox"/> (7) (A) |
| <input type="checkbox"/> Section 706(b) of Title VII | <input type="checkbox"/> (7) (C) |
| <input type="checkbox"/> Section 709(e) of Title VII | <input type="checkbox"/> (7) (D) |
| <input type="checkbox"/> (4) | <input type="checkbox"/> other |
| <input type="checkbox"/> (5) | (see attached) |

COMMENTS PAGE

Your request is granted. Enclosed is the most recent EEOC OGC Trial Brief Bank Index. Note that it is dated November 1998.

INDEX OF BRIEF BANK TOPICS

NOVEMBER 1998 (through Doc. No. 438)

This is a **THIRD** update to the brief bank index, adding documents 321-438. The index includes references to all documents. References to the new documents or new index topics are in bold. As in the prior index, documents are listed by type (e.g., discovery, motions, trial briefs, TROs) at the end of the index (pages 50-56). Training documents are included in the last section, after the section "Types of Documents."

To avoid confusion, since this is a **CUMULATIVE** index rather than just an update, you should throw away the old (June 1998) index.

ADA

Accommodation

Burden on employer to show undue hardship 149

Carrying wheelchair-bound person 381

Duty continues when former accommodation no longer effective 373

Collective bargaining agreement rights do not necessarily take precedence over statutory rights 113, 338

Employer cannot unilaterally impose 239

Employer must consider without request 278

Financial status of defendant relevant to evaluating accommodation 253

Interactive process not engaged in 381

Leave 340

Maintain medical coverage 2, 12

McDonnell-Douglas test improperly applied 149

Necessary for non-essential functions, even in "regarded as" case 389

Reassignment 149, 201, 206, 275, 373, 434

Duty triggered when formerly successful accommodation no longer effective 373

Refusal forced employee to seek disability benefits 287

Under CBA 206, 338

Rehabilitation Act, ADA broader than 113

Transfer to another job 149, 201, 206, 287

Travel

Not required 275

Work-related event 381

Undue hardship

Burden of proof shifts to employer 149

Union has duty to accommodate 113, 206, **338**

Union and employer must negotiate 113

Benefits

AIDS cap 81

Certification of disability to obtain other benefits
not absolute defense 138, 174, 216, 286, 287

Mental disability benefits unequal to physical 116,
117, 284, **375**

Retirement, different for disabled 230

Standing of totally disabled individual to challenge
plan 116, 117, **375**

Blanket exclusion policy violation 85, 86, 239, **342, 430**

Business necessity

Improperly expanded to allow medical examination 370

Certification of disability

**Employer disability plan does not consider ability to
work with accommodation 340**

Not determinative on issue of ability to do job 138,
174, **340**

Treated as after acquired evidence 138, 174

Claims period

Not limited by 2-year back pay period or by charge
filing period 199

Class of jobs, excluded from 86, 244, 272, **430**

Class claims proper 26

Color blindness 172

Collective Bargaining Agreement

Reassignment 206

Compared to Rehabilitation Act

Broader range of accommodations in ADA 113

Union has duty to accommodate under ADA 113

Conditional offer, withdrawn 97, 245

Conduct resulting from disability 201

Conflict with regulations or conduct of other federal
agencies

DOJ indictment of defendant not inconsistent with
EEOC's challenge to exclusion of individuals with
record of rehabilitation for drug/alcohol abuse 239

- DOT regulations 244
- FAA regulations (less stringent) 239
- NIOSH/OSHA general duty clause 383**
- SSA regulations 244, 270, 277, 278, 286, 287, 331
- Covered entity 81, 269
- Diabetes 85, 86
- Direct threat 12, 86, 97, 201, 239, 259, **340, 370, 383, 423, 434**
- Disability
 - Asymptomatic condition 273
 - Certification of total disability to obtain other benefits not absolute defense 138, 174, 286, 287, **331, 340**
 - Definition of 98, 173, 177, 201, **335, 337, 339, 340**
 - Consistent with Rehab Act 158
 - Employer disability plan determines as disabled person who can work with accommodation 340**
 - Individualized assessment required 85, 86, 97, 283
 - Mitigating factors such as medicine, prosthetics not considered 158, 177, **275, 335, 337, 342**
 - Future disability 383**
 - Long term plans
 - Employer disability plan determines as disabled person who can work with accommodation 340**
 - Distinction between mental & physical discriminatory 116, 117, 284, **375**
 - Eligibility includes former employees 284, 375
- Discharge 2, 12, 177, 201, 273
 - Training case study 388**
- Essential functions **423**
 - Determined when worker last worked (long term benefits) 284
 - Determined by evidence available when decision made 245
 - General duty clause of Occupational Safety & Health Act does not require employer to reject applicant who in the future may not be able to perform 383**
 - Job-related and consistent with business necessity 393**
 - No longer able to perform--reassignment duty triggered 373**
 - Travel 275

Good faith reliance on doctor no defense 393

Hiring 85, 86

 refusal to hire persons not "100%" well 26, 283

Impairments (included "regarded as")

 AIDS 12, 62, **370**

 Asymptomatic HIV 273, **370**

 Back 149

 Cancer 2, 177, **376**

 Carpal tunnel syndrome 272, **383**

 Color blindness/impairment of color vision 173

 Diabetes, 85, 86, **342**

 Epilepsy 55, 244, **423**

 Hearing deficit 180

Hip/mobility impairment 430

 Hypothyroidism 158

 Lifting 149, **371**

Monocular vision 434

 Obesity 97, 283

Individualized assessment required 85, 86, 97, 239, 283,
342, 393

 Differs from request for accommodations 239

Judicial estoppel 138, 174, 216, 229, 239, 244, 270, 278,
286, 287, 292, **331, 340**

Leave as accommodation 340

Light duty limited to non-retirement eligible 76

Major life activity

Comparing functioning to average person 371

 Lifting 149, **371**

 Reproduction/sexual activity 273

 Working 149, 177, 272, **342**

Medical examination

Business necessity defense 370

 Consent to during settlement discussions, excluded 209

 Irrelevant in "regarded as" case 55

Post-offer 393

**Predictive of future disability 383 (carpal tunnel),
 393 (herniated disk)**

**Rejection based on "standard medical assessment code"
 430**

Medical policy

 AIDS exclusion 81

Requiring disclosure of prescription medicine 155
Return from leave must be "without limitations" 149
Mental benefits 116, 117, 284, **375**
Pre-offer inquiries 97, 155, **332, 383**
Prohibition covers non-disabled employees 155, **332**
Predictive tests 383
Prescription medicines, required disclosure 155
Prima facie case
Disparate discipline establishes 175
"Regarded as," only need perform essential functions without accommodation 389
Replacement by non-disabled unnecessary 175
Selection criteria must be job-related and consistent with business necessity 393
Qualified individual with a disability (QUID)
Good faith reliance on doctor no defense 393
Individualized assessment 85, 86, 97, 239, 247, **339, 342, 393, 423**
One who can work with accommodation qualified 340
Prima facie case 149
Totally disabled worker qualified because when he could work, he performed satisfactorily 138, 174, 284
Totally disabled worker challenging disability policy 116, 117, 284, 292
Reassignment 149, 201, 205, 287, **338, 434**
Record of disability
Cancer 177, **376**
Rehabilitation for drug/alcohol abuse 239
"Regarded as" disabled 55, 85, 86, 97, 177, 180, 239, 283, **342, 376, 383, 389, 430, 434**
Ability to perform nonessential functions not element of prima facie case 389
Asymptomatic HIV 273
History of drug/alcohol abuse 239
Medical condition irrelevant 55
Mobility impairment 430
Retaliation
Nondisabled protected 339
Retirement, differential benefits 230
Return to work

- Employer refuses to allow employee back 26, 149, 244, 247
- Individualized assessment 247
- "Without limitations" 149
- Safety concerns
 - Blanket exclusion not justified 86, 239, **342**
 - Fear of future harm to employee, not justification for refusal to hire for 383**
- Social security disability
 - Application for benefits (denied) does not preclude claim 331**
 - Receipt of benefits does not preclude claim 174, 244, 270, 286, 292
- Substantially limited
 - Absence from work not needed to establish 177
 - Decrease in performance not necessary; condition made performance considerably more difficult 177
 - Compared to ability of average person 371**
 - Excluded from a class of jobs 239, 244, 247, 272, **339**
 - Factual issues precluding summary judgment 180, **339, 371**
 - "Foreclosed generally" from employment, improper standard 149, 272
 - Limitation must be considered with regard to disabled person's education and skill levels 339**
 - Mitigating factors such as medicine, prosthetics not considered 158, 177, 275, **335, 337, 342**
 - Recurrent, fatal nature of disease 177, 273
- Undue hardship
 - Burden of proof on employer 149
 - CBA conflict relevant but not dispositive 338**
 - Reassignment 373**
- Union SEE ADA, Accommodation
- Workers' Compensation
 - Receipt of benefits does not preclude claim 229

ADEA

- Advertising for new college graduates 34
- Age 60 no-downbid policy (airline pilots) 288
- Average ages not probative 101, 131
- Benefits 227, 230, 313, 314, 315

- Lower pension benefits discriminatory 293
- Charge not necessary for EEOC suit 123, 134, 313
- Condition precedent, tender back of benefits 233
- Cost justification defense 136, **431**
- Demotion 203, 274
- Determining factor 119
- Discharge
 - Training case study 388**
 - Cumulative evidence of discrimination 118, 274
- Discovery
 - Sample interrogatories/document request for complex class case 189
- Disparate impact theory
 - After CRA 1991 24, 314, 315, 316
 - Plaintiff need not chose either impact or treatment if either may be established 24, 314, 315, 316
- Evidence
 - Probity--look to speaker, context 203
- Hicks discussion 163
- Intervention 142
- Judicial estoppel
 - Effect of social security disability application 277
- Jury Instructions
 - Direct evidence need not be close in time to discharge 119
 - Determining factor 119
- Jury trial
 - Not available on Section 217 claim 243
- Light duty
 - Retirement-eligible not offered 76
- Mandatory retirement see Retirement, below
- OWBPA (Older Workers Benefit Protection Act)
 - Pension benefits are age-related 314
- Offer of alternate employment
 - Claim not obviated because of offer 299
 - Relevant for damages, not for establishing claim 299
- Pension eligibility not RFOA if proxy for age 314, 315, 316
- Pension fund not proper defendant 293
- Portal-to-Portal limitations do not apply to EEOC suits 190, 312

