1. Time Limits

Statutes of limitations often prove to be a major obstacle for plaintiffs bringing employment discrimination claims.[318] Such problems occur because the potential causes of action have different applicable limits,[319] and because time constraints must be satisfied while administrative remedies are pursued. These often conflicting requirements result in a fair amount of confusion regarding the proper deadline.[320]

Several of the most frequently used federal statutes provide a 180-day limit for filing a claim with the appropriate federal agency if the state provides a remedy; if there is no state agency, the period is extended to 300 days.[321] For claims brought under section 1983

F. Supp. 717 (D. Del. 1978), plaintiff filed his Title VII complaint against the Department of Justice, the Immigration and Naturalization Service, and five individual INS employees. Defendants argued that plaintiff should have named the Attorney General of the United States as the sole defendant, and thus moved to dismiss the complaint. The court, however, found that the language of Title VII left the decision of the "appropriate" defendant to the court's discretion. The court, therefore, substituted the head of the INS as defendant for purposes of plaintiff's Title VII claims, and dismissed those claims against the original named defendants.

This problem is unlikely to arise in the case of an employer in the private sector, since most plaintiffs know for whom they work.

318. *See* Ricks v. Delaware State College, 22 Fair Empl. Prac. Cas. (BNA) 788 (D. Del. 1978), *rev'd in part*, 605 F.2d 710 (3d Cir. 1979), *rev'd*, 449 U.S. 250 (1980) (extensive discussion of applicable statutes of limitations). In Spencer v. Roudebush, 443 F. Supp. 149 (D. Del. 1977), plaintiff elected to pursue an avenue of relief which did not require that she be informed of the 30-day limit on filing a civil action after exhausting that remedy; consequently, her failure to comply with that deadline barred her suit.

319. *See infra* notes 321-328 and accompanying text.

320. *See Ferguson*, 560 F. Supp. at 1109-91 (presents an excellent example of the confusion engendered by statute of limitation; however, the time constraints did not bar amendment of the complaint). *Id.* at 1191.

Additionally, the 180-day statute of limitations for filing a discrimination charge under Title VII is inapplicable when the EEOC is the plaintiff. EEOC v. E.I. du Pont de Nemours & Co., 516 F.2d 1297 (3d Cir. 1975).

321. *See* Title VII, 42 U.S.C. § 2000e-5(e) (1983); Age Discrimination in Employment Act, 29 U.S.C. § 626(d) (1983); Rehabilitation Act, 29 U.S.C. § 794a (1983); Labor Management Relations Act, 29 U.S.C. § 160(b) (1983). For discussions of Title VII time requirements, see Annot., 67 A.L.R. FED. 381 (1984); Annot., 53 A.L.R. FED. 859 (1981); and Annot., 4 A.L.R. FED. 833 (1970).

The Fair Labor Standards Act, 29 U.S.C. § 215 (1983), and the Equal Pay Act, 29 U.S.C. § 206(d) (1983), allow plaintiffs two years to file claims. Other federal statutes, however, only give a plaintiff 30 days to file a complaint with the appropriate agency. *See, e.g.*, Occupational Safety & Health Act of 1970, 29 U.S.C. § 660(C) (1983) (prohibits discharge of or discrimination against an employee who files, institutes, or testifies regarding a complaint to enforce the statute, or who is

and the Constitution directly, the most appropriate state statute of limitations is applied.[322] In Delaware, this is three years.[323] The state statutes generally provide their own requisite time periods, which are often quite short.[324] Common law actions follow their own statutes of limitations.[325] When the only available remedies for a particular cause of action are equitable and no limitation period is specified, the equitable doctrine of laches governs.[326] These time limits can be avoided by alleging a "continuing violation" as long as some conduct of the defendant falls within the statutory period.[327] Additionally, claims can be separated by individual causes of action and by defendant, if there is more than one, for purposes of applying the correct limitation period.[328]

The primary problem with statutes of limitations is twofold: when they begin to run and what, if anything, will toll their running. Generally, a statute begins to run from the time of the allegedly unlawful action.[329] As mentioned previously, this may be avoided by

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about to take any of these actions); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(b) (1983) (same); Railroad Safety Act, 45 U.S.C. § 441(b)(1) (1983) (same, but further applies to those refusing to work under conditions reasonably believed to be dangerous).

322. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975) (section 1983 action); Holmberg v. Armbrecht, 327 U.S. 392 (1946) (federal question).

323. *See* DEL. CODE ANN. tit. 10, § 8106 (1975). *See also* Goldsmith v. E.I. du Pont de Nemours & Co., 32 Fair. Empl. Prac. Cas. (BNA) 1879 (D. Del. 1983); Burris v. Wright Constr. Co., 459 F. Supp. 157 (D. Del. 1978).

324. DEL. CODE ANN. tit. 29, § 5115(b) (1983) (Delaware "whistleblowers" statute provides a 90-day statute of limitations).

325. For most tort and contract actions in Delaware, this is the three-year period prescribed by DEL. CODE ANN. tit. 10, § 8106 (1975).

326. *See* Goodman v. McDonnell-Douglas Corp., 456 F. Supp. 874 (D. Mo. 1978) (enforcement procedures for the veterans' rights statute, 38 U.S.C. § 2022 (1983), interpreted as being limited only by laches).

327. In Stallings v. Container Corp. of Am., 75 F.R.D. 511 (D. Del. 1977), the plaintiffs alleged that they were "attacking a promotion procedure which has operated to their prejudice in the past and which . . . will continue to operate to their prejudice in the future." *Id.* at 515. The court accordingly held that the claims were not time barred. However, the court granted summary judgment for the defendant in Burris v. Wright Constr. Co., 459 F. Supp. 157 (D. Del. 1978), because no acts alleged in the complaint fell within the three-year statute of limitations for a § 1981 claim.

328. *See* Ricks v. Delaware State College, 22 Fair. Empl. Prac. Cas. (BNA) 788 (D. Del. 1978), *rev'd in part*, 605 F.2d 710 (3d Cir. 1979), *rev'd*, 449 U.S. 250 (1980); Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287 (D. Del. 1975).

329. When the allegedly unlawful conduct concerns a dismissal which is to take effect at a later date, the statute begins to run when the decision to terminate

asserting a continuing violation.[330] The statute may be tolled if doing so would be equitable, but there is no set standard for determining what action will be sufficient to toll its running.[331] If the time limits for filing with the state agency are shorter than that of the federal statute, missing the state deadline cannot bar plaintiff's federal claim.[332]

An additional time problem arises for plaintiffs pursuing administrative remedies. For example, the Delaware statute requires filing an appeal from a decision of the State Personnel Commission within thirty days.[333] This thirty day period, however, does not include the filing of cross-appeals, as this would compel the prevailing party to file a cross-appeal in anticipation of an appeal or risk being barred by the statute should the losing party file on the thirtieth day.[334]

At the federal level, Title VII provides a prime example of the confusion encountered in attempting to comply with administrative procedures while preserving one's right to bring a civil action thereunder. The statute gives a plaintiff ninety days in which to commence a civil action once the EEOC has issued a "right to sue" letter.[335] The EEOC practice in recent years has been to notify the complainant that it is declining any further involvement in the matter, but that the complainant may obtain a "right to sue" letter if desired.[336] The courts in Delaware have held that the ninety day period for filing suit following the "right to sue" letter begins to run with the receipt of the first letter advising the plaintiff that the EEOC will no longer

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has been made and has been communicated to the plaintiff. *See* Lanyon v. University of Del., 544 F. Supp. 1261 (D. Del. 1982), *aff'd*, 709 F.2d 1493 (3d Cir. 1983); Delaware State College v. Ricks, 449 U.S. 250 (1980), *rev'g*, 605 F.2d 710 (3d Cir. 1979).

330. *See supra* note 300 and accompanying text.

331. *See* Erlandson v. Pioneer Salt & Chem. Co., 20 Fair Empl. Prac. Cas. (BNA) 716, 717 n.11 (D. Del. 1978) (lists number of actions which will toll the statute); *Lanyon*, 544 F. Supp. at 1262 (statute tolled for misinformation given by the state administrative agency to plaintiff concerning deadlines for filing a claim); Cannon v. State of Del., 523 F. Supp. 341 (D. Del. 1981) (EEOC's failure to follow its own procedure tolled the running of the statute as against plaintiff, since she would have been barred from filing suit through no fault of her own).

332. Missing the state time limit cannot "shrink the federal remedy." *Erlandson*, 20 Fair Empl. Prac. Cas. at 717 (quoting Bonham v. Dresser Indus., Inc., 569 F.2d 187 (3d Cir. 1978)).

333. DEL. CODE ANN. tit. 29, § 5949(b) (1983).

334. *See* Coffin v. Department of Natural Resources & Environmental Control, 391 A.2d 193, 194-95 (Del. 1978).

