EMPLOYMENT LAW MANUAL

Prepared By:
The Employment Group
of Margolis Edelstein

BY: Christopher A. Tinari, Esquire

HARRISBURG OFFICE:
3510 Trindle Road
Camp Hill, PA 17011
717-975-8114

PITTSBURGH OFFICE:
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256

WESTERN PA OFFICE:
983 Third Street
Beaver, PA 15009
724-774-6000

SCRANTON OFFICE:
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

MARGOLIS EDELSTEIN
The Curtis Center
170 S. Independence Mall W.
Suite 400E
Philadelphia, PA 19106-3337
(215) 931-5895
FAX (215) 922-1772
ctinari@margolisedelstein.com

www.margolisedelstein.com

CENTRAL PA OFFICE:
P.O. Box 628
Hollidaysburg, PA 16648
814-695-5064

SOUTH NEW JERSEY OFFICE:
100 Century Parkway
Suite 200
Mt. Laurel, NJ 08054
856-727-6000

NORTH NEW JERSEY OFFICE:
Connell Corporate Center
300 Connell Drive
Suite 6200
Berkeley Heights, NJ 07922
908-790-1401

DELAWARE OFFICE:
750 Shipyard Drive
Suite 102
Wilmington, DE 19801
302-888-1112

Common Law Principles

I. AT-WILL EMPLOYMENT - PENNSYLVANIA

A. General Rule

The Commonwealth of Pennsylvania follows as does most of the United States, the prevailing status of employment is considered to be "at-will." Paul v. Lankenau Hospital, 524 Pa. 90, 569 A.2d 346 (1990); Clay v. Advanced Computer Applications, Inc., 522 Pa. 86 559 A.2d 917 (1989); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). The employment at-will doctrine provides that, absent contractual or statutory restriction, either the employer or the employee may terminate the employment relationship for any reason or for no reason at all. McLaughlin v. Gastrointestinal Specialists, Inc., 696 A.2d 173 (Pa. Super. 1997); Pipkin v. Pennsylvania State Police, 548 Pa. 1, 693 A.2d 190 (1997). The general rule is that no cause of action exists for terminating an "at-will" employment relationship. Stumpp v. Stroudsburg Municipal Authority, 540 Pa. 391, 396, 658 A.2d. 333, 335 (1995).

Contracts of Employment

1. Express Contracts

If an employee has an express employment agreement for a term certain, the employee is no longer at will and may only be discharged pursuant to the terms of the contract. Employment is presumptively at will unless an employee can provide clear proof that an express contract exists for a specific term or duration of employment or that the contract provides for discharge only for just cause or other specified reasons. Holewinski v. Children's Host of Pittsburgh, 437 Pa. Super. 174, 649 A.2d 712 (1994), allocatur support denied, 540 Pa. 641, 659 A.2d 560 (1995).

Although certain contract terms may be applied, the existence of the employment contract itself cannot be implied, and must be proven with evidence of a specific term of employment or cause for termination. Rodgers v. Prudential Ins. Co. of America, 803 F. Supp. 1024 (M.D. Pa. 1992), Aff'd, 998 F.2d 1004 (3d Cir. 1993). Pennsylvania presumes all employment to be at will. See Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). The party attempting to overcome the presumption must show clear and precise evidence of an oral employment contract for a definite term. See Gorwara v. AEL Indus., Inc., 784 F. Supp. 329, 242 (E.D. Pa. 1992).

Salary computed to a specific time period is insufficient to establish a contract. Booth v. McDonnell Douglas Truck Servs. Inc., 401 Pa. Super. 234, 585 A.2d 24 (1990), allocatur denied, 528 Pa. 620, 597 A.2d 1150 (1991).

An employee is not guaranteed a term of employment as a result of a promise to maintain employment if performance is good. See McWilliams v. AT&T Info Sys Inc., 728 F. Supp. 1186 (W.D. Pa. 1990).

2. Employee Handbooks

Plaintiffs have successfully pursued causes of action based upon the provisions set forth in a handbook, manual or policies written and provided by the employer. Pennsylvania Courts have held, however, that a handbook only has legally binding contractual significance if the handbook or oral modification to the handbook clearly states that it is to have this effect, Anderson v. Haverford College, 851 F.Supp. 179, 182 (E.D. Pa. 1994); Martin v. Capital Cities Media, Inc., 354 Pa. Super. 199, 511 A.2d 830 (1986), Allocatur Denied, 514 Pa. 643, 523 A.2d 1132 (1987), or if it clearly states that an employee may be discharged only "for just cause." Reilly v. Stroehmann Brothers Co., 532

A.2d 1212, 1216 (1987).

The mere publishing of a handbook does not create the meeting of the minds required to create a contract unless the parties bargained for the handbook provisions. Martin, supra. Similarly, where the employer reserves the right in a handbook or policy manual to make unilateral changes, and provides a nonexclusive list of offenses which constitute cause for discharge, a plaintiff cannot reasonably expect that the employer intends to bind itself to that handbook or policy. Luteran v. Loral Fairchild Corp., 455 Pa. Super.. 364, 688 A.2d 211, Allocatur Denied, 701 A.2d 578 (Pa. 1997).

To overcome the at-will presumption, there must be an express contract between the parties, or an implied-in-fact contract plus consideration passing from the employee to the employer from which the court can infer the parties intended to overcome the at-will presumption. Sharp v. BW/IP Int'l, Inc. 991 F. Supp. 451, 459 (E.D. Pa. 1998) (citing Anderson v. Haverford College, 851 F. Supp. 179, 181 (E.D. Pa. 1994)).

Pennsylvania courts agree that an appropriate disclaimer in the employee handbook with regard to the at-will status of the employee is sufficient to overcome an employee's argument that the handbook creates a contract for employment. Thus, an employer may issue statements in an employee handbook that are not contractually binding, so long as such statements are accompanied with "an appropriate, conspicuous disclaimer." Morten v. Cities Media, Inc., 354 Pa. Super. 119, 511 A.2d 830 (1986), allocatur denied, 514 Pa. 643, 523 A.2d 1132 (1987).

3. Additional Consideration Supplied by Employee

The presumption of at-will employment may be overcome by showing that the employee provided substantial additional consideration to the employer and termination of

employment would result in great hardship or loss to the party known to be both employer and employee when the contract was made. Permenter v. Crown Court & Seal Co., Inc., 38 F. Supp. 2d 372 (1999), Aff'd 210 F.3d 358 (3d Cir. 2000); Darlington v. General Electric, 350 Pa. Super. 183, 504 A.2d 306 (1986) overruled on other grounds by, Clay v. Advanced Comp. Applications, Inc., 522 Pa. 86, 559 A.2d 917 (1989).

The additional consideration given to the employer must be substantial. The at-will presumption is not overcome every time a worker sacrifices theoretical rights and privileges. Scott v. Extra Corporeal, Inc., 376 Pa. Super. 101, 545 A.2d at 339.

In Luteran v. Loral Fairchild Corp., 688 A.2d 211, 455 Pa. Super. 364 (1996), an employee agreed to a confidentiality clause, a non-competition clause and a clause giving the employer the right to any inventions employee made or conceived was so minimal that in no sense could it be said that the agreement was to the level of additional consideration.

In Cashdollar v. Mercy Hosp. of Pittsburgh, 406 Pa. Super. 606, 595 A.2d 70 (1991) the court upheld a jury verdict in favor of the plaintiff on a claim of breach of implied contract. After much persuasion by Mercy Hospital of Pittsburgh, Cashdollar left his job as vice-president of human resources at a hospital in Fairfax, Virginia where he had worked for over four years, for a similar position at Mercy Hospital in Pittsburgh, Pennsylvania. Mercy Hospital induced Cashdollar to leave his job with promises of future opportunity. Sixteen days after he began his employment, however, Cashdollar was fired. The jury found additional consideration existed in this instance because the employee conferred a substantial benefit on the employer other than what the position would normally require. Resigning from a secure, high-paying job, selling his house and relocating to Pittsburgh with his pregnant wife and two-year-old son were determined to be sufficient evidence that

an implied contract for employment existed between Cashdollar and Mercy Hospital.

3. Specific Intent to Harm

Pennsylvania state and federal courts have indicated there is no viable claim for wrongful discharge using a "specific intent to harm" exception, which implies that the employer discharged the employee in bad faith and with the intent to harm him. See Donahue v. Federal Exp. Corp., 753 A.2d 238 (Pa. Super. 2000); Brosso v. Devices for Vascular Intervention, Inc., 879 F. Supp. 473 (E.D. Pa.), Aff'd 74 F.3d 1225 (3d Cir. 1995).

4. Implied Covenant of Good Faith and Fair Dealings

Pennsylvania appellate courts have consistently held there is no implied duty of good faith and fair dealing that applies to termination of a pure at-will employment relationship. Donahue v. Federal Exp. Corp., 753 A.2d 238 (Pa. Super. 2000). The Supreme Court held "an At-will employee has no cause of action against his employer for termination of the at-will relationship except where that termination threatened clear mandates of public policy. Pipkin v. Pennsylvania State Police, 548 Pa. 1, 693 A.2d 190 (1997). A number of federal cases have squarely held that Pennsylvania recognizes no cause of action for wrongful discharge based upon breach of the duty of good faith and fair dealing in an at-will employment contract. McDaniel v. American Red Cross, 58 F. Supp. 2d 628 (W.D. Pa. 1999). The McDaniel court further held that although the duty of good faith and fair dealing exists in an at-will employment contract, there is no bad faith when an employer discharges an at-will employee for good reason, bad reason or no reason at all, as long as no statute or public policy is implicated.

