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INTRODUCTION

Employment law attempts to provide broad protection for employees by eliminating discrimination from the workplace and compensating victims.[1] Congress enacted remedial statutes that protect employees from discrimination on the basis of race, color, religion, sex, national origin,[2] age,[3] and disability.[4] This Survey examines how the Tenth Circuit dealt with several important issues in the field of employment law during the survey period.[5]

Part I of this Survey addresses the controversial issue of individual liability under Title VII. In *Haynes v. Williams*,[6] the Tenth Circuit examined the issue of individual liability under Title VII in the context of sexual harassment. The *Haynes* court concluded that supervisors could not be held personally liable under Title VII.[7] Part II of the Survey analyzes disparate impact claims under the Age Discrimination in Employment Act (ADEA). In *Ellis v. United Airlines, Inc.*,[8] the Tenth Circuit concluded that claims of disparate impact are not viable under the ADEA.[9]

Part III examines the award of attorney's fees under Title VII. In *Corneveaux v. CUNA Mutual Insurance Group*,[10] the court held that awarding attorney's fees against counsel under Title VII is inappropriate.[11] Part IV discusses when the Americans with Disabilities Act (ADA) considers unpaid leave a "reasonable accommodation." In *Hudson v. MCI Telecommunications Corp.*,[12] the court held that indefinite, unpaid leave is not a "reasonable accommodation" under the ADA.[13] Finally, this Survey examines how these Tenth Circuit decisions affect both Plaintiffs and Defendants.

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1. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (detailing the purposes underlying Title VII).
2. 42 U.S.C. §§ 2000e-2000e-17 (1994).
3. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1994).
4. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213.
5. The survey period covers cases decided between September 1995 and August 1996.
6. 88 F.3d 898 (10th Cir. 1996).
7. *Haynes*, 88 F.3d at 898-99.
8. 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996).
9. *Ellis*, 73 F.3d at 1007.
10. 76 F.3d 1498 (10th Cir. 1996).
11. *Corneveaux*, 76 F.3d at 1508.
12. 87 F.3d 1167 (10th Cir. 1996).
13. *Hudson*, 87 F.3d at 1169.

I. THE QUESTION OF PERSONAL LIABILITY UNDER TITLE VII

A. *Background*

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin,[14] and prevents retaliatory acts directed toward employees who file complaints against an employer.[15] The Civil Rights Act of 1991[16] expanded Title VII equitable relief to include compensatory and punitive damages.[17] Prior to the 1991 expansion, only equitable remedies such as reinstatement and backpay were generally assessed against employers.[18]

In *Meritor Savings Bank v. Vinson*,[19] the Supreme Court agreed with Equal Employment Opportunity Commission (EEOC) guidelines concluding that Congress intended to utilize agency principles in determining employer liability.[20] Under agency principles, an employee's wrongful conduct imputes liability to the employer.[21] Conduct that falls outside the legitimate scope of the employee's authority, however, releases the employer from liability.[22] Agents may be held personally liable for conduct undertaken without the apparent, actual, or implied authority of the employer.[23] Additionally, agency doctrine allows joint liability between the employer and agent.[24] The Court's application of agency law has caused confusion among the circuits.[25] Thus, the reliance on agency principles has failed to provide a clear standard on the issue of personal supervisor liability.

Arguably, the Tenth Circuit added to the overall confusion concerning

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14. 42 U.S.C. § 2000e-2(a).

15. *Id.* § 2000e-3(a).

16. *Id.*

17. *Id.* § 1981a(a)(1) states, in pertinent part:

> In an action brought by a complaining party under [Title VII] . . . against a respondent who engaged in unlawful intentional discrimination . . . prohibited under [this act], and provided that the complaining party . . . may recover compensatory and punitive damages as allowed in subsection (b) of this section . . . .

Id.

18. *See* Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995) (citing pre-1991 remedies as supporting employer liability).

19. 477 U.S. 57 (1986).

20. *Vinson*, 477 U.S at 72.

21. *See* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) (stating the master is liable for torts of servants committed in the scope of their employment).

22. *Id.* §§ 228, 235 (stating that the act must be committed in contemplation of some benefit to the master for employer to incur respondeat superior liability).

23. *Id.* § 359C(1).

24. *Id.* § 217B, 359C(1) (stating the principal and agent are jointly and severally liable "for a wrong resulting from the tortious conduct of an agent and principle, and a judgment can be rendered against each . . . ."); *see also* Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39, 48-50 (1994) (making an argument for imposing joint and several liability). The Second Circuit has adopted the argument that joint and several liability applies. *See* Cornwell v. Robinson, 23 F.3d 694, 697 (2d Cir. 1994) (finding individual supervisors jointly and severally liable under Title VII); *Tomka*, 66 F.3d at 1318-19 (Parker, J., dissenting).