Preempts state law 136
Pretext 132, 237
 Established if reasons so arbitrary that unreasonable to believe 132
 Inference that one reason false because all or most of others are specifically refuted is reasonable, even if that one reason is not specifically refuted 132
Reasonable factor other than age (RFOA)
 Orderliness of succession and planning compensation not RFOA supporting mandatory retirement 134
 Pension eligibility not RFOA because proxy for age 314, 315, 316
Recent college graduate requirement 34
Reduction in force 131, 237
Reinstatement 227
Retirement
 Bridge to social security or Medicare defense inapplicable 431
 Cost justification defense 431
 Disability, age differential in benefits 230
 Eligible employees not allowed light duty 76
 Lump sum payment only available to employees under "x" years old 203, 313, **431**
 Mandatory
 Company directors 134
 Police officers 227
 Plan facially discriminatory 203
 Union liability 431
Statistical evidence re: average age irrelevant 131
Statute of limitations not applicable after CRA 1991 24, 190, 312, 313, **410**
Tender back of benefits as condition precedent to suit 233
Timeliness of suit 233, **410**
 Failure to file within 90 days of withdrawal of charge 233
Waiver void under OWBPA 233
Willfulness 163, **399**
 Jury instruction contradicted oral instruction 399
Withdrawal of charge violates OWBPA 233

ADR SEE Arbitration

AIDS

- Benefit caps 81
- Deposition before litigation 125
- Discharge 12
- Exclude evidence re: infecting others, prior drug use, sexual practices 207, 208, 210
- Expedited trial 128
- Fifth amendment assertion re: infecting others 208
- Jury questionnaire due to sensitive nature of information 62, 255
- Protective order for charging party's identity 67, 68
- Transfer case to protect charging party 69

Admissions SEE Party Admissions

Adverse Inference

- Records destruction 28, 31

Affirmative defenses (includes 8(b) defenses)

- Challenge sufficiency in Motion to Strike 61, 66, 141
- Conditions precedent 396, 428**
- Discovery regarding factual bases 416**
- Exhaustion of remedies 61, 65, 66
- Failure to conciliate 11, 90, 91, **396, 403, 404, 428**
- Failure to file charge 61
- Failure to state a claim 61, 65, 90, 110, 111, 126, 141, **403**
- General denial (should be stricken) 61, 91
- Good faith belief that wages did not violate FLSA (EPA cases) 65
- Good faith belief that women could not perform as tailors because one had tried and failed 379**
- Good faith belief not basis for denial of injunctive relief 379**
- Investigation in "bad faith" no defense 104
- Judgment on the pleadings, not proper method to challenge 66
- Laches 313, **330**
- Not employer 395**
- Untimely raised 404**

After-acquired evidence

Benefits

Certification of disability for purpose of obtaining
benefits may be analogized to 138, 174

Hiring--misconduct at prior job not relevant where defendant
knew of alleged misconduct but continue to employ that
person 43

Answer See also Affirmative Defenses

Failed to raise affirmative defense 396

General denial (should be stricken) 61, 91

Apparent authority

Basis for sexual harassment claim 109, 148

Appeal

1291 326, 401

1292(b) certification 48

Denial of pre-judgment interest 171

Interlocutory, opposed 48, 232, **326, 401**

Jury instructions, objection preserved 343

Stay pending 46, **433**

Applications See also Documents, Records

Destruction/Failure to maintain 4, 16, 56, 103

Failure to maintain as basis for excluding contrary evidence
regarding applicant pool 16

Arbitration

Civil Rights Act of 1991 rejects mandatory 20, 38, 236, 294,
333, 368

**Class claims can proceed even if individual claims subject
to 369**

Class claims independent of individual 326 (EEOC), 369

Collective Bargaining Agreement cannot waive statutory
rights 231, 285

Condition of employment 294, 295, **333, 368**

Consideration from employer 368

Cost sharing 38

EEOC's recovery unaffected by claimants' agreement 51, 236,
326

EEOC claim is independent of claimant's 326

Federal Arbitration Act (FAA) does not apply to employment contracts 38, 107, 137, 157, 168, 295

Forum neutrality 294

Future claims, cannot be waived 20, 38, 157, 294, **333, 368**

Gag orders 38, 167

Gilmer distinguished 38, 51, 107, 157, **333**

Insufficiency of remedies, basis for challenge 20, 38, 157, 168, 204, **368**

Knowing and voluntary agreement 20, 38, 204, 236, 294, 295, **333**

Limited discovery 204

Mandatory agreements-challenge to 20, 25, 38, 51, 100, 107, 157, 168, 204, 236, 285, 294, 295, **326, 333, 368**

Misrepresentations by employer 204

Prospective waiver, improper 20, 38, 157, 294, **333, 368**

Public policy 368

Railway Labor Act mandate does not supplant Title VII rights 100

Remedies, reduction from statutory remedies basis for challenge 20, 38, 157, 168, 204, **368**

Retaliation

Job conditioned on signing agreement 25, 38

Review standard "whether arbitrator correctly applied governing law" 334

Securities industry agreements provide discovery and protections not available in challenged procedures 157

Threats of dismissal 295

Union cannot waive employee's right to redress under employment discrimination statutes 107, 231, 285

Waiver of right by late assertion 51

Attorney-client relationship SEE Privilege

Attorney's fees

Award should not be linked to damages 341

Bad faith as basis 53, 70

"Billing judgment approach" rejected 341

Christiansburg 70, **351**

Claims not frivolous, unreasonable or without foundation 70, 75, 87, 234, **351**

Dismissed case when realized evidence insufficient 87
EAJA not applicable to Title VII 47, **351**
EAJA requires bad faith 53
Improperly awarded 53, 70, 87, 234
Linking award to damages undermines policy of Title VII 341
Lodestar 341
Mixed motive case 179
Prevailing plaintiff 88, 155, 276, 282, **341**
Reasonableness of amount requested 70, 276, **351**
Rule 11 70, 282
Waived by failure to request 282

BFOQ-Sex

Factual basis lacking 31
Home health care worker 28
Non-pregnancy 59
Reasonable alternatives to meet privacy interests 13, 31
Waitstaff 59
Weight loss counselor 13

Back Pay

Adverse inference from raising Fifth Amendment re: tip
reporting alternate to denial 265
Conform to evidence 398
Includes raises, sick leave, vacation and overtime 227, **324**
Increase award to compensate for additional tax liability
320
Interest, compounding 319
Interim earnings
 Offset by quarter or year rather than cumulatively 317
Mitigation See Separate Heading, Mitigation
Pension payments not deductible 227
Period continues while claimant in school 324
**Period extends beyond initial parity of wages in training
position, since in job denied, wages ultimately would have
exceeded 324**
Recovery not precluded by Fifth Amendment invocation re: tip
reporting 265
Taxes, income, or social security, not deductible 227
Unemployment compensation not deductible 212, 227
Union not necessary party to determine 323

Bad faith

Basis for attorneys fees 53, 70

Bankruptcy 309, 391, 392, 432

EEOC claims 432

Executory contract 392

Hearing to accept consent decree in EEOC case 392

Obtaining relief from agents, officers of corporation and parties to CBA 432

Procedures for relief 432

Stay 432

Beards SEE basis for claim (race, religion)

Benefits

Constitute pay 30

Offset of pension payments 14

Pension contribution to back pay award 14

Recoupment by state fund of pension payments 14

Bifurcation

Allows EEOC time to contact additional class members 103

Due to late identification of class members because of defendant's destruction of applications 103

Discovery, inappropriate 298

Expedition/economy served by 103, 251, 298, 302, **409**

Improper in individual case 165

Jury trial right unaffected 140, 298

Liability and damages 103, 140, 165, 302, **409**

Opposition 415

Prejudice to EEOC 415

Protects defendant from evidence relevant to punitive damages 165

Punitive damages issues 165, 251

Tactical considerations 195, 251

Burden of Proof SEE Pretext

Cause finding

Nonreviewability of reasonable cause determination 310

Cause of action

EEOC independent of charging party's 382

"Individual" (not "employee") protected under Title VII § 703 346

Non-disabled employees can state ADA claim

Pre-offer medical inquiries 155

Retaliation 339

Survives death of charging party 21, 54

White males can challenge racial and sexual harassment of blacks and females on basis that harassment destroyed close working relationships for all 166

Charges

ADEA cases may proceed without filing of 123, 134, 313

Additional claims not named 384

Additional victims not named 126, 356, 364

Agreements limiting/precluding filing of 11, 25 See also
Arbitration

Deferral agency

Qualify even if only relief is conciliation 374

Disclosure

Disclosure to charging party of other charges against
Respondent improper, even if charging party seeks it
for his defense in a criminal case 22

To third party 29

Unnamed victims 424

Dismissal improper under work sharing agreement 143

Employer policy requiring use of internal procedure before
(or instead of) filing charge 11, 25

Failure to exhaust administrative remedies

Unnotarized charge not 328

Filing period tolled

Employees had no way of knowing of discrimination 105

Employer affirmatively withheld information 105

Improper handling 110, 359, 364

Jurisdiction, state FEP charges

Notarization not required 290, 328

Letter naming parties and practices sufficient 374

LOD

Excluded because prejudice to EEOC outweighs probative
value 222

Notarization of state charges 290, 328
Notice to employer of claims not in charge 384
Pattern and practice cases, no charge necessary 266
Relation back
 Amended charge 384
 Verified charge to letter 374
Scope
 Discrimination not stated in charge 126, 384, 424
 Expand after litigation filed 283
 Like/related claims 126, 380, 384
 Retaliation needs no separate charge 380
 **Single filing rule applies only to private, multi-
 plaintiff actions 424**
 Victims not named in charge 11, 126, 283, 356, 424
Timeliness
 If scope expanded because additional victims found,
 their claims are timely if original charge is timely
 126
Validity of charge not notarized but valid under EEOC
standards 290, 328
Verification
 Charge relates back to letter 374
 State law requires notarization, but EEOC
 does not 290, 328
Work sharing agreement
 Automatic filing with state FEP 105
 Waiver of jurisdiction by state agency 364

Chilling effect of policy
 Basis for introducing policy as evidence 4

Civil Rights Act of 1991
 Disparate treatment claims remain 413
 Jurisdiction of court unchanged 413
 Section 118 236
 Section 1981a 291, 344, 345
 Statute of limitations for Commission ADEA cases deleted
 190, 312