335. *See* 42 U.S.C. § 2000e-5(f)(1) (1983). *See* Annot., 4 A.L.R. FED. 833 (1970).

336. *See* Garvin v. American Life Ins. Co., 416 F. Supp. 1087 (D. Del. 1976).

be involved.[337] Notwithstanding this strict interpretation, the ninety day period, like the underlying one, can also be equitably tolled.[338]

2. Exhaustion of Administrative Remedies

Regardless of whether a private right of action is ultimately authorized by a statute, administrative remedies must first be pursued.[339] Initially, the aggrieved party must file a complaint with a certain office or board. This seemingly simple requirement frequently results in confusion because the similarity in name and function of

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337. *Id.* at 1089-92. The court stated:

> The majority of courts which have had similar issues before them have concluded that Section 706(f)(1) contains no authority for a two-letter procedure, and that Congress intended the 90-day limitations period to begin running upon notification that one of the enumerated contingencies had arisen, not upon receipt of a "Right to Sue" letter . . . . Clearly the statute provides no authority for a procedure the operative effect of which is to permit the aggrieved party to decide when the limitations period will begin to run.

Id. at 1089-90. *See also* DeMatteis v. Eastman Kodak, 511 F.2d 306 (2d Cir. 1975). Because plaintiff had not filed suit within 90 days of being informed that the EEOC would take no further action on her complaint, her action was time-barred. See also *Robinson*, 33 Fair Empl. Prac. Cas. at 884, where the court laid down the law in no uncertain terms:

> The plaintiff consulted several lawyers promptly after she received the Right to Sue letter from the EEOC . . . . She had ample opportunity to discover that, under the caselaw in this district, the first letter from the EEOC notifying her of the dismissal of her complaint triggered the 90-day period for filing suit.

338. *See Trader*, 576 F. Supp. at 1205. Although plaintiffs were unsuccessful in asserting their Title VII claims because the 90 day period had elapsed prior to their filing their complaints, the court stated: "[T]he substantive policy of Title VII—to promote the humanitarian goal of ending employment discrimination—will be equally served by allowing plaintiffs, *in appropriate cases*, to institute federal court actions despite non-compliance with the 90-day filing period." *Id.* (emphasis added). Further language suggests that an "appropriate case" would be one in which the defendant was responsible for the late filing. *Id.* at 1206. *See also Lanyon*, 544 F. Supp. at 1262 (90-day filing period tolled for misinformation supplied by Delaware Department of Labor concerning deadlines); EEOC v. Delaware Trust Co., 416 F. Supp. 1040 (D. Del. 1976) (despite several errors in delivery of documents, appropriate filing procedures and time period were satisfied).

339. A description of the administrative process is found in Sandler, *Introduction and Overview of Employment Discrimination Law*; Washington, *Practice Before Delaware Anti-Discrimination Section*; Lewis, *Practice Before the EEOC*; and Schranck, *Representing the Respondent Employer in the Administrative Process*, Addresses at the Delaware State Bar Association and the Delaware Law School Continuing Legal Education Seminar on Employment Discrimination Law (Mar. 26, 1982) (outlines and audiotapes available at the Delaware Law School Library).

the various agencies[340] can easily lead to filing with the wrong agency[341] as well as failing to file with both the state and federal administrative boards when required by statute.[342] In addition to following formal administrative procedures,[343] a complainant may also have to comply with informal ones.[344] Significantly, there is no requirement that administrative remedies be exhausted when the claim is brought under 42 U.S.C. § 1983,[345] thus making section 1983 most attractive to a plaintiff falling within its coverage.

3. Relief Sought and Process Desired

Should a cause of action survive the pitfalls of time constraints and administrative procedures, further choices are necessary as to the relief sought and the process most likely to enable the plaintiff to obtain such relief. The process chosen is necessarily dependent upon the preferred relief and will often involve trade-offs. If equitable relief such as reinstatement is desired, the option of a jury is lost.

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340. *See* EEOC v. State Dep't of Health & Social Servs., 595 F. Supp. 568 (D. Del. 1984). Under Reorganization Plan No. 1 of 1978, much of this authority was consolidated in the EEOC as part of its enforcement duties. This should simplify the filing process considerably, but the constitutionality of the authority for that reorganization is not free from doubt.

341. *See* EEOC v. Delaware Trust Co., 416 F. Supp. 1040 (D. Del. 1976). In *Delaware Trust*, even the United States Postal Service was embroiled in the confusion. The plaintiff's letter, addressed to the EEOC, was delivered to the Office of Federal Contract Compliance Programs (OFCCP), the arm of the Department of Labor which enforces discrimination claims against federal contracts. Both of these agencies must be distinguished from federal, state, and local Civil Rights Commissions, which also investigate claims of discrimination.

342. *See Cannon*, 523 F. Supp. at 341 (Title VII claim required to be filed with both the Delaware Department of Labor and the EEOC; EEOC must defer to primary jurisdiction of Department of Labor before it processes a complaint); National Cash Register v. Riner, 413 A.2d 890 (Del. 1979) (claim of age discrimination must first be filed with appropriate state agency to give it an opportunity to resolve the conflict). *See* Annot., 72 A.L.R. FED. 10 (1985).

343. *See, e.g.*, Skomorucha v. Wilmington Hous. Auth., 504 F. Supp. 836 (D. Del. 1980) (Title VII requires that the aggrieved party first file with a state or local authority, and then with the EEOC). *See also* Annot., 23 A.L.R. FED. 895 (1975).

344. *See* Ferguson v. E.I. du Pont de Nemours & Co., 560 F. Supp. 1172 (D. Del. 1983). In *Ferguson*, one of the reasons the court gave for rejecting plaintiff's claim for wages commensurate with work she alleged was managerial in nature was that she had never requested any adjustment of her pay based on her belief that as a secretary she was doing managerial work. Similarly, plaintiff's failure to request reconsideration of a review board's decision worked against him in Guilday v. Department of Justice, 451 F. Supp. 717 (D. Del. 1978).

345. Monroe v. Pape, 365 U.S. 167 (1961).

A request for legal relief brings the seventh amendment right to jury trial into play. Sometimes legal and equitable relief may be pursued simultaneously, either because the statute so permits,[346] or because more than one cause of action is being asserted.[347] On the other hand, not all types of relief are available under each potential cause of action.[348] The importance of this decision cannot be overemphasized, since the final choice to pursue a certain type of relief may effectively foreclose other avenues.

A plaintiff desiring monetary relief has several choices: front pay, back pay, compensatory damages, and punitive or liquidated damages. Front pay resembles a promotion with commensurate pay while the plaintiff awaits the actual promotion.[349] Back pay compensates plaintiff for wages which would have been earned but for the improper employment action.[350] Compensatory damages encompass damages other than lost wages; most frequently they are requested for the mental distress engendered by the employer's action. Punitive damages retain their usual meaning in the employment context. Liquidated damages are analogous to punitive damages,[351] but the maximum amount recoverable is often limited by statute.[352]

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346. *See* 29 U.C.S. § 1132(c) (1983) (both injunctive relief and damages are available under ERISA).

347. *Hanshaw*, 405 F. Supp. at 297. The complainants' prayer for "other equitable relief as the court deems appropriate" was proper since plaintiffs had asserted claims under §§ 1981, 1983, and 1985 as well as Title VII, and "the limits imposed by the equitable nature of the relief granted under section 2000e-5(g) do not apply to the causes of action under section 1981, 1983 and 1985." *Id.*

348. *See, e.g.*, Eckerd v. Indian River School Dist., 475 F. Supp. 1350, 1357 (D. Del. 1979) (sole remedies under DEL. CODE ANN. tit. 14, § 1414 (1974), are back pay and reinstatement). Sometimes the statute requires election of remedies, as does the Railroad Safety Act, 45 U.S.C. § 441(d) (1983). The Railway Labor Act provides for exclusively administrative relief. 45 U.S.C. § 153 (1983). *See* Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183 (1982).

349. *See* Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 FORDHAM L. REV. 579 (1984).

350. Back pay does not, however, include compensatory damages. The use of correct terminology is critical. In Erlandson v. Pioneer Salt & Chem. Co., 20 Fair Empl. Prac. Cas. (BNA) 716 (D. Del. 1978), a prayer for "compensatory and punitive damages" was stricken as unrecoverable under the ADEA.

351. "The liquidated damages provision of ADEA . . . is 'in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA.'" *Kneisley*, 577 F. Supp. at 738 (quoting Kelly v. American Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981)).

352. The Fair Labor Standards Act, 29 U.S.C. § 216(b) (1983), and the Equal Pay Act, 29 U.S.C. § 206(d)(3) (1983), both permit recovery of liquidated damages in an amount equal to that obtained as back pay.