25. *See* Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589 (1993) (stating the use of agency principles has not managed to establish a clear standard among the courts).

supervisor liability by failing to resolve the issue of individual liability under Title VII.[26] In *Sauers v. Salt Lake County*,[27] the Tenth Circuit held that Title VII prohibits suits against individuals in their individual capacity.[28] However, six months later, the court in *Brownlee v. Lear Siegler Management Service Corp.*,[29] held that an agent's status as an employer can render the agent personally liable.[30] Recently, the Tenth Circuit characterized the issue of personal liability as open and unresolved.[31] Furthermore, the other circuit courts are equally divided on the issue of personal liability.[32]

B. Haynes v. Williams[33]

1. Facts

Marcia Haynes and Melanie Dean (collectively the Plaintiffs) worked with Gail Williams (Defendant) in a mental health unit at a prison facility operated by the Oklahoma Department of Corrections.[34] The Plaintiffs instituted an action under Title VII accusing the Defendant of improper physical contact and verbal abuse.[35] The Western District Court of Oklahoma held that the Defendant was personally liable and awarded compensatory and punitive damages to the Plaintiffs.[36]

2. Decision

The Tenth Circuit reversed, holding that a supervisor could not be held personally liable.[37] The court reasoned that the Plaintiffs must sue the employer directly for recovery under Title VII.[38] The Tenth Circuit relied on the holding in *Sauers* to support its finding.[39] Specifically, the court addressed the apparent contradiction[40] between *Sauers* and *Brownlee* by finding that the

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26. *See* Ball v. Renner, 54 F.3d 664, 667 (10th Cir. 1995) (avoiding the question of personal supervisor liability).

27. 1 F.3d 1122 (10th Cir. 1993).

28. *Sauers*, 1 F.3d at 1125; *see also* Lankford v. City of Hobart, 27 F.3d 477, 480 (10th Cir. 1994) (applying the *Sauers* rule).

29. 15 F.3d 976 (10th Cir. 1994).

30. *Brownlee*, 15 F.3d at 978. *Brownlee* is an age-discrimination case, but the *Ball* court cited to it to demonstrate that confusion exists within the Tenth Circuit regarding personal liability. *Ball*, 54 F.3d at 667.

31. *Ball*, 54 F.3d at 668.

32. *Compare* Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (holding that supervisor may qualify as an "employer" under Title VII), *rev'd on other grounds*, 900 F.2d 27 (4th Cir. 1990) *and* Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (stating that a plaintiff may properly seek recovery against individuals under Title VII), *with Tomka*, 66 F.3d at 1313 (precluding individual liability under Title VII), *and* Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995) (finding no individual liability for supervisors under Title VII), *and* Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993) (deciding that individuals may not be sued personally under Title VII).

33. 88 F.3d at 898.

34. *Haynes*, 88 F.3d at 899.

35. *Id.*

36. *Id.* at 898.

37. *Id.* 898-99.

38. *Id.* at 899.

39. *Id.*

40. *Ball*, 54 F.3d at 667.

language in *Brownlee* used a different agency principal that does not affect *Sauers*.[41] Further, the court stated that the language in *Brownlee* is "*obiter dictum*," while the rule in *Sauers* was the proper holding for the case.[42] Finally, the court concluded that even if the two cases were directly in conflict, they would still follow the rule in *Sauers*.[43]

The court next analyzed the issue of individual liability in light of the remedial changes to Title VII made by the Civil Rights Act of 1991.[44] The court interpreted the amended language of Title VII as continuing to affix liability on the employer and not the individual supervisor.[45] Additionally, the court reasoned that because Title VII placed caps on the possible award in terms of the number of employees, Congress must have intended to place a cap on employer liability.[46] Congress enacted caps only for employers, which implied that Congress did not consider individuals to be liable.[47] The Tenth Circuit further reasoned that if Congress intended to hold individuals liable under Title VII, Congress would have included individuals in the amended statute.[48]

3. Analysis

The Supreme Court has yet to address the issue of personal liability under Title VII. Advocates of personal liability[49] suggest that the deterrence value is strong enough to justify imposing individual liability under Title VII.[50] Another policy argument asserts that a literal reading of Title VII appears to support the finding of individual liability.[51]

Critics of individual liability argue that the language in Title VII does not support an imposition of individual liability.[52] In *Haynes*, the Tenth Circuit followed the majority argument that "taken as a whole," the language used in the amended Title VII "continue[s] to reflect the legislative judgment that

41. *Haynes*, 88 F.3d at 900.

42. *Id.* at 900.

43. *Id.* The court noted a published opinion of one panel constitutes binding precedent absent en banc reconsideration or a contrary Supreme Court decision. *Id.* at 900 n.4.

44. *Id.* (stating the amendments add compensatory and punitive damages to the remedies available).

45. *Id.* at 901.

46. *Id.* Under the Civil Rights Act of 1991, the lowest cap of $50,000 applies to employers with more than 14 but fewer than 101 employees. *Id.* (citing 42 U.S.C. § 1981a(b)(3)(A) (1994).

47. *Haynes*, 88 F.3d at 901.

48. *Id.* (stating that Congress would have discontinued the exemption for small employers if Congress intended individual liability).

49. *See* Ming K. Ayvas, Note, *The Circuit Split on Title VII Personal Supervisor Liability*, 23 FORDHAM URB. L.J. 797, 813-14 (1996) (discussing the competing rational of statutory interpretation under Title VII); *see also* Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 551-56 (1996) (assessing the arguments for and against imposing individual liability).

50. *See* Ayvas, *supra* note 49, at 814-15.

51. *See* Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 575 (1994) (noting liability turns on who is considered the employer and defining "employer" as a person engaged in business with 15 or more employees and agents of the employer).

52. *See* White, *supra* note 49, at 551-56; *see also* Ayvas, *supra* note 49, at 805-08 (outlining arguments for limiting Title VII to employers).

statutory liability is appropriately borne by employers, not individual supervisors."[53] Furthermore, it seems inconsistent to exempt small employers who employ fourteen or fewer persons from complying with Title VII, while holding individuals who employ no one personally liable for discrimination.[54] Title VII was enacted as a remedial statute and because there is no mention whatsoever in the language of Title VII about individual liability, the Tenth Circuit's argument is convincing.

