

**34th Annual
North Carolina/South
Carolina Labor &
Employment Law Program**

October 12-13, 2018

NORTH CAROLINA

BAR ASSOCIATION
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34th Annual North Carolina/South Carolina Labor & Employment Law Program

PLANNERS AND SPEAKERS

Judge Henry F. Floyd is with the U. S. District Court of Appeals for the Fourth Circuit in Richmond, VA. He was nominated by President Barack Obama on January 26, 2011, to a seat vacated by Karen J. Williams. He was confirmed by the Senate on October 3, 2011 and received commission on October 5, 2011. He received his B.A. degree from Wofford College in 1970 and his J.D. degree from the University of South Carolina School of Law in 1973.

Judge Max O. Cogburn was sworn in as United States District Judge for the Western District of North Carolina on March 14, 2011. He is a graduate of the University of North Carolina at Chapel Hill, Samford University Cumberland School of Law. During his career he has served as a United States Magistrate Judge; Assistant U. S. Attorney, serving as lead attorney in the Organized Crime and Drug Enforcement Task Force and chief assistant U.S. Attorney as well as other stints in private practice.

Jennifer L. Bills grew up in Greensboro and left the South for a time to attend Haverford College in Pennsylvania and Northeastern University School of Law in Massachusetts. Upon graduation, she clerked for U.S. District Court Judge Gene Carter in Portland, Maine. Ms. Bills worked for nonprofit organizations and two small Boston law firms practicing civil rights law before returning home to North Carolina in 2008. She teaches Disability Law as an Adjunct Professor at UNC School of law and several CLE courses on topics including Employment Law and Ethical Issues for Clients with Diminished Capacity. Ms. Bills moderated a panel and co-authored a paper for the 2015 ABA Labor and Employment Law Annual Conference entitled, “Workplace Wellness Programs: Bona Fide Benefit or Prescription for a Lawsuit?” She worked as a Senior Attorney at Disability Rights NC for 9 years before returning to private practice. Currently Ms. Bills is Of Counsel at The Noble Law Firm in Chapel Hill, where she represents plaintiffs in employment matters, conducts workplace investigations, and trains employers and employees on workplace rights and responsibilities. Ms. Bills lives in Chapel Hill with her wife and two daughters, who amaze her every day.

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Brian S. Clarke is an Administrative Judge with the Equal Employment Opportunities Commission (EEOC) in Charlotte. Prior to entering academia, he practiced law for more than eleven years with Littler Mendelson PC and Nexsen Pruet LLC. While in practice, he argued and won significant cases before the North Carolina Supreme Court and the North Carolina Court of Appeals and successfully represented clients before the Fourth Circuit and the U.S. Supreme Court. He also taught at Washington & Lee University School of Law as an Adjunct Professor of Law from 2009 to 2011. He received his B.A. degree in History from the University of North Carolina at Chapel Hill and his J.D. degree, *magna cum laude* and Order of the Coif, from Washington & Lee University School of Law. His work has appeared in the Utah Law Review, the Rutgers Law Review, and the California Law Review Circuit, among others.

Thomas M. Colclough is Deputy District Director at Equal Employment Opportunity Commission (EEOC) in Raleigh. He received his B.A. and Management, General degree from St. Augustine’s College in Raleigh and his M.A. degree in Liberal Arts and Sciences/Liberal Studies from the University of North Carolina at Greensboro.

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Melissa A. Essary is Professor of Law and Dean Emerita at Campbell University Law School in Raleigh. She has taught employment law to thousands of student and she regularly speaks on this topic both regionally and nationally. Professor Essary is a member of the Labor & Employment Law Section of the North Carolina Bar Association. Professor Essary is a 1982 *summa cum laude* graduate of the University of Texas at Austin and a 1985 *magna cum laude* graduate of the Baylor University School of Law. Following graduation, she served as a trial lawyer for two Texas firms, most notably the Vinson and Elkins firm of Dallas, where she litigated complex commercial cases.

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Brian C. Groesser is Director of Operations and a managing attorney, associate with Midkiff Muncie & Ross PC in Raleigh. Brian's entire practice is dedicated to serving the needs of employers and insurance carriers in defending workers' compensation claims in North Carolina. He places strong emphasis on the relationships he has with his clients while providing efficient and effective representation. Brian has successfully defended and closed claims at all levels of the Industrial Commission. He is a member of the North Carolina Association of Defense Attorneys and the North Carolina and Wake County Bar Associations. He received his A.B. degree, *magna cum laude*, from the University of Michigan in 2003 and his J.D. degree, *magna cum laude*, from North Carolina Central University School of Law in 2008.

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He has represented both the International Council of Psychologists and the World Federation for Mental Health (Non-Governmental Organizations) at the United Nations. He currently serves on the boards of Wake Technical Community College, the National Association of Diversity Officers in Higher Education (founding member and conference chair), One World Market and The Forest at Duke (retirement community).

Michael M. Shetterly is the managing shareholder with Ogletree Deakins Nash Smoak & Stewart, PC in the Greenville, South Carolina office. He regularly counsels management on an array of employment and labor law issues, but the primary focus of his practice is FMLA and ADA compliance. He regularly counsels the firm's clients to ensure management can confidently comply with these complex laws. Mr. Shetterly began his legal career as a litigator in an array of cases, including construction, insurance, toxic torts and non-compete and trade secret cases. He still litigates today, including employment law cases. He therefore has a blended practice, focusing on litigation and proactive advice to clients. Mr. Shetterly views his counseling role as one designed to make clients self-sufficient and compliant. His advice is practical, making difficult concepts simple. He is locally and nationally recognized as an excellent trainer of general counsels, human resources, and management.

Jerry H. Walters, Jr. (planner) is a shareholder with Littler in Charlotte. He practices management-side employment and labor law and provides litigation and counseling services on a wide variety of issues including, discrimination, harassment, retaliation, and wrongful discharge, among others. Jerry also has special expertise in defending wage and hour collective and class actions involving allegations of unpaid overtime, off-the-clock work, unpaid missed or interrupted meal breaks, preliminary and postliminary unpaid time, misclassification of employees, and other FLSA and state wage and hour claims.

Jerry has successfully handled cases before federal and state courts, the U.S. Equal Opportunity Commission, the U.S. Department of Labor, and other administrative agencies. Jerry previously served as a member of the North Carolina Commission on Workforce Development having been appointed by the Governor in 2008. He is a permanent member of the Fourth Circuit Judicial Conference, and is a member of the American, North Carolina, and Georgia Bar Associations. Jerry was named to *The Best Lawyers in America*® in 2018. He received his B.A. with distinction from the University of North Carolina at Chapel Hill and his J.D., *cum laude*, from Campbell University Law School.