5. Public Policy Exceptions

The public policy exception is currently the most controversial exception to the

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

The sources of public policy which may limit the employer's right of discharge include legislation; administrative rules, regulation, or decision; and judicial decision. In certain instances, a professional code of ethics may contain an expression of public policy. Absent legislation the judiciary must define the cause of action in case-by-case determinations.

The courts have established a body of cases that illustrate when a Public Policy Exception will be found.

B. Workers' Compensation Act:

In Schick v. Shirey, 552 Pa. 590; 716 A.2d 1231 (1998) the Pennsylvania Supreme court held that discharging an employee in retaliation for filing a workers' compensation claim was a violation of public policy.

C. Unemployment Compensation Act:

The Pennsylvania Superior Court held in Highhouse v. Avery Transp., 443 Pa. Super. 120, 660 A.2d 1374 (1995) and Raykovitz v. K-Mart, Corp., 445 Pa. Super. 378, 665 A.2d 8833 (1995) that discharging an employee in retaliation for filing an unemployment compensation claim was a violation of public policy.

D. Occupational Safety and Healthy Act (OSHA):

In McLaughlin v. Gastrointestinal Specialist, 561 Pa. 307, 750 A.2d 283 (2000), the Pennsylvania Supreme Court held that discharging an employee in retaliation for reporting a safety violation of OSHA was not a violation of public policy. In Sourge v. Wright's Nitwear Corp., 832 F. Supp. 118 (E.D. Pa. 1993) discharging an employee in retaliation for reporting to OSHA was a violation of public policy.

E. Jury Duty:

In Ruther v. Faller and Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) the Pennsylvania Superior Court held that discharging an employee for attending jury duty was a violation of public policy. A statutory prohibition from preventing the termination of an employee based upon the employee's attendance or scheduled attendance for jury duty is located at 28 U.S.C. § 1875(a) (West 2003).

F. Criminal Background History:

In Hunter v. Port Kauth of Allegany Cty., 277 Pa. Super. 4, 419 A.2d 631 (1980) the Pennsylvania Superior Court held that denying employment based upon prior criminal conviction not related to the position was a violation of public policy. A statutory provision that permits an employer to consider felony and misdemeanor convictions only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied. 18 Pa. Cons. Stat. Ann. § 9125(b) (West 2003).

G. Polygraph Test:

In Kroen v. Bedway Sec. Agency, Inc., 430 Pa. Super. 83, 633 A.2d 628 (1993) the Pennsylvania Superior Court held that discharging an employee for refusal to take a polygraph test was a violation of public policy. A statutory prohibition that prevents an employer from discharging, disciplining or discriminating in any manner against an

employee or prospective employee who refuses, declines or fails to take or submit to a lie detector test is located at 29 U.S.C. § 2002(3) (West 2003).

H. Pennsylvania Human Relations Act:

Nazar v. Clark Distrib. Sys., Inc., 46 Pa. D. & C. 4th 28 (2000) the Lackawanna Court of Common Pleas held that discharging an employee for making a PHRA complaint was a violation of public policy. Statutory prohibition preventing retaliation for a filing a charge of discrimination pursuant to the Pennsylvania Human Relations Act is located at 43 Pa. Cons. Stat. Ann. § 955(b)(5)(d) (West 2003).

I. Wage Payment and Collection Law:

In Fialla-Dertani v. Pennysaver Publications of Pa., Inc., 45 Pa. D. & C. 4th 122 (2000) the Allegheny Court of Common Pleas held that discharging an employee for making a complaint under the WPCL was in violation of public policy.

J. Illegal Activity:

A number of cases determining it is a violation of public policy to discharge or take job action against the employee for refusing to engage in illegal activity or to testify against the employer who engaged in illegal activity. Perry v. Tioga Cty., 694 A.2d 1176 (Pa. Commw. 1996) - employee discharged for refusal to perform illegal activity. Brown v. Hammond, 810 S. Supp. 644 (A.D. Pa. 1993) - employee discharged for refusing to bill paralegal time as attorney's time. Hanson v. Gishner Sys. Group, Inc., 831 F. Supp. 403 (M.D. 1993) - employee discharged for refusal to lie to federal investigators.

K. Work Related Incidents:

Courts have found that most day-to-day work-related incidents, that is disputes that arise over terms and conditions of employment, work rules, company policy do not provide

a basis for a Public Policy Exception.

L. Privacy:

Issues of personal privacy are among the exceptions Pennsylvania courts have yet to clearly define. A violation of public policy was found when an employee was discharged for refusal to consent to urinalysis and property search that constituted an invasion of privacy. Borse v. Pierce Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992). Symth v. Pillsbury, 914 F. Supp. 97 (E.D. Pa. 1996). No violation of public policy when employee discharged for inappropriate e-mail despite employee's reasonable expectation of privacy.

M. Free Speech:

An emergent exception to the At-Will Doctrine is in the area of free speech, whether an employee may terminate an at-will employee based upon the employee's exercise of his or her free speech rights in the workplace. In Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) the Third Circuit held an at-will employee who was allegedly discharged for his refusal to participate in his former employer's lobbying effort and the employee's privately stated opposition to the company's political position had stated a claim for wrongful discharged under Pennsylvania law.

N. Whistleblowing:

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

not employed in the public sector.

Implied Contracts

Pennsylvania Courts generally are reluctant to alter an employee's at-will status based upon an implied contract theory. They have, however, recognized two bases as creating a cause of action for wrongful discharge based upon an implied contract: handbooks and manuals, which was discussed earlier in the text and additional consideration supplied by the employee.

a. Additional Consideration Supplied:

Oral representations by the employer regarding the terms of employment have been held insufficient to overcome the at-will presumption. The plaintiff, however, may be able to overcome this presumption if statements by the employer concerning the terms of employment caused the employee to provide additional consideration above and beyond the mere performance of services for which the employee was hired. "A Court will find additional consideration when an employee affords his employer a substantial benefit other than the services for which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform." Darlington v. General Electric, 350 Pa. Super. 183, 501 A.2d 306, 315 (1986). See also, News Printing Co. v. Roundy, 409 Pa. Super. 64, 597 A.2d 662 (1991). Agreeing to a confidentiality clause, a restrictive covenant, or giving the employer the right to inventions created on company time, however, does not constitute additional consideration. Luteran at 217.

If sufficient additional consideration is found to exist to create an implied contract, the employee may not be fired during the agreement term, absent just cause. Curran v.

Children's Service Center of Wycoming Cty., Inc., 396 Pa. Super. 29, 578 A.2d 8 (1990). Thus, when an employer induces the plaintiff to leave his job with promises of future opportunity, and the plaintiff undergoes significant hardship in response to the promise, the jury has found that an implied contract was created, and that the employer breached its contractual obligations. Cashdollar v. Mercy Hospital of Pittsburgh, 460 Pa. Super. 606, 595 A.2d 70 (1991).

Mere reliance on an employer's promise does not create a contract-type right to employment, however. Nor is detrimental reliance on a promise "relevant in determining whether an employee had a property interest in his employment." Paul v. Lankenau Hospital, 524 Pa. 90, 569 A.2d 346, 348 (1990); Stumpp at 335. Thus, promissory estoppel is not currently a recognized cause of action in Pennsylvania.

Employment Related Causes of Action - Tort

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

a. Intentional Infliction of Emotional Distress:

Although termination, by itself, will not give rise to the tort of intentional infliction of emotional distress, a terminated employee may recover for this claim when the circumstances surrounding the discharge are particularly egregious.
Brieck v. Harbison-Walker Refractories, 624 F.Supp. 363, 367 (W.D.Pa. 1985). Moreover, on-the-job harassment may suffice to state a claim an employee need not be wrongfully terminated to state a claim for intentional infliction of emotional distress; Shaffer v. National Car Corp., 565 F.Supp. 909 (E.D.Pa. 1983).

Intentional infliction of emotional distress has been defined as one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and if bodily harm to the other results from it, for such bodily harm, only in very egregious cases. Shaffer v. National Can Corp., supra.

To prove intentional infliction of emotional distress, the plaintiff must show: (1) that the defendant intended to inflict emotional distress upon plaintiff, or the defendant knew or should have known that plaintiff's emotional distress was likely the result of his or her conduct; (2) defendant's conduct was extreme and outrageous and proximately caused plaintiff severe and substantial emotional distress; and (3) plaintiff's emotional distress resulted in damages. Brieck at 367.

Extreme and outrageous, in most states, is not defined as mere insult, annoyance or conduct causing stress but rather, the conduct must "go beyond all possible bounds of decency, and ... be regarded as atrocious, and utterly intolerable in a civilized community." Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C. App.), cert. denied, 459 U.S. 912 (1982). The plaintiff need not have experienced physical injury in order to recover for intentional infliction of emotional distress, but the severity should be such that "no reasonable person could be expected to endure it." Restatement (Second) of Torts §46 comment j at 77-78 (1977). The intensity and duration of the distress are factors which are considered in determining its severity. Id.

Defenses: Under Pennsylvania law, a plaintiff cannot recover for intentional infliction of emotional distress if the employer succeeds in showing that its conduct was not outrageous, D'Ambrosio v. Pa. Nat. Mut. Cas. Ins. Co., 396 A.2d 780, 787 (Pa.Super.