The *Haynes* court cited two propositions to support the notion that Congress never intended individual liability under Title VII. First, the court concluded that it would be a "long stretch" to infer "Congress silently intended to abruptly change" the meaning of the statute through an amendment that only addresses the remedial portions of the statute.[55] Second, the court concluded that since Congress enacted liability caps for the employer and failed to address a cap for individual liability, no individual liability was contemplated or intended.[56]

The initial impression of the court's holding in *Haynes* is to question any reasoning that exonerates the person responsible for the harm. Nevertheless, careful study will show that the Tenth Circuit's decision is appropriate under the current federal employment discrimination scheme.[57] The language of Title VII does not support the imposition of personal liability.

C. *Other Circuits*

The Tenth Circuit is one of the last circuits to address the issue of individual liability under Title VII. The Fourth and the Sixth Circuits impose individual liability under Title VII. The Fourth Circuit held that "[a]n individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment."[58] The Sixth Circuit stated that "the law is clear," individuals may be held liable as "'agents' of an employer under Title VII."[59]

The Second, Fifth, Ninth, Eleventh, and the District of Columbia Circuits have all refused to impose individual liability. The Second Circuit reasoned that Title VII's failure to explicitly allow agent liability illustrates Congress's intent not to hold individuals liable.[60] The Fifth Circuit reasoned that allowing individual liability would be "illogical" as it would result in some employees being treated as "both an employer and an employee."[61] The Ninth Circuit stated that Title VII's use of the term "agent" in the definition of "em-

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53. *Haynes*, 88 F.3d at 901.
54. *See* White, *supra* note 49, at 553.
55. *Haynes*, 88 F.3d at 901.
56. *See supra* notes 46-48 and accompanying text.
57. *See generally* White, *supra* note 49, at 544-56 (arguing that Title VII should be limited to employers).
58. *Paroline*, 879 F.2d at 104.
59. *Continental Corp.*, 789 F.2d at 1231.
60. *Tomka*, 66 F.3d at 1314.
61. Grant v. Lone Star, 21 F.3d 649, 653 (5th Cir. 1994).

ployer" indicated incorporation of respondeat superior liability, and not to impose individual liability.[62]

II. DISPARATE IMPACT UNDER THE ADEA

A. *Background*

Congress enacted the Age Discrimination in Employment Act (ADEA)[63] "to promote employment of older persons based on their ability rather than age."[64] The ADEA prohibits employers from discriminating against older employees over the age of forty.[65] Because of the many similarities between the ADEA and Title VII, courts have applied some of the same theories of liability.[66]

Claims under the ADEA are brought by individuals who assert that their employers discriminated against them because of their age.[67] Disparate treatment claims arise when an employer treats an employee unsatisfactorily because of a protected characteristic such as age.[68] Unlike disparate treatment, disparate impact theory is based on the protected characteristic which has an unjustified effect on members of a protected class.[69] After *Hazen Paper Co. v. Biggins*,[70] it is not clear whether disparate impact extends to the ADEA.[71] The argument behind disparate impact liability was espoused by Chief Justice Burger in *Griggs v. Duke Power Co.*[72] The basic premise is that a facially neutral employment practice can have an unconstitutional disparate impact upon a protected class.[73] The Court declined to address the issue of whether a disparate impact theory of liability is viable under the ADEA.[74]

In *Geller v. Markham*,[75] the Second Circuit premised liability under the ADEA on a disparate impact theory.[76] The Supreme Court denied certiorari on appeal, but Justice Rehnquist strenuously dissented, arguing application of disparate impact liability to the facts in *Geller* undermined the underlying

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62. *Maxwell's Int'l Inc.*, 991 F.2d at 587; *see also Haynes*, 88 F.3d at 898; *Gary*, 59 F.3d at 1399 (agreeing with the reasoning in *Miller* that the agent provision in Title VII incorporated respondeat superior liability); Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991) (denying individual liability in cases involving public employers).

63. 29 U.S.C. §§ 621-34 (1994).

64. *Id.* § 621(b).

65. *Id.* § 621(a)(1).

66. *See* Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 513-17 (1995) (discussing the theories of liability under the ADEA).

67. CHARLES D. EDELMAN & ILENE C. SIEGLER, FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW: SLOWING DOWN THE GOLD WATCH 76 (1978).

68. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

69. *Id.*

70. 507 U.S. 604 (1993).

71. *Hazen*, 507 U.S. at 610.

72. 401 U.S. 424 (1971).

73. *Albemarle Paper Co.*, 422 U.S. at 426.

74. *Hazen Paper Co.*, 507 U.S. at 610.

75. 635 F.2d 1027 (2d Cir. 1980), *cert. denied* sub nom. Markham v. Geller, 451 U.S. 945 (1981).

76. *Geller*, 635 F.2d at 1031-34.

policies and statutory provisions of the ADEA.[77] Justice Rehnquist found that the "reasonable factor other than age" exception explicitly protects age-neutral factors and would, therefore, preclude disparate impact liability in cases where the employer's actions are based on cost factors.[78] He further stated that so long as the cost rationale is not pretext, such employment practices do not implicate the ADEA regardless of the effect on older workers.[79]

Justice O'Connor similarly indicated in her *Hazen Paper* analysis that she would not support extending disparate impact liability to the ADEA.[80] Other Justices have also expressed concerns about disparate impact liability in other opinions.[81] Nonetheless, the Supreme Court has not resolved the issue of whether to extend disparate impact liability to the ADEA.