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34th Annual North Carolina/South Carolina Labor & Employment Law Program

TABLE OF CONTENTS

CHAPTER I

The Fourth Circuit Year in Review

Brian S. Clarke – Charlotte

Judge Max O. Cogburn - Asheville

R. Michael Elliot - Charlotte

Table of Contents.....	I-2
Introduction.....	I-5
Age Discrimination in Employment Act (“ADEA”).....	I-7
Americans with Disabilities Act (“ADA”) & Rehabilitation Act.....	I-14
Employee Retirement Income Security Act (“ERISA”).....	I-18
Equal Pay (“EPA”).....	I-27
Fair Labor Standards (“FLSA”).....	I-32
Family and Medical Leave Act (“FMLA”).....	I-50
Title VII & Section 1981.....	I-52

CHAPTER II

An Overview of Handling Social Media in Your #Employment Law Practice Worth a Retweet, Like or Follow

Brian C. Groesser – Raleigh

Michael A. Kornbluth – Durham

Maureen M. Zyglis - Raleigh

Introduction.....	II-1
Items to Consider with Social Media: What Role Can it Play in Your Case?.....	II-1
Evidentiary Concerns: How Can Social Media Evidence be used at a Hearing?.....	II-2
Role of Social Media in Hiring, Monitoring & Firing.....	II-7
Hiring.....	II-7
Monitoring.....	II-8
Firing.....	II-11
Summary of Proposed 2018 Formal Ethics Opinion 5: Accessing Social Network Presence of Represented or Unrepresented Persons.....	II-15
Scope.....	II-16
Authorities and Rules.....	II-16

CHAPTER III

2018 Supreme Court Commentary: Employment Law

Julianne “Julie” Theall Earp – Greensboro

Judge Henry F. Floyd – Richmond, VA

Jonathan R. Harkavy - Greensboro

Daniel C. “Danny” Lyon - Charlotte

Introduction.....	III-1
Statistical Setting of the 2017 Term	III-2
Decisions of the 2017 Term.....	III-4
Labor Relations	III-4
Employee Compensation and Benefits.....	III-17
Employment Discrimination and Retaliation.....	III-24
Adjective Cases.....	III-29
Sundry Cases	III-35
Grants of Certiorari for the 2018 Term	III-37
Additional Commentary	III-41

CHAPTER IV

ADA and FMLA: Employment Rights of People with Disabilities & Employers

Jennifer L. Bills – Chapel Hill

Michael M. “Mike Shetterly – Greenville, SC

Introduction – Intersection of ADA and FMLA	IV-1
Basics of the ADA and FMLA.....	IV-2
Structure of the ADA	IV-2
Structure of the FMLA	IV-5
Hot Topics in ADA & FMLA Jurisprudence	IV-7
ADA/FMLA Interplay	IV-7
Leave as an Accommodation	IV-9
Light Duty or Job Restructuring as an Accommodation.....	IV-10
Temporary Transitional Duty as a Reasonable Accommodation	IV-12
Determining Essential Functions and Accommodations	IV-14
Medical Documentation and Examination	IV-14
Conclusion	IV-15

CHAPTER V
**“Time Up” and “#MeToo” – Considerations of the Benefits and Ethics
of an Early Private Settlement that Avoids Litigation and Public Disclosure**

Thomas M. Colclough – Raleigh
Angela N. Gray – Greensboro
Andrew M. Habenicht - Charlotte

Materials for this Chapter Were Not Available at the Time of Distribution

CHAPTER VI
The Art of Negotiation

DeWitt F. McCarley – Charlotte

Definitions.....	VI-3
Negotiation	VI-3
The Subject of Negotiation	VI-3
Tactics.....	VI-3
Strategy.....	VI-3
Types of Tactics and Strategies	VI-3
Style	VI-4
Components of Negotiation Process	VI-4
Planning and Preparation	VI-4
Opening Moves and Relationship Building	VI-4
Information Gathering and Exchange.....	VI-5
Offers, Proposals and Solutions.....	VI-5
Narrowing of Differences.....	VI-6
Closure	VI-6
Choosing a Strategy	VI-7
General Concerns	VI-7
Specific Issues to Consider in Choosing a Strategy.....	VI-7
Specific Tactics.....	VI-7
Competitive Tactics.....	VI-7
Cooperative Tactics	VI-9
Telephone Negotiations	VI-9
“Bottom Lines”; 6 Basic “Rules”	VI-10
Part II: Demonstration	VI-11

CHAPTER VII-A
2018 NLRB Traditional Labor Law Update

Shannon R. Meares – Winston-Salem
John T. Merrell – Greenville, SC
Trisha S. Pande – Chapel Hill

Introduction.....VII-A-1
Case Summaries.....VII-A-2

CHAPTER VII-B
Federal and North Carolina Wage and Hour Law Overview and Update

Bartina L. Edwards – Charlotte
Wood W. Lay - Charlotte

Federal Wage and Hour Law: The Fair Labor Standards Act.....VII-B-1
 Minimum Wage.....VII-B-1
 OvertimeVII-B-2
 Recordkeeping Requirements.....VII-B-5
 Individual Liability and RemediesVII-B-6
 Collective Action.....VII-B-6
 Sources of Authority.....VII-B-6
Other Federal Wage and Hour Statutes.....VII-B-7
 Service Contract Act.....VII-B-7
 Davis-Bacon ActVII-B-7
North Carolina Wage and Hour ActVII-B-8
 When Must Wages be PaidVII-B-9
 When Can Wages be ForfeitedVII-B-9
 When Can an Employer Deduct or Withhold WagesVII-B-9
 Postings and Records.....VII-B-10
 Individual Liability and RemediesVII-B-10
 Recent UpdatesVII-B-11

CHAPTER VIII
Implicit Bias

Benjamin D. Reese, Jr., Psy.D. - Durham

Do Lawyers Needs Implicit Bias Training.....VIII-1
Implicit Bias & the Implicit Association.....VIII-3
What Law Firms Can Learn from Starbucks.....VIII-7
Implicit Bias and Lawyers.....VIII-15

CHAPTER IX-A-PART I
North Carolina Federal District Court Update: A Year in Review