Claimants
 Claim forms in Title VII hiring case 307

Contact by defense attorney 321, 363
Contact by EEOC 321, 363
Identified after individual case filed 283
Identified late because evidence withheld 103
Not limited to individuals harmed within charge-filing period 199
Recovery available for non-charging party 357, 424

Claims administration

Costs of computerization of data 8
Individualized damages for class members 227
Other costs 8

Claims period

EEOC not limited by charge-filing period or by 2-year back pay period in identifying individuals entitled to relief 11, 105, 199

Class action

23(a) requirements met 217, **390**
ADA claims may be asserted as class action 26
Business information on defendants 191
Claimants not limited to individuals harmed during charge-filing period or 2-year back pay period 11, 105, 199
Claims forms 307
Claims for compensatory and punitive damages do not make class certification inappropriate 390
Decertification of class 390
Discovery 187, 189, 191, 192, 193, 194, 195, 197, 198
EEO-1, use of 198
EEOC does not proceed under Rule 23 26, 186, 199, 302
Failure to hire (women) 330
Individual in nonclass action entitled to Teamsters presumption where pattern or practice of discrimination is found 390
Library resource 191
Like or related claims 3, 26
Pattern and practice, sexual harassment 266
Race hiring, training case study 388
Race promotion, class decertified 390
Seventh amendment rights for defendant 390

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 17

- Sexual harassment constitutes pattern and practice claim 266
- Scope of 3, 11, 126
- Settlement considerations 186
- Trial considerations 195

Collateral order SEE Appeal, interlocutory

Collateral estoppel

- Conciliation agreement improper basis because it is non-judicial resolution 120
- Doctrine of virtual representation 288
- Pilot cases re: age 60 no-downbid policy 288

Collective Bargaining Agreements

- Covers only contractual, not statutory, rights 231
- Employer still obligated to accommodate (ADA) 206

Comparators

- Discipline of sexual harassment complainants 365**
- Relevant to investigation of race discrimination claims 182
- Treatment of people in other protected classes (and homosexuals) 397**

Complaint

Models

- ADA 185
- ADEA 185
- Equal Pay Act 185
- Title VII 185
- Title VII/EPA 185

Notice pleading 418

Short statement of facts 418

Computer files

Discovery

- If files relevant, descriptions relevant 205, **412**
- Obtaining organization of, descriptions of 205, **412**
- Obtaining from defendant 189, 192, 193, 194, 205
- Personnel data
 - Organization and analysis 192, 193, 194, 205, **412**
 - Preferred formats 194

TRO to prevent destruction 82

Conciliation

Adequacy of 3, 26, 90, 104, 134, **391, 396, 428**

Agreement

Enforcement against injured party not covered by
agreement violates public policy 120

No effect on admissibility of evidence of harassment in
new individual's case 122

Resolution of individual charge does not bar suit on
same topic based on another charge during same time
period 120

Terms prohibit filing of charge, not lawsuit 120

**Claims in reasonable cause determination; can litigate even
if not in charge 384**

Jurisdiction

Not prerequisite 91

Offer of employment not Ford offer 391

Offer rejected when defendant refused to settle class claims
90

Offer rejected when defendant failed to make counteroffer
104, **396, 428**

Settlement discussion properly excluded from litigation 391

Unnecessary before intervention 302

Confidentiality See also Protective Order

Defendant waived when failed to conciliate 84

EEOC challenge to 52, 71, 84

Enforcement efforts hampered by 84

Litigation/bad publicity insufficient bases for sealing
record 84

Name of HIV-positive charging party 67

Party seeking bears burden of articulating harm 52

Presumption favors public access 52, 71, 84

State law re: confidentiality of HIV-status basis for
protective order 67

Consolidation of lawsuits

If common facts/law prevail 41

Within court's discretion 41

Continuing violation

Evidence of harassment before 300 day period admissible even if recovery period limited 121, 122, **364**
Evidence of harassment before 300 day period admissible even if conciliation agreement resolved earlier charges 122
Pattern and practice cases 266
Recovery for individuals harmed prior to charge filing period and 2-year back pay period 11, 105, 199, 266, **364**
Timeliness of claims (regardless of statute of limitations) 24, 122

Corporations

Financial information for punitive damages 40, 427
Locating business information 191
Proceed only through counsel 89
Stipulation to damages cap does not obviate need to produce financial information 427

Costs

Claims administration 8
Court has discretion to deny 88
Failure to appear at deposition 5, 94, 96
Failure to respond to discovery 5
Parties bear own 6, 254
Voluntary dismissal 6, 88

Customer preference

Not sufficient to establish BFOQ 28, 31, 188, **360**

Damages

After acquired evidence
 Certification of total disability treated as after acquired evidence 138, 174
Ambiguities in calculation resolved against employer 330
Back pay (see Back pay, above)
Calculation not excluded if underlying evidence provided to defendant in discovery 127
Cap not basis for refusing discovery on defendant's financial condition 40, **361, 427**
Claims period not limited by charge-filing period or by 2-year back pay period 11, 105, 199, **364**

Class estimate proper when defendant's records incomplete
127

Compensatory 163, **364**

Available for violations before and continuing after
passage of 1991 CRA 122

Mental condition not placed in controversy 130, 200,
301

Court has discretion in resolving ambiguities 330

Economic loss not needed for quid pro quo case 114

Estimate not excluded if underlying evidence provided to
defendant in discovery 127

Fraudulent conveyance of assets by employer 309

Front pay for extended time period 274, **405**

Jury or judge determines back pay 215

Mitigation SEE Mitigation

Offer of lower-rank employment does not cut off damages
299

Pension recomputed 227

Prejudgment interest 171, 227

Punitive

Available for violations before and continuing after
passage of 1991 CRA 122, 291

Award not set aside as matter of law 248

Bases

Evidence of intentional discrimination 420

Title VII and § 1981a 364

Bifurcation to shield defendant from evidence re:
punitives improper 165, 253

Cap not basis for denying discovery on defendant's
financial status 40

Cap not related to egregiousness of behavior 169

Discovery of financial status 219, 253, **416, 427**

Proceeds concurrently with discovery on liability
219, 253

Failure to provide prompt remedial action 152, **344**

**Failure to object to reference to punitive damages is
waiver of objection 429**

Jury issue 420

Knowledge of other acts of harassment 152

Standard

"Extraordinarily egregious" not
standard 169, 420
**Participation of higher management or ratification
not standard 345**
Standard same as for other Civil Rights statutes
291

Reinstatement 2, 227, 405
Sufficiency of evidence 202, 259, 344, 420, 429
Title VII and § 1981a 364

Daubert SEE Evidence

Death

Charging party's does not affect claims 21, 54
Class member's does not affect claims 431

Default

Defendant's failure to respond to litigation 5

Deferral Rights (state agency)

Automatic waiver of jurisdiction under work sharing
agreement 143
Notarization required by state but charge taken by EEOC
290

Deliberative process privilege SEE Privilege

Department of Transportation

Regulations do not require that driving certification be
denied to person who is morbidly obese 97

Deposition

30(b)(6) deposition
Against EEOC improper 170
Against EEOC lawyers improper 310
Financial officer 219
Inappropriate method to review legitimacy of
administrative investigation 310
Inappropriate method to seek statistical and legal
bases for litigation 310
Charging party cannot be excluded 305

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 22

Conduct of, guidance 385

Contempt for refusal to appear 349

EEOC employees, opposed 95, 170

Failure to appear 5, 94, 96, **349**

Financial officer 219

Guidance re: preparation and conduct of 385

Harassing, opposed 43, 160

Perpetuate testimony of ill charging party (pre-litigation)
23, 125

Preparing witnesses 385

State FEP investigator 162

Direct threat 12, 86, 97, 201

Disability SEE ADA, Disability

Discharge

Fighting, provoked by use of racial epithets 80

Involuntary leave treated as 62

Disclosure

Charges

Disclosure to charging party re: other charges against
Respondent for use in a criminal case 22

Disclosure to third party 29, 182

Prevented by sovereign immunity 29

Prevented by Title VII 29, 182

Prevented by deliberative process privilege 29

Evidence

Failure to disclose (or late disclosure) is basis to
exclude 102, 112, 124, 164, **354 (expert), 421**

Investigation of sex harassment allegations 94

Witnesses 419, 421

Expert

Evidence considered 354

Prior testimony 354

Report 354

Settlements

Public interest dictates 71, 84, 167

Discovery See types of documents at end of index

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 23

Adverse inference from invocation of Fifth Amendment 265

Affirmative defenses 416

Bifurcation would increase cost, inefficiency 298

Certifying effort to informally resolve dispute 10

Class actions 189, 192, 193, 194, 197, 198, 297

Child of charging party not appropriate focus 306

Comparables 297, 365

Computer information 189, 191, 192, 193

Confidential informants 394

Costs for failure to comply with 5, 94, 96

Court order re: sequence of 366

Disclosure, mandatory 416, 421

Duty to comply/respond 5, 83 (Commission), 96 (defendant)

Duty to supplement 58, 164

Enforcing informal agreement re: sequence 366

Examination of witness who claims that her medical/mental condition prevents her from testifying 353

Financial status of defendant 40, 94, 219, 253, 267, 268, 361, 416

Discovery conducted concurrently with discovery on liability 219, 253

In camera review 394

Inadvertent disclosure of privileged documents 303

Limits on

Arbitration limits on basis for invalidating arbitration agreement 168

Inquiry into sexual behavior 1, 160

Inquiry into romantic relationship at prior employment 43

Privacy 1, 160

Mandatory disclosures, sufficiency of 416, 421

Notes of supervisor

Diary notes regarding charging party are not work product 135

Planning 194, 366

Privilege, inadvertent disclosure not waiver 303

Review of court order, mandamus inappropriate 361

Sanctions

Costs for failure to comply 5, 94, 96

Exclusion proper for untimely identification of witnesses 58, 102, 164

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 24

Sequence taken 366, 416

Sexual harassment

Inquiry into plaintiff's sexual behavior 1, 43

Remedial investigation conducted by attorney 94

Scope of 1, 160, **365**

Substantial need to obtain notes of supervisor showing motivation 135

Tax records 407

Union activity of charging party 425

Witnesses, untimely identification 58, 102, 164

Witnesses, confidential, identity improperly sought 394

Discretion of district court

Abuse of

Award of back pay, front pay and injunction proper 133

Award of attorney's fees 155, 179

Award of costs 88

Denial of pre-judgment interest 171

Consolidation of lawsuits 41

Limited in mixed motive case re: award of fees to defendant 179

Dismissal

Failure to state a claim 110, 111

Fees award improper when EEOC dismissed as soon as realized lack of evidence 6, 87