B. Ellis v. United Airlines, Inc.[82]

1. Facts

Two flight attendants sued United Airlines, Inc. (United) for refusing to hire them claiming violation of the ADEA.[83] United claimed the flight attendants failed to meet the company's weight restrictions.[84] The flight attendants contended that the restrictions were pretextual for age discrimination and alternatively, that the weight restriction as applied to applicants disparately impacts older individuals by not accounting for the natural weight gain associated with age.[85] The district court granted summary judgment for United and the flight attendants appealed.[86]

2. Decision

The issue on appeal was whether the disparate impact theory was cognizable under the ADEA. The Tenth Circuit affirmed the district court's decision to grant summary judgment,[87] taking the opportunity to answer the question left open by *Hazen Paper*.[88] The Tenth Circuit held that the ADEA does not

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77. *Markham*, 451 U.S. at 948 (Rehnquist, J. dissenting).
78. *Id.* at 948-49.
79. *Id.*
80. *See* Sloan, *supra* note 66, at 539-42 (analyzing Justice O'Connor's opinion in *Hazen Paper*).
81. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (expressing concern about disparate impact liability leading to quotas); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1988) (expressing concern that disparate impact liability may result in racial quotas); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (expressing concerns about the effects of disparate impact); City of Richmond v. J.A. Croson Co., 448 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (expressing concern about disparate impact potentially imposing liability without a finding of fault).
82. 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996).
83. *Ellis*, 73 F.3d 997, 1000.
84. *Id.*
85. *Id.*
86. *Id.* at 1001.
87. *Id.* at 1012.
88. *Hazen*, 507 U.S. at 610 (declining to address the issue of whether the ADEA encompasses disparate impact theory of liability).

recognize the theory of disparate impact liability.[89]

Beginning with a textual analysis of the ADEA,[90] the Tenth Circuit interpreted the phrase "because of such individual's age" as prohibiting an employer from intentionally treating individuals differently based on age,[91] but not prohibiting unintentional discrimination resulting from employment decisions made for reasons other than age.[92] While the court generally has interpreted the ADEA in tandem with Title VII,[93] it reasoned that the ADEA is different from Title VII in "salient ways that counsel against interpreting the ADEA to recognize disparate impact claims and that reinforce our reading of the text of the ADEA."[94]

First, the court reasoned that § 623(f) of the ADEA states an employer may take action otherwise prohibited "where the differentiation is based on reasonable factors other than age."[95] The court noted that there is similar language in the Equal Pay Act[96] which the Supreme Court interpreted to preclude disparate impact claims.[97]

Second, the court reasoned that the legislative history of the ADEA does not support disparate impact claims.[98] A pre-enactment report issued by the Secretary of Labor[99] recommended that "arbitrary discrimination based on age" should be prohibited, while problems resulting from factors that "affect older workers more strongly" should be addressed through other means.[100] Further, the court noted that Congress explicitly added disparate impact claims to Title VII in the 1991 Civil Rights Act,[101] while providing no parallel provision to the ADEA.[102] Citing dicta in *Hazen Paper*[103] and a trend among courts addressing the issue of disparate impact claims under the ADEA,[104]

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89. *Ellis*, 73 F.3d at 1007.

90. *Id.* The ADEA's prohibition on discrimination provides that:

> [I]t shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

Id. (quoting 29 U.S.C. § 623(a) (1994)).

91. *Ellis*, 73 F.3d at 1007.

92. *Id.*

93. *Id.* (explaining that in *Griggs* the Supreme Court construed Title VII to create a disparate impact theory).

94. *Id.* at 1007.

95. *Id.* at 1008.

96. The Equal Pay Act provides, in pertinent part, that employers can pay unequal wages to men and women where the pay differential is "based on any other factor other than sex . . . ." 29 U.S.C. § 206(d)(1) (1994).

97. *Ellis*, 73 F.3d at 1008 (citing County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981)).

98. *Id.* at 1008.

99. *Id.* (quoting U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER § 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965)) [hereinafter SECRETARY'S REPORT].

100. *Id.*

101. 42 U.S.C. § 2000e-2(k)(1)(A).

102. *Ellis*, 73 F.3d at 1008.

103. *Hazen*, 507 U.S. at 610.

104. *See* Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 138 (6th Cir. 1995);

the Tenth Circuit held that disparate impact claims are not cognizable under the ADEA.[105]

C. *Analysis*

The Tenth Circuit considered the legislative history of the ADEA in its *Ellis* decision.[106] An argument that Congress intended to extend disparate impact liability to the ADEA correlates the Secretary's Report[107] with the Court's reasoning in *Griggs*, in which both expressed a similar concern about arbitrary discrimination.[108] The Tenth Circuit, however, interpreted the Secretary's Report as recommending the prohibition of disparate impact theory under the ADEA.[109]

The Tenth Circuit's interpretation of the Secretary's Report appears appropriate considering that Congress amended Title VII, but not the ADEA, to provide specifically for disparate impact.[110] The Tenth Circuit argues that by specifically amending Title VII, and not the ADEA, Congress intended to disallow disparate impact under the ADEA.[111] However, as one commentator remarked, "[i]t seems unpersuasive . . . to read so much into congressional inaction."[112] The legislative intent argument, standing alone, is not very compelling.

The ADEA permits employment decisions based on "reasonable factors other than age (RFOA)."[113] The Tenth Circuit's decision in *Ellis* follows the reasoning of Justice Rehnquist's dissent in *Geller* in which he argued the RFOA exception precludes disparate impact liability in cases where the employer bases action on cost factors even though the facially neutral action may disparately impact older workers.[114] Justice Rehnquist further reasoned that the RFOA exception explicitly protects age-neutral factors so long as the cost rationale is not a pretext for discrimination based on age.[115]

DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732-34 (3d Cir. 1995) (holding that there is no disparate impact claim under the ADEA); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076-78 (7th Cir. 1994).