Title VII allows recovery of back pay for the two years prior to the filing of the claim. However, compensatory and punitive damages are unavailable.[353] While the ADEA permits a plaintiff to obtain back pay and liquidated damages,[354] damages for emotional distress have been interpreted as not being recoverable.[355] For violations of constitutional rights, a plaintiff may request compensatory as well as punitive damages.[356] Additionally, punitive damages are available in section 1983 actions "primarily for their effect on defendant, and to vindicate the public interest in deterring malicious or wanton conduct by public officials."[357] The normal rules for awarding compensatory and punitive damages in a tort or contract action apply to complaints of unfair employment practices brought under common law causes of action.[358]

The scope of equitable relief available to a plaintiff is equally broad.[359] This relief may include orders to hire, promote, or reinstate.[360] It may be only an opportunity to clear one's name[361] or to

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353. 42 U.S.C. § 2000e-5(g) (1983) sets out the remedies available under Title VII.

354. 29 U.S.C. § 626(b) (1983). As noted previously, liquidated damages are only available where the violation is voluntary, knowing, or with reckless disregard for the consequences. *Kneisley*, 577 F. Supp. at 738. *See also* Annot., 55 A.L.R. FED. 604 (1981).

355. Section 7(b) of the ADEA defines monetary relief only in terms of "amounts owing to a person as a result of a violation of this chapter . . . ." The "amounts owing" to a victim of age discrimination are not further defined by state. Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir., 1982), *cert. denied*, 459 U.S. 1039 (1982) (neither damages for pain and suffering nor punitive damages available). *See also* Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499 (D. Del. 1977).

356. *See* Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977). Plaintiff brought an action under § 1983 alleging that the university did not renew his contract because of his exercise of his first amendment rights. The court awarded plaintiff compensatory damages for the emotional distress, humiliation, and embarrassment suffered by him as a result of the defendants' conduct, and also granted him punitive damages against the university's president for his wanton disregard of plaintiff's constitutional rights. *Id.* at 1274. Similarly, a jury awarded both compensatory and punitive damages to a high school principal who was terminated with reckless disregard of his constitutional rights to due process and privacy; the court ordered a remittitur, finding the amounts excessive. Schreffler v. Board of Educ. of Delmar School Dist., 506 F. Supp. 1300 (D. Del. 1981).

357. *Aumiller*, 434 F. Supp. at 1312.

358. *See, e.g.*, Reiver v. Murdoch & Walsh, P.A., 36 Fair Empl. Prac. Cas. (BNA) 997 (D. Del. 1985) (discussion of measure of compensatory damages for breach of contract; punitive damages possible).

359. *See* Annot., 38 A.L.R. FED. 27 (1978).

360. *See Aumiller*, 434 F. Supp. at 1307. "[R]einstatement is an integral part of the remedy where a teacher, or other public employee, has been terminated from employment for the exercise of rights protected by the First Amendment."

361. Morris v. Board of Educ. of Laurel School Dist., 401 F. Supp. 188 (D.

be heard fairly.[362] Injunctive relief may be available to change decision-making procedures,[363] require institution of training programs,[364] or expunge personnel records.[365] Preliminary injunctive relief may be sought since financial hardship generally accompanies loss of employment.[366] Seeking equitable relief would prohibit a jury trial; this is probably desirable where the plaintiff's conduct as well as the defendant's may be in issue.[367]

Del. 1975). Here, plaintiff's constitutionally protected liberty interest in her teaching career entitled her to an opportunity to clear her name with respect to allegations of her repeated insubordination. The court found that this lawsuit had provided her with such an opportunity.

362. *See id.* at 213. "Under the contractual provisions breached [procedural safeguards against unfair teacher evaluations in specified situations such as this case, plaintiff] had a right to be considered for reemployment in an atmosphere uncontaminated by charges which she did not have a fair opportunity to rebut." *Id.* at 213. Accordingly, the court required the school board to consider plaintiff for reemployment for the following school year.

363. *See* Stallings v. Container Corp. of Am., 75 F.R.D. 511 (D. Del. 1977) (court directed defendant to develop a new shift foreman promotion procedure to guard against the subjective procedures challenged by plaintiffs). *See supra* text accompanying notes 11-13. The court required defendant to submit the plan for its approval prior to its institution.

364. *See Stallings*, 75 F.R.D. at 523 (request denied on the facts but not on principle).

365. *See Schreffler*, 506 F. Supp. at 1300 (reinstatement and expungement contingent upon plaintiff's accepting remittitur of punitive and compensatory damages); Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977).

366. See, e.g., *Skomorucha*, 504 F. Supp. at 836 (D. Del. 1980), where such relief was available but not warranted by the facts. Note the financial hardship encountered by plaintiffs following their termination in *Eckerd*, 475 F. Supp. at 1350, and *Aumiller*, 434 F. Supp. at 1273.

The standards for granting a preliminary injunction in an employment discrimination case are the same as for any other case. The court must consider the moving party's likelihood of success on the merits, whether the movant will suffer irreparable injury if the injunction is not granted, whether the opposing party will be injured, and the degree to which the public interest will be affected by granting the relief. *Skomorucha*, 504 F. Supp. at 838. In Lewis v. Delaware State College, 455 F. Supp. 239, 251 (D. Del. 1978), the court found that plaintiff "made a strong showing that her constitutional rights were violated and that, as a result, she . . . had to accept a lower paying job in other than her chosen field. . . . [N]o further showing of irreparable harm is required."

367. "[S]exually aggressive conduct and explicit conversation on the part of a plaintiff may bar a cause of action for sexual harassment." *Ferguson*, 560 F. Supp. at 1196 (citations omitted).

In Knotts v. Bewick, 467 F. Supp. 931, 937-38 (D. Del. 1979), plaintiff's on-the-job conduct had been so "impossible" and disruptive that only nominal damages were awarded in lieu of back pay and reinstatement. *Cf.* Goldsmith v. E.I. du Pont de Nemours & Co., 571 F. Supp. 235, 245 (D. Del. 1983), which limited plaintiff's relief to damages for retaliatory discharge in light of a work record characterized by absenteeism and low productivity.

The plaintiff should choose the process which will maximize his chances of obtaining the desired relief. The first step is to select a state or federal forum.[368] The relative efficacy of the various state and federal administrative agencies should be considered when making this decision, keeping in mind that a record is being developed during the course of administrative proceedings.[369] Finally, and perhaps most importantly, the plaintiff must decide whether to demand a jury.[370]

It is especially interesting to note that an ADEA claim is one of the few causes of action permitting a jury trial.[371] The jury may decide claims for back pay and liquidated damages,[372] but may not

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Plaintiff's conduct may be relevant in considering whether to reinstate him but not in awarding back pay. *See* Kneisley v. Hercules, Inc., 577 F. Supp. 726 (D. Del. 1983). A possible exception to this is where plaintiff's conduct is directly related to the request for back pay, as in *Stallings*, 75 F.R.D. at 522-23. One plaintiff had refused a promotion, which barred his claim for back pay subsequent to the date of his refusal.

368. Section 1983 and claims of constitutional violations may be brought in state as well as federal courts under the state's concurrent jurisdiction to hear any federal question which is not expressly reserved to the federal courts by statute. *See generally* 28 U.S.C. §§ 1331, 1333, 1338 (1983).

369. As discussed previously, some administrative remedies can be pursued simultaneously; others require an election. In Washam v. J.C. Penney Co., 519 F. Supp. 554 (D. Del. 1981), the court held that an NLRB award based on retaliatory discharge for union activities did not bar plaintiff's EEOC claim for race discrimination. "Neither the NLRB nor the EEOC presented Washam with a forum in which it was possible for him to litigate both racial discrimination and unfair labor practice claims. He presented each to the appropriate agency." *Id.* at 559 (relying upon Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and referring to Meltzer, *Labor Arbitration and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30 (1971)). *See also* Note, *National Labor Relations Act: The Roles of the NLRB and the Courts of Appeals After* Pullman-Standard *in Determining Employer Motivation in Section 8(a)(3) Dual Motive Cases*, 36 VAND. L. REV. 1095 (1983).

370. This decision is not left to plaintiff alone. Where a cause of action permits a jury trial, defendants have demanded one. As mentioned previously, a defendant may desire a jury trial when plaintiff's conduct is or may be culpable. A defendant may also want a jury trial where its action, though discriminatory, is such as to appeal to the jury's sympathy or understanding. *See, e.g.*, Fesel v. Masonic Home of Del., Inc., 428 F. Supp. 573 (D. Del. 1977) (defendant refused to hire male nurse because the nurses had to attend to the predominantly female residents' personal needs, such as bathing; this will be particularly likely to elicit sympathy from older female jurors who could conceive of themselves in such a situation).