Improper sanction for marking on evidence 98

Improper where jurisdiction waived under work sharing agreement 143

Inability to prove claims 6, 87

Voluntary-with prejudice 6, 87, 88

-without prejudice 6

Disparate Impact 313, 314, 315, 316

Document destruction See also Applications, Records

Computer files 82

Failure to maintain applications basis for excluding contrary evidence regarding applicant pool 16

Failure to preserve applications 4, 16, 56, 103

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 25

Presumption that destroyed documents would have supported
EEOC case 28, 31
TRO to enjoin destruction of 56, 81, 82

Due process clause

Jurisdiction over church does not violate 30

EEO-1

Analysis for class case 198

EEO-STAT

Avail and square programs 187

Educational requirement

Violates Title VII 324

Employer

Definition, number of employees SEE Jurisdiction

Engaged in commerce 147, 168

Individual liable in official capacity 406

Legislative history of definition 49

Nonprofit group 147

Sale of business 395

Employment Agency

**Client liable under Title VII for directing discrimination
346**

Jurisdiction regardless of number of employees 73

Enforcement authority

**Arbitration agreement, even if binding on employee, does not
limit EEOC 326, 369**

Epithets

Racial, provocation for fighting 80

Equal Pay Act

Benefits constitute pay 30, 78

Constitutionality 30, 181

Good faith belief that wages did not violate FLSA 65

Head of household 30, 78

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 26

- Provisions allowing individuals to sue states constitutional 181
- Reducing salary of males improper 30, 78
- Religious basis for paying men more rejected 32
- Statute of limitations, tolling 228
- Tuition waiver constitutes pay 78
- Equal protection clause
 - Opinion letter that Catholic nuns are exempt from coverage of discrimination statutes does not discriminate against Baptists 30
- Equitable tolling
 - Employer concealed practices 105
 - Victim not penalized for error of state or federal agency 328**
 - Victims had no knowledge of harm 105
- Establishment clause
 - EPA jurisdiction over church/employer 30
- Estoppel See ADA, Judicial estoppel
 - Consistency of EEOC's position with other federal agencies 239, 277, 278, 292
- Ethical rules
 - Contacting former/current employees 77, **363 (check others)**
- Evidence See also Federal Rules of Evidence, Discovery, Party Admissions
 - Admissions-party 4, 28, 59, 63, 222
 - Anecdotal
 - Properly considered in totality of evidence 156
 - Character
 - Discrimination against others 218
 - "Good" character of alleged harassers irrelevant 224
 - Lying, poor employment record inadmissible 414**
 - Prior alcohol/drug usage 211, 213, **377, 414**
 - Sexual activity/orientation prejudicial 210, **344, 345**
 - Tax records 407**

- Sexual harassment allegation does not put charging party's character at issue 124, **344, 345**
- Contradictory testimony by company witnesses 152
- Credibility improperly assessed 108, 207, **377**
- Daubert See Evidence-Expert, this entry
- Destruction of
 - Not shown when evidence marked on after defendant received clean copy 98
 - Presumption that destroyed documents would have supported plaintiff's case 28, 31
- Exclusion of
 - Accident during time not seeking damages 245
 - Average ages 101
 - Damages calculation not excluded if underlying evidence provided to defendant in discovery 127
 - Discrimination against others 218
 - Employment policies 218
 - Evidence requiring testimony of EEOC attorney 112
 - Expert 354**
 - Gender stereotypes 207
 - LOD 222
 - Investigation by EEOC 220
 - Order limited to certain evidence 225
 - Prejudicial 101, 112
 - Prior drug/alcohol use 211, 213, **377, 414**
 - Self-serving statements of defense counsel 221
 - Settlement discussions 209
 - Sexual activity 210, **344**
 - Sexual behavior not related to workplace 209, **344**
 - Tax records 407**
 - Treatment of people in other protected categories 397**
 - Unemployment compensation 212
 - Witnesses
 - Excluded from trial during testimony of others 214
 - Untimely identified 58
- Expands scope of litigation to additional positions 101
- Expert
 - Challenged under Daubert 130, 207, 223, 308
 - Methodology/scientific bases 130, 223, 308
 - Qualifications 130, 223
 - Excluded because not disclosed 102, 112, 124, 164

Failure to provide report/other information basis for exclusion 102, 354
Fees paid by parties for own expert 435
Gender stereotypes challenged under Daubert 207
Private investigator not expert on drug activities 377
Scope of testimony constrained by report and disclosure 354
Sexual abuse/harassment, behavioral characteristics of victims 362
Sufficiency of policies, investigation not topic for expert testimony 224
Failure to retain applications basis for challenging contrary evidence regarding hiring/applicant pool 16
Failure to disclose 102, 112, 124, 164
Hearsay
 Charging party's mannerisms 45
 Declarant unidentified 4
 Facts re: investigation 3
 Facts re: company's state of mind 4, 5
 HIV status 208
 Letter from defense counsel to investigator 221
 Self-serving statements 221
Identify victims 419
Impeachment
 Collateral evidence not admissible 39
 General bad acts not admissible to discredit witness 124
Jury decision
 Credibility 207
Mental examination not needed to prove compensatory damages 130, 200
Motivation
 Evidence re: hiring women into other positions not probative 378
 Latitude granted because proof difficult 218
Nexus of statement to discriminatory behavior 203
Party admission 4, 28, 59, 63
Personal knowledge necessary 131
Prejudicial 45, 101, 208, 211, **377, 387**
Prior alcohol/drug use inadmissible 211, 213, **377**

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 29

Prior inconsistent statement not admissible on collateral issue 39

Relevance

Accident not during time seeking damages irrelevant 245

Adequacy of EEOC's investigation 220

Broadly defined, subpoena enforcement 205

Decision makers did not consider 45, 145

Discrimination against others 218, **422**

Good character of alleged harassers 224

Harassment prior to conciliation agreement of another charge relevant 122

Health of defendant owner 356

Investigation of claim by defendant 220, 224

Notes in supervisor's diary relevant to retaliation 135

Prior acts of discrimination 152, 218, 421

Reflects motivation 4, 135

Reinstatement offer not received 112

Settlement discussions, excluded 209, **391**

Statement by charging party after termination decision 45, 145

Statement by decision maker regarding possible future layoffs 203

Treatment of people in other protected groups 397

Union organizing 425

Sexual harassment

Discovery, scope limited to protect charging parties 160

Harassment prior to conciliation agreement of another charge relevant 122

Harassment before 300 day period admissible 121

Knowledge of prior acts of harassment 152

Sexual orientation, inadmissible 210

Statistics

Average age not probative re: individual claims of discrimination 101, 131

Properly considered as part of total evidence 156

Summary judgment, should be viewed in totality 118

Supervisor's diary notes 135

Tax records 407

Weighted age averages, misleading 101

Ex parte contacts

Content of EEOC message 321, 363

Defendant with charging party/claimants 83, 232, 298, **321, 363, 401, 409**

EEOC with current and former employees 77, 159, **363**

Management employees 304

Restrictions of trial court not basis for appeal 401

Exhaustion of remedies

Title VII does not require 61, 65, 66

Expert SEE also Evidence

Fees

Preparation time 435

Reduction 435

FLSA SEE also ADEA, Equal Pay Act

Section 17 as basis for recovering damages against Union under ADEA 431, 437

Federal Arbitration Act (FAA) SEE Arbitration

Federal Rules of Civil Procedure SEE topic headings because this section only contains references to documents that refer to rule explicitly

Rule 8 90, **418**

Rule 9 61, 91

Rule 11 70, 183

Rule 12 3, 65, 280, **418, 419**

12 (b) compared to Rule 56 3

Rule 16 75, **419**

Rule 19 74, **323**

Rule 23 26, 217, 302, **357**

Rule 24 10, 74, 296, 302, **417**

Rule 25 79

Rule 26 7, 10, 43, 58, 102, 164, **354, 416, 419, 421**

Rule 27 23, 125

Rule 30 219, 310

Rule 35 55, 83, 130, 200, 300, 301

Rule 37 5, 102, 112, 124, 164

Rule 41 6, 88

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 31

Rule 42	41
Rule 49	70
Rule 51	343
Rule 53	8
Rule 56	3
Rule 59	205, 412 , 429 , 433
Rule 60	412
Rule 65	38, 81
Rule 72	322

Federal Rules of Evidence

Rule 401	253, 356 , 359 , 377 , 378
Rule 402	101, 145, 356 , 359
Rule 403	101, 112, 208, 209, 210, 211, 212, 213, 218, 222, 308, 377 , 378 , 397 , 425
Rule 404	124, 224 , 344 , 355 , 414
Rule 408	209, 391
Rule 412	1, 344 , 355
Rule 602	131
Rule 608	377 , 414
Rule 611	414
Rule 615	214
Rule 702	130, 207, 223, 308
Rule 801	4, 59
Rule 803	4, 45
Rule 804	4

Fifth Amendment

Adverse inference from assertion 265
Assertion re: under reporting of tips does not preclude
recovery 265, **364**
Question designed to force charging party to invoke is
prejudicial 208, 211
Recovery not precluded by assertion re: mitigation 265, **364**

Financial Status

Defendant's, discoverable 40, 94, 267, 268, **416**

Forum non conveniens SEE Transfer; Venue

Free exercise clause

EPA jurisdiction over church does not violate 30

General duty clause (Occupational Safety & Health Act)
Not basis for rejecting applicants with likelihood of
suffering future disabilities 383

Grievance procedure
EEOC need not recommend employer's internal process 321

Harassment SEE Racial harassment, Sexual harassment
Basis for transfer of case 69

Hazen Paper
Disparate impact theory survives for ADEA cases 313, 314,
315, 316

Hicks SEE Pretext

Hiring
Applicant flow analysis 187, 241
Availability 187, 241
Disparate impact 235
Disparate treatment 235
Pretext for failure to hire 235

Immunity
Eleventh Amendment 181

Impeachment
Collateral evidence not admissible 39

Independent contractor
Agency test 249, 372
Control over work primary factor 372
Darden test 249, 372