1979), or that plaintiff's emotional distress was not sufficiently severe. Alexander v. Polk, 750 F.2d 250, 265 (3d Cir. 1984). Further, an employer is not held liable if its exercise of its legal rights in a permissible way caused the plaintiff's emotional distress. Restatement (Second) of Torts §46 comment g at 76 (1977).

b. Defamation:

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

In order to establish a cause of action for defamation, the employee must show: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm to the plaintiff; and (7) abuse of a conditionally privileged occasion. Miketic v. Baron, 675 A.2d 324, 327 (Pa. Super. 1996).

1) Special Harm:

The plaintiff need not prove actual injury if the allegedly defamatory statement was made with knowledge of its falsity or with reckless disregard for its truth. Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L.Ed. 2d 789, 94 S.Ct. 2997 (1974).

Defenses:

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

subject matter as being of public concern. Elia v. Erie Ins. Exchange, 634 A.2d 657, 659 (1993), alloc. denied, 644 A.2d 1200 (1994).

Employer's Qualified Privilege:

Pennsylvania Courts recognize the absolute privilege of the employer to publish defamatory information in notices of employee termination which are published only to the employee, Yetter v. Ward Trucking Co., 585 A.2d 1022, 1024 (1991), in warning letters, Agriss v. Roadway Exp., Inc., 483 A.2d 456, 461 (1984), and in employee evaluations, which are deemed consented to by the employee. Baker v. Lafayette College, 504 A.2d 247 (1986). Consent is an absolute privilege. Id.

Some employer communications are conditionally privileged, and as such are protected from legal action. A communication is conditionally privileged when:

> (1) some interest of the person who publishes the defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved; or (3) a recognized interest of the public is involved. Beckman v. Dunn, 419 A.2d 583, 587-88 (1980).

One example of a conditionally privileged communication is the employer job reference. In many states, including Pennsylvania, employers enjoy a "qualified privilege" to give a defamatory reference provided that the reference is not made with malice, is limited to legitimate business interests, and is made only to persons with a legitimate interest in hearing the reference. Daywalt v. Montgomery Hosp., 573 A.2d 1116 (1990).

Plaintiff can overcome an employer's conditional privilege defense by showing that the privilege was abused, through publication resulting from malice or improper purpose. Id.

a. Invasion of Privacy:

A dismissed employee may be able to maintain a cause of action for invasion of privacy if his or her employer improperly obtained information related to the dismissal. There are two subcategories of Invasion of Privacy:

1) Intrusion:

A plaintiff can establish a cause of action for intrusion if he or she can show: (1) an intentional intrusion, physical or otherwise, upon the solitude or seclusion of the employee's private affairs or concerns; (2) such intrusion would be offensive to a reasonable person; and (3) such intrusion proximately caused plaintiff damage. Restatement (Second) of Torts Sect. 652 B (1977).

Most intrusion cases involve the employer's intrusion into a physical area in which the employee had a reasonable expectation of privacy, in order to obtain information about the employee. Rogers v. IBM Corp., 500 F.Supp. 867, 870 (W.D. Pa. 1980).

Defenses:

Consent and waiver of rights are two of the most common defenses to this cause of action. Restatement (Second) of Torts Sect. 652F (1977). The absolute privileges applicable to defamatory statements apply to intrusion. Id.

2) Public Disclosure of Private Facts:

A plaintiff can establish a cause of action by showing that:

(1) the defendant publicized a private matter about the plaintiff; (2) the publicity would be "highly offensive" to a reasonable person; (3) the matter is not of legitimate public concern; and (4) disclosure proximately caused damage to plaintiff

and injured plaintiff's feelings. Restatement (Second) of Torts Sect. 652D (1977).

In order to be actionable, the publicity must involve communication to the public at large, or to so many individuals that the matter is substantially certain to become one of public knowledge. Rogers at 870.

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

II. STATUTORY EXCEPTIONS TO AT-WILL

The Core Statutes

A. Federal Statutes

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

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

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

4. **The Civil Rights Act of 1871**, 42 U.S.C. § 1985(3) and 1986, prohibits two or more persons from conspiring to deprive others, on the basis of their race or other invidiously discriminatory animus, of rights and privileges secured by the Constitution and by laws that do not contain their owner enforcement provisions.

5. **The Age Discrimination in Employment Act of 1967**, as amended, 29 U.S.C. §§ 621-637 ("ADEA"), prohibits discrimination against applicants and employees who are age 40 or over.

6. **The Americans With Disabilities Act of 1990**, 42 U.S.C. §§ 12101-12111 ("ADA"), prohibits discrimination against qualified individuals with a disability, against individuals who are regarded as having a disability, and against individuals who have a record of such a disability. The statute requires that reasonable accommodations be made for qualified individuals with a disability, unless to do so would be an undue hardship.

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

8) **The Family and Medical Leave Act of 1993**, 29 U.S.C.A. §§ 2601-2654 (West 2003): prevents termination for taking defined leave for most industries.

9) **The Employee Polygraph Protection Act**, 29 U.S.C.A. §§ 2001-2009 (West 2003): prevents termination for refusing a polygraph examination.

10) **The Jury System Improvement Act of 1978**, 28 U.S.C.A. §1875 (West 2003): prevents termination for serving jury duty.

11) **The Uniformed Services Employment and Reemployment Rights Act ("USERRA")**, 38 U.S.C.A. §§ 4301-4333 (West 2003): prevents termination of military personnel for fulfilling military duties.

12) **The Criminal History Records Information Act,** 18, Pa. Const. Stat. Ann. §§ 9101-9183 (West 2003). Section 9125 governs the use of criminal records and states that felony and misdemeanor convictions may be considered by the employer only to the extent they relate to the applicant's suitability for employment in the position for which he has applied.

B. Pennsylvania Statutes

1. **The Pennsylvania Human Relations Act**, 43 P.S. §§ 951, *et seq.* ("PHRA"), prohibits the same types of discrimination as Title VII, but also prohibits discrimination on the basis of ancestry, age, and non-job-related disabilities and the use of a guide or support animal. In addition to protecting applicants and employees from discrimination, it protects independent contractors licensed by the Bureau of Professional and Occupational Affairs.

   Notably, employer liability under the PHRA follows the standards set out for employer liability under Title VII. *Ogden v. Keystone Residence*, 226 F.Supp.2d 588 (M.D. Pa. 2002)(citing *Goosby v. Johnson & Johnson Medical, Inc.*, 228 F.3d 313 (3d Cir. 2000)).

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

C. Pittsburgh

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

D. Philadelphia

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

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991, 42 U.S.C.A. §§2000e et seq., prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.

An employer subject to Title VII is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar days in the current or preceding calendar year, and any agent of such person . . ." 42 U.S.C.A. §2000e (b). Title VII protections apply to employees in both the public and private sectors.

An individual employee on his or her own behalf or as a class representative may bring a Title VII suit. Id. at 2000e-5(f)(1). Religious institutions are generally exempt. Id. at §2000e-1.

a. Discrimination - Definition

Although Title VII does not explicitly define the term "discriminate," its meaning has evolved as a result of Federal and State case law but **disparate treatment** and **disparate impact** are two primary categories.

Disparate Treatment

Disparate treatment under Title VII involves treating individuals differently on the basis of their race, color, sex, national origin or religion. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). Disparate treatment focuses on the employer's discriminatory motive. Id. The plaintiff attempts to prove **intentional bias**, and the employer asserts a legitimate non-discriminatory reason for the employment decision. Id.

a. Burden of Proof

The Supreme Court's conceptual framework for the order and allocation of proof was set out in the seminal case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in which the plaintiff alleged that he had not been re-hired because of his race. According to McDonnell Douglas, the standard for establishing whether there exists different treatment based on the plaintiff's protected group is as follows: (1) The plaintiff must establish a prima facie case;

> (2) The defendant must "articulate some legitimate, nondiscriminatory reason" for the employment action; and
>
> (3) The plaintiff must then prove that the defendant's reason was a mere pretext for discrimination.

Id. at 802; Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The plaintiff can only prevail if he can directly persuade the Court that:

- a discriminatory reason more likely motivated the employer; or
- demonstrating that the employer's asserted reason is not credible. Burdine at 254-6.

Hiring Discrimination

a. Prima Facie Case:

The structure of the plaintiff's prima facie case, as set out in McDonnell Douglas, consists of four elements. The Plaintiff must prove that:

(1) Membership of a protected group;

(2) Applied and was qualified for the position;

(3) Was rejected; and

(4) The position remained open and the employer continued to seek applicants.

Although the precise wording of the McDonnell Douglas prima facie case applies to hiring discrimination cases, Courts have applied slightly modified versions of these elements to other types of employment discrimination scenarios with only the third element of the formula changed to reflect the circumstances.

b. Pretext Plus:

Under St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993), the Supreme Court held that in order to prevail in a Title VII action, the plaintiff must not only prove that the Defendant's stated reasons are false, but must also meet the **"pretext plus"** task of proving both that the alleged discriminatory act was the real reason, and also that all other possible nondiscriminatory reasons for the adverse action were not influential factors in the Defendant's decision. Id. at 2747.

The Third Circuit does not require strict adherence to the Hicks "Pretext Plus" model. Instead, the Third Circuit ruled that, while the rejection of the employer's nondiscriminatory reason does not compel a verdict in favor of the plaintiff, **it does permit the trier of fact to infer discrimination** and find for the plaintiff on the basis of the allegations of discrimination in the plaintiff's prima facie case. Fuentes at 764, Seman at

433.

c. Motivating Factor:

The United States Supreme Court held that once a plaintiff in a Title VII case shows that the unlawful factor played a motivating part in the employment decision, the defendant may still avoid a finding of liability by proving that it would have made the same decision even if it had not allowed the unlawful factor to play such a role. Price-Waterhouse v. Hopkins, 490 U.S. 228, 244, 109 S.Ct. 1775, 1787 (1989). Thus, under Price-Waterhouse, the defendant will be found liable for employment discrimination in violation of Title VII only if the plaintiff can show not only that the unlawful factor motivated the employment decision, but also that it had a "determinative effect" upon that decision. Id.