Section 1983 permits jury trials. Tyler v. Board of Educ. of New Castle County Vocational-Technical School Dist., 519 F. Supp. 834 (D. Del. 1981). Arguably, they are also allowable under ERISA. *See* Note, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 717 (1983).

371. 29 U.S.C. § 626(c)(2) (1983). *See Rechsteiner*, 75 F.R.D. at 499.

372. *Rechsteiner*, 75 F.R.D. at 502-03; Marshall v. Electric Hose & Rubber Co., 413 F. Supp. 663 (D. Del. 1976).

award relief on equitable claims.[373] Realistically, jury members may not be able to identify with a plaintiff of a different sex or race, but may more easily see themselves as growing older. Consequently, the effect of a jury in an age discrimination case could be significant.[374]

B. The Prima Facie *Case*

1. The Core Elements

Most claims of unlawful employment practices involve a failure to hire, promote, or discharge.[375] However, an employee may also allege a "constructive discharge" if working conditions become so intolerable as to force him to resign.[376] To survive a motion for summary judgment on such discrimination claims, a plaintiff must establish a *prima facie* case.

The elements necessary to establish a *prima facie* case of discrimination were first set down by the Supreme Court in *McDonnell-Douglas Corp. v. Green*[377] in the context of a Title VII claim. They have since been required for other causes of action alleging discrimination.[378] Plaintiff must produce evidence that he was a member of the protected class, was qualified for the job from which he was

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373. *See Marshall*, 413 F. Supp. at 668 (quoting Curtis v. Loether, 415 U.S. 185, 195-96 (1974)). The court in *Curtis* stated that "[w]here the 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.' "

374. *See supra* notes 196-208 and accompanying text. This remains purely speculative, however, because the reported cases involving the ADEA either do not include a demand for a jury or are resolved at preliminary stages, thereby eliminating a trial on the merits.

375. *See, e.g.*, Annot. 58 A.L.R. FED. 98-112 (1982).

376. *See Ferguson*, 560 F. Supp. at 1202 n.72. Plaintiff must show a deliberate attempt to create intolerable conditions but need not prove defendant specifically intended to get rid of plaintiff. "Under the theory of constructive discharge, a voluntary termination is considered a discharge if a reasonable person would resign under similar conditions." *Id.* at 1203.

The "constructive discharge" theory has been extended to "constructive demotions" as well.

> I see no reason to distinguish the situation where an employer makes conditions so intolerable that the employee, in response, reasonably decided to take a demotion from one where the employee resigns. To reject such a constructive demotion theory would, in effect, penalize an employee for conduct amounting to a mitigation of damages.

Toscano, 570 F. Supp. at 1206.

377. 411 U.S. 792 (1973).

378. National Cash Register v. Riner, 424 A.2d 669 (Del. Super. Ct. 1980) (adopted under the Delaware Anti-Discrimination statute). These elements are also required under the ADEA. Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977).

discharged (demoted or for which he was not hired), and that members not in the protected class were treated more favorably.[379]

The first element to be proven is discriminatory motive.[380] Because proving that an employer's practices evidence an actual intent to discriminate requires subjective manifestations of this intent, the courts have adopted two other theories. In the first, applicable to section 1983 and Title VII, a plaintiff is required to show disparate treatment; the focus is on the discriminatory motive underlying the treatment.[381] Plaintiff must demonstrate that similarly situated employees were not treated equally.[382] The more recent theory, utilized

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379. *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Obviously, these basic elements must be tailored to fit the specific context. For example, to support a charge of retaliatory discrimination, plaintiff must produce evidence "that: 1) the employee participated in the protected activity (filing a discrimination complaint); 2) the employer knew of this participation; and 3) following this participation, the employee was denied a promotion within such a period of time and in such manner that the court can infer a retaliatory motivation." *Guilday*, 485 F. Supp. at 326 (citations omitted).

A *prima facie* case for an allegation of deprivation of constitutional rights is established when activity protected under the *Pickering* balancing test is shown to be a substantial or motivating factor in the discharge of a public employee. Pickering v. Board of Educ., 391 U.S. 563 (1968). *Eckerd*, 475 F. Supp. at 1358 (citing Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977)). The *Pickering* test involves balancing "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

380. *See* Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Post Service Board of Governors v. Aikens, 70 CALIF. L. REV. 1201 (1982); Comment, *The Standard of Appellate Review in Title VII Disparate-Treatment Actions*, 60 U. CHI. L. REV. 1481 (1983); Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983).

381. *See Wilmore*, 699 F.2d at 669-70.

382. *See* Davis v. Carolina Freight Carriers Corp., 32 Fair Empl. Prac. Cas. (BNA) 1489, 1495 (D. Del. 1983) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

With respect to plaintiff's demonstration of disparate treatment of similarly situated coaches (those who failed to follow administrative directives), the court in *Morris*, 401 F. Supp. at 201, stated:

> [T]he administration's treatment of . . . other coaches conclusively establishes that a single failure to follow a directive about visitors at practice was not considered . . . to be cause for non-renewal. Indeed, the fact is that no deficiency has been attributed to Miss Morris which could not be attributed with significantly greater justification to other coaches who subsequently were recommended for and received tenure.

While plaintiff successfully demonstrated disparate treatment, she ultimately failed on her claim for racial discrimination: "[This court is not required] to close its eyes to evidence indicating a different kind of motivation, and the irresistible

under Title VII alone, allows plaintiff to show the disparate impact of the employer's practices.[383] Liability may be imposed upon an employer under this theory when the challenged practices evince a disparate outcome, regardless of how benign the underlying motive.[384] Thus, practices which are facially neutral in their treatment of different groups but in fact affect one group more harshly than another may be found discriminatory even in the absence of such intent if the practices cannot be justified by business necessity.[385] Disparate impact need not be demonstrated statistically.[386] However, statistical evidence is normally helpful to present an objectively verifiable pattern of disparate impact.[387]

The second element is that plaintiff must be a member of the class protected by the statute; this is simply a matter of showing that the plaintiff falls within the coverage of the statute.[388] Plaintiff

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conclusion on this record is that the disparity in . . . treatment of Miss Morris and the other coaches was attributable, not to her race, but to the Mitchell letter." *Id.*

383. *See Wilmore*, 699 F.2d at 670.

384. *Id.*

385. *Id.* (quoting Croker v. Boeing Co. (Vertol Division), 662 F.2d 975, 991 (3d Cir. 1981)). The relationship between a practice justified by business necessity and a bona fide occupational qualification is discussed *infra* text accompanying notes 477-486.

386.

> Plaintiffs . . . are not limited to statistical proof, however. If a plaintiff can show a pattern of individual employment decisions made pursuant to the challenged practice in which qualified blacks are consistently passed over in favor of whites with equal or poorer qualifications, an inference of disparate impact could properly be drawn even though a comparison of the overall results of the practice with what one would expect from a random selection does not produce statistically significant results.

Stallings v. Container Corp. of Am., 75 F.R.D. 511, 520-21 (D. Del. 1977). In this case, the court found for plaintiffs on the strength of the non-statistical evidence. *Id.* at 521.

387. "A prima facie case of disparate impact can be shown by statistical indicia." *Wilmore*, 699 F.2d at 670. Additionally, the court in *Stallings* stated that "[o]rdinarily, a plaintiff's statistical evidence plays a major role in disparate impact cases. If there is statistically significant evidence of disparate impact, absent a showing by the employer of business necessity or the like, the plaintiff is entitled to relief." *Stallings*, 75 F.R.D. at 520.

Sometimes statistics cannot be used effectively because the absolute numbers involved may be too small for drawing reliable conclusions. *See id.* at 519. Also, the relevant labor pool with which to compare the actual work force is usually the metropolitan area rather than the boundaries of political subdivisions. EEOC v. du Pont de Nemours & Co., 445 F. Supp. 223 (D. Del. 1978).

388. *See* Guilday v. Department of Justice, 451 F. Supp. 717 (D. Del. 1978). *See also* 42 U.S.C. § 2000e-16 (Title VII amendments to add federal government employees to its protection made retroactive to any then-pending claims).

must also prove that he was qualified for and applied for the position in question.[389] In the contexts of discharge and failure to promote claims, qualification for the position may be established by showing that the plaintiff did satisfactory work.[390] Where a plaintiff has alleged a denial of promotion, a "generalized expression of interest can be considered an application,"[391] at least in situations where positions were not posted, thus making specific application impossible.[392]

The last element to be proved by a plaintiff in establishing a *prima facie* case is that the unprotected class has been treated more favorably.[393] This requirement is normally satisfied by showing that the position was filled by a person not in the protected class,[394] that the employer continued to seek qualified applicants after rejecting the plaintiff,[395] or that job benefits were conditioned on sexual favors.[396] However, plaintiff need not show that the position was filled by another person or that the employer continued to seek applicants in an age discrimination claim involving a reduction-in-force.[397]

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389. *McDonnell-Douglas*, 411 U.S. at 802.