Melissa A. Essary - Raleigh

Introduction.....	IX-A-2
Case Dispositions.....	IX-A-3
Title VII.....	IX-A-9
Title VII and § 1981.....	IX-A-40
Title VII and the Age Discrimination in Employment Act (ADEA).....	IX-A-45
Title VII, ADEA, and ADA.....	IX-A-50
Title VII and NCEEPA.....	IX-A-54
Title VII and the First Amendment.....	IX-A-56
Title VII, Section 1981, First Amendment, and Title IX.....	IX-A-60
Title VII, ADA, and FMLA.....	IX-A-66
Title VII, Section 1981, ADEA.....	IX-A-70
Title VII, Section 1981, ADEA, and State Claims.....	IX-A-73
Title VII, Section 1981, and WDPP.....	IX-A-75
Title VII, Section 1981, ADA, and State Claims.....	IX-A-79
Title VII and IIED.....	IX-A-83
Title VII, Negligent Retention and Supervision, Assault, and Battery.....	IX-A-93
Section 1981.....	IX-A-95
Age Discrimination in Employment Act (ADEA).....	IX-A-101
Americans with Disability Act (ADA).....	IX-A-103
ADA, FMLA, and Rehabilitation Act.....	IX-A-120
ADA, FMLA, REDA, and NCEEPA.....	IX-A-122
ADA, FMLA, and State Claims.....	IX-A-124
ADA, REDA, and WDPP.....	IX-A-128
ADEA, Libel, Slander, WDP, IIED, and NEID.....	IX-A-130
Fair Labor Standards Act (FLSA).....	IX-A-133
ERISA.....	IX-A-148
Wrongful Discharge in Violation of Public Policy (WDPP).....	IX-A-151
The First Amendment and IIED.....	IX-A-153
North Carolina Wage and Hour Act, Breach of Contract, and Breach of Implied Covenant of Good Faith and Fair Dealing.....	IX-A-155
Equal Protection, Section 1983, and Tortious Interference with Contract.....	IX-A-157
Breach of Contract.....	IX-A-161

CHAPTER IX-A-PART II
NC Update – State Appellate Court

Laura J. Wetsch - Raleigh

Abuse of Process	IX-A-2
Attorneys	IX-A-3
Attorneys’ Fees	IX-A-3
Civil Conspiracy.....	IX-A-4
Civil Procedure	IX-A-4
Constitutional Claims.....	IX-A-5
Fraud.....	IX-A-6
Governmental Immunity	IX-A-7
Malicious Prosecution	IX-A-8
Misappropriation of Trade Secrets	IX-A-8
Negligent Infliction of Emotional Distress (NIED)	IX-A-10
Noncompetes	IX-A-10
Public Employees.....	IX-A-11
Public Employees – Benefits.....	IX-A-17
Statute of Limitations	IX-A-18
Title VII	IX-A-18
Tortious Interference.....	IX-A-18
Unfair and Deceptive Trade Practices	IX-A-19
Whistleblowers.....	IX-A-20
Workers Comp Exclusivity.....	IX-A-20

CHAPTER IX-B
South Carolina Legal Update

C. Frederick W. “Fred” Manning, II – Columbia, SC

PowerPoint Presentation.....	IX-B-1
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CHAPTER I

Fourth Circuit Update and Fourth Circuit Update Panel

Judge Max O. Cogburn – Asheville

Brians S. Clarke – Charlotte

R. Michael Elliot - Charlotte

NORTH CAROLINA

BAR ASSOCIATION

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CHAPTER I
The Fourth Circuit Year in Review

Brian S. Clarke – Charlotte
Judge Max O. Cogburn - Asheville
R. Michael Elliot - Charlotte

Table of Contents.....	I-2
Introduction.....	I-5
Age Discrimination in Employment Act (“ADEA”).....	I-7
Americans with Disabilities Act (“ADA”) & Rehabilitation Act.....	I-14
Employee Retirement Income Security Act (“ERISA”).....	I-18
Equal Pay (“EPA”).....	I-27
Fair Labor Standards (“FLSA”).....	I-32
Family and Medical Leave Act (“FMLA”).....	I-50
Title VII & Section 1981.....	I-52

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CHAPTER I

The Fourth Circuit Year in Review

Brian S. Clarke – Charlotte
Judge Max O. Cogburn - Asheville
R. Michael Elliot - Charlotte

TABLE OF CONTENTS

INTRODUCTION	5
AGE DISCRIMINATION IN EMPLOYMENT ACT (“ADEA”)	
<u><i>Ullrich v. CEEXEC, Inc.</i></u> , 709 Fed. Appx. 750 (4th Cir. 2017).....	7
<u><i>Waters v. Logistics Mgmt. Inst.</i></u> , 716 Fed. Appx. 194 (4th Cir. 2018).....	9
<u><i>EEOC v. Baltimore Co.</i></u> , ___ F.3d ___ (4th Cir. 2018).....	11
AMERICANS WITH DISABILITIES ACT (“ADA”) & REHABILITATION ACT	
<u><i>Bingman v. Baltimore Co.</i></u> , 714 Fed. Appx. 244 (4th Cir. 2017).....	14
<u><i>Smith v. Loudon Co. Pub. Sch.</i></u> , 723 Fed. Appx. 194 (4th Cir. 2018).....	15
EMPLOYEE RETIREMENT INCOME SECURITY ACT (“ERISA”)	
<u><i>Plotnick v. Computer Sci. Corp.</i></u> , 875 F.3d 160 (4th Cir. 2017).....	18
<u><i>Gordon v. CIGNA Corp.</i></u> , 890 F.3d 463 (4th Cir. 2018).....	19
<u><i>Griffin v. Hartford Life & Acc. Ins. Co.</i></u> , 898 F.3d 371 (4th Cir. 2018).....	22
<u><i>Grabowski v. Hartford Life & Acc. Ins. Co.</i></u> , ___ Fed. Appx. ___ (4th Cir. 2018).....	26
EQUAL PAY ACT (“EPA”)	
<u><i>EEOC v. Maryland Ins. Admin.</i></u> , 879 F.3d 114 (4th Cir. 2018).....	27

FAIR LABOR STANDARDS ACT (“FLSA”)