Injunction See also Preliminary relief, TRO
Available
Arbitration agreement, effect of 326
Discrimination proven, absent unusual circumstances
324, 347, 358, 382

Discrimination stopped, policy changed 382
 Good faith defense proven 379
 Policy in place 405
 Standard of proof same for EEOC as for intervenor 382
Court's discretion 347, 358
Expunge personnel file 382
Good faith defense not basis for denying 379
Harassment 250
Health insurance 2, 81
Hiring procedures 27
Intervenor may obtain 161
Lying at trial 382
Mandatory arbitration agreement 25, 38, **326**
Policy defendant has refused to change 155, **358**
Presumption favors EEOC 12, 250
Public interest, to vindicate 27, 167, **398**
References for charging party 382
Retaliation 27, 250
Settlement terms contrary to public policy 167
Standard to receive 27, 155, 167, 250, **358, 382**
Training 27, **382**

Integrated enterprise SEE Jurisdiction

Intent

 Proof

 Evidence of company's state of mind 5

Interest SEE Prejudgment Interest

Interlocutory appeal SEE Appeal

Intervention

Certification of Public Importance

Court should not look behind 417

Delay or prejudice 417

 EEOC's status as intervenor not basis for denying injunctive relief 161

 EEOC intervention does not deny defendant's 7th amendment right to trial 302

 Permissive, standards 10, 74, 142, 242, 302, **417**

Motion to Intervene

Example 10, 13, 142, 242, 302, **417**

Public interest 302, **417**

Separate EEOC suit on same claims not a bar 242

Subpoena enforcement action not appropriate vehicle for
296

Investigation, EEOC

Challenge to (conducted in bad faith/vendetta) 50, 104, 170,
220, **359**

Conduct of, irrelevant to trial de novo 170, 220, **359**

Deposition re: conduct of 95, 162, 170

**EEOC error in failing to investigate claims should not bar
innocent charging party from asserting claims 384**

Need not exhaust all alternative methods before obtaining
injunction against terms of settlement decree preventing
employees from assisting EEOC 167

Obstructed by third party agreement not to talk to EEOC 167

Scope broad 205

Investigation, Employer

In house process, EEOC need not recommend 321

Lawyer-performed investigation waives attorney-client
privilege 94

Judgment

Conform to evidence 398

Judgment on the pleadings

Not proper method to challenge affirmative defenses 66

Judicial estoppel 138, 174, 216, 229, 277 (ADEA), 278, **331**

Jurisdiction (including coverage and no. of employees)

180 day period before issuing right to sue not
jurisdictional 153

Alter ego 57, **406**

Church

Exercise under EPA not unconstitutional 30

Conciliation

not jurisdictional prerequisite 91, **396**

- Corporation 57
 - State law determines 406**
- Employee status
 - Leased/temporary employees 346**
 - Retirees 230
 - School bus drivers 249
- Employment agency, discrimination against own employees 73
- Engaged in commerce 147
- Former employee covered for retaliation 176
- Improper handling of charge 110
- Independent contractors 249, **372**
- Individual as "alter ego" of corporation 57, **406**
- Integrated enterprise 19, 94, 104, 269, **348**
- Law of case
 - dictates jurisdiction not reviewed again 32
- Liable in official capacity 406**
- Notarization of state FEP charge 290
- Number of Employees
 - Church, school and day care are one entity for ADA coverage 269
 - Employment agency needs no minimum number 73
 - Independent contractors 249, 372**
 - Integrated enterprise 19, 94, 104, 269, **348**
 - Part time 33, 49
 - Payroll method 33, 49, 71
 - Volunteers 18
- Pre-determination settlement, enforcement of 129
- Purchase of business 395**
- Retaliation, former employee covered 176
- Single employer 104
- Subject matter, lack of 110, 111, **413**
 - EEOC can proceed even if charging party withdrew individual lawsuit 413**
- Successor corporation 79, 92
- Verification of state FEP charge
 - Notarization not required 290
- Volunteers 18

Jury

- 7th amendment right not implicated 302, **390**
- ADEA; not available in suit under only Section 217 243

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 36

AIDS case 62

Bifurcation does not affect right to jury 140, 298

Decides back pay 215

FLSA 243

Instructions

ADEA Age need only be determining factor 119

ADEA Direct evidence need not be close in time to
termination decision 119

Basis for new trial 429

Objections to 258, 343, 399, 429

Interview jurors 350

Questionnaire (additional) proposed because of media
coverage, psychiatric testimony (HIV/AIDS issues) 62, 255

Unavailable under Section 217 (ADEA) 243

Leave

Involuntary, evidence of discrimination 63, 64

Involuntary, considered discharge 63, 64

Pregnancy, denial of 257

Letter of Determination SEE LOD

Liability See also Sexual harassment, liability

Agency 13, 148, 271

Bifurcation of trial on liability and on damages 103, 140

Certification of total disability treated as after acquired
evidence; not defense to liability 138, 174

Fear of injury no basis for terminating pregnant waitress 59

Owner/president/management official 13, 16, 57, 276

**Principal liable for agent employed in managerial capacity
acting within scope of employment 420**

Stipulation, example 35

Successor corporation 79, 92

Formed as subterfuge to avoid liability 79

Supervisor 17, 93, 148, 154, 271, 276, 311

Light duty

Age discriminatory policy 76

Retirement eligible not allowed 76

Local rules

Noncompliance as basis for denial of request 47

LOD

Exclude because prejudicial to EEOC 222

Mandamus

Extraordinary remedy 361

Improper method to review discovery order 361

Standard for 361

Mandatory Retirement SEE Retirement

Medical Examination

Cardiovascular fitness test age-biased 316

Circumstances for granting 200

Conduct of

Exclude questions re: communications with EEOC 300

Receive questions, answers and instructions for mental examination 300

Tape recording 300

Opposing

Condition at time of rejection, not current health, is significant 55

Medical condition not in controversy in "regarded as" ADA case 55

Mental condition not at issue where nonpecuniary compensatory damages claim made 130, 200, 301

To establish whether witness is physically, mentally able to testify 353

Medical Insurance SEE ADA, Benefits, Preliminary Relief

"Meet and Confer" certification, Rule 26

Example 10

Failure basis for denying motion 394

Mental condition

Compensatory damages does not place in controversy 130, 200, 301

Long term disability plans 116, 117, 284

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 38

Obtain questions, answers and instructions for tests
administered 300
Tape record examination 300

Mitigation

Age/illness reason for failure 44
Education for new career 324
Employer has burden of showing insufficiency 44
Fifth Amendment assertion re: tip reporting does not
preclude recovery of back pay 265, **364**
Jobs unavailable 131, 139, 274
Nonpecuniary damages, no duty to mitigate 263
Offset quarterly or annually rather than over entire backpay
period 317
Reasonableness judged on circumstances 44, 139, 224
Retirement reasonable 131
Starting a business 318
Unconditional offer not received 131, 299

Mixed motive 179

Discretion to award attorneys' fees against plaintiff who
established that discrimination was motivating factor is
limited 179
Establishing discrimination was motivating factor proper
basis for denying fees against plaintiff 179
Proportionality test for awarding attorneys' fees is
contrary to Supreme Court precedent and Congressional intent
179

Motion to Dismiss

Compare to Motion for Summary judgment 3
Guidance on drafting, sample 386
Standard improperly applied 280

Motion to Strike

Guidance on drafting, sample 386
Proper way to challenge affirmative defenses 61, 66

Native Americans

Preferences based on tribal affiliation violate Title VII
329

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 39

Necessary party

Improper rule for allowing EEOC to participate in case 74

Union not, if only back pay requested 323

No beard policy SEE basis for discrimination (race, religion)

Constitutes religious discrimination 108

Opinion testimony SEE Evidence, expert

Party admissions See also Evidence

Chilling effect, even if statement not true 4

Direct evidence 28, 63

Supervisor's statement re: reasons for discharge 59

Payroll method

Counting employees for jurisdiction 33

Pension

Lower benefits based on age 293

Offset against back pay 14

Recoupment by state fund 14

Policy

Chilling effect 4, 11

Failure to follow as evidence of discrimination 218

Liability established unless employer shows (by clear and convincing evidence) no harm 330

Victims not needed for prima facie case 108

Pre-determination settlement

Jurisdiction to enforce 129

Reasons to enforce 129

Preemption

ADEA contains "clear statement" of Congress' intent to preempt state law 136

ADEA preempts state law 136

Title VII determination does not preempt state Law Against Discrimination 151

Pregnancy See Sex

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 40

Fear of tort liability no basis for discharge 59

Non-pregnancy not BFOQ 59

Policy of denying leave of absence 257

Pre-judgment interest

Exceptions when unavailable 171

Presumptively available for back pay awards 171, 227

Preliminary Relief

Enjoin destruction of computer files, documents 56, 81, 82

Enjoin enforcement of settlement 167

Enjoin racial harassment 250

Maintain health insurance 2, 81

Presumption favors EEOC 250

Reinstatement 2, 12

Retaliation 27, 250

TRO 2, 12, 25, 27, 38, 56, 81, 82, 129, 250

Pre-offer medical inquiries (ADA)

Violate ADA 97

Pretext 118, 132, 150, 156, 163, 178, 218, 237, **343, 429**

11th Circuit precedents on burdens of proof 163

Arbitrariness of reasons basis for finding 132

Failure to promote 218

Hicks 163, 178, 338, 343, 429

Inference if supervisors' testimony contradictory re: facts surrounding termination decision 150

Inference that one reason false because all others are refuted is reasonable, even if that one reason is not refuted 132, **343**

Jury's rejection of proffered reason is sufficient to support finding of discrimination 178, **338**

Pretext plus 178, **338**

Pretrial order

Contents control future activity 112, **359**

Prevailing party See also Attorneys fees, Costs

Case law in 6th Circuit mixed 88

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 41

Privacy

- BFOQ defense-male workers in female health club 13, 188
- BFOQ defense--female tailors 379**
- BFOQ defense-referral of home health care workers 31, 188, **360**
- Basis for protective order 9, 160
- Disclosure of investigation to third party violates 29
- Limit on scope of discovery in sexual harassment 1, 160