390. Note the value to plaintiffs' cases of their good personnel records in Morris v. Board of Educ. of Laurel School Dist., 401 F. Supp. 188 (D. Del. 1975), and Guilday v. Department of Justice, 485 F. Supp. 324 (D. Del. 1980). Plaintiff's case was greatly impaired by his record of absenteeism and low productivity in Goldsmith v. E.I. du Pont de Nemours & Co., 571 F. Supp. 235 (D. Del. 1983).

391. *Ferguson*, 560 F. Supp. at 1193.

392. *Id.* Ferguson was quite vocal and persistent in her attempts to obtain a promotion. *See id.* at 1180-81.

393. *See McDonnell-Douglas*, 411 U.S. at 802.

394. Because she was not replaced by a male after her termination, plaintiff failed to establish a prima facie case of sex discrimination in Lanyon v. University of Del., 544 F. Supp. 1262 (D. Del. 1982), *aff'd*, 709 F.2d 1493 (3d Cir. 1983). However, a plaintiff satisfied this element by alleging that he was fired ostensibly for financial reasons but was replaced within days by a female, and that such action was in furtherance of a company practice to hire males for managerial positions and females for the lower-paying menial jobs. Zalewski v. M.A.R.S. Enterprises, Ltd., 561 F. Supp. 601 (D. Del. 1982).

395. *See* Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346 (D. Del. 1978).

396. See Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983), where plaintiff was denied a promotion which ultimately went to another woman who was involved in an affair with the supervisor. Plaintiff had refused to engage in sexual relations with the supervisor. The court stated, "[E]ven where, for example, one woman is promoted over another, if the unsuccessful applicant would not have been treated in the same manner if she were a man, the employer is still liable for sex discrimination." *Id.* at 1199 (citing Skelton v. Balzano, 424 F. Supp. 1231, 1235 (D.D.C. 1976)).

397. *Kneisley*, 577 F. Supp. at 731. The court stated that "[s]o long as plaintiff pursues his theory of the case as involving a discriminatory layoff, he need not introduce evidence of replacement by a younger employee." *Id.*

2. Other Allegations

Rule 8(a) of the Federal Rules of Civil Procedure has simplified the procedure for pleadings by stating that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[398] Notwithstanding the more relaxed requirements of Rule 8(a), the Third Circuit has required plaintiff to "set forth with specificity each defendant's alleged violations" in a civil rights complaint.[399] However, some courts may be willing to construe the complaint as a whole to determine if the requisite information is present.[400] When liquidated damages are sought for a willful violation, it is sufficient that the complaint alleges the condition of the mind in general terms.[401]

Both Title VII and the ADEA require plaintiffs to allege that all state remedies have been exhausted.[402] A statement that "all timeliness requirements were met," accompanied by affidavits including a copy of the charge filed with the state agency showing that the requisite waiting period had expired, satisfied the Title VII requirement.[403] The complaint need not allege separate acts to charge defendants as acting in both their individual and official capacities.[404] Of course, the complaint must also contain information required in all civil actions, such as a jurisdictional allegation[405] and a properly alleged class for a class action.[406]

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398. FED. R. CIV. P. 8(a)(2) provides in pertinent part: "(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

399. *See* Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976).

400. *See* Trader v. Fiat Distributors, Inc., 476 F. Supp. 1194 (D. Del. 1979) (court found complaint not pleaded with enough specificity; advised plaintiffs as to what information to include in their amended complaint).

401. *See Rechsteiner*, 75 F.R.D. at 502 (relying upon FED. R. CIV. P. 9(b)).

402. 29 U.S.C. §§ 5000e-5(c), 633(b) (1983). The court chastised both parties for failure to comply with such a provision in *Rechsteiner*, 75 F.R.D. at 507. However, the court may grant leave to amend to correct this deficiency. *See* Patton v. Conrad Area School Dist., 388 F. Supp. 410 (D. Del. 1975).

403. *Hanshaw*, 404 F. Supp. at 297. *See also Trader*, 476 F. Supp. at 1206-07 (willingness to look at record, not only the complaint, for proof of satisfaction of this requirement); *Erlandson*, 20 Fair Empl. Prac. Cas. at 717 (subsequent affidavits, uncontested by defendant, permitted to satisfy requirement when complaint was "unclear on [its] face").

404. *See Hanshaw*, 405 F. Supp. at 298 (citing Wood v. Strickland, 420 U.S. 308 (1975)).

405. *See* FED. R. CIV. P. 8(a)(1).

406. See *id.* at Rule 23 for requirements neccessary to maintain a class action. In a civil rights class action, the class must be properly certified for each claim.

C. *The Burden of Proof*

Historically, there were three phases to proving a discrimination claim under Title VII.[407] Plaintiff first had to establish a *prima facie* case of discrimination by a preponderance of the evidence.[408] If plaintiff succeeded in doing so, the burden then shifted to defendant to articulate a nondiscriminatory reason for the action.[409] The burden then returned to plaintiff to prove, again by a preponderance of the evidence, that the reasons offered by defendant were merely pretextual.[410] These burdens were modified in *United States Postal Service v. Aikens*[411] to eliminate the alternating burdens in favor of an analysis of all the evidence.[412]

Both standards require plaintiff to ultimately demonstrate by a preponderance of the evidence that the employer intentionally discriminated against him on an impermissible basis. "The plaintiff may succeed in this either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[413] Testimony from similarly situated employees is admissible and may be introduced to rebut an employer's asserted justification for the action.[414] Additionally, evidence of conduct outside

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Brotherhood Ry. Carmen of the U.S. & Can. v. Delpro Co., 98 F.R.D. 471 (D. Del. 1983); Wilmore v. City of Wilmington, 533 F. Supp. 844 (D. Del. 1982), *rev'd*, 699 F.2d 667 (3d Cir. 1983). *See also* Note, *Reinstating Vacated Findings in Employment Discrimination Class Actions: Reconciling* General Telephone Co. v. Falcon *with* Hill v. Western Electric Co., 1983 DUKE L.J. 821 (1983). The need to certify a class pursuant to FED. R. CIV. P. 23 also applies when the EEOC is the plaintiff. EEOC v. Delaware Trust Co., 81 F.R.D. 448 (D. Del. 1979).

However, "[t]he rule does not necessitate a showing that each class member presents exactly the same legal and factual questions, but rather that there be *some* questions of law or fact common to all class members." *Wilmore*, 30 Fair Empl. Prac. Cas. at 1763. Nor does the requirement of typicality mean that all plaintiffs' claims be identical. *Id.* at 1764. The class may be divided into subclasses to reduce conflict and generally facilitate management. Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287 (D. Del. 1975).

407. This burden of proof also applies to those civil rights actions which have adopted the methodology of Title VII, such as the ADEA. *See supra* note 378.

408. *See Ferguson,* 560 F. Supp. at 1192 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)).

409. *See id.*

410. *See id.*

411. 460 U.S. 711 (1983).

412. *Id.*

413. *Id.*

414. Kneisley v. Hercules, Inc., 577 F. Supp. 726 (D. Del. 1983). "Similiarly situated" in this case meant persons in the same department as the plaintiff, as he alleged a department-wide practice of discrimination. "To prove the existence of a discriminatory reduction-in-force in the Organics Department, Kneisley may

the time period may be admissible as it is relevant to the issue of discriminatory intent.[415]

D. Defenses to a Charge of Unfair Employment Practices

A defendant has several negative defenses available. As discussed previously, the statute may not provide a private right of action,[416] or plaintiff may have failed to exhaust state remedies as required by statute.[417] The defendant may contend that it is not subject to the statute: for example, the statute may only apply to employers of a certain size or type,[418] or the defendant's action occurred prior to the statute's effective date.[419] A defendant may assert that the plaintiff's claim is barred by the statute of limitations.[420]

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introduce testimony of other Department employees who were allegedly victims of the same coercion as was Kneisley." *Id.* at 738.

415. *Ferguson*, 560 F. Supp. at 1191. The court stated:

> Once it is found that the plaintiff has a timely claim, evidence relating to past practices, even though not separately actionable, constitutes evidence relevant to discriminatory intent and recovery. This conclusion is virtually dictated by the remedial provisions of section 706(g) which limit the award of back pay to a time period of two years prior to the filing of the charge with the EEOC.

Id. See also Goldsmith v. E.I. du Pont de Nemours, Inc., 32 Fair Empl. Prac. Case. (BNA) 1879, 1880 (D. Del. 1983).

416. *See supra* notes 161-162, 164 and accompanying text.

417. *See* Cannon v. State, 523 F. Supp. 341 (D. Del. 1981). *See generally supra* notes 339-345 and accompanying text. As usual, however, exhaustion is not required if pursuit of such remedy would have been futile. Aiello v. City of Wilmington, 426 F. Supp. 1272 (D. Del. 1976).