<u><i>Randolph v. Powercomm Constr., Inc.</i></u> , 715 Fed. Appx. 227 (4th Cir. 2017).....	32
☉ <u><i>Schilling v. Schmidt Baking Co.</i></u> , 876 F.3d 596 (4th Cir. 2017).....	34
☉ <u><i>Degidio v. Crazy Horse Saloon & Restaurant, Inc.</i></u> , 880 F.3d 135 (4th Cir. 2018).....	37
☉ <u><i>Balbed v. Eden Park Guest House, LLC</i></u> , 881 F.3d 285 (4th Cir. 2018).....	42
<u><i>Valasquez v. Salsas and Beer Restaurant, Inc.</i></u> , ___ Fed. Appx. ___ (4th Cir. 2018).....	45
☉ <u><i>Weckesser v. Knight Enterp. S.E., LLC</i></u> , ___ Fed. Appx. ___ (4th Cir. 2018).....	46

FAMILY AND MEDICAL LEAVE ACT (“FMLA”)

<u><i>Shoemaker v. Alcon Labs., Inc.</i></u> , ___ Fed. Appx. ___ (4th Cir. 2018).....	50
--	----

TITLE VII & SECTION 1981

<u><i>Munive v. Fairfax Co. Sch. Bd.</i></u> , 700 Fed. Appx. 288 (4th Cir. 2017).....	52
<u><i>McKinney v. G4S Gov’t Solutions, Inc.</i></u> , 711 Fed. Appx. 130 (4th Cir. 2017).....	53
<u><i>Melendez v. Bd. Of Educ. for Montgomery Co.</i></u> , 711 Fed. Appx. 685 (4th Cir. 2017).....	58
<u><i>Lacasse v. Didlake, Inc.</i></u> , 712 Fed. Appx. 231 (4th Cir. 2018).....	59
<u><i>Tillery v. Piedmont Airlines, Inc.</i></u> , 713 Fed. Appx. 181 (4th Cir. 2018).....	62
<u><i>Hernandez v. Fairfax Co.</i></u> , 719 Fed. Appx. 184 (4th Cir. 2018).....	64

<u>Rayyan v. Virginia Dept. of Trans.</u>, 719 Fed. Appx. 198 (4th Cir. 2018)	67
<u>Cooper v. Smithfield Packing Co.</u>, 724 Fed. Appx. 197 (4th Cir. 2018)	69
<u>Sanders v. Tikras Tech. Solutions Corp.</u>, 725 Fed. Appx. 228 (4th Cir. 2018)	71
<u>Nnadozie v. Genesis HealthCare Corp.</u>, 730 Fed. Appx. 151 (4th Cir. 2018)	73
<u>Barnes v. Charles Co. Public Schools</u>, ___ Fed. Appx. ___ (4th Cir. 2018)	77
☺ <u>Strothers v. City of Laurel</u>, 895 F.3d 317 (4th Cir. 2018)	78

INTRODUCTION

The number of substantive labor and employment law opinions the Fourth Circuit issued in the last year remains low at 33 (29 employment and ERISA and 4 labor).¹ Of the Court's 29 substantive employment law cases, 12 cases dealt primarily with Title VII/Section 1981, 6 with the FLSA, 4 with ERISA, 3 with the ADEA, 2 with the ADA, and 1 each with the FMLA and EPA.

Trends over the last year?

The Year of the Prima Facie Case. In EEO cases, this was undoubtedly the year of the prima facie case. In twelve of the nineteen EEO cases (Title VII, ADA, ADEA, FMLA, and EPA) the Fourth Circuit held that the plaintiff/employee failed to establish a prima facie case on at least one claim. See *Ullrich* (ADEA), *Waters*, (ADEA), *Smith* (ADA), *McKinney* (Title VII – retaliation), *Melendez* (Title VII – retaliation and discrimination), *Lacasse* (Title VII & ADA – discrimination), *Tillery* (Title VII – retaliation), *Rayyan* (Title VII – discrimination), *Cooper* (Title VII – discrimination and retaliation), *Sanders* (Title VII – retaliation), and *Barnes* (Title VII – discrimination). That is a huge percentage of cases.

Employee Friendly FLSA Cases (again). The employees won the majority of the FLSA cases. Most importantly, the Fourth Circuit refused to compel arbitration in two FLSA cases. When added to the Lorenzo case from 2016, the Court has staked out some important limits to the enforceability of arbitration provision, at least in the FLSA context.

A quick look at the Fourth Circuit bench shows a couple of changes. Judges William Traxler and Dennis Shedd, both of South Carolina, took senior status; and Judges J. Marvin Quattlebaum and Julius “Jay” Richardson have been nominated and confirmed to replace them. Judge Both Judge Quattlebaum and Judge Richardson were confirmed on August 16, 2018, Judge Quattlebaum by a vote of 62-28 and Judge Richardson by a vote of 81-8. Prior to their nominations to the Fourth Circuit, Judge Quattlebaum served on the D.S.C. for about five minutes and, prior to that, was a partner at Nelson Mullins in Greenville. Judge Richardson – who is younger than me and graduated law school in 2003 [which makes me hate him on purely petty grounds] – was an Assistant U.S. Attorney for the D.S.C. and made a name for himself by successfully prosecuting Dylan Roof.

¹ For my own personal sanity and to avoid duplication of effort as there is a labor law update as well, I have not included the four labor cases in this manuscript. For reference purposes, the substantive labor cases decided by the Fourth Circuit in the last year are as follows: (1) *NLRB v. Bluefield Hosp. Co.*, ___ F.3d ___ (4th Cir. 2018)(affirming district court's refusal to grant preliminary injunction to Board); (2) *S. Freedman & Sons, Inc. v. NLRB*, 713 Fed. Appx. 152 (4th Cir. 2017)(affirming ALJ and Board finding that employer engaged in ULP for terminating employees just before a grievance hearing for reasons that were pretextual); (3) *Bakery & Confectionary Union v. Just Born II, Inc.*, 888 F.3d 696 (4th Cir. 2018)(multiemployer union pension plan seeking delinquent contributions); and (4) *Greenbrier Hotel Corp. v. UNITE HERE Health*, 719 Fed. Appx. 168 (4th Cir. 2018)(employer was entitled to recover excess assets held by fund when it ceased providing coverage to employer's employees).

The Fourth Circuit now has 9 judges nominated by Democratic presidents [6 by Obama and 3 by Clinton]: Harris, Thacker, Floyd, Diaz, Wynn, Keenan [Obama], Gregory, King, and Motz [Clinton]. And 6 judges nominated by Republican presidents [2 by Trump, 2 by GW Bush, 1 by GHW Bush, and 1 by Reagan]: Quattlebaum, Richardson [Trump], Agee, Duncan [GW Bush], Niemeyer [GHW Bush], and Wilkinson [Reagan]. Additionally, the court has three Senior Judges, two Republicans and one Democrat: Traxler [Clinton], Shedd [GW Bush], and Hamilton [GHW Bush].