Privilege

Attorney-client

- Common interests 42, 83
- Communication for obtaining or giving legal advice 36
- Contact with current/former employees 77, 159, 304, **321, 322, 436**
- Defendant cannot assert re: class members 297, **321**
- Defendants' contact with class members 232
- EEOC and charging party/claimant 42, 75, 83, 297, **321, 322**
- Ethical rules re: contacts with employees 77
- Failure to assert earlier is waiver 36
- Factual information not protected 416**
- Intra-company communication to affirmative action manager 36
- Investigation by attorney of sexual harassment 94
- Self-critical analysis challenged by EEOC 297
- Testimony of affirmative action officer not covered 36
- Waiver 7, 36, 77, 94
- Withdrawal from representation 402**

Deliberative process 29, 162, 170, 303, **367**

- Prevents deposition on bases for cause/no cause determination 95, **367**
- Prevents disclosure of charge 29
- State FEP investigation 162

Documents withheld must be identified 7

Fifth Amendment

- Invocation by charging party 208, 211

State reports privilege

- Federal law against discrimination outweighs state protection for reports 37

Waiver 7, 36, 83, 94, 303

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 42

Work product

Improper assertion equivalent to waiver 7

Substantial need is basis for obtaining notes of supervisor; notes show motivation and are not available elsewhere 135

Supervisor's diary notes re: charging party 135

Promotion

Abolish job rather than promote 218

Blanket exclusion from because of record of substance abuse rehabilitation 239

Failure to 218

Protective Order

Contacting former and current employees 77, 159

EEOC investigator for deposition re: conduct of investigation 170

EEOC investigator in third party lawsuit 95

Harassment of charging party or witness as basis 43, 67, 68, **400**

Identity of charging party with HIV 67, 68

Limits inquiry into witness' sex life 1, 43

Modify order in related case regarding evidence relevant to second case; more efficient to use same evidence 142

Presumption favors public access to information 52, 84

Privacy as basis 9, 67, 68, 84, 160

Public interest not served by naming charging party 68

Sequence of discovery 366

State law protects confidentiality of HIV-status 67

Trial witnesses 400

Untimely request basis for denial of 9, **416**

Provocation

Racial epithets, defense to discharge for fighting 80

Punitive damages See also Damages

Available for violations before and continuing after passage of 1991 CRA 122

Bifurcated trials, evidence should be presented at liability portion 251

Cap on damages not basis for denying discovery 40

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 43

Discovery of financial status of defendant 40, 94, 267

"Extraordinarily egregious" is improper standard 169

Failure to remedy harassment 152

Jury decision of appropriate award 169

Limitations on damages under CRA 1991 based on size of employer, not egregiousness of conduct 169

Omission from arbitration remedies basis for challenging agreement 168

Participation or ratification of discrimination by higher management not required 345

Prior harassment admissible to establish basis 122, 152

QUATTRO PRO 192

Racial Harassment 80, 150, 166, **384**

Claims not in charge 384

Epithets, defense to fighting 80

Failure to remedy 150

Hostile environment can arise from one incident 150

One incident can be sufficient to state a claim 150

Subpoena enforcement 182

Sufficiency of evidence to avoid summary judgment 150

White male can complain of racial harassment on basis that it ruins close working relationships for all 166

Railway Labor Act

Title VII rights not eliminated by mandatory arbitration provision 100

Reconsideration of judgment

Court's discretion 412

Legal error 205, **412, 434**

Mistake, inadvertence, excusable neglect 412, 434

Records SEE Applications, Document destruction

Recusal

Court properly denied 111

Referrals

Discriminatory 31, 105

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 44

Reinstatement

Evidence of offer excluded 112

Offer not received, no bar to recovery 112

Rejection of

Fear of retaliation 63, 64

Retaliation fear basis for rejecting 63, 64

Releases SEE Waiver

Religion

Accommodation

Beard 108

Days off for holiday 133

Difference in policy re: accommodating management and
non-management employees 108

Undue hardship 133, 256

Discovery, scope of 256

Exemption of Catholic nuns from coverage of employment
discrimination laws not discrimination against Baptists 30

Failure to grant tenure to nun in Canon Law Dept. 9

No beard policy 108

Policy revision during litigation indicates policy not
mandated by religion 32

Reasonable accommodation 108, 256

Representation by counsel 89

Res judicata

Conciliation agreement improper basis because it is non-
judicial resolution 120

Doctrine of virtual representation does not bar EEOC
from relitigating pilot age-60 no downbid cases against
employer not party to first suit 288

Retaliation

Basis for rejecting reinstatement 63, 64, 274

**Behavior need not be ultimate employment action 325, 327,
339**

Charge not necessary (second) 166, **380**

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 45

Claim stated even if charge says retaliation for filing charges and retaliation actually occurs for protected activity 166

Coverage (under ADA) for nondisabled complainant 339

Discharge for cooperating with EEOC 274

Discharge for lying to EEOC 139

Discharge for rejecting mandatory arbitration agreement 25, 38

Failure to replace lost work/clients 411

Former employee covered 176

Good faith belief that conduct complained of was illegal 115, 166, 254, **327**

Notes of supervisor in diary relevant 135

Procedure denying right to file charge 11

Reasonable individual would believe complaining of same sex harassment is protected activity 115, 254

Threats of adverse employment action 325, 339

Underlying allegation need not violate Title VII 115, 166, 254, **327**

Retirement

Less favorable benefits for early retirement 203

Less favorable benefits for disabled 230

Mandatory

Company directors 134

Police officers 227

Pilots 288

Mandatory policy can be challenged even if no charge filed 134

Orderliness of succession and planning compensation not reasonable factor other than age supporting mandatory retirement 134

Right to sue

180 day wait before issuing not jurisdictional 153, 155

EEOC regulation allows for early issuance 153, 155

EEOC need not wait 180 days before issuing 153, 155

Ripeness 116, 117

Rule 11

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 46

Model brief 183 (includes affidavits)
Standard for fee awards against plaintiff 70

Rule 35 SEE Medical Examination, Federal Rules of Civil Procedure

Sanctions See also Attorney's fees

Appearance without local settlement authority 75
Asserting privilege after magistrate ruled it was waived 94
Bench warrant 349

Contempt 349

Excluding evidence/witness 58, 102, 124
Rule 11 70, 183 (model brief; includes affidavits)
Rule 16 75

Sealing record SEE Confidentiality

Settlement

Class action 186
Confidential (EEOC opposed) 71, 84
Contract principles apply 71, 182
Discussions not admissible as evidence 209, **391**
Enforcement
 Meeting of the minds 71
 Oral settlement 145
 Predetermination settlement 129
 Void as against public policy 167
Exclude evidence of discussions 391
Local authority needed to appear at conference 75
Offer, determined by timing and existence of claim 391
Resolution of DOL charges not waiver of Title VII claims 330

Seventh Amendment

**Compensatory and punitive damages claims do not deny
defendant right 390**
Defendant not entitled to same jury for liability and
damages 298
Intervention by EEOC does not deny defendant's right to jury
trial 302

Sex discrimination

BFOQ 13, 31, 59, 188, **360, 379, 493**

Claims period not limited to 2-year back pay or charge-filing period 105, 199

Customer preference 379, 403

Denial of tenure 9, 156

Discharge

Pregnancy 59, 60

Hire, failure to

Men 13, **360, 403**

Statistical evidence 28, 187, 241, 330

Women 4, 28, 241, 252, 330, 378, 379, 403, 408, 426

Failure to refer 31, **360, 403**

Hiring of women in other positions no defense 378

Lay BFOQ defense based on customer preference 379

Pregnancy

Discharge 59, 60

Fear of injury while working not basis for termination 59

Policy denying leave 257

Promote, failure to

Punitive damages available 291

Sex plus

Proof no different than sex alone in absence of policy based on both sex and other attribute 156

Sexual harassment

Abuse of delegated authority 93, 114, 148

Agency theory 114, 148

Restatement section 219(2)(d) applies 114

Restatement section 166 inapplicable 114

Apparent authority 109, 148

But for his/her sex 106, 279, 280, **325**

Character of charging party not at issue 124, 224, **344, 355**

Co-worker 1, 3, 115, 279, 280

Continuing violation theory 121, 122

Cursing SEE Foul language, below

Customer 411

Defenses

Charging party welcomed harassment 224, **344, 380**

Equally bad treatment of men and women 172

Investigation by defendant sufficient 220, 224

- Jokes 144, 152
- Resignation by complainant precluded investigation/remedy 380**
- Delay in investigation 411**
- Evidence
 - Behavioral characteristics of victims 362**
 - Character of charging party not issue 124, 224, **344, 355**
 - Difficulty in performing job 152
 - EEOC 1995 guidelines should be excluded because never issued 223
 - Expert re: general patterns of harassment, behavioral characteristics of victims 362**
 - Expert whose theory not supported by psychological community should be excluded 223
 - Failure to provide prompt remedial action 94, 152, 154, **365, 380**
 - Gender stereotypes, basis for harassment 281
 - General "bad acts" not admissible to discredit charging party 124, 224, **344, 355**
 - Harassment welcome 224
 - Harassment prior to charge filing period admissible even if recovery period limited 121
 - Hostile environment, sufficiency of 202, 279, **325, 380, 411**
 - Knowledge of other acts of harassment 152, **325, 365**
 - Men not treated differently 325**
 - Other women not harassed 225
 - Other women not offended 225
 - Plaintiff's sexual behavior 1
 - Series of acts rather than one does not change analysis 154
 - Threats alone sufficient 311, **325**
- Foul language
 - Charging party's use not evidence of welcomeness 144
- Harassment equally of men and women defense 172
- Hostile environment 109, 114, 148, 152, 202, 224, 271, 279, **325, 380**
 - Decline in performance unnecessary 152
 - Increased difficulty to perform job sufficient to establish 152