418. *See* Reiver v. Murdoch & Walsh, P.A., 36 Fair Empl. Prac. Cas. (BNA) 997 (D. Del. 1985). Although the court in *Reiver* ultimately dismissed the case on the ground that the controversy was not ripe, it discussed the applicability of Title VII to a position on the board of directors of a professional corporation. The court noted that "certain private membership clubs, 42 U.S.C. § 2000e(b)(2), religious corporations, associations, educational institutions, or societies, 42 U.S.C. § 2000e(b), are expressly excluded from the prohibitions of Title VII with respect to employment." *Id.* at 1000.

419. *See* Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886 (D. Del. 1978). The court granted summary judgment for defendant because the 1978 amendments to the ADEA were inapplicable to a pension plan instituted in 1971. Plaintiff's claim of involuntary retirement was dismissed for failure to state a claim on which relief could be granted since his retirement occurred on December 31, 1978, and the amendments prohibiting involuntary retirement did not take effect until January 1, 1979. *See also* McDonnell v. Gannett News Serv., Inc., 518 F. Supp. 1326 (D. Del. 1981). *Cf.* Guilday v. Department of Justice, 451 F. Supp. 717 (D. Del. 1978) (Title VII retroactive for federal government employees with pending claims).

420. *See supra* notes 318-338 and accompanying text. This defense was raised in a large number of cases, probably because of the complexity of several periods of limitation coupled with lack of clarity as to when each begins to run.

When a plaintiff alleges that an employer should be liable on the basis of *respondeat superior*, the employer can successfully defend on the basis that it did not know and should not have known of the acts constituting the violation, or that it took action to rectify the situation. In *Robinson v. E.I. du Pont Nemours & Co.*,[421] the court found that plaintiff had never complained to anyone in the company about the alleged sexual advances made by her supervisor, nor did she produce evidence that defendants knew or should have known of the conduct.[422] In *Ferguson v. E.I. du Pont de Nemours & Co.*,[423] the court did not hold the company liable since, when plaintiff notified her supervisors of the harassment to which she was allegedly subjected, the supervisors promptly investigated her complaint and the conduct thereupon ceased.[424]

The court reached a contrary result in *Toscano v. Nimmo*.[425] Although defendant hospital argued that it could not be responsible for the supervisor's unlawful conduct unless his supervisors knew or should have known that such actions were occurring,[426] the court held that this was not a prerequisite to liability.[427] Even if the court were to adopt this position, however, the court noted that plaintiff had notified her superiors of the supervisor's conduct yet they failed to take any corrective action.[428]

In addition, individual defendants may attempt to avoid liability for the corporate action. However, as organizations can only act through individuals, however, an agency relationship is easily found.[429] When the cause of action is based on section 1983, defendant can

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421. 33 Fair Empl. Prac. Cas. (BNA) 880 (D. Del. 1979).
422. *Id.*
423. 560 F. Supp. 1172 (D. Del. 1983).
424. *Id.* at 1199. The court stated that:
employers should not be liable if they seek to alleviate or dispel hostile environments by methods such as strict and prompt remedial measures and strictly enforced and well-known company policies. Further, when supervisory personnel engage in such activity, they act outside the scope of their authority and agency principles, therefore, do not apply.
425. 570 F. Supp. 1197 (D. Del. 1983).
426. *Id.* at 1203.
427. *Id.* at 1203-04.
428. *Id.* at 1204.
429. *See* Hanshaw v. Delaware Technical & Community College, 405 F. Supp. 292 (D. Del. 1975) (members of the board of trustees, both as individuals and officials, are properly defendants as they failed to establish that they were not agents of the employer college); Cannon v. State, 523 F. Supp. 341 (D. Del. 1981) (State Personnel Commission is an agent of the employer state for purposes of Title VII action).

argue that it is not a "person" within the meaning of the statute, or that plaintiff's claim does not involve the requisite "state action."[430]

The usual procedural defenses are available to a defendant. Thus, a defendant may successfully contend that plaintiff is seeking inappropriate relief or is using an incorrect means of obtaining such relief,[431] or that the plaintiff has brought suit in an improper forum,[432] or that plaintiff's complaint is defective.[433] Defendant may assert that it or the claim is not subject to the court's jurisdiction,[434] or that process has been improperly served.[435] Although these defenses are often effective in securing dismissal of a case, there is always the possibility that plaintiff may be granted leave to amend his complaint to conform to the requisite standard[436] or that plaintiff may pursue his suit in the appropriate forum (assuming that the statute of limitations has not run).[437] Where a plaintiff has been successful in obtaining relief through an administrative proceeding and thereafter brings a civil action, a defendant may claim that this action is barred by *res judicata* or collateral estoppel.[438]

A defendant may obtain summary judgment by negating an element of plaintiff's *prima facie* case. It may establish, for example,

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430. *See infra* notes 444-464 and accompanying text discussing immunities.

431. See discussion of desired relief and the appropriate means to obtain such relief *supra* notes 346-375 and accompanying text.

432. *See* Aiello v. City of Wilmington, 426 F. Supp. 1272 (D. Del. 1976) (federal court may decline to exercise pendent jurisdiction over state law claims); Trivits v. Wilmington Inst., 417 F. Supp. 160 (D. Del. 1976).

433. As mentioned previously, Title VII and the ADEA require a plaintiff to allege that administrative remedies have been exhausted. Similarly, the courts require plaintiffs in civil rights cases to plead the facts of the violation with greater specificity than that allowed by FED. R. CIV. P. 8(a)(2).

434. *See* Magid v. Marcal Paper Mills, Inc., 517 F. Supp. 1125 (D. Del. 1981) (defendant not subject to personal jurisdiction in Delaware).

435. *See id.*

436. *See, e.g.*, Trader v. Fiat Distributors, Inc., 476 F. Supp. 1194 (D. Del. 1979) (complaint not drafted with enough specificity to satisfy requirement for civil rights complaints; plaintiffs granted leave to amend).

437. *See* Washam v. J.C. Penney Co., 519 F. Supp. 554 (D. Del. 1981).

438. This argument, however, has not been persuasive. In Goldsmith v. E.I. du Pont de Nemours & Co., 32 Fair Empl. Prac. Cas. (BNA) 1881 (D. Del. 1983), the court found that plaintiff's appearance before the state unemployment compensation board did not bar his subsequent discrimination claim. In Washam v. J.C. Penney Co., 519 F. Supp. 554 (D. Del. 1981), plaintiff presented his unfair labor practices claim to the NLRB and his employment discrimination claim to the EEOC. The court found collateral estoppel and *res judicata* inapplicable because neither administrative proceeding provided plaintiff with a forum in which to litigate both claims; furthermore, defendant could not show that the race discrimination claim was ever actually litigated before the NLRB. *Id.* at 559-60.

that its treatment of all employees is fair and consistent (negating discriminatory motive); that the individual is not a member of the protected class;[439] or that plaintiff was unqualified for the position to which promotion was sought.[440] Analogous to negation of an element is the defense of just cause. If defendant can merely articulate some legally permissible, nondiscriminatory reason for its action, the plaintiff must show that this explanation is in fact a cover-up for its discriminatory intent.[441] The difference between this defense and negation of an element is that here plaintiff has already established a *prima facie* case which defendant is attempting to rebut. Explanations such as another applicant's superior qualifications[442] or budget reductions[443] are generally sufficient to return the burden of proof to plaintiff.

The defenses of governmental and official immunity may be available when a state or its employees are sued. Generally, the two immunities stand or fall together, as the government can only act through its officials in the performance of their duties. The Delaware Tort Claims Act[444] bars suits against the state and its officials when the conduct complained of arose out of and in connection with performance of an official duty, the conduct was in good faith, and did not constitute gross or wanton negligence.[445] Though school

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439. *See, e.g.*, McDonnell v. Gannett News Serv., Inc., 518 F. Supp. 1326 (D. Del. 1981) (plaintiff not a member of the class protected by 1978 amendments to ADEA prohibiting involuntary retirement prior to age 70 when he was forced to retire on December 31, 1978, since amendments not effective until January 1, 1979).

440. *See* Ferguson v. E.I. du Pont de Nemours & Co., 560 F. Supp. 1172 (D. Del. 1983) (plaintiff's claim that she was not promoted to any of 16 different positions rebutted by evidence that she was only qualified for four of these which were filled by women more qualified than she).

441. *See* McDonnell-Douglas, 411 U.S. at 805, *cited in Morris*, 401 F. Supp. at 201.