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

Subsequent Third Circuit Decisions have held that the 1991 Act is not retroactive,

and therefore does not apply to pre-Act conduct. The Third Circuit has therefore applied the Price-Waterhouse standard for "mixed motive" in those cases whose conduct occurred before the enactment of §107 of the Civil Rights Act of 1991. Hood v. Ernst & Young, 28 F.3d 366, 371 (3d Cir. 1994); Starceski v. Westinghouse, 54 F.3d 1089, 1095-96 (3d Cir. 1995). The Third Circuit has not yet addressed the question of whether a Price-Waterhouse "determinative effect" instruction is appropriate in pretext cases wherein the unlawful conduct occured subsequent to the 1991 Act, Watson v. "Septa", 1998 U.S. Dist. LEXIS 14390 at p. 28, has acknowledged that the intent of §107 was to legislatively overrule the standard of liability established in Price-Waterhouse for mixed motive cases. Woodson v. Scott Paper, 109 F.3d 913, 935 n.29 (3d Cir. 1997). In a recent Pennsylvania District Court case, the Court decided that since the question has not yet been addressed by the Third Circuit, the Court will permit the Price-Waterhouse "determinative effect" instruction in a pretext case. Watson at 29.

d. Pattern or Practice Class Actions:

Where the client presents numerous examples of unlawful employment decisions against other members of the same protected group, it is possible to pursue a class action under the disparate treatment theory. The claim in a disparate treatment class action is that the employer's differential treatment of the plaintiff is part of a "pattern or practice" of discriminatory treatment toward other members of plaintiff's protected group. Teamsters v. United States, 431 U.S. 324 (1977). In Teamsters, the Court held that the plaintiff must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather the unusual practice." Id. at 336. Pattern and practice plaintiffs generally establish a prima facie case upon presentation of statistical

evidence that creates an inference of systemic, class-wide discrimination. Gross disparities between the percentage of the protected class in the general population and the percentage in the employer's work force support such a finding. Id. Evidence of individual disparate treatment further supports the plaintiff's claim. Id. at 360.

The defendant can attempt to attack the validity of the statistics by demonstrating that the proof is unreliable because it is inaccurate or inappropriate, or that the disparities are not statistically significant. Id.

Disparate Impact

Disparate impact cases involve facially neutral selection devices or criteria that disproportionately affect members of a protected group. 42 U.S.C. §2000e-2(k)(1)(A); Teamsters at 335-36 n. Neutral factors contain no specific reference to any protected group. Id. They can include educational requirements, employment tests, height and weight requirements, experience requirements, arrest and conviction records, or dress requirements. Proof of discriminatory motive is not required. Griggs v. Duke Power Co., 401 U.S. 424 (1971). To rebut an allegation of disparate impact, the employer may show that the challenged requirement was job-related. Id. The plaintiff may then prevail only upon a showing that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in efficient workmanship. Id. See also Dothard v. Rawlinson, 433 U.S. 321, 53 L.Ed.. 2d 786, 97 S.Ct. 2720 (1977), which found a Title VII violation based on the disparate impact of height and weight requirements for female prison guards.

Subjective employment practices may, in appropriate cases, be analyzed under the disparate impact theory. Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 101 L.Ed. 2d

827, 108 S.Ct. 2777 (1988).

Gender Discrimination

Discrimination on the basis of gender is prohibited under Title VII, but there are additional forms of discrimination unique to gender.

1. Sexual Harassment: Two types of conduct may constitute sexual harassment: quid pro quo sexual and sexual harassment that creates a hostile environment.

a. Quid Pro Quo:

Quid pro quo harassment consists of verbal or physical behavior or conduct of a sexual nature that is "unwelcome" and, commonly, is persistent. Submission to or rejection of these unwelcome advances or requests forms the basis for an employment decision that affects an individual or becomes a condition of an individual's employment. 29 C.F.R. §1604.11(a)(2) (1991). A common example is where an employee rejects persistent sexual advances; suddenly, that individual receives a poor work performance evaluation; and the individual is then terminated. Courts have held employers strictly liable for quid pro quo harassment initiated by supervisory employees. Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 78 (3d Cir. 1983).

b. Hostile Work Environment:

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

29 C.F.R. §1604.11(a)(3); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In hostile environment cases, the employer must have actual or constructive knowledge of the harassment for liability to attach to the employer. Id.

To prove hostile work environment harassment under Pennsylvania law, a plaintiff must demonstrate that:

(1) he or she suffered intentional discrimination because of his or her gender; (2) the discrimination was pervasive and regular;

(3) the discrimination detrimentally affected him or her, and

(4) the discrimination would detrimentally affect a reasonable person of the same sex in that position. Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Brown v. Continental Baking Co., 891 F.Supp 238, 242-43 (E.D.Pa. 1995).

1. Pervasive:

To determine whether the harassment was pervasive and regular, the Courts look at the totality of circumstances. Stair v. Lehigh Valley Carpenters Local 600, 813 F.Supp. 1116, 1119 (E.D.Pa. 1993); Garvey v. Dickinson, 763 F.Supp. 799 (M.D.Pa. 1991). A single incident of sexual harassment is insufficient to show the requisite pervasiveness of the action. Kuhn v. Philip Morris U.S.A., Inc., 814 F.Supp. 450, 454 (E.D.Pa. 1993). Merely uttering epithets which cause an employee to feel offended does not create a hostile work environment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 126 L.Ed.2d 295, 114 S.Ct. 367 (1993).

2. Detrimental effect:

The Supreme Court held that a Plaintiff need not show that the offensive conduct seriously affected her psychological well being. Id. at 370-71. "Title VII comes into play

before the harassing conduct leads to a nervous breakdown. ...certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." Id. In the Third Circuit, the relevant question in determining detrimental effect is whether the discrimination would have detrimentally affected a reasonable person of plaintiff's sex. Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

c. Threat Cases:

1. Supervisor - Hostile Work Environment

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

In the United States Supreme Court cases of Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2275, 66 U.S.L.W. 4643 (1998), and Farragher v. City of Boca Raton, 118 S. Ct. 2257, 66 U.S.L.W. 4634 (1998), the Court ruled that in threat cases, where no tangible adverse employment action has taken place, and where the perpetrator is a supervisor with immediate or higher authority, the employer is subject to vicarious liability, unless it can prevail on a two-pronged affirmative defense that:

(1) it acted reasonably to prevent or correct the harassment, and

(2) the plaintiff acted unreasonably, either by failing to use the measures made available by the employer, or by failing to avoid the harm. Ellerth at see also

Farragher at 2292-93. If the harasser is not above the victim in the chain of command, then the Courts will revert to the above-described "severe and pervasive" inquiry under Stair v. Lehigh Valley Carpenters Local 600 and Garvey v. Dickinson.

The Third Circuit interpreted these two Supreme Court opinions and pointed out that there is a potential overlap between the two categories of supervisory harassment (falling within the scope of employment) and non-supervisory harassment (falling outside the scope of employment). These two areas overlap when non-supervisory personnel engages in sexual harassment against an employee with the belief that by doing so he is serving his employer, and thus is "aided by the agency relationship." Durham Life Insurance Co. v. Evans, 166 F.3d 139 (1997). These "overlap" cases would turn on the fact finder's perception of the harasser's intent. Id. If the harasser believed that he was acting, at least in part, in his employer's interests, then the acts might be considered within the scope of employment, and the employer could be held vicariously liable. Id. at 18.

d. Same-Sex Harassment:

The United States Supreme Court also recently determined that same-sex sexual harassment is actionable under Title VII, so long as the harassment is because of the victim's sex. Oncale v. Sundowner Offshort Services, Inc., 118 S.Ct. 998 (1998). Oncale also dispensed with the presumption that when the perpetrator belongs to the same category as that of the victim, there was no intent to discriminate.

e. Pregnancy discrimination:

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

A plaintiff can establish a prima facie case of pregnancy discrimination under Title VII by showing that:

(1) she is a member of a protected class,

(2) she satisfactorily performed the duties required by the position,

(3) she was discharged; and

(4) the position remained open and was ultimately filled by a nonpregnant employee. Geraci v. Moody-Tottrup, Intern, Inc., 82 F.3d 578 (3d Cir. 1996).

If a prima facie case is established, the burden of proof shifts to the employer to articulate a legitimate, clear, specific and nondiscriminatory reason for discharging the employee. Id. If this is done, the plaintiff has the ultimate burden to prove that the employer's reason was merely a pretext for pregnancy discrimination. Id.

An employer may not exclude pregnant women and women who can become pregnant from certain jobs on the basis of "fetal protection". International Union, United Auto., and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 113 L.Ed. 2d 158, 111 S.Ct. 1196 (1991).

It is not a violation of the Pregnancy Discrimination Act for an employer to consider an employee's absence on maternity leave in making an adverse employment decision due to the need for a reduction in force if the employer would have considered the absence of an employee on a different type of disability leave in the same manner. In re Carnegie Center Assoc., 129 F.3d 290 (3d Cir. 1997).