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 49

- Physical contact unnecessary to establish 152
- Threats to establish 152, 202, 311
- Investigation
 - Attorney constitutes waiver of privilege 94
 - Delay 411**
- Joking no defense 144, 152
- Liability
 - Delay in investigation 411**
 - Notice to employer unnecessary 93, 114, 154, 271, 276, 311
 - Series of acts rather than one does not change analysis 154
 - Theories of 17, 93, 109, 114, 148, 154, 271, 276, 311, **347**
- Male challenge to harassment of women on basis that harassment ruined close working relationships for all 166
- Male-on-male 106, 115, 254, 279, 280, 281
 - Heterosexual men 281
- Notice
 - Supervisory acts 93, 114, 154, 271, 276, **347, 380**
- Pattern and practice claims, applicable 266
- Policy against, no defense 266
- Quid pro quo 114, 202
 - Economic loss not needed after CRA 114
 - Threats alone actionable 114, 311
- Remedial actions 94, 154, 225, **365, 380, 411**
 - Failure may constitute constructive discharge 380**
 - Promptness 225 (in other complaints), **411**
- Retaliation 202, 254, **325, 380, 411**
 - Reasonable individual would believe complaints of same sex harassment protected activity 115, 215
- Same sex 106, 115, 254, 279, 280
 - Sexual attraction unnecessary to state claim 281
 - Stereotypes, harassment based on 281
- Supervisor, conduct sufficient to establish employer liability 17, 93, 114, 115, 148, 154, 202, 254, 271, 276, 311, **343**
- Victims not named in charge 126
- Welcomeness
 - Charging party welcomed 224, **344, 380**

Foul language by charging party not evidence of 144

Sovereign immunity

Bars claim of improper handling of charge 110

Bars enforcement of third party subpoena against EEOC 22, 29

Prevents disclosure of charge 29

Standing SEE Cause of Action

Statistics

Availability/applicant flow 187, 196, 197, 252, 308

EEO-STAT Square and Avail programs 187

Hiring cases, tests 187, 196, 241, 252

Labor market availability

Expert challenged because analysis flawed 308

Proof 196, 197, 241, 252

Weighted age averages, exclusion 101

Statute of limitations

ADEA

No limitations on ADEA after CRA 1991 24, 190, 312, 313, **410**

ADCAA reflects Congress intended no statute of limitations 24, 190, 312

Equal Pay Act 228

Equitable tolling

Defendants delay in EEOC investigation 228

Limits recovery but not liability period 199

Pattern and practice cases, no charge filing requirement 266

Retroactivity 61

State statutes-not applicable to Title VII 24

Title VII has none 141

Tolling 228, **410**

Because of conciliation 410

Because of need for subpoena enforcement 228

Stay

For further EEOC investigation to identify class 283

Pending appeal 46

Pending mandamus 361

Stereotypes

Male harassed for failure to meet 281

Subpoena

Against EEOC

Administrative file sought 240

Sovereign immunity bars 22, 29

Third party to suit 240

Child of charging party not appropriate subject 306

Criminal defendant seeks charges against employer 22

Computerized files, descriptions of 205, **412**

EEOC Enforcement

Computerized files, description 205, 412

Confidentiality protected by statutory prohibition on disclosure 182

Defense on merits not basis for challenging 123, 184

Disclosure of ongoing internal investigation protected against by statute 182

Exhaustion of remedies 182, 184

Fees for witness interviews during investigation 289

Merits not properly raised in subpoena enforcement action 123, 184

Model briefs 184 (with affidavits)

Return of documents to employer 289

Scope of authority broad 184, 289

Untimeliness of ADEA charge not basis for challenging 123

State "reports privilege" preempted by federal law 36

Title VII prevents EEOC disclosure of information 22

Intervention by charging parties inappropriate in subpoena enforcement action 296

Successor company See also Integrated enterprise, Jurisdiction, Liability

Subterfuge to avoid liability 79

Summary Judgment

Compared to Motion to Dismiss 3

Contradictory statements re: facts surrounding termination 150, **343**

Discovery to establish question of fact 235

Evidence should be viewed in totality 118, 156

Hicks

Rejection of defendant's proffered reasons allows claim to proceed to trial 338, 343

Improper in sexual harassment cases because determination involves credibility 144

Standard of Review 3

Sufficiency of evidence 150, 180, 235, **340, 343**

Supervisor

Liability for harassment 17, 93, 114, 115, 148, 154, 202, 254, 271, 276, 311

Temporary Restraining Order (TRO)

Enjoin harassment 250

Enjoin records destruction 56, 81, 82

Maintain health insurance 2, 81

Presumption favors EEOC 250

Reinstatement 2, 12

Retaliation 27, 250

Showing required to obtain 12, 25, 81

Tenure

Denial based on gender 9, 156

Timeliness

180 day wait before Right to Sue issued not jurisdictional 153

Additional victims, claims are timely if original charge is timely 126

Claimants need not wait 180 days from date charge filed before filing suit 153

Claims of individuals injured prior to charge filing period or 2-year back pay period 199

300-day period 105

Charge filing period is 300 days for charge filed automatically with state agency under work sharing agreement 105

EEOC certification of inability to investigate waives any requirement (if it exists) that claimant wait 180 days before filing suit 153

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 53

Failure to file ADEA lawsuit within 90 days when no notice
that EEOC ending processing 233

Tolling SEE Equitable Tolling

Training

Injunction requiring 27

Transfer

Inconvenience to corporate witnesses not relevant 69, 226

Protect charging party from harassment 69

Standards for 69, 226

Union

Cannot waive individual's right to statutory remedies 107

CBA does not automatically take precedence over ADA 113

Duty to accommodate under ADA 113

Duty to negotiate ADA reasonable accommodation 113

Liability for damages under ADEA 431, 437, 438

Necessary party 323

Organizing activity inadmissible in Title VII cases 425

Venue

Corporate headquarters location improper bases 99, 226

Proper where discrimination occurred 99, 226

Title VII has own provision 99

Voir Dire

AIDS case, special questionnaire sought 62

Media coverage 62

Psychiatric treatment 62

Questionnaire to seek additional jury information because of
complexity of issues and media coverage 62

Volunteers

Counted as employees to establish jurisdiction 18

Waiver

Consideration 15

Employee's role in fashioning terms of waiver 15

Employer's failure to disclose facts 15 (ADEA)

Failure to return consideration not ratification 336
Future claims 20
Knowing and voluntary 15 (ADEA), 20 (Title VII/ADEA), 38,
330
Privilege SEE Privilege
Prospective waiver invalid 20, 38, 157, 294, 333, 336
**Ratification does not result merely from failure to return
consideration 336**
Settlement of DOL claim not waiver of Title VII claims 330
Time for consideration (ADEA) 15

Withdrawal as counsel
Opposition 89, 402

Witnesses

Amend list for "good cause" 164
Confidential informants' identity sought 394
Disclosure in scheduling order 419
**Ex parte contact 77, 83, 159, 199, 232, 298, 304, 321, 322,
363, 401, 409, 436**
Excluded because untimely identified 58, 102, 164, 419, 421
Harassment of 400
Medical condition precludes testifying 353
Personal knowledge necessary 131
Prepare for deposition, trial 385
Private investigator not expert on drug activities 377

Work product doctrine
Bases for asserting (EEOC) 83
Diary notes of supervisor do not qualify 135

Worksharing Agreement

Charge filing period 300 days when charge filed
automatically with state FEP under 105
Deferral rights automatically waived 143

TYPES OF DOCUMENTS

(last document included is **438**)

Certification of Efforts to Informally Resolve Discovery 7

Claims forms in class actions

307 (Title VII, failure to hire, promote; grocery store)

Document Production

147 (is defendant employer engaged in commerce)

189 (ADEA age layoff; database documentation)

192 (ADEA age layoff; database documentation)

193 (general; computer tapes and diskettes)

194 (planning discovery)

261 (Title VII national origin failure to hire; organization of plant, job descriptions, general work information)

Findings of Fact and Conclusions of Law

60 (Title VII pregnancy discharge)

241 (Title VII class failure to hire (women), statistical evidence)

320 (Title VII class failure to hire (women), proposed conclusion of law ONLY on increasing backpay award to compensate for increased taxes owed)

330 (Title VII class failure to hire (women))

352 (Title VII sex, sexual harassment)

Interrogatories

147 (is defendant employer engaged in commerce)

189 (ADEA age layoff; database documentation)

192 (ADEA age layoff; database documentation)

193 (general; computer tapes and diskettes)

194 (planning discovery)

260 (Title VII class--organization of plant, qualifications, identity of employees, job descriptions, etc.)

262 (Title VII national origin failure to hire--job titles, descriptions, hiring, procedures/recruitment, experts, affirmative defenses)

268 (samples re: financial data, case cites re: right to obtain)

309 (seeking evidence of financial assets, insurance)

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 56

Juror Questionnaire 62, 255

Jury Instructions, Objections to 258, 343, 399, 429

MOTIONS

for Certification of Expedited Appeal 48

to Compel (and Oppositions)

219 (Opposition to motion to quash deposition of financial officer)

256 (responses/information re: religious accommodation)

297 (ADEA class; Defendant failed to identify class members, asserted inappropriate privileges)

303 (Seeks return of inadvertently disclosed privileged documents)

353 (independent medical examination)

365 (responses re: employees at other facilities, other sexual harassment lawsuits, internal investigation, fraud by harasser, comparators)

394 (opposition; defendant failed to "meet & confer," defendant improperly sought identify of confidential informants, in camera inspection not useful)

416 (bases for affirmative defenses, financial information, personnel file of alleged harasser)

427 (financial information of employer)

to Dismiss (AND Opposition to)

226 (forum non conveniens)

413 (opposition; jurisdiction when charging party withdrew individual suit)

419 (opposition; dismiss members of class)

to Exclude Experts

308 (Title VII, class, sex, failure to hire)

354 (Title VII, individual, sex, failure to hire)

377 (exclude expert re: drug trafficking)

for Expedited Trial

128 (charging party has AIDS; sets forth medical condition and basis for expediting trial)

to Intervene

9 (Title VII sex)

10 (ADEA/Title VII sex)

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 58

- 142 (ADEA class case)
- 242 (Sex discrimination/sex harassment, class (Mitsubishi))
- 302 (Title VII sex, class, failure to promote (Home Depot))
- 417 (Title VII sexual harassment, retaliation)**

In Limine (and Opposition)