As always, cases are grouped by subject matter. The subject matter areas are in vaguely chronological order with the oldest first.

The discussion of each case begins with an italicized summary of the court's holding and is followed by a more detailed discussion of the facts and the court's rationale. At the end of the more interesting cases is an "AUTHOR'S NOTE" that briefly provides my thoughts on the relative importance of the case and/or the case's unusual or interesting aspects.

These are my thoughts and opinions (not those of the U.S. Equal Employment Opportunity Commission, the United States of America, Donald J. Trump, the North Carolina Bar Association, the South Carolina Bar, etc.) and, as such, feel free to completely disregard them. I, of course, am solely responsible for any errors, omissions or bad jokes.

Cases marked with a yin-yang – ☯ – are discussed in the presentation as well as in the manuscript.

PERSONAL NOTE:

If I can indulge you all in a moment of personal privilege, I would like to announce that this – my ELEVENTH annual Fourth Circuit Update – will be my last.

After attending my first Labor & Employment Law Annual Meeting in 2000 – when Ted Gentry was doing the Fourth Circuit Update – I decided that, one day, I would be up on that stage. It took me a few years to get there. I first volunteered for this role back in 2007, when I was an Associate at Littler Mendelson in Charlotte. At that point, I was married, and had three little kids. My first Fourth Circuit Update presentation took place in October of 2008. Little did I know how long I would continue this work or the incredible changes I would go through while doing it both personally and professionally.

Professionally, I have gone from private practice at Littler to academia, first as an adjunct at Washington & Lee University, then as a full-time tenure-track law professor at Charlotte School of Law, and finally as a tenure-track business law professor at Western Carolina University. As a professor, I taught Civil Procedure and Employment Law to 1,000+ students. My academic writing was published in a number of top law reviews including the UTAH LAW REVIEW, the RUTGERS LAW REVIEW, the CALIFORNIA LAW REVIEW ONLINE, the SOUTH CAROLINA LAW REVIEW, the GREEN BAG, and the JOURNAL OF LEGAL EDUCATION. [My article in the UTAH LAW REVIEW, actually had its genesis in a conversation with Jon Harkavy at this conference in 2009. Further, my most ambitious piece of academic work – ObamaCourts? The Impact Of Judicial Nominations On Court Ideology, 30 J. L. & POL.

[UNIV. OF VIRGINIA] 195 (2015) – sprang directly from my work on these presentations.] My work has been cited in dozens of articles, books, and briefs ... and a few court opinions. [Judges ...hint hint].

This summer, I took a final step professionally in to what is, quite honestly, a dream job. I was appointed an Administrative Judge for the U.S. Equal Employment Opportunity Commission in August.

Personally, since I have been doing the Fourth Circuit Update, I have had two more kids – the last of whom was born *literally* as I did my fifth annual presentation (Amelia Miller Clarke, born 9:22 am, October 26, 2012) – got divorced, and got engaged (which comes with 2 stepkids). I bought a 200+ year old house and have spent hundreds of hours restoring it.

With my new judicial (or quasi-judicial) position – not to mention the chaos of my personal life – it is time to retire and pass the Fourth Circuit Update on to someone new. I hope I set the bar sufficiently high for that next eager lawyer. I look forward to sitting in the audience next year. [And I look forward to NOT spending 100+ hours each year on the manuscript.]

Thank you all very, very much for your attention and feedback and indulgence for the last 11 years. I hope that these presentations have been interesting, educational, and – most of all – useful to those practicing employment law. I know I learned a tremendous amount while preparing for them.

AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA")

Ullrich v. CEXEC, Inc., 709 Fed. Appx. 750 (4th Cir. 2017).

The Fourth Circuit AFFIRMED summary judgment for the employer on plaintiff's retaliation claims under the ADA and ADEA, finding that the plaintiff was unable to establish pretext.

Panel: Niemeyer, Thacker, Harris

Opinion: Per Curiam

In 1984, Ronald G. Ullrich was hired by CEXEC. He rose through the ranks, and in January 2008, he took over the duties typically associated with a Chief Operating Officer, and worked in a non-billable, overhead role. In May 2014, the President and CEO of CEXEC, Weston Rhodes, demoted Ullrich by realigning Ullrich's job duties to focus exclusively on business development. In the same month, Ullrich complained to the human resources director, Carolyn Cahoon, that Rhodes was harassing him regarding his work performance. A year later, in March 2015, Ullrich filed a Charge of Discrimination with the EEOC ("EEOC Charge") asserting claims of discrimination on the basis of age and disability.

In August 2015, CEXEC suffered two significant business losses. As a result, a number of employees would become overhead until they were able to find new billable work. Rhodes determined that CEXEC needed to reduce overhead. Devon Musselman, Ullrich's supervisor, contacted Ullrich directly to advise him that his position was in jeopardy unless CEXEC could find a direct billing opportunity for him. Musselman requested that, by September 20, 2015, Ullrich either identify (1) work at which he could immediately become billable, or (2) a project that had a high probability of a win for CEXEC. On September 20, Ullrich emailed Musselman a document outlining his plan for obtaining direct billing. A significant portion of the plan was a verbatim reiteration of content from the internet on business development. Further, Ullrich's plan only referenced a single prospect for direct billing which was not yet open for bidding.

After receiving Ullrich's email, Musselman informed Rhodes that Ullrich had failed to identify a direct billing opportunity or a potential contract with a high probability of a win. Accordingly, Musselman called Ullrich on September 21, 2015, and told him that he was being laid off. He also sent a follow-up letter, explaining the circumstances of the layoff.

Ullrich sued. The district court granted summary judgment, finding that the gaps between Ullrich's complaint to HR Director Cahoon in May 2014 and his termination in September 2015 and between Ullrich's EEOC Charge in March 2015 and his termination were too lengthy to permit an inference of retaliation.