105. *Ellis*, 73 F.3d at 1008-09.

106. *See supra* notes 90-94 and accompanying text.

107. SECRETARY'S REPORT, *supra* note 99.

108. For a general discussion favoring the allowance of disparate impact claims under the ADEA, see Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229 (1990); Peter H. Harris, Note, *Age Discrimination, Wages, and Economics: What Judicial Standard?*, 13 HARV. J.L. & PUB. POL'Y 715 (1990); Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984).

109. *Ellis*, 73 F.3d at 1008.

110. For a general discussion of commentators opposed to extending disparate impact to the ADEA, see Donald R. Stacy, *A Case Against Extending the Disparate Impact Doctrine to the ADEA*, 10 EMPLOYEE RELATIONS L.J. 437 (1984-85); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982).

111. *Ellis*, 73 F.3d at 1008.

112. Sloan, *supra* note 66, at 518.

113. The ADEA provides in relevant part that: "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . ." 29 U.S.C. § 623(f)(1) (1994).

114. *Markham*, 451 U.S. at 948 (Rehnquist, J., dissenting).

115. *Id.* at 949. The cost rational argument is based on the premise that the combined effect

The Tenth Circuit's most persuasive argument for disallowing disparate impact liability under the ADEA is the RFOA exception. Commentators have argued the existence of the RFOA defense implies the ADEA should be applied only to cases of disparate treatment.[116] Justice Rehnquist's dissent in *Geller* is a good indication of how today's Court might decide the issue.[117]

D. *Other Circuits*

Other circuits have already addressed the issue of disparate impact liability under the ADEA. The Second Circuit assumed disparate impact liability applies under the ADEA in *Geller v. Markham*.[118] The *Geller* case was decided before *Hazen Paper*, and did not conduct an analysis of the issue. *Geller* is not persuasive, however, because *Hazen Paper* eliminated the assumption that disparate impact applies under the ADEA.[119]

The Eighth Circuit held disparate impact liability cognizable under the ADEA.[120] The Eighth Circuit case decided post-*Hazen Paper*, assumed without analysis that disparate impact theory under the ADEA was viable.[121] The Ninth Circuit, also post-*Hazen Paper*, did not decide the issue, but referred to earlier Ninth Circuit precedent in finding no conflict between *Hazen Paper* and the Ninth Circuit's jurisprudence recognizing a disparate impact claim under the ADEA.[122] In an unpublished opinion, the First Circuit assumed that the district court correctly found that the ADEA supports a claim for age discrimination on a theory of disparate impact liability.[123]

The Third,[124] Sixth,[125] and Seventh[126] Circuits have all concluded that the ADEA does not support a disparate impact claim. The Seventh Circuit disallowed the disparate impact challenge, holding the theory unavailable after the Supreme Court's decision in *Hazen Paper*.[127] The Third Circuit went into great detail about the doubt *Hazen Paper* cast on the availability of disparate impact liability under the ADEA,[128] and then ultimately refused to apply the disparate impact theory for other reasons.[129]

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of higher pay, generally caused by older workers' seniority, coupled with the declining performance, because of age-related physical deterioration, makes older workers more expensive. *See, e.g.*, Terrence P. Collingsworth, Note, *The Cost Defense Under the Age Discrimination in Employment Act*, 1982 DUKE L.J. 580, 593-602 (1982).

116. *See, e.g.*, Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. TOL. L. REV. 1261, 1278-83 (1983). *See supra* note 111 and accompanying text.

117. *Markham*, 451 U.S. at 948.

118. *Markham*, 635 F.2d at 1032.

119. *See, e.g., DiBiase*, 48 F.3d at 733 n.20.

120. Houghton v. Sipco, Inc., 38 F.3d 953, 958-59 (8th Cir. 1994).

121. *Houghton* 38 F.3d at 958-59.

122. *See* Mangold v. Cal. Pub. Util. Comm'n, 67 F.3d 1470, 1473-74 (9th Cir. 1995).

123. Graffam v. Scott Paper Co., No. 95-1046, 1995 WL 414831, at *3 (1st Cir. July 14, 1995).

124. *DiBiase*, 48 F.3d at 732-34.

125. *Lyon*, 53 F.3d at 138-39.

126. *Francis W. Parker Sch.*, 41 F.3d at 1076-77.

127. *Id.* at 1076-77.

128. *DiBiase*, 48 F.3d at 725-29.

129. *Id.* at 727-28.

III. AWARDING ATTORNEY'S FEES AGAINST COUNSEL

A. *Background*

Litigants usually pay their own attorneys' fees under the "American" rule.[130] In some situations, including litigation under Title VII,[131] the losing party can be ordered to pay the prevailing party's attorney's fees.[132] In *Christiansburg Garment Co. v. EEOC*,[133] the Supreme Court held that a prevailing defendant may recover reasonable attorney's fees under Title VII if the plaintiff's action was frivolous.[134] However, the Supreme Court noted in *Roadway Express, Inc. v. Piper*,[135] that Title VII does not authorize the imposition of attorney's fees against opposing counsel.[136]

If a plaintiff's attorney is responsible for bringing a frivolous suit, the court must impose sanctions from sources other than Title VII.[137] Federal Rule of Civil Procedure 11 (Rule 11)[138] allows an award of attorney's fees against counsel in these situations.[139] Some courts hesitate to assess sanctions against opposing counsel under Title VII, but they assess sanctions under Rule 11.[140] The imposition of attorney's fees against counsel under Title VII remained an unresolved issue in the Tenth Circuit. In *Roadway*, the Supreme Court noted that Title VII and 42 U.S.C. § 1988 fee provisions are identical.[141] The Tenth Circuit addressed the issue in the context of § 1988 in *Crabtree v. Muchmore*.[142] In *Crabtree*, the Tenth Circuit remanded to have attorney's fees awarded under § 1988 or Rule 11 depending upon who was at fault between the client and the attorney.[143] Other circuits have held that § 1988 does not support the imposition of attorney's fees against opposing counsel.[144]

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130. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (stating that under the "Traditional American Rule," each party is responsible for its own attorney's fees).