- 4 (opposition to defendant's effort to exclude statements that women were not hired because plaintiff cannot identify the speakers except as "receptionist" or "employee;" also responds to defendant's challenge that same information should not be admitted as showing company's "state of mind" re: hiring women)
- 16 (because of defendant's record keeping violation, court should exclude evidence of other males who applied)
- 39 (not motion in limine, but discusses EEOC's reasoning for arguing to exclude evidence of outside work relationship as irrelevant)
- 45 (opposition to defendant's effort to include evidence that a co-worker was intimidated by charging party)
- 58 (to exclude testimony of witnesses untimely identified)
- 124 (opposition to defendant's effort to include evidence of "bad acts" (forgery) by charging party)
- 207 (Sex harassment, oppose exclusion of EEOC's gender stereotype expert)
- 208 (opposition; AIDS-exclude testimony re: infecting others)
- 209 (opposition; AIDS-exclude consent to medical exam during settlement negotiations)
- 210 (AIDS-exclude evidence of sexual practices)
- 211 (exclude prior drug usage)
- 212 (exclude unemployment compensation)
- 213 (exclude prior alcohol use)
- 214 (exclude witnesses under Fed.R.Evid. 615)
- 215 (seeks advance determination about evidence of back pay/mitigation)
- 218 (opposing exclusion of complaints of non-charging parties)
- 220 (exclude evidence of conduct of investigation)
- 221 (exclude letter from defense attorney to investigator)
- 222 (exclude LOD)
- 223 (exclude defendant's industrial psychologist expert)

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 59

- 224 (exclude testimony of witness re: defendant's policies/investigation were "good;" there was no hostile environment)
- 225 (exclude testimony of women not harassed)
- 245 (exclude evidence of epileptic seizure and accident occurring after relevant time period)
- 253 (opposing exclusion of evidence of defendant's net worth)
- 259 (concerning punitive damages)
- 263 (re: charging party's sexual activity (HIV))
- 265 (opposition; strike class members who asserted 5th amendment re: reporting tip income)
- 354 (expert testimony)
- 355 (Fed.R.Evid. 412, information re: sexual history)
- 356 (health of defendant owner)
- 359 (EEOC investigation)
- 377 (expert re: drug trafficking)
- 378 (Title VII, historical hiring of women)
- 379 (BFOQ defense)
- 391 (settlement discussions)
- 397 (opposition; defendant treated other employees, such as homosexuals, well)
- 414 (bad character)
- 421 (evidence disclosed at end of discovery in violation of Rule 26)
- 422 (opposition; exclude prior discrimination claim)
- 424 (opposition; exclude additional claimants)
- 425 (charges filed with NLRB)

to Quash

- 240 (subpoena of director in non-EEOC lawsuit)

to Strike

- 47 (strike answer that seeks attorney's fees under EAJA)
- 50 (strike unsupported allegations that lawsuit is vendetta by investigator)
- 61, 65, 91 (strike defenses insufficient as a matter of law)
- 66 (Reply; EEOC's motion to strike defenses insufficient as a matter of law)
- 164 (strike witness list)

for Summary Judgment (and Opposition to)

- 227 (benefits/ADEA class case)
- 235 (opposition; Title VII hiring, statistics, impact and treatment)
- 236 (opposition; mandatory arbitration)
- 239 (ADA blanket policy re: substance abuse)
- 244 (opposition; ADA failure to hire, epileptic, direct threat)
- 247 (ADA opposition; neck and back injury, need for individualized assessment)
- 249 (opposition; ADEA mandatory age 70 retirement, independent contractor)
- 252 (Title VII sex/hiring; statistics)
- 266 (opposition; Title VII, class, sexual harassment (quid pro quo and hostile environment, pattern or practice)
- 343 (opposition; Title VII sex, individual, hiring)
- 348 (both; Title VII jurisdiction, integrated enterprise)
- 376 (opposition; ADA record of/"regarded as" failure to accommodate)
- 380 (opposition; Title VII sexual harassment, hostile environment)
- 381 (opposition; ADA reasonable accommodation)
- 383 (ADA failure to hire (carpal tunnel), pre-employment predictive test, direct threat)
- 384 (opposition; Title VII race, retaliation, harassment, discharge)
- 393 (opposition; ADA failure to hire, "regarded as," asymptomatic back condition, direct threat)
- 395 (Title VII employer status)
- 396 (Title VII condition precedent)
- 403 (ADEA/Title VII race, sex, national origin; failure to hire, failure to refer)
- 406 (opposition; Title VII race, employer status)
- 410 (ADEA discharge)
- 411 (opposition; Title VII sexual harassment by customer)
- 420 (opposition; Title VII punitive damages claims)
- 423 (ADA failure to accommodate)
- 434 (ADA monocular vision; failure to accommodate, discharge)

Pretrial Order

- 238 (ADEA RIF/discharge)
- 246 (ADA failure to re-hire)
- 360 (ADEA/Title VII (race, sex, national origin); failure to hire)
- 408 (Title VII (sex) failure to hire, pattern and practice)
- 426 (Title VII sex discrimination)
- 428 (Title VII sex discrimination, retaliation; conditions precedent, conciliation)
- 430 (ADA failure to hire, "regarded as", blanket exclusionary policy)
- 431 (ADEA early retirement plan, liability of union for CBA)

Protective Order

- 1 (discovery re: sexual behavior outside work except with harasser)
- 22 (to avoid disclosure of charges against employer who has filed criminal charges (murder) against doctor who complained of national origin discrimination)
- 43 (to prevent defendant from inquiring into consensual sexual relationship supervisor had with employee at previous job, allegedly to use as basis for termination)
- 67, 68 (to protect identity of HIV-positive individual)
- 77 (opposition to defendant's efforts to keep EEOC from contacting former and current employees)
- 95 (investigator subpoenaed in third party case; to prevent inquiry into topics covered by deliberative process, including bases for cause/no cause determination)
- 142 (to modify protective order in related case which prohibits disclosure of discovery in that case to anyone)
- 160 (to limit scope of discovery to protect witness in deposition about sexual harassment claims)
- 162 (to prevent defendant from deposing investigator)
- 170 (to prevent 30(b)(6) deposition of EEOC regarding internal communications during investigation/cause decision)
- 300 (to restrict parameters of Rule 35 examination)
- 301 (to prevent Rule 35 examination)

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 62

- 304 (to prevent Rule 35 examination)
- 306 (to prevent abuse of subpoena; defendant seeks personal information about child of litigants, who has no role in case)
- 310 (to prevent 30(b)(6) of Commission lawyers concerning their legal and statistical analysis of case)
- 363 (To prevent EEOC from communicating with potential claimants)
- 366 (sequence of discovery)
- 400 (to prevent defendant from contacting/harassing witnesses)
- 407 (to prevent subpoena of tax/medical information of charging party and her daughter)

Statement of disputed facts

- 34 (ADEA numerous defendants and claims)
- 104 (ADA discharge AIDS)
- 343 (Title VII sex (female), failure to promote, retaliatory discharge)
- 348 (Title VII jurisdiction, integrated enterprise)
- 376 (ADA record of, "regarded as," reasonable accommodation)
- 380 (Title VII sexual harassment, hostile environment)
- 381 (ADA reasonable accommodation)
- 384 (Title VII race, retaliation, harassment and discharge)
- 395 (employer status in sale of business)
- 410 (ADEA discharge)
- 434 (ADA monocular vision, failure to accommodate, discharge)

Stipulation of Liability on the Merits

- 35 (ADEA)

Temporary Restraining Orders/Injunction

- 2 (ADA, seeking reinstatement of position and health benefits)
- 12 (AIDS, retain job and maintain benefits)
- 25 (Title VII, prevent employees from being forced to wait to file EEOC charges until after internal mandatory arbitration)
- 27 (Title VII, after trial; injunction to vindicate public interest, to ensure fair hiring, to require training and to protect employees from retaliation)

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 63

- 38 (to enjoin defendant from enforcing mandatory arbitration agreement)
- 56, 81, 82 (to stop records destruction by referral agency; 82 includes computer files)
- 129 (to restrain defendant union from violating pre-determination resolution)
- 250 (eliminate racially hostile workplace)

Trial Briefs

- 13 (Sex discrimination failure to hire men; BFOQ defense)
- 28 (Sex discrimination failure to hire women)
- 59 (Sex pregnancy discrimination; BFOQ defense)
- 64 (Post trial; sex discrimination Whether involuntary pregnancy leave violates Title VII)
- 78 (EPA paying male teachers more in wages and benefits)
- 131 (ADEA discharge)
- 163 (ADEA discharge, pretext)
- 237 (ADEA layoff, damages)
- 241 (Title VII sex discrimination, failure to hire women, statistical evidence, calculation of relief)
- 257 (Title VII pregnancy discharge, policy)
- 311 (Title VII sexual harassment, class (quid pro quo, hostile environment)
- 330 (Title VII failure to hire, statistics, damages calculations)
- 357 (Title VII sex discrimination, scope of recovery to non-charging parties)
- 358 (Title VII injunctive relief)
- 411 (Title VII sexual harassment by customer)

TRAINING/EDUCATIONAL

- 83 Relationship between EEOC and charging parties and other claimants regarding litigation matters
- 159 Memorandum on ex parte contacts with current and former employees (1995, 1997)
- 183 Model Rule 11 sanctions opposition
- 184 Model subpoena enforcement brief
- 185 Model complaints
- 186 Class action settlements

INDEX TO EEOC BRIEF BANK

NOVEMBER 1998

Page 64

- 187 Availability and applicant analyses using EEOSTAT
- 188 Case law on BFOQ established by privacy concerns
- 190 Legal discussion on affect of 1991 CRA on ADEA statute of limitations
- 191 Resource guide to library materials supporting class case research
- 192 Obtaining, processing and analyzing computerized data
- 194 Selected issues in planning data discovery
- 195 Considerations in the trial of class actions
- 196 Statistical evidence
- 197 Creating and using databases in EEO litigation
- 198 EEOC survey data and its use in class action cases
- 199 Recovery in Title VII and ADA cases for acts of discrimination occurring prior to the charge filing period
- 200 Nonpecuniary compensatory damages and Federal Rule of Civil Procedure 35 mental examinations
- 267 Understanding and using financial data: an Ernst & Young guide for attorneys; Investigative accounting, techniques and procedures for determining the reality behind the financial statements
- 317 Research by legal intern on offset of interim earnings by quarterly or yearly periods rather than cumulatively over entire backpay period
- 318 Research by legal intern on starting your own business as meeting backpay mitigation requirement
- 319 Research by legal intern on compounding of interest on backpay
- 320 Expert report on method used in increasing backpay awards to compensate for additional taxes owed by claimants as a result of receiving entire backpay award in year of judgment
- 367 Deliberative process privilege
- 385 Deposition witnesses
- 386 Pretrial Motions
- 387 Writing
- 388 Federal employment discrimination laws & EEOC enforcement
- 432 Bankruptcy materials
- 436 Memorandum to Systemic Litigation Attorneys re: ex parte contacts with employees (former, current; managerial, non)