On appeal, Ullrich asserted that Rhodes (CEXEC's CEO) made "multiple statements of intent to retaliate" during the sixty days following Ullrich's March 2015 EEOC Charge and that these statements were sufficient to show both a causal connection and pretext. The Fourth Circuit

rejected this argument noting that Rhodes’s statement did not show an intent to retaliate and were not made between the date of Ullrich’s EEOC Charge and his termination. The court noted that Rhodes discussed terminating Ullrich with the HR Director four or five times between May 2014 (when Ullrich complained to HR) and May 2015 (when he filed the EEOC Charge), However, the fact that Rhodes was considering terminating Ullrich was tied to his performance and business concerns. Accordingly, the court concluded that Ullrich failed to make a prima facie case of retaliation.

Further, even if Ullrich established a prima facie case, he presented no evidence whatsoever that CEXEC’s legitimate, non-discriminatory reason for his termination – the need to reduce overhead and Ullrich’s inability to show a likelihood that he could quickly become billable – was a pretext for retaliation. The court noted that as evidence of pretext, Ullrich proffered two alleged comparators. However, neither was actually similar to Ullrich because both were working partially on directly billable work, whereas Ullrich was completely nonbillable at the time of his termination. Further, Ullrich did not provide any evidence regarding these would-be comparators’ positions, supervisors, history, or other relevant information.

Given Ullrich’s failure to present sufficient evidence of pretext, the Fourth Circuit affirmed summary judgment for CEXEC.

AUTHORS’ NOTE: Overall, this is a pretty straightforward McDonnell Douglas case with some reiteration of well established law, namely the need for comparators to be truly comparable and the limits of temporal proximity for establishing a causal connection in retaliation cases.

Waters v. Logistics Mgmt. Inst., 716 Fed. Appx. 194 (4th Cir. 2018)

The Fourth Circuit AFFIRMED summary judgment for the employer finding that the plaintiff did not establish a prima facie case either of age discrimination or of retaliation.

Panel: Wilkinson, Agee, Wynn

Opinion: Per Curiam

LMI is a nonprofit organization that offers consulting services to the government. When this suit was filed, LMI employed around 1,200 employees, 67% of whom were over the age of forty, and 40% of whom were over fifty. LMI hired Waters in October 1988. His job was to provide computer support for various company teams. Ten years later, Waters moved to LMI’s Corporate Information Systems (CIS) department, where he was promoted to supervisor of CIS’s Applications Development group. In that role, Waters was responsible for supervising three programmers who designed and maintained business applications that LMI used internally.

Although Waters’ performance reviews were generally positive, his yearly evaluations indicated that he did not take to his supervisory role. When asked about Waters during an internal company review of the CIS department, at least three LMI executives complained about his inability to turn

around projects in a timely manner and about his reluctance to adequately supervise the programmers in his group.

In May 2013, LMI hired Lori Becker as Chief Financial Officer (CFO). As CFO, she was responsible for overseeing CIS. Because Becker felt that CIS was costly and prone to unnecessary delays, she brought in G2SF, a technology consulting firm, to evaluate the CIS department. G2SF concluded that CIS was not operating efficiently and recommended that it be reorganized. Based on G2SF's analysis, Becker hired William Brydges to replace Robert Bertha as the director of CIS. Becker tasked Brydges with making the department run more efficiently.

Shortly before Brydges began his review of CIS, Waters met with Becker informally to discuss his future at LMI. Bertha's resignation had left Waters concerned about his own job security, and he expressed this concern to Becker in late September 2014. During the meeting, Becker asked Waters why the Applications Development group needed four programmers. Waters left fearful that he would no longer have a role at LMI.

Brydges proceeded to evaluate every group in CIS, including Infrastructure, Information Security, and Applications Development. He met with numerous CIS employees, including Waters, and also with a number of executives from other departments.

During his evaluation of CIS, Brydges concluded that the division would operate more effectively if the Applications Development group did not build and maintain custom business applications, but instead purchased existing software from other companies. For this reason, he felt that CIS needed employees who could work with internal clients using software that was already available. After discussing his plan with Waters, Brydges felt that Waters did not understand the strategy he intended to implement. Brydges also concluded that Waters did not adequately perform his supervisory duties, and that he was effectively a fourth programmer who was paid approximately twenty percent more than the other programmers in the group.

After finishing his review of CIS, Brydges decided to reorganize the department. As part of this restructuring, he recommended disbanding the Applications Development group and eliminating Waters' position as supervisor of that group. Brydges terminated Waters in January 2015. Waters was the only employee who was fired in this restructuring. He was fifty-two at the time.

Waters sued. In support of his claims, Waters pointed to a Town Hall meeting in July 2014, where LMI's CEO, Nelson Ford, said that "people with gray hair are probably not the future" of the firm. Ford apologized for this remark a few months later. Additionally, Waters noted that LMI reduced certain benefits such as retirement contributions and annual leave accrual for employees with more than fifteen years of service. And third, Waters claimed that he engaged in protected activity when he met with Becker to discuss his job security, and that a jury could reasonably find that he was fired in retaliation for opposing LMI's allegedly discriminatory employment policies.

The district court granted summary judgment in favor of LMI finding that Waters could not establish that LMI's legitimate, non-discriminatory reason for terminating him was pretextual.

On appeal, the Fourth Circuit found that Waters did not establish a prima facie case of age discrimination, because (1) he was not performing his job duties at a level that met LMI's legitimate expectations ("for ten years, [Waters] received poor performance reviews concerning his ability to manage his subordinates"); and (2) his position did not remain open nor was he replaced by a substantially younger person (LMI completely eliminated Waters's position as supervisor). The court also concluded that, even if Waters established a prima facie case, he could not establish that the reorganization that resulted in his termination was pretextual.

Similarly, the court held that Waters also failed to establish a prima facie case of retaliation. The court found it very unlikely that Waters engaged in protected activity when he expressed concerns about his job security to LMI CFO Lori Becker, which was not focused on any concerns about age discrimination. Further, the court concluded that even if Waters could establish a prima facie case, he could not establish pretext.

AUTHORS' NOTE: It is tough to prove discrimination in a corporate reorganization where the plaintiff's position is totally eliminated.

☉ **EEOC v. Baltimore Co., ___ F.3d ___ (4th Cir. 2018)**

*The Fourth Circuit VACATED and REMANDED the district court's order refusing to award back pay to successful ADEA plaintiffs. **The Court held that a retroactive monetary award of back pay was a mandatory legal remedy upon a finding of liability under the ADEA.***

Panel: Gregory, Keenan, Shedd

Opinion: Per Curiam [*yes, even though it is a published opinion*]

In this action, the EEOC brought action against Baltimore County and unions representing county employees alleging that the County's pension system violated the ADEA by requiring older county employees to pay higher contributions than those paid by younger employees.