2. THE AGE DISCRIMINATION in EMPLOYMENT ACT (ADEA)

The Age Discrimination in Employment Act ("ADEA") prohibits discrimination against employees on the basis of age. The ADEA also provides the following to be unlawful act under ADEA:

- discrimination or retaliation based on the assertion of rights under the Act, 29 U.S.C.A. §623(d),
- publication of notices or advertisements related to employment that express age preference or limitation, 29 U.S.C.A. §623(e), and
- forced retirement of non-federal employees, 29 U.S.C.A. §623(f)(2).

Until the 1986 amendments, the Act protected individuals in the private federal and non-federal sectors between the ages of 40 and 70 from discrimination on the basis of age. 29 U.S.C. §631(a), 29 U.S.C. §633a(a). The 1986 amendments extended coverage to most non-federal employees age 70 and above as well.

The prohibitory language of the ADEA is almost identical to that of Title VII, and Courts have relied upon Title VII precedent in interpreting comparable ADEA provisions. Oscar Mayer Co. v. Evans, 441 U.S. 750, 756, 60 L.Ed. 2d 609, 99 S.Ct. 2066 (1979).

Using the McDonnell Douglas four-element test as a guideline, a prima facie case of age discrimination can be established when:

(1) plaintiff was in the age group protected by the ADEA,

(2) he was discharged or demoted,

(3) at the time of his discharge or demotion he was performing his job at a level that met his employer's legitimate expectations, and

(4) he was discharged or demoted on the basis of age. O'Connor v. Consolidated Coin Caterer's Corp., 517 U.S. 308, 134 L.Ed. 2d 433, 116 S.Ct. 1307 (1996).

Plaintiff must show not only that he or she was within the protected age group, and adversely affected by a management decision, but also that age was a factor in the adverse decision. Hazen Paper Co. v. Biggins, 507 U.S. 604, 123 L.Ed. 2d 338, 113 S.Ct. 1701, 1705, (1993).

1. Exhaustion of Administrative Remedies

Before filing a federal court action for age discrimination, a non-federal employee must initiate administrative proceedings with the EEOC. 29 U.S.C. §626(d).

a. Deferral

No Civil Action may be commenced until sixty days after the individual has filed a charge of unlawful discrimination with the EEOC. 29 U.S.C. §626(d). In deferral states such as Pennsylvania, a second time requirement is imposed. No Civil Action may be commenced until sixty days after the commencement of proceedings under State law. 29 U.S.C. §633(b). Oscar Mayer & Co. at 750.

2. Reduction in Force (RIF)

In reduction in force cases (RIF), Third Circuit has held that, in order to prevail, a plaintiff must present evidence showing that the defendant did not treat age as a neutral factor in its decision to terminate plaintiff's employment. Berndt v. Kaiser Aluminum and Chem. Sales, Inc., 789 F.2d 253 (3d Cir. 1986). The plaintiff must provide direct, circumstantial or statistical evidence tending to indicate that the employer discharged the plaintiff for impermissible reasons. Marzano v. Computer Science Corp., 91 F.3d 497 (3d Cir. 1996).

3. Defenses:

The ADEA expressly provides five defenses:

1) bona fide occupational qualification;

2) bona fide employee benefit plans;

3) bona fide seniority systems;

4) good cause; and

5) reasonable factors other than age. 29 U.S.C. §623(f)(1)-(3), §4(f)(1)-(3).

Exceptions to these defenses include the allowance of mandatory retirement for firefighters, law enforcement officers and tenured professors. 29 U.S.C. §622.2(2)(c).

a. Bona Fide Occupational Qualification

The Supreme Court in Western Airline, Inc. v. Criswell, 472 U.S. 400, 412 (1985), approved the test set out by the EEOC for the employer asserting a bona fide occupational qualification ("BFOQ") defense. The employer asserting a BFOQ defense has the burden of proving that:

(1) the age limit is reasonably necessary to the essence of the business, and either,

(2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or

(3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. Criswell, at 412.

b. Bona Fide Employee Benefit Plan and Seniority Systems

The Older Workers Benefit Projection Act of 1990 (OWBPA) Bona Fide Employee Benefit Plan, Pub. L. No. 101-433, 104 Stat. 978, 101 St. Cong., 2d Sess. (1990) provides that it shall not be unlawful for an employer to take any action otherwise prohibited to:

(a) observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act,

(b) to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, or

(2) that is a voluntary early retirement incentive plan consistent with the relevant purposes of this Act. Id. at §103.

Bona fide seniority systems, §4(f)(2), as amended, provides that "it shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act." OWBPA §103, 29 U.S.C. §623(f)(2).

c. Reasonable Factors Other Than Age (RFOA)

Reasonable factors other than age (RFOA) and the good cause defense: §4(f)(1) of the ADEA states that "it shall not be unlawful of an employer . . . (1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . ." 29 U.S.C. §623(f)(1), §4(f)(1). §4(f)(3) states that it is not unlawful for an employer to discharge or otherwise discipline an individual for good cause.

An RFOA defense is very fact specific. In EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984), the Third Circuit considering an RFOA defense concluded that an employee's eligibility for early retirement cannot constitute an RFOA since "early retirement is too closely related to age to be given credence as a valid justification." Id. at 222.

3. THE AMERICANS WITH DISABILITY ACT

The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. 12101 et seq., aims to eliminate discrimination against individuals with disabilities in the areas of employment, public service, public accommodation and telecommunications. The employment provisions of the Act (Title I), which went into effect on July 26, 1992, prohibit not only discrimination by employers in all employment related activities, but also impose additional obligations relating to the manner in which employers treat both their employees and applicants for employment. The ADA applies to employers who employ fifteen or more employees. The employment provisions of the ADA apply to private employers, employment agencies, labor organizations, labor management committees and state and local governments. Id. at §12111.

a. Prima Facie Case

A plaintiff presents a prima facie case of discrimination under the ADA by demonstrating that he or she:

(1) is a disabled person within the meaning of the ADA;

(2) is otherwise qualified to perform the essential functions of the job; and

(3) has suffered an adverse employment decision as a result of discrimination. Gaul v. Lucent Technologies, Inc., 134 F.3d 576 (3d Cir. 1998).

The ADA defines a "qualified individual with a disability" as someone who, with or without reasonable accommodation, can perform the essential functions of the job position in question". 42 U.S.C. §12111.

In three cases all decided in favor of the employer, the U.S. Supreme Court is developing a strict definition of those protected by the Act. In doing so, the Court rejected

as "disabled" individuals whose conditions were readily correctable medically. In Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999), plaintiffs were twin sisters who wanted to be pilots; they had 20/20 vision with glasses or contacts but did not meet United's requirement of uncorrected visual acuity of 20/100 or better. Both Murphy v. United Parcel Service, Inc., 119 S.Ct. 2133 (1999) and Albertsons, Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999) involved DOT commercial driver standards. Murphy was a UPS mechanic/driver who was fired because his high blood pressure exceeded DOT standards but was controlled by medication. Albertsons involved a driver's insufficient visual acuity. The driver's condition was not correctable but he had received a waiver of the DOT requirement under an experimental government program. The Supreme Court would not evaluate disability in the uncorrected or unmitigated condition because the ADA requires the impairment substantially limit a major life activity which was not the case for either of the employees involved. The decisions in Sutton and Murphy may also restrict plaintiff "regarded as" claims since the Supreme Court rejected arguments that the employers "regarded" them as disabled for the particular jobs in question. The Court found that a limit on working would have to apply to a broad class of jobs to be regarded as disabled from the major life activity of working.

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

b. Disability

"Disability" is defined under the ADA as a "physical or mental impairment" which "substantially limits" one or more of the "major life activities" of an individual. 42 U.S.C.

§12102(2); Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3d Cir. 1997). "Disability can also mean having a record of a physical or mental impairment which substantially limits a major life activity, or being regarded as having such an impairment." Id. An individual is regarded as having a physical or mental impairment which **substantially limits** one or more major life activities when that individual:

> (1) has an impairment which is not substantially limiting, but is treated by a covered entity as if he or she had a substantially limiting impairment, or
>
> (2) has a physical or mental impairment that is substantially limiting only because of the attitudes of others, or
>
> (3) has no physical or mental impairment at all, but is treated by a covered entity as if he or she has a substantially limiting impairment.

29 C.F.R §1630.2(l).

The ADA specifically excludes the following conditions from its coverage to eliminate or avoid any debate about whether they are disabilities: current illegal drug use, homosexuality and bisexuality, sexual behavior and gender identity disorders, compulsive gambling, kleptomania, pyromania, predisposition to illness, temporary non-chronic impairments, personality traits, environmental, cultural or economic disadvantages, advanced age and pregnancy. 42 U.S.C. §12210(a) and (b).

A physical impairment is defined under the statute as "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss, affecting one or more of the following body systems: neurological, muscular skeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hermic and lymphatic, skin and endocrine." 29 C.F.R. §1630.2(h).

Major life activities are described as those basic activities that the average person

can perform with little or no difficulty, such as: caring for oneself, performing manual tasks, walking, seeing, breathing, learning, working, sitting, standing, lifting and reaching." Olson v. General Elec. Astrospace, 101 F.3d 947 (3d Cir. 1996).

c. Substantially Limits

The EEOC has adopted a multi-pronged definition of the term "substantially limits" as follows:

> (a) unable, because of single physical or mental impairment, or because of the combined effect of several different physical or mental impairments, to perform a major life activity that the average person in the general population can perform; or
>
> (b) significantly restricted as to the conditions, manner or duration under which the individual can perform a major life activity as compared to average persons in the general population.