131. 42 U.S.C. § 2000e-5(k) (providing: "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . .").

132. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 260-61.

133. 434 U.S. 412 (1978).

134. *Christiansburg*, 434 U.S. at 421.

135. 447 U.S. 752 (1980).

136. *Roadway*, 447 U.S. at 761 n.9.

137. *See, e.g.*, Susan R. Bogart, *Civil Procedure—Third Circuit Suggests that Attorney Who "Should Have Known Better" Share in Paying Attorney Fee Sanctions for Frivolous Employment Discrimination Suit—*Quiroga Hasbro, Inc., *934 F.2d 497 (3d Cir.), cert denied, 112 S. Ct. 376 (1981)*, 65 TEMP. L. REV. 959 (1992) (discussing the sanctions applicable to attorneys).

138. FED. R. CIV. P. 11 [hereinafter Rule 11].

139. *See generally* Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 289-96 (1992) (discussing how Rule 11 intersects with Title VII).

140. *See, e.g.*, Johnson v. New York Transit Auth., 823 F.2d 31, 32 (2d Cir. 1987) (awarding fees against attorney pursuant to Rule 11).

141. *Roadway*, 447 U.S. at 761.

142. 904 F.2d 1475 (10th Cir. 1990).

143. *Crabtree*, 904 F.2d at 1479.

144. *See infra* notes 164-67 and accompanying text.

B. Corneveaux v. CUNA Mutual Insurance Group[145]

1. Facts

Mary Corneveaux worked for CUNA Mutual Insurance Society (CUNA) for thirteen years.[146] CUNA, in 1989, phased out Corneveaux's position due to company wide downsizing.[147] Corneveaux applied for another position and the company hired a male employee instead.[148]

Corneveaux brought suit against CUNA alleging age discrimination and retaliation, sexual and religious discrimination, and breach of an implied contract under Utah law.[149] The trial court ordered Corneveaux's counsel to pay $5,000 for attorney's fees incurred by CUNA in defense of the gender and religious discrimination claims.[150] CUNA's counsel questioned the appropriateness of ordering Corneveaux's counsel to pay the fees under Title VII and suggested a finding under Rule 11 instead.[151] The trial court found Corneveaux's Title VII claims "unreasonable and groundless," yet the court found no Rule 11 violation.[152] The trial court further stated it was basing the award for attorney's fees solely on Title VII.[153] The award of attorney's fees against plaintiff's counsel under Title VII appeared as an issue of first impression in the Tenth Circuit during the survey period.

2. Decision

The issue on appeal was whether the trial court abused its discretion in awarding attorney's fees against the Plaintiff's counsel based solely on Title VII. The Tenth Circuit reversed, vacating the award of attorney's fees.[154] The court found that the trial court erred and the language of Title VII did not support the award of attorney's fees against opposing counsel.[155] The Tenth Circuit noted that in *Roadway*, the Supreme Court stated "[n]either § 1988 nor § 2000e-5(k) makes any mention of attorney liability for costs and fees."[156]

The Tenth Circuit then turned to the *Crabtree* case which was the next authority cited by the trial court in awarding attorney's fees.[157] The court distinguished this case from *Crabtree* because the trial court here had already ruled Rule 11 sanctions were inappropriate.[158] Thus, attorney's fees could not be awarded against the Plaintiff's attorney.

145. 76 F.3d 1498 (10th Cir. 1996).
146. *Corneveaux*, 76 F.3d at 1502.
147. *Id.*
148. *Id.*
149. *Id.* at 1501.
150. *Id.* at 1508.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1509.
155. *Id.*
156. *Id.* (citing *Roadway*, 447 U.S. at 761).
157. *Id.* at 1509. *See supra* notes 142-43 and accompanying text.
158. *Corneveaux*, 76 F.3d at 1509.

3. Analysis

The Supreme Court's notation in *Roadway*, that § 2000e-5(k) fails to mention attorney liability for fees, is conclusive that Title VII does not authorize the imposition of attorney's fees against opposing counsel.[159] Further, in reliance on the Tenth Circuit's decision in *Crabtree*, the trial court erroneously applied *Chevron, U.S.A., Inc. v. Hand*,[160] which addressed the proper allocation of Rule 11 sanctions between an attorney and the client.[161] Rule 11 sanctions were not at issue in *Corneveaux*. Neither Title VII nor the Tenth Circuit's decision in *Crabtree* support a finding by the trial court of an award of attorney's fees against opposing counsel.

One purpose for awarding attorney's fees is to discourage frivolous lawsuits.[162] Even though Title VII does not allow the awarding of attorney's fees against counsel, other means are available to lower courts in sanctioning an attorney. The Third Circuit referred to Rule 11 and the court's inherent power to control the judicial process as means for sanctioning attorneys.[163] Therefore, if a lower court believes counsel is responsible for bringing a frivolous suit, the court should sanction the attorney by a means other than Title VII's fee shifting provision.