This was this case's third trip to the Fourth Circuit. In the first appeal, the court reversed a grant of summary judgment in favor of the County and remanded the case for the district court to determine whether the contribution rates of the County's age-based employee retirement benefit plan (the plan) were permissible based on financial considerations or whether they violated the ADEA. *See E.E.O.C. v. Balt. Cty.*, 385 Fed. Appx. 322 (4th Cir. 2010). On remand, the district court concluded that the County violated the ADEA by imposing disparate plan contribution rates based on age. *See E.E.O.C. v. Balt. Cty.*, 747 F.3d 267 (4th Cir. 2014). The district court awarded partial summary judgment in favor of the EEOC on the issue of liability. *Id.* In the second appeal, the Fourth Circuit affirmed the award of summary judgment to the EEOC and remanded for consideration of damages.

On remand from the second appeal, the parties approved a strategy for the gradual equalization of contribution rates under the plan and entered into a Joint Consent Order Regarding Injunctive Relief, which the district court approved. However, that consent order did not resolve claims for

monetary relief and expressly indicated that the availability of such relief would be addressed by the court at a later date.

The court ultimately denied the EEOC's motion for retroactive monetary relief, in the form of back pay concluding that it had the discretion under the enforcement provision of the ADEA to wholly deny back pay.

In this appeal, the County argued that the district court properly exercised its discretion under the ADEA [28 U.S.C. § 626(b)] in denying the EEOC an award of back pay because the ADEA grants courts broad authority "to grant such legal or equitable relief as may be appropriate," including the denial of back pay. 29 U.S.C § 626(b). In contrast, the EEOC points to the incorporation into the ADEA of certain provisions of the Fair Labor Standards Act (FLSA), which mandate that violators "shall be liable" for back pay. *See* 29 U.S.C. §§ 216(b), 626(b).

The Fourth Circuit agreed with the EEOC and conclude that a retroactive monetary award of back pay under the ADEA is mandatory upon a finding of liability.

In determining the correct interpretation of 28 U.S.C. § 626(b), the court stated that in the realm of statutory interpretation it first considered whether the statute "has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[I]n looking to the plain meaning, we must consider the context in which the statutory words are used because '[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole.'" *Ayes v. U.S. Dep't of Veterans Affairs*, 473 F.3d 104, 108 (4th Cir. 2006) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)).

The ADEA enforcement provision reads, in relevant part:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(b). Additionally, Section 216 of the FLSA, which Congress incorporated into the ADEA's enforcement provision, provides:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

29 U.S.C. § 216(b).

Before commencing its analysis, the Fourth Circuit observed that the ADEA is a remedial statute enacted “to promote employment of older persons based on their ability rather than age” and noted that, in light of this, it would employ a “standard of liberal construction [to] accomplish [Congress’] objects.” *Urie v. Thompson*, 337 U.S. 163, 180 (1949).

The court then turned to its interpretation of the ADEA. Because Congress adopted the enforcement procedures and remedies of the FLSA into the ADEA, the court construed the ADEA consistent with the cited statutory language in and judicial interpretations of the FLSA. Back pay is, and was at the time Congress passed the ADEA, a mandatory legal remedy under the FLSA. *See* 29 U.S.C. § 216(b) (“Any employer who violates the [FLSA] **shall be liable** to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation.” (emphasis added)). Accordingly, the court concluded, in enacting the ADEA, Congress would have been aware that retroactive monetary damages, such as back pay, were mandatory remedies under the FLSA, and intended to incorporate such mandatory remedies into the ADEA.

The court then looked to various other sources to buttress its conclusion. First, it noted that the Supreme Court applied a similar analysis in determining whether jury trials were available for violations of the ADEA. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (“[When], as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute” and when the ADEA was enacted “it was well established that there was a right to a jury trial in private actions pursuant to the FLSA.”). Next it looked to the legislative history of the ADEA, which also indicated that Congress consciously chose to incorporate the powers, remedies, and procedures of the FLSA into the ADEA.

Finally, the Fourth Circuit rejected the County’s reliance on a trilogy of Title VII pension decisions issued by the Supreme Court: *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); and *Florida v. Long*, 487 U.S. 223 (1988). In all three instances, the Supreme Court held a back pay award under Title VII is a discretionary *equitable* remedy that a court may select in awarding relief to a plaintiff. Unlike under Title VII, however, back pay is a mandatory legal remedy under the FLSA and ADEA.

AUTHORS' NOTE: The ultimate conclusion here is certainly important; but the analytical path the Fourth Circuit followed is perhaps more interesting. The court began by setting up a purely textualist analysis (citing a 1997 Supreme Court case for the legal standard). However, it then declared [correctly] that the ADEA is a “remedial statute” and, as a result, it would employ a “standard of liberal construction [to] accomplish [Congress'] objects.” To support this very different mode of statutory construction, the court relied on Urie v. Thompson from 1949. Needless to say, the Supreme Court viewed statutory construction very differently in 1949 and 1997 (and 2009 and 2018). So, while the Fourth Circuit asserted that it was engaging in a textualist analysis – as current Supreme Court precedent would seem to require – it actually engaged in much broader exercise, looking at Congressional intent and purpose. The court has done this type of “remedial statute” interpretation several times in recent years, typically in the FLSA context (see Schilling v. Schmidt Baking (2017) [below in FLSA section], Salinas v. Commercial Interiors (2017), McFeeley v. Jackson Street Entertainment (2016)) but also in the anti-discrimination context (see Butler v. Drive Automotive (2015)[Title VII], Jacobs v. NC Admin. Off. of the Courts (2015) [ADA]), and ERISA (Tatum v. RJR (2014)). The court’s willingness to continue to broadly construe “remedial statutes” to effectuate their remedial purpose is certainly good news for the plaintiff’s bar.

AMERICANS WITH DISABILITIES ACT (“ADA”) & REHABILITATION ACT

Bingman v. Baltimore Co., 714 Fed. Appx. 244 (4th Cir. 2017).

Fourth Circuit AFFIRMED jury award to plaintiff, who was terminated because of his disability and subjected to improper medical information inquiries, of \$400,000 in damages, including \$298,000 in non-economic damages.

Panel: Wilkinson, King, Floyd

Opinion: Per Curiam

Larry R. Bingman, who was formerly employed as a laborer with the Bureau of Highways of Baltimore County, Maryland, sued Baltimore County (the County) alleging he was terminated because of his disability, in violation of the ADA. A jury rendered a verdict in favor of Bingman, awarding Bingman \$400,000 in damages, of which \$298,000 consisted of non-economic damages.