29 U.S.C. §1630.2(j). Factors to be considered include the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment. Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996).

A qualified individual with a disability is one who "with or without reasonable accommodation, can perform the **"essential functions"** of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). A person who is unable to work is not covered under the ADA. McNemar v. Disney Store, Inc., 91 F.3d 610, cert. denied 117 S.Ct. 958, 136 L.Ed. 2d 845.

The term "essential functions" is broadly defined as meaning "the fundamental job duties of the employment position the individual with the disability holds or desires. The term does not include the marginal functions of the job." 29 C.F.R. §1630.2(n). The ADA

specifies that consideration is to be given to the employer's judgment as to what functions of a job are essential, and a written job description shall be considered evidence of the essential functions of the job. Id.

d. Reasonable accommodations:

Title I of the ADA prohibits employers from failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified" employee with a disability, unless the employer can prove that the accommodation would impose an "undue hardship" on its operations. 42 U.S.C. § 12112.

The ADA imposes on employers the duty to make reasonable accommodations to the known needs of individuals who are qualified for the job in question. Id. The accommodation obligation does not arise until the employee or applicant makes the need for accommodation known. 56 Fed. Reg. 35744 (1991). Under ADA §105, employers are obligated to notify applicants and employees of their duty to make reasonable accommodations.

Under the ADA, accommodations are to be individually tailored, on a case by case basis, to meet the specific needs of both the disabled individual and the job. 42 U.S.C. §12111(a). Employees can modify jobs, the work environment, and the manner or circumstances in which the job is performed, in order to enable an otherwise qualified individual to participate the essential functions of the job. An accommodation is reasonable if the associated costs are not disproportionate to the financial and administrative burdens it would produce. Gaul at 580-81. The accommodation does not have to be the best accommodation possible so long as it is sufficient to meet the job related needs of the individual being accommodated. Employers have the ultimate

discretion to choose between effective accommodations.

e. Defenses:

Similar to a Title VII disparate treatment charge, the employer may justify the challenged action by showing that it was taken for a legitimate, nondiscriminatory reason. 29 C.F.R. §1630.15(a). In the case of a disparate impact claim, the employer may defend its use of selective criteria that have the disparate impact of screening out individuals with disabilities by showing that the criteria are job-related and consistent with business necessity. 29 C.F.R. §1630.15(b) and (c). The employer, however, cannot exclude an individual with a disability if the criteria could be met or job performance accomplished with a reasonable accommodation. Id.

1. Undue hardship:

An undue hardship on the operation of the employer's business is a defense to a claim of discrimination or necessary accommodation. 29 C.F.R. §1630.15(d). "Undue hardship" means an action which requires significant difficulty or expense. 42 U.S.C.A. §12111(10)(a). Some factors which may be considered include:

(1) nature and cost of the accommodation;

(2) the overall financial resources of the covered entity, and

(3) the overall size of the business of a covered entity. 42 U.S.C. §12111(10)(b).

2. Direct threat:

Finally, an employer may defend against a claim of discrimination in violation of the ADA by showing that the plaintiff does not meet the job qualifications standards since he or she poses a direct threat to the health or safety of other individuals in the work place. 42 U.S.C.A. §12113(b). "Direct threat" is defined as "a significant risk to the health or safety of

others that cannot be eliminated by reasonable accommodation." 42 U.S.C.A. §12111(3). This defense arose out of the Supreme Court case, School Bd. of Nassau County v. Arline, 480 U.S. 273, 94 L.Ed. 2d 307, 107 S.Ct. 1123 (1987), in which the Court found that the qualification of an employee who is disabled by a contagious disease would depend on certain considerations regarding the risk of the disease to the health and safety of others. To determine whether such an individual is otherwise qualified, an inquiry should be conducted which would include an assessment of: "(a) the nature of the risk (how the disease is transmitted); (b) the duration of the risk (how long the carrier is infectious); (c) the severity of the risk (what is the potential harm to third parties); and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." Arline at 1131, quoting Brief for American Medical Association as Amicus Curiae 19.

4. EQUAL PAY ACT "EPA"

a. Administrative Remedies Available

29 U.S.C. §206(d), proscribes gender-based pay discrimination among employees. The Act applies to employees of federal, state, and local governments and their agencies, as well as to labor unions and other private sector employees. Responsibility for the enforcement and administration of the Act is vested in the EEOC. Pub.L. No. 98-532, 98 Stat. 2705(1984). The EEOC has issued regulations setting forth its interpretation of the various provisions of the Equal Pay Act. 29 C.F.R. §§1620.1-1620.34, (1992). Although the Courts afford substantial deference to these regulations, they are not binding. Federal Elec. Co. v. Gilbert, 429 U.S. 125, 50 L.Ed. 2d 343, 97 S.Ct. 401 (1976); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 91 L.Ed. 2d 49, 106 S.Ct. 2399 (1986). The employee may petition the EEOC to investigate the matter. 29 CFR §§1620.30-1620.31 (1992).

There are no mandatory administrative procedures with which an employee must comply before filing a complaint in Court for a trial de novo. 29 U.S.C. §216(b).

b. Burden of Proof

The plaintiff in an EPA case has the initial burden of proving a violation by demonstrating that:

(1) an employer pays or paid different wages to employees of the opposite sex in an establishment when they are doing equal work on jobs, the performance of which requires equal skill, effort, and responsibility under similar working conditions. 29 U.S.C. §206(d)(1). Wetzell v. Liberty Mut. Ins. Co., 449 F.Supp. 397 (W.D.Pa. 1978).

Once plaintiff has established a prima facie case, the burden falls upon the

defendant to show that the wage differential resulted from a legitimate factor and was not based on sex.

c. Equal work: The jobs need not be identical, but only substantially equal. Schultz v. Wheaton Glassco, 421 F.2d 259, 359 (3d Cir. 1970); cert. denied, 398 U.S. 905 (1970).

d. Similar working conditions: The test of "similar working conditions" is a flexible standard requiring only similarity, not equality as in the other three factors. 29 CFR §1620.18(a)(1992); Corning Glass Works v. Brennan, 417 U.S. 188, 41 L.Ed. 2d 1, 94 S.Ct. 2223 (1974).

e. Statute of Limitations

The statute of limitations for filing a complaint under the Equal Pay Act is two years after the cause of action accrues. If the defendant has acted "willfully or intentionally" in violating the Act, the suit may be filed within three years of the accrual of the cause of action. 29 U.S.C. §255(a). An employer's conduct is willful if it knew that the statute was "in the picture". Coleman v. Jiffy-June Farms, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972).

f. Jury Trial

A private plaintiff seeking legal relief has the right to a jury trial in an Equal Pay Act suit. Lorillard v. Pons, 434 U.S. 575, 580, 55 L.Ed. 2d 40, 98 S.Ct. 866 (1978). If the claim, however, is based on equitable relief, such as an EEOC injunction proceeding under 29 U.S.C. §217, there is no right to a jury trial. Sullivan v. Wirtz, 359 F.2d 426 (5th Cir.), cert. denied, 385 U.S. 852 (1966).

(1) a bona fide seniority system;

(2) a bona fide merit system;

(3) a system based on quantity or quality of production; or

(4) a system based on any factor “other than sex”.

The exceptions are affirmative defenses on which the employer has the burden of production and proof by a preponderance of the evidence. 29 U.S.C. §206(d)(1); Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir. 1973), cert. denied, 414 U.S. 866 (1973).

The “catch-all” exception in which a number of different concerns have been litigated, such as whether night work falls under the category of “factors other than sex” rather than under a determination of the similarity of working conditions. Corning, supra. Corning clearly established that night work is to be considered under the "factors other than sex" exception to the act. In Hodgson, supra, the Third Circuit held that “economic benefit” may be a factor other than sex within the meaning of the fourth exception. Any nonsexual factor based on an employer’s legitimate business judgment may be a “factor other than sex”. Hodgson at 594.

g. Pretext Defense

An employee may rebut an employer’s affirmative defense with evidence that the asserted defense is merely a pretext for discrimination. To show pretext, an employee must show that the employer did not use the assertive nondiscriminatory factor “reasonably in light of the employer’s stated purpose as well as its other practices.” Aldrich v. Randolph Cent. School Dist., 9613 F.2d 520, 526 (2d. Cir. 1992).

h. The Bennett Amendment:

Equal Pay Act claims are frequently involved in companion claims of sex discrimination under Title VII. The Bennett Amendment to Title VII sets forth the rule for

interpreting the relationship between these two statutes:

"It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of 206(d) of title 29." 42 U.S.C. §2000e-2(h).

The Equal Pay authorizes the payment of a wage differential where such wages are paid pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex, these practices are also exempted from Title VII's prohibitions by the Bennett Amendment. County of Washington v. Gunther, 452 U.S. 161, 169, 68 L.Ed.2d 751, 101 S.Ct. 2242.

i. Equal Pay Act Versus Affirmative Action:

The Eastern District has held that a challenge by male professors to a university's implementation of an affirmative action clause in a collective bargaining agreement, whereby female and minority faculty members were eligible for salary increases not available to non-minority male faculty members, states a cause of action under the Equal Pay Act. Lyon v. Temple Univ., 543 F.Supp. 1372 (E.D.Pa. 1982).