C. *Other Circuits*

Several circuit courts have already concluded that it is inappropriate to award attorney's fees against counsel in a Title VII action. The Third Circuit recognized that Title VII "does not authorize assessment of fees against the loser's attorney."[164] The Sixth Circuit held that "an award under section 1988 may only be charged against the losing party, not the party's attorney."[165] The Seventh Circuit held that "[s]ection 1988 only authorizes the imposition of fees against parties to the litigation, not their attorneys."[166] The Eleventh Circuit held § 2000e-5(k) "contemplates assessments of attorney's fees against losing parties, not against counsel."[167] Clearly, many circuits support the Tenth Circuit's decision not to allow an award of attorney's fees against counsel under Title VII.

IV. DEFINING THE AMERICANS WITH DISABILITIES ACT

A. *Background*

The purpose underlying the enactment of the Americans with Disabilities Act (ADA) is the prevention of employment discrimination against those who

159. *Roadway*, 447 U.S. at 761. *See supra* notes 135-41 and accompanying text.
160. 763 F.2d 1184 (10th Cir. 1985).
161. *Chevron*, 763 F.3d at 1187.
162. Bogart, *supra* note 137, at 959.
163. Quiroga v. Hasbro, Inc., 934 F.2d 497, 504 (3d Cir. 1991).
164. *Quiroga*, 934 F.2d at 504.
165. Smith v. Detroit Fed'n of Teachers, Local 231, 829 F.2d 1370, 1374 n.1 (6th Cir. 1987).
166. Hamer v. County of Lake, 819 F.2d 1362, 1370 (7th Cir. 1987).
167. Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 915 (11th Cir. 1982).

are disabled.[168] An employer violates the ADA if a qualified individual with a disability requests a reasonable accommodation which would enable the employee to perform the job and the employer refuses despite the fact that the accommodation would not impose an undue hardship on the employer.[169] The ADA is "an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given."[170]

The Tenth Circuit adopted a two-part test for determining whether a disabled person qualifies under the ADA.[171] First, the court determines "whether the individual could perform the essential functions of the job."[172] Second, if the court concludes the individual cannot perform the essential functions of the job, the court must determine whether any reasonable accommodation by the employer would enable the employee to perform the job.[173]

Considerable uncertainty exists regarding what constitutes "reasonable accommodation."[174] Reasonable accommodation is generally interpreted as a standard requiring the employer to accommodate a disabled employee until such accommodation becomes an undue hardship on the employer.[175] A reasonable accommodation may include altering the physical layout of the workplace,[176] making changes to the position itself,[177] and providing additional unpaid leave.[178]

Unpaid leave may be a reasonable accommodation under the ADA, however, the Fourth Circuit held that the ADA does not require an employer to grant an employee indefinite leave as an accommodation.[179] Other circuit

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168. 42 U.S.C. § 12112(a) (1994) (providing in pertinent part: "[n]o [employer] . . . shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). For a historical overview of the ADA, see generally Chai R. Feldblum, *The Revolution of Physical Disability Anti-Discrimination Law: 1976-1996*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 613 (1996) (providing a historical overview of the ADA).

169. *See* Stephanie Jae Stevenson, *Tenth Circuit Survey: Disability Law*, 73 DENV. U. L. REV. 707, 723 (1996). The article discusses additional qualifications for disabled status under the ADA. *Id.* at 720-23.

170. 29 C.F.R. pt. 1630 app. at 1630.1(a) (1995).

171. White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) (quoting Chandler v. City of Dallas, 2 F.3d 1385, 1393-94 (5th Cir. 1993)).

172. *White*, 45 F.3d at 361.

173. *Id.* at 361-62.

174. *See generally* Morley Gunderson & Douglas Hyatt, *Do Injured Workers Pay for Reasonable Accommodation?*, 50 INDUS. & LAB. REL. REV. 92 (1996) (discussing the uncertainty that exists with respect to reasonable accommodation); Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201 (1993) (detailing what constitutes a reasonable accommodation under the ADA).

175. *See* Gunderson & Hyatt, *supra* note 174, at 93.

176. *Development in the Law "The Americans with Disabilities Act: Great Progress, Greater Potential*, 109 HARV. L. REV. 1602, 1611 (1996).

177. *Id.*

178. Laura Pincus, *The Americans with Disabilities Act; Employers' New Responsibilities to HIV-Positive Employees*, 21 HOFSTRA L. REV. 561, 578 (1993); *see also* McDonald v. Dep't of Public Welfare, 62 F.3d 92, 97 (3d Cir. 1995).

179. Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995).

courts have reached similar conclusions.[180] The issue of indefinite leave as a reasonable accommodation remained unresolved in the Tenth Circuit until the current survey period.

B. Hudson v. MCI Telecommunications Corp.[181]

1. Facts

April Hudson worked for MCI Telecommunications (MCI) as a customer service representative.[182] Hudson's duties required her to spend approximately six hours a day on the phone and at a computer keyboard.[183] Hudson was diagnosed with carpal tunnel syndrome and her treating physician issued restrictions that she was to take fifteen minutes off for each hour of repetitive, digital activity.[184]

She worked the next month and a half doing tasks that did not involve typing or keyboard activity.[185] MCI suspended Hudson for being tardy and later terminated her.[186] After her termination she underwent surgery to correct the problem and her physician lifted her work restrictions.[187] Hudson brought the action alleging MCI failed to provide reasonable accommodations thereby violating the ADA.[188] The district court granted MCI's motion for summary judgment and Hudson appealed.[189]