442. *See* Ferguson, 560 F. Supp. at 1186-88 (court examined the qualifications of the individuals selected for the positions to which plaintiff claimed she was qualified for promotion and found that all 16 individuals possessed better qualifications than plaintiff). A contrary result was reached in Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983), where the court, after examining the evidence of both plaintiff's and the selected woman's credentials, determined that plaintiff was equally, if not more, qualified than the successful applicant. Thus the court concluded that the promotion had been awarded on the basis of sexual favors.

443. *See* Lanyon v. University of Del., 544 F. Supp. 1262 (D. Del. 1982), *aff'd*, 709 F.2d 1493 (3d Cir. 1983) (university's institution of a ten percent across-the-board budget cut satisfied its burden of asserting a permissible nondiscriminatory reason for plaintiff's termination).

444. DEL. CODE ANN. tit. 10, §§ 4001-4005 (1984).

445. *See infra* notes 455-464 and accompanying text. The statute comes into

districts are expressly protected by the Act,[446] a number of actions have been brought against school districts.[447] The standard for common law governmental/official immunity is similar to that codified in the Delaware statute: defendant must show that he acted without malice or awareness that he was violating plaintiff's rights, and that he did not know nor reasonably should have known that his actions violated the plaintiff's constitutional rights.[448]

Good faith must be pleaded and proved by the defendant.[449] Affidavits merely alleging that the official acted in good faith are insufficient to satisfy this requirement.[450] However, good faith exercise of discretionary functions may be demonstrated by the evidence presented at trial.[451] The standard is both subjective (whether defendant acted to deprive a plaintiff of constitutional rights with malicious intent) and objective (whether a reasonably prudent person would have known he was violating one's constitutional rights).[452] However,

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play when the suit is not barred by some other immunity, such as the eleventh amendment.

446. DEL. CODE ANN. tit. 10, § 4003 (1984), states in pertinent part: "Any political subdivision of the State, *including the various school districts,* and their officers and employees shall be entitled to the same privileges and immunities as provided in this chapter for the State and its officers and employees . . . ." (emphasis added).

447. *See generally* Schreffer v. Board of Educ. of Delmar School Dist., 506 F. Supp. 1300 (D. Del. 1981); Eckerd v. Indian River School Dist., 475 F. Supp. 1350 (D. Del. 1979); Sedule v. Capital School Dist., 425 F. Supp. 552 (D. Del. 1976); King v. Caesar Rodney School Dist., 396 F. Supp. 423 (D. Del. 1975); Patton v. Conrad Area School Dist., 388 F. Supp. 410 (D. Del. 1975); Morris v. Board of Educ. of Laurel School Dist., 401 F. Supp. 188 (D. Del. 1975).

In *Patton*, the court dismissed claims for monetary damages against the school board members acting in their official capacities. Plaintiff survived summary judgment on the same claims against the board members acting in their individual capacities, however, pending pleading and proof of good faith performance of individual duties.

448. *See Aiello*, 426 F. Supp. at 1296 (quoting Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53 (3d Cir. 1976)).

449. *See Skomorucha*, 504 F. Supp. at 836; *Eckerd*, 475 F. Supp. at 1368; *Aumiller*, 434 F. Supp. at 1307.

450. *See Hanshaw*, 405 F. Supp. at 299 (citing *Wood*, 420 U.S. at 322).

451. *See* Morris v. Board of Educ. of Laurel School Dist., 401 F. Supp. 188 (D. Del. 1975). In *Morris*, the court found the board members "acted in reliance on the integrity of Mr. Hupp which they had had no previous reason to doubt." In deciding not to renew plaintiff's contract, "they were acting sincerely in the belief that they were doing right." *Id.* at 216. Thus, the court held that they only were subject to the injunctive relief obtained by plaintiff.

452. *See Aumiller*, 434 F. Supp. at 1307. The court stated:

> Where a public official who is aware of uncertainties surrounding the propriety of a particular course of conduct pursues that course of conduct without first attempting to resolve factual and legal doubts, this Court

the absence of good faith requires more than a mere abuse of discretion.[453] Should defendant not be entitled to immunity, it may nevertheless be exempt from punitive damages on the basis of its status as a public entity.[454]

The eleventh amendment[455] provides another form of immunity to state defendants. The amendment provides that a state may not be sued in federal court by citizens of a foreign state,[456] and has been extended to prohibit federal actions against a state by its own citizens absent state consent.[457] The most vexing problem is determining whether defendant is "the state." The Third Circuit has held that a governmental agency may claim the state's immunity under the amendment only if the state is the "real party in interest."[458] Several factors are considered in arriving at this determination: (1) state law defining the relationship between the agency and the state; (2) whether the judgment will have to be paid out of the state treasury if plaintiff prevails; (3) whether the agency is performing a governmental or proprietary function; (4) whether the agency has been separately incorporated; (5) whether its operations are autonomous; (6) whether it has the power to sue, be sued, and to contract; (7) whether it is exempt from state taxation; and (8) whether the state has immunized itself from responsibility for the

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only can conclude that the public official has shed his cloak of official immunity and acts at his peril.

See also Hanshaw, 405 F. Supp. at 299 (quoting *Wood*, 420 U.S. at 322).

453. *See* Chaudoin v. Atkinson, 406 F. Supp. 32 (D. Del. 1975).

454. Tyler v. Board of Educ., New Castle County Vocational-Technical School Dist., 519 F. Supp. 834, 837 (D. Del. 1981) (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981): "[S]chool districts, . . . like municipalities proper, come within the scope of the *Newport* decision, in keeping with the rationale that Congress did not intend to burden innocent taxpayers with such liability."). *See also* Smith v. New Castle County Vocational-Technical School Dist., 574 F. Supp. 813 (D. Del. 1983).

Furthermore, sovereign immunity bars payment of interest on an award by both state and federal defendants. Guilday v. Department of Justice, 485 F. Supp. 324 (D. Del. 1980) (federal); Department of Health & Social Servs. v. Crossan, 424 A.2d 3 (Del. 1978) (state).

455. U.S. CONST. amend XI, states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

456. *See id.*

457. *See* Edelman v. Jordan, 415 U.S. 651 (1973); Hans v. Louisiana, 134 U.S. 1 (1890).

458. *See* Urbano v. Board of Managers, 415 F.2d 247 (3d Cir. 1969).

agency's operations.[459] If, upon an analysis of these factors the agency is found to be in effect an alter ego of the state, the eleventh amendment will operate to bar a plaintiff's federal action. The Delaware federal courts have consistently held that neither school boards[460] nor the University of Delaware[461] are protected by the amendment.[462] Likewise, housing authorities are not permitted to assert the defense.[463] However, state hospitals and departments of finance are protected, as well as state officials acting in their official capacities when any recovery of damages would be paid from the state treasury.[464]

Some defenses are particular to the statute under which the cause of action is sought. For example, section 1983 proscribes the deprivation of constitutional rights "under color of state law."[465] Thus, state action is a prerequisite to liability under this statute.[466]

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459. *See King*, 396 F. Supp. at 425-26 (citing *Urbano*, 415 F.2d at 251).

460. *See, e.g.*, Eckerd v. Indian River School Dist., 475 F. Supp. 1350 (D. Del. 1979); Hawkins v. Board of Public Educ., 468 F. Supp. 201 (D. Del. 1979); Hanshaw v. Delaware Technical & Community College, 405 F. Supp. 292 (D. Del. 1975); King v. Caesar Rodney School Dist., 396 F. Supp. 423 (D. Del. 1975). For a good discussion of applicability of the eleventh amendment, sovereign immunity, and the Delaware Torts Claims Act to school boards, see Smith v. New Castle County Vocational-Technical School Dist., 574 F. Supp. 813 (D. Del. 1983).

461. *See* Gordenstein v. University of Del., 381 F. Supp. 718 (D. Del. 1974).

462. *See King*, 396 F. Supp. at 426 n.4 and accompanying text. With respect to school boards, the discussion of eleventh amendment applicability in *King* is especially enlightening. The court there examined the evidence and concluded that the school board was not sufficiently affiliated with the state so as to make it an "alter ego" of the state. Specifically, the court noted that, although the school board lacked complete autonomy over its operations, it alone had the power to reinstate a plaintiff who had been terminated. Any attorney's fees which plaintiff would recover if victorious would come not from the state treasury but from insurance carried by the school board. The school board was permitted to and did retain private counsel rather than rely upon the state attorney general. *Id.*

463. *See Skomorucha*, 504 F. Supp. at 835 (based on Wilmington Housing Auth. v. Williamson, 228 A.2d 782 (Del. 1967)).

464. Lillard v. Delaware State Hosp. for the Chronically Ill, 552 F. Supp. 711 (D. Del. 1982). However, the eleventh amendment did not bar injunctive relief against state officials acting in their official capacities when the relief was of prospective application. *Id.* at 718 (citing *Ex parte* Young, 209 U.S. 123 (1908)).

465. 42 U.S.C. § 1983 (1983).