5. FAMILY MEDICAL LEAVE ACT (FMLA)

The FMLA covers only employers employing 50 or more employees working within 75 miles of an employee's work site. Id. The Family Medical Leave Act ("FMLA") entitles an eligible employee to a total of 12 work weeks of leave during any twelve month period for one or more of the following:

- birth of a child of the employee and in order to care for such child;
- placement of a child with the employee for adoption or foster care;
- to care for the spouse, or a child or parent of the employee, if such spouse, child or parent has a serious health condition; and
- a serious health condition that makes the employee unable to perform the functions of the position of such employee. 29 U.S.C. §2612(a)(1).

An eligible employee is defined in the FMLA as "an employee who has been employed "for at least twelve months by the employer with respect to whom leave is requested ...; and for at least 1,250 hours of service with such employer during the previous twelve month period." 29 U.S.C. §2611(2).

a. Serious health condition:

A "serious health condition" is an "illness, injury, impairment, or physical or mental condition that involves any period of incapacity or treatment connected with inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider. Id. at §2611(11).

Generally the FMLA provides that an action may be brought under this section not later than two years after the date of the last event constituting the alleged violation for

which the action is brought. 29 U.S.C.A. §2617(c)(1). If the action is brought for a willful violation of the FMLA, such action may be brought within three years of the date of the last event constituting the alleged violation for which such action is brought. 29 U.S.C.A. §2617(c)(2).

A complaint may be filed with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions which are believed to constitute the violation. 29 C.F.R. §8125.401.

b. Elements of Discrimination based on FMLA

The elements of a cause of action in an FMLA discrimination suit will follow the guidelines of other employment discrimination suits as discussed above, since nothing in the FMLA or any amendment made by the FMLA "shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability." 29 U.S.C.A. §2651(a).

6. The PENNSYLVANIA HUMAN RELATIONS ACT

The Pennsylvania Human Relations Act (PHRA) is broader than the Federal Employment Discrimination Laws and prohibits discrimination in a wide range of employment areas. The PHRA prohibits discrimination on the basis of race, color, religious creed, ancestry, handicap and disability, use of guide dogs because of blindness or deafness of the user, use of support animals because of blindness or deafness, association with a person with a handicap or disability, age, sex, natural original or possession of a GED as opposed to a high school diploma. 43 P.S. §952.

The scope of the PHRA is also broader than that of the Federal Anti-Discrimination statutes in that it protects certain independent contractors as well as employees. 43 P.S. §955(a). However, the PHRA definition of "independent contractor" differs from the common law definition. Under the PHRA, the term "independent contractor" includes "any person who is subject to the provisions governing any of the professions and occupations regulated by State licensing laws enforced by the Bureau of Professional and Occupational Affairs in the Department of State, or is included in the Fair Housing Act. 43 P.S. §954(x).

The PHRA covers employers of 4 or more persons within the Commonwealth. 43 P.S. §954(b). The definition of "employer" also includes employees of the Commonwealth and any of its subdivisions, boards, departments, commissions or school districts. Religious, fraternal, charitable or sectarian corporations or associations which are not supported in whole or in part by governmental appropriations are exempt from certain provisions of the Act. These organizations, however, are defined as "employers" for purposes of the prohibition on discriminatory practices based upon race, color, age, sex, national origin or disability. 43 P.S. §954(b).

Under the PHRA, individuals as well as employers can be found liable for acts of employment discrimination. Further, under the PHRA, it is an unlawful employment practice for any person to "aid, abet, insight, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice." 43 P.S. §955(e); Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552-53 (3d Cir. 1996).

The EEOC defers to the administrative and investigative procedures of state agencies, such as the Pennsylvania Human Relations Commission, when a charge is timely filed under state law. 32 U.S.S. §2000e-5(c), (d) and (e); Equal Employment Opportunity Commission v. Arabian American Oil Company, 499 U.S. 244, 111 S.Ct. 1227 (1991).

a. Practice and Procedure Under the PHRC

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

Practice and Procedure in the PHRC and EEOC are outlined in detail in Margolis Edelstein Publication of Christopher Tinari entitled "Practice Under the Pennsylvania Human Relations Act" under www.margolisedelstein.com/publications.

III. REMEDIES

A. Tort Remedies

1. Defamation

Successful plaintiffs may recover the full range of tort remedies, including punitive damages when the employee is found to have acted with malice. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1285 (3d Cir. 1979). Clemente v. Espinosa, 749 F. Supp. 672 (E.D. Pa. 1990). Successful plaintiffs may recover general damages. Adopting §569 of the Restatement (Second) of Torts, the Pennsylvania Superior Court has abolished the requirement that the plaintiff prove special harm (monetary loss) in libel actions in order to recover. Agriss at 474. Likewise, a slander per se (words, falsely spoken, imputing criminal offense, loathsome disease, business misconduct or serious sexual misconduct), is actionable without proof of special damages. Walker v. Grand Cent. Sanitation, Inc., 634 A.2d 237, 244 (Pa. Super. 1993); Clemente v. Espinosa, 749 F. Supp. 672, 677 (E.D. Pa. 1990).

2. Intrusion and Public Disclosure

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

B. Title VII - Civil Rights Act of 1991

The purpose of remedies under Title VII is to make a plaintiff whole for any injuries suffered as a result of the unlawful employment action. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 45 L.Ed. 280, 95 S.Ct. 2363 (1975). Because of the "make whole" and deterrent purposes at the core of Title VII, a finding of a Title VII violation presumptively entitles the victim of the discrimination to back pay. Id. at 422.

1. Back Pay

Back pay includes not only salary loss, but also compensation for lost overtime, shift differentials, anticipated raises, and fringe benefits. Generally, if a victim of discrimination lost an economic benefit, that loss is recoverable. Back pay awards cannot extend back more than two years before the date the initial charge was filed with the EEOC. 42 U.S.C. §2000(e)-5(g).

2. Front Pay

Courts would prefer to make an employee whole by awarding back pay coupled with an order for reinstatement, immediate hiring, or immediate promotion, since they are the remedies that involve the least amount of speculation. However, where the Court makes a finding that reinstatement or promotion is not possible, due to irreparable animosity between the parties or changed circumstances, the alternate remedy of front pay may be used to make the employee whole. Feldman v. Philadelphia Housing Authority, 43 F.3d 823 (3d Cir. 1994).

3. Compensatory and Punitive Damages

The Civil Rights Act of 1991 allows the complaining party in a Title VII action to recover compensatory and punitive damages against the defendant who has engaged in unlawful intentional discrimination. 42 U.S.C.A. §1981a(a)(1). Compensatory damages, which include damages for emotional pain and suffering or other non-pecuniary losses, were not available under Title VII before the 1991 amendments to the Civil Rights Act of 1964. Under the 1991 amendments, limited compensatory damages are available to victims of race, sex, religion and disability discrimination against private or public employers, but only in cases of intentional discrimination. 42 U.S. §1981(a)(b)(2).

Discrimination was intentional if defendant "engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C.A. §1981a(b)(1).

4. Damages Caps

The Civil Rights Act of 1991 imposes caps on the combined amount of compensatory and punitive damages available to the plaintiff. The damages caps under the 1991 amendments to Title VII are as follows:

- $50,000 for an employer with 15 to 100 employees;
- $100,000 for an employer with between 101 and 200 employees;
- 200,000 for an employer with between 201 and 500 employees; and
- $300,000 for an employer with more than 500 employees. 42 U.S.C. §1981a(b)(3). These limits do not cover back pay, interest on back pay and front pay.

Punitive damages are not recoverable against a government, a government agency, or a political subdivision. Id.

C. Civil Rights Act of 1866, § 1981 and § 1983

Compensatory and punitive damages are permissible types of relief in race discrimination claims under the Civil Rights Acts of 1866 (§1981) and 1871(§1983). Unlike Title VII however, these sections do not impose caps on compensatory and punitive damage awards. Under §1981 and §1983 actions, Courts have ordered such equitable relief as reinstatement, hiring and promotion, and have awarded front pay. Gurmankin v. Constanzo, 626 F.2d 1115 (3d Cir. 1980), cert. denied, 450 U.S. 923, 101 S.Ct. 1375 (1981). Compensatory damages under these sections do not include back pay, interest on

back pay, or any other type of relief authorized under §706(g). 42 U.S.C.A. §1981a(b)(2).

These remedies do not apply to disparate impact cases. Id.

1. Mitigation

Plaintiffs have a general duty to mitigate damages. The duty to mitigate damages includes an obligation to seek other appropriate employment. Back pay will be reduced by other earnings which the plaintiff received during the back pay period. Among various earnings which will offset back pay are: wages and salaries earned at other employment; earnings from self-employment; severance pay; retirement benefits; and disability payments.

The Third Circuit has held that unemployment benefits, as well as payments under Social Security and welfare programs, should not be deducted from a Title VII back pay award. Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 82-83 (3d Cir. 1983) See also, Gelof v. Papineau, 829 F.2d 452, 454-55 (3d Cir. 1987) (accord in ADEA cases).

2. Pre-Judgment Interest

Title VII authorizes pre-judgment interest from the date of the discrimination to the date of judgment. Loeffler v. Frank, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed. 2d 549(1988).

3. Equitable Relief

Equitable relief is generally sought by the charging party or by the EEOC to maintain the status quo or to return the parties to the position they were in before the claimed discrimination occurred. Before granting a temporary or preliminary injunction, Courts generally require evidence that:

(1) there is a threat of irreparable harm to the party seeking relief;

(2) this threatened injury outweighs whatever damage the proposed injunction may cause to the other parties;

(3) there is a probability that the party seeking the preliminary relief will ultimately succeed at trial; and

(4) the injunction will not be adverse to the public interest. County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L.Ed. 2d 642, 99 S.Ct. 1379 (1979).