2. Decision

The Tenth Circuit affirmed the judgment of the district court, holding that Hudson failed to establish that an indefinite leave of absence would be a "reasonable accommodation" under the ADA.[190] The court noted that the plaintiff conceded she could not perform the essential functions of her job.[191] However, she alleged MCI failed to "reasonably accommodate" her by refusing her unpaid leave while she sought treatment.[192]

The court noted that in *Myers*,[193] the Fourth Circuit "concluded that the term 'reasonable accommodation' refers to those accommodations which presently, or in the near future, enable the employee to perform the essential functions of his job."[194] The court agreed with the plaintiff that an unpaid leave may be a reasonable accommodation, but the court concluded in this case that the plaintiff failed to present any evidence as to the duration of the impair-

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180. *See infra* notes 203-05 and accompanying text.
181. 87 F.3d 1167 (10th Cir. 1996).
182. *Hudson*, 87 F.3d at 1168.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 1167.
189. *Id.*
190. *Id.* at 1169.
191. *Id.* at 1168-69.
192. *Id.* at 1169.
193. *Myers*, 50 F.3d at 278.
194. *Hudson*, 87 F.3d at 1169 (quoting *Myers*, 50 F.3d at 283).

ment.[195] Thus, the court concluded that MCI was not required to wait indefinitely for the plaintiff's recovery and the judgment of the district court was affirmed.[196]

3. Analysis

The ADA guidelines provide that reasonable accommodations may include additional unpaid leave for necessary medical treatment.[197] A per se rule that unpaid leave of an indefinite period could never constitute a reasonable accommodation, such as the one opined in *Hudson*, is irrational. The court in *Hudson* did not clarify why unpaid leave should be analyzed differently from other proposed accommodations under the ADA. Whether any accommodation is reasonable should be analyzed by the specific circumstance in a given case.[198] The courts should apply the same criteria to unpaid leave as other proposed accommodations.[199]

A per se rule is irrational because it is possible that an indefinite leave could be a reasonable accommodation. For example, a large employer with a very high turnover and unskilled labor force could provide indefinite leave as a reasonable accommodation if the leave allows an employee to eventually perform the essential job functions and the leave did not inflict undue hardship upon the employer. In *Hudson*, MCI refused to provide unpaid leave while Hudson sought necessary medical treatment and the court concluded that indefinite leave was not a reasonable accommodation without an analysis of whether it would impose an undue hardship upon MCI.[200]

The plaintiff in *Hudson* failed to produce evidence as to the expected duration of her impairment by the date of termination.[201] A notation made by the plaintiff's physician on the day after termination indicated surgery would end the plaintiff's impairment.[202] Applying the court's reasoning, if the plaintiff had been terminated a day later, the unpaid leave would constitute a reasonable accommodation. Furthermore, for a company to avoid liability in unpaid leave cases, it need only terminate an employee before the employee provides them with any evidence as to the expected duration of the unpaid leave.

C. *Other Circuits*

Other circuits have addressed the issue of unpaid leave as a reasonable accommodation, reaching the same result that the Tenth Circuit reached in *Hudson*. The Fourth Circuit held that a reasonable accommodation under the

195. *Id.* at 1169.
196. *Id.*
197. *See* 29 C.F.R. pt.1630 app at 1630.2(o) (1996) (providing interpretive guidance of Title I of the ADA).
198. *See* Lee, *supra* note 174, at 235-43.
199. *See supra* notes 175-178 and accompanying text.
200. *Hudson*, 87 F.3d at 1169. *See supra* note 175 and accompanying text.
201. *Hudson*, 87 F.3d at 1169.
202. *Id.*

ADA does not include indefinite leave.[203] The Fifth Circuit similarly held that an employer is "not required to make reasonable accommodation[s] in the form of an indefinite leave of absence."[204] Likewise, the Sixth Circuit held that an employer is not under a duty to keep employees on unpaid leave until a position opens up that will reasonably accommodate them.[205] The Third Circuit, however, stated that "some case law might support the plaintiff's position that an unpaid leave of absence is an appropriate accommodation in some circumstances."[206]

CONCLUSION

During the survey period the Tenth Circuit made it easier to defend against employment discrimination claims. The court's decision in *Haynes* is appropriate under the current federal employment law scheme. The language of Title VII does not support a finding of personal liability. The application of this holding does not preclude individuals from being liable, it only precludes them from being liable under Title VII. Individuals may still be sued under state tort law.

The Tenth Circuit makes a persuasive argument for precluding disparate impact liability under the ADEA in *Ellis*. The RFOA exception in the ADEA along with Justice Rehnquist's dissent for denial of certiorari in *Gellar*, establish a compelling argument that a disparate impact theory is not cognizable under the ADEA. Plaintiffs must now show intentional or disparate treatment to prevail under the ADEA.

The only Tenth Circuit decision rendered during the survey period that benefits plaintiffs is *Corneveaux*. If the *Corneveaux* court had reached the opposite conclusion, holding that counsel may be liable for attorney's fees under Title VII, this would discourage attorneys from bringing actions under Title VII. The majority is clear that Title VII does not support the finding that counsel can be held liable for attorney's fees.

Finally, the Tenth Circuit's decision concerning reasonable accommodation under the ADA further burdens plaintiffs. The court hindered plaintiffs by requiring them not only to establish that unpaid leave is a reasonable accommodation, but plaintiffs must also provide evidence as to the expected duration of the impairment by the date of termination. This ruling is unsound because the court failed to consider whether the indefinite leave imposed an undue hardship on the defendant.

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203. *Myers*, 50 F.3d at 283.
204. Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 757 (5th Cir. 1996).
205. Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996).
206. *McDonald*, 62 F.3d at 97.