466. This appears to be in direct conflict with the eleventh amendment. However, the harshness of denying a plaintiff redress against the state in a federal forum led the courts to develop the factors which will be considered in determining whether the defendant is sufficiently affiliated with the state as to be a state agency to which the amendment will apply. It seems that although a defendant may not be an agent of the state for eleventh amendment purposes, it may still have enough of a

Usually, if defendant has any connection at all to the state, this requirement is easily satisfied.[467] However, the mere licensing and regulation of a private hospital (as opposed to a state-operated one) does not render that hospital's action that of the state for purposes of section 1983.[468] Another frequently contested issue in section 1983 cases is whether the defendant is a "person" within the meaning of the statute. School boards are "persons" under section 1983,[469] as is the University of Delaware.[470] When section 1983 is applicable to a particular defendant, the affirmative defense of good faith is available.[471]

Title VII specifically allows for deduction of money earned or which could have been earned by a plaintiff.[472] Defendant has the task of proving that plaintiff could have, but failed to, mitigate his damages by securing alternative employment.[473] Whether this set-off provision applies to payment obtained from unemployment compen-

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connection with the state to render its action that of the "state" for liability to attach under § 1983. *Cf.* Great Am. Federal Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979); Annot., 52 A.L.R. FED. 106 (1981).

467. *See, e.g.*, Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977) (state-supported university).

468. *See* Avallone v. Wilmington Medical Center, Inc., 553 F. Supp. 931 (D. Del. 1982).

469. *See Eckerd*, 475 F. Supp. at 1364, where the court said:

> [T]he Supreme Court's decision in *Monell v. Department of Social Services* makes it clear that the Indian River Board of Education and the Indian River School District "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief," and that local government officials [here school board members] sued in their officials [sic] capacities are 'persons' under § 1983 in those cases in which, as here, a government would be suable in its own name."

Id.

470. *Gordenstein*, 381 F. Supp. at 725 (university is not a state agency, it is a person under § 1983).

471. *See supra* notes 448-453 and accompanying text.

472. 42 U.S.C. § 2000e-5(g) (1983). *See Morris*, 401 F. Supp. at 214-15. Although there is no language in the ADEA which expressly authorizes set-offs, the Third Circuit has read such a requirement into the statute:

> The absence of express set-off language in the ADEA enforcement provisions does not compel the inference that Congress intended to preclude set-offs. The make-whole relief objective is common to both Title VII and ADEA and will be effectuated only if back pay awards are reduced to reflect alternate source earnings.

Rodriguez, 569 F.2d at 1243.

473. *See Eckerd*, 475 F. Supp. at 1365. Defendants failed to establish that plaintiff could have mitigated his damages, whereas plaintiff had produced evidence that he had indeed sought other employment. *Id.*

sation has generated a great deal of controversy.[474] The Third Circuit has recently disallowed such a deduction on the ground that the statute mentions only income "derived or derivable from earnings" and makes no mention of any other deductions.[475] However, a reduction of damages for unemployment compensation and actual earnings was permitted in a section 1983 action.[476]

A further defense specific to Title VII is that of a "bona fide occupational qualification."[477] The statute itself recognizes that there may be instances when religion, sex, or national origin may be "reasonably necessary to the normal operation of that particular business or enterprise."[478] Even allowing that such discrimination may be necessary, the statute is very narrowly construed.[479] To establish such a defense in a sex discrimination claim, the employer must prove:

> not only that it had a factual basis for believing that the hiring of any members of one sex would directly undermine the essence of the job involved or the employer's business, but also that it could not assign job responsibilities selectively in such a way that there would be minimal clash between the privacy interests of the customers and the non-discrimination principle of Title VII.[480]

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474. *See, e.g.*, Craig v. Y&Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983); *Eckerd*, 475 F. Supp. at 1350; *Hawkins*, 468 F. Supp. at 201.

475. *See* Craig, 721 F.2d at 82. The court apparently finds a distinction between earned and unearned income in the sense that an employee has not worked for unemployment benefits, whereas he has worked when he receives wages from an employer.

476. *See Eckerd*, 475 F. Supp. at 1365 (award of back pay reduced by amounts equal to plaintiff's salary and benefits earned during an assistantship at a state university; *Hawkins*, 468 F. Supp. at 215 (unemployment compensation received by plaintiff deducted from award of back pay).

477. 42 U.S.C. § 2000e-2(e).

478. *Id.* Note that the defense is unavailable for claims of race discrimination by its express exclusion from this section.

479. *See* 29 C.F.R. § 1604.2 (1985). The EEOC guidelines state in pertinent part:

> (a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly . . . . (1) The Commission will find that the following situations will not warrant the application of the bona fide occupational qualification exception: . . . (ii) The refusal to hire an individual based on stereotyped characterization of the sexes . . . . (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers.

Id.

480. *Fesel*, 447 F. Supp. at 1351.

The defense was successfully asserted in *Fesel v. Masonic Home of Delaware, Inc.*,[481] in which a male nurse's aide was denied employment at a retirement home due to his sex.[482] The court noted that many of the female residents[483] would have objected to having a male nurse attend to their personal needs. While customer preference was insufficient to justify sex-related job discrimination, the residents' legally protected privacy interests were implicated here and had to be recognized by the Home in running its business.[484] Further, the Home's size and operation were such that it could not hire a male nurse's aide for any shift in such a way that at least one female aide would also be on duty to attend to the female guests' personal needs.[485] However, the court stressed the narrowness of its decision, intimating that the decision might well be different were defendant a larger home with more staff.[486]

Finally, defendant may assert that plaintiff has an ulterior motive in bringing the suit. This defense is most often raised in sexual discrimination cases. In the context of sexual harassment, this has become known as the "woman scorned" defense,[487] where defendant asserts that the case was brought in revenge for the breakup of a relationship. The ulterior motive may be of a more subtle character, such as that found in *Robinson v. E.I. du Pont de Nemours & Co.*,[488] in which plaintiff alleged sexual harassment and religious discrimination.[489] The court found no evidence to support either claim, noting that plaintiff herself had admitted that she was "casting about for

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481. 447 F. Supp. 1350 (D. Del. 1979).

482. *Id.* at 1347.

483. *Id.* at 1352. Of 30 total guests at the home in 1973, when plaintiff was rejected, 22 were female. *Id.*

484. *Id.*

485. *Id.* at 1353. The shifts were scheduled so as to leave one aide alone on two days per week. The court found that since a patient's personal needs can arise at any hour, selective job assignment simply was not feasible. *Id.* The court rejected plaintiff's contention that the home could have hired a female "swing person" to assist a male nurse during the times when he would be on duty alone, saying that "[no] duty to accommodate the rights of prospective male employees goes so far as to require the employment of additional personnel." *Id.* at 1354.

486. *Id.* at 1353 n.9.

487. The defendant supervisor in Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983), alleged that plaintiff had brought the suit in revenge for his having broken off an affair with her. The court, however, was convinced that this was in fact not the case. *Id.* at 1201.

488. 33 Fair Empl. Prac. Cas. (BNA) 880 (D. Del. 1979).

489. *Id.* at 881.

someone to blame for her inability to get along with others.'"[490] Such a defense may be difficult to prove, however, as it necessarily involves knowledge of plaintiff's subjective state of mind. Furthermore, it appears that it would only be successful in a situation where plaintiff's evidence is weak.[491] Where plaintiff has a strong case of discrimination,[492] subjective desire for revenge, even if true, should have no bearing on the merits of the case.

V. CONCLUSION

In view of the relatively small number of cases which reached a determination on the merits, and the fact that few of those were favorable to the plaintiff, it is clear that Delaware plaintiffs within the last ten years have found winning an employment discrimination claim to be quite difficult.[493] One possible explanation for the paucity of successful plaintiffs at the reported case level is that the meritorious cases are, for the most part, being resolved at the administrative level. This is buttressed by the observation that the number of victorious plaintiffs is larger when the cause of action does not require exhaustion of administrative remedies, such as section 1983. The cases are surprisingly complex, with many procedural and substantive pitfalls awaiting an inexperienced plaintiff. The many potential causes of action, each with its own set of procedural requirements, and the number of defenses which can be raised to deny plaintiff's claim, therefore, make experienced counsel a necessity. Regardless of the success of the individual plaintiffs, it is clear that the days when an employer could unilaterally discharge an employee without repercussions are over.

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490. *Id.*

491. *See supra* notes 376-397 and accompanying text. In such a case, the court may dismiss the cause of action or grant summary judgment on another ground, such as failure to establish a *prima facie* case of discrimination.

492. *See, e.g.*, Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983) (plaintiff's evidence of sexual discrimination and harassment very strong).

493. Of course, the reported cases upon which this article concentrated give no indication of the disposition of cases through administrative proceedings.