The United States Supreme Court has ruled that loss of income, claims of humiliation, and loss of reputation do not constitute irreparable harm for the purposes of equitable relief, since such claims can be compensated by monetary damages if the employee succeeds at trial. Sampson v. Murray, 415 U.S. 61 (1972). The likelihood of success without a showing of irreparable harm is not sufficient to obtain a preliminary injunction, because the employee can be made whole with money damages. Marxe v. Jackson, 833 F.2d 1121 (3d Cir. 1987).

D. Age Discrimination Employment Act "ADEA"

1. Back Pay

The ADEA incorporates the civil remedies that are allowed under the Equal Pay Act, 29 U.S.C.A. §626(b), such as back pay and liquidated damages, in an amount equal to the back pay award. Unlike Title VII, which provides back pay availability as a matter of equitable discretion, the ADEA provides back pay as a matter of right. Lorillard v. Pons, 434 U.S. 575, 55 L.Ed. 2d 40, 98 S.Ct. 866(1978). It is also well settled that successful plaintiffs under the ADEA are entitled to a reimbursement for fringe benefits, including savings plans, social security and pensions. Kelly v. Matlack, 903 F.2d 978, 985 (3d Cir.

1990).

Liquidated damages, in an amount equivalent to the plaintiff's award for back pay and benefits, are given in cases of "willful violations." 29 U.S.C.A. §626(b). Thus, a finding of willfulness results in a doubling of damages. The Supreme Court has defined "willfulness" in this context as a situation where "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Trans World Airlines v. Thurston, 469 U.S. 111, 83 L.Ed. 2d 523, 105 S.Ct. 613(1985).

2. Front Pay

Front pay can also be awarded in cases where reinstatement is not possible. Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1099 (3d Cir. 1995). The Eastern District has held that an award of front pay for three years of future salary was "reasonable and sufficient." Woodyatt v. Bethlehem Steel Corp., 1996 WL 34427 *1 (E.D.Pa.).

3. Equitable Relief

The Courts are also given jurisdiction to grant other appropriate relief, such as compelling employment, reinstatement, or promotion. 29 U.S.C.A. §626(b).

4. Pain and Suffering

Every Circuit Court that has confronted the issue has disallowed compensatory damages for pain and suffering under the ADEA. Espinueva v. Garrett, 895 F.2d 1164 (7th Cir. 1990).

5. Punitive Damages

Several District Courts have allowed recovery of punitive damages. However, every Circuit Court that has decided the issue has disallowed punitive damages. Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982), cert. denied, 459 U.S. 1039 (1982).

An employee has a duty to seek other employment to mitigate damages. Anastasio v. Schering Corp., 838 F.2d 701 (3d Cir. 1988).

Courts have unanimously held that an employer found in violation of the ADEA is not entitled to prove its "good faith" to the Court in order to reduce an award of liquidated damages. Wehr v. Burroughs Corp., 619 F.2d 276, 279 (3d Cir. 1980).

E. ADA Americans with Disabilities Act

The ADA provides remedies for victims of discrimination, including front and back pay, attorneys' fees, compensatory and punitive damages, as well as injunctive relief such as reinstatement, hiring or promotion. 42 U.S.C. §12117(a); 29 U.S.C. §794a. Compensatory and punitive damages under Title I are subject to caps under the Civil Rights Act of 1991, 42 U.S.C. §1981(a) depending upon the number of employees, as outlined above.

F. Equal Pay Act

Employees who have prevailed in an EPA case are entitled to back pay as a result of the initial wage differential, in addition to an amount equal to the back pay as liquidated damages. 29 U.S.C. §§216-217. A Court may award double damages as liquidated damages unless the defendant proves that it acted in a sincere and reasonable belief that its conduct was lawful. 29 U.S.C. §260.

A trial court may also award prejudgment interest to make the injured party whole. EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1074 (4th Cir. 1982). Back pay is normally limited to wages due for two years preceding suit but may be extended to three years for a willful violation. 29 U.S.C. §255.

G. Family Medical Leave Act

§107 of the FMLA provides that an employer who violates the FMLA shall be liable for damages including wages, employment benefits, other compensation denied or lost, or actual monetary loss sustained by the employee as a direct result of the violation (e.g. cost of providing care) up to a sum equal to 12 weeks of wages for the employee. In addition, an employee may be awarded liquidated damages equal to the foregoing amounts, plus interest, reasonable attorneys fees and expert witness fees.

Punitive damages are not available under the FMLA. 29 U.S.C. §2617. The Court may also award equitable relief, including employment, restitution or promotion.

H. Pennsylvania Human Relations Act

If the court finds that an employer has discriminated against an employee in violation of the PHRA, the Court may issue an injunction against further engagement in the practice, and may order affirmative action which may include, but is not limited to, reinstatement or hiring, back pay accruing up to three years prior to the filing of the complaint, and any other legal or equitable relief that the Court deems appropriate. 43 P.S. §962(c). There is no cap on damages. The Court may award punitive and compensatory damages, including damages for mental anguish and humiliation. Cain v. Hyatt, 734 F.Supp. 671 (E.D.Pa. 1990).

Attorney's Fees

A. In General

Each of the federal statutes discussed above contains a specific provision authorizing the awarding of attorney's fees to the prevailing party. The Court may allow the prevailing party, other than the Commission or the United States, a reasonable attorney fee, witness fee and costs. 42 U.S.C. §2000e-5(k). Title VII, as amended by the Civil Rights

Act of 1991

- The ADA American Disabilities Act, 42 U.S.C. §12205.
- Age Discrimination in Employment Act (ADEA); and Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).
- Equal Protection Act

B. Plaintiff

1. Prevailing Party

The plaintiff must be a "prevailing party" in order to be eligible for a fee award under the above statutes. Plaintiffs are considered "prevailing parties" if they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Farrar v. Hobby, 506 U.S. 103, 121 L.Ed.2d 494, 113 S.Ct. 566, 573 (1992). The Third Circuit regards a plaintiff as prevailing if he or she has obtained some of the benefits sought by the suit, and there is a causal connection between the suit and the fact that the relief was obtained. Ashley v. Atlantic Richfield Co., 794 F.2d 128, 131 (3d Cir. 1986).

A plaintiff who has entered into a favorable prejudgment settlement of an employment discrimination claim is generally considered a prevailing party. Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244 (3d Cir. 1992); Ashley at 131.

Under the "catalyst theory," the plaintiff is deemed to have prevailed, even despite the absence of a favorable final judgment after a full trial, when the lawsuit produces a voluntary action by the defendant that affords the plaintiff some or all of the relief sought. Hewitt v. Helms, 482 U.S. 755, 760-761, 96 L.Ed. 654, 107 S.Ct. 2672 (1987);

Baumgartner v. Harrisburg Housing Authority, 21 F.3d 541 (3d Cir. 1994).

If a suit is groundless and is settled for nuisance value, no attorney's fees will be awarded to the Plaintiffs. Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 103 L.Ed.2d 866, 109 S.Ct. 1486, 1493 (1989). Although a plaintiff who wins only nominal fees is a prevailing party, he or she should receive no attorney's fees award, since the degree of the plaintiff's overall success bears heavily upon the reasonableness of any fee award. Farrar at 112-114.

C. Defendant

Prevailing defendants can recover fees under Title VII and the ADA. A Court may also award attorney's fees to a prevailing defendant if the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 54 L.Ed.2d 648,98 S.Ct. 694 (1978).

The Third Circuit has applied Christiansburg Garment in determining whether a plaintiff's claim is frivolous, unreasonable, or groundless. Quiroga v. Hasbro, Inc., 934 F.2d 497, 503 (3d Cir. 1991). An action is frivolous only if the plaintiff can make no rational argument in law or fact to support his or her claim for relief. Story v. Morgan, 786 F.Supp. 523, 524 (W.D. Pa. 1992). An action is not frivolous when supported by evidence which, if believed, would support a verdict. EEOC v. L.B. Foster Co., 123 F.3d 749, 753 (3d Cir. 1997).

There is no provision for an award of attorney's fees to a defendant in cases under either the ADEA.

D. Pro Se Plaintiff

Attorney's fees awards are awarded against a pro se plaintiff only when it is clear that the plaintiff should have recognized the frivolity of the claim. Hughes v. Rowe, 449 U.S. 5, 15, 66 L.Ed.2d 163, 101 S.Ct. 173 (1980).

Pro se litigants are not entitled to attorney's fees, even if the litigant is an attorney. Kay v. Ehrler, 499 U.S. 432, 113 L.Ed. 486, 111 S.Ct. 1435 (1991).

E. Computation of Fees

The United States Supreme Court has held that the attorney's fees should be calculated according to the number of hours reasonably expended on the litigation, times a reasonable hourly rate. Blum v. Stevenson, 465 U.S. 886, 79 L.Ed.2d 891, 104 S.Ct. 1541 (1984). The result of this computation, called the "lodestar," is "strongly presumed to yield a reasonable fee." Washington v. Philadelphia Co. Ct. of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996).

The reasonable hourly rate is calculated according to the "prevailing market rate." Blum at 895 n. 11. The Third Circuit has adopted the "community market rate" rule for determining a reasonable billing rate. Student Public Interest Group v. AT&T Bell Lab. ("SPRIG"), 842 F.2d 1436, 1447 (3d Cir. 1988). Under the community market rate rule, the fee is to be based upon affidavits of other plaintiff civil rights attorneys in the community. Washington at 1036.

The burden is upon the defendant to counter this evidence. Id.