On appeal, the County argued that the jury’s non-economic damages awards are not supported by the evidence presented. The Fourth Circuit rejected this argument finding that, given Bingman’s testimony as to the nature of his emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life, the jury’s \$298,000 award was grossly excessive or shocking to the conscience.

The Court also rejected the County’s “bald assertion” that the jury should not have been allowed to award Bingman damages based on its wrongful medical inquiry or examination claim. The

County used out-of-date medical authorizations to gather cancer-related medical records about Bingham, when Bingham reported a back injury to the County. Moreover, it was undisputed that Bingham was made to undergo a medical examination based solely on speculation that Bingham's bones may be brittle because of his cancer treatments. Although these events may have ultimately resulted in the County's decision to terminate Bingham's employment, the inquiries and examination were separate acts for which the jury was justified in awarding damages and its \$6,000 award for these unlawful acts was reasonable.

Additionally, the County raised the fact that Bingham applied for and received Social Security Disability Insurance (SSDI) payments. The court rejected any inference that Bingham's application for or receipt of SSDI payments entitled the County to any presumption regarding Bingham's ADA claims. See *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 802 (1999) ("In our view, ... despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption").

AUTHORS' NOTE: DO NOT DO WHAT THE COUNTY DID HERE. EVER.

Smith v. Loudon Co. Pub. Sch., 723 Fed. Appx. 194 (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment in favor of the employer.

Panel: Wilkinson, Traxler, Duncan

Opinion: Per Curiam

The Loudoun County (Virginia) School District hired Adonia Smith in August 2007 as a teacher of special education for the hearing impaired at Frances Hazel Reid Elementary School. Smith has been profoundly deaf since birth—she hears nothing, cannot speak, and cannot read lips. Smith is fluent in American Sign Language ("ASL"). It is her first and primary language, with English being her second. She was assigned to teach several hearing-impaired students. A large part of her job was drafting and managing the Individualized Education Plans ("IEPs") for the students.

Loudoun attempted to accommodate Smith's disability in various ways. For scheduled events, such as staff meetings, parent-teacher conferences, IEP meetings, and other employer-sponsored events, Loudoun provided ASL interpreters through a contract with an interpreter-placement company, WeInterpret. Smith could also request a WeInterpret interpreter outside of scheduled events. Smith claimed, however, that the interpreters occasionally did not show up and often were not competent when they did appear.

Another accommodation issue involved informal communication between Smith and people in different rooms or buildings. To accommodate Smith's need to verbally communicate with such people, Loudoun installed a video relay phone in Smith's class and another in a workroom across the hall in spring 2009. That phone allowed Smith to sign ASL into a screen linked to an interpreter who would verbally translate through a standard phone line. In her first two years at the school,

Smith also benefited from working in the same classroom as a colleague who was fluent in ASL and from having an instructional assistant who was nearly fluent in ASL.

Smith's initial time at the school was successful. Following her first year—the 2007-08 school year—Principal Liz Fye gave her a favorable end-of-year review. Smith remained on good terms with the administration during the first half of her second year as well, and Loudoun's deaf and hard-of-hearing specialist, Eileen McCartin, evaluated Smith positively in December 2008.

In early 2009, however, problems began to surface. In February 2009, Principal Fye held a meeting for all deaf/hard-of-hearing staff and announced the school would be adopting a “total communication approach” to educating deaf/hard-of-hearing students. Rather than concentrating on ASL, teachers were to use whatever communication method was effective for teaching a hearing-impaired student. Smith strongly disagreed with this method and contended hearing impaired students should communicate primarily in ASL. Smith went so far as to send an email to her students' guardians that derided the new approach.

In early March 2009, Smith sent an email to Principal Fye requesting a full-time ASL interpreter during the school day. Smith stated that an interpreter would be a “big help” to her for her “interaction with school administrators, teachers, staff members, parents, and students who don't know ASL.” Principal Fye submitted the request to the district's risk management division, which undertook to consider the issue with the employer benefits department.

On March 13, 2009, Smith received her first documented reprimand for interpersonal conflicts. Assistant Principal Richard Hammler reprimanded Smith for getting “angry and hostile” toward a substitute teacher and expressed disappointment that Smith had not heeded his “plea on two occasions for teamwork and professionalism.”

The disagreements and reprimand notwithstanding, Smith received an overall satisfactory performance review for her second year, and Loudoun renewed her contract for a third year. Unfortunately for Smith, the 2009-2010 school year turned out to be her most difficult yet. Before the start of the year, the two teachers Smith had relied on for help in informal communication were transferred to other positions and thus no longer available to help Smith, although one of those teachers was replaced by another teacher who knew ASL. Smith reiterated her request for a full-time personal ASL interpreter on numerous occasions in the fall of 2009, emphasizing that a full-time interpreter was needed “to assist me in my ongoing communications with [school] staff ... in order to avoid misunderstandings.” Around this time, the administration moved the video relay phone from Smith's classroom to a locked equipment room in the library. Smith added the return of her video relay phone to her previous accommodation requests.

Prior to the 2009-2010 school year, the school had hired a new principal (Brenda Jochems) and assistant principal (Ellen McGraw), and these administrators quickly developed substantial concerns with Smith's performance. Furthermore, on November 3, 2009, Loudoun's employee-benefit supervisor denied Smith's requests for a video relay phone in her classroom and for a daily full-time interpreter. The supervisor explained that Smith already had access to two video relay phones at school and that the school would accommodate impromptu verbal interpretation by

installing a video remote interpreting service within sixty days. In actuality, however, the service was not installed and working until seven months later.

In 2009, Smith was placed on the “December list,” alerting her that she was at risk for non-renewal of her contract for the following year. In a letter explaining this decision, Principal Jochems criticized Smith for insufficient and untimely lesson planning, inadequate student assessment, poor and untimely IEP management, and “[s]trained professional relationships with the special education team that has caused undue stress and hurt feelings.” Nonetheless, the school sought to provide Smith with assistance in making the improvements she would need in order to keep her job. For example, Jochems and McGraw met with her weekly with an ASL interpreter to assist her in understanding and completing lesson plans, IEPs, and other issues. Other employees were also assigned to assist Smith in preparing the IEPs and gathering documentation for the Virginia grade-level assessment (“VGLA”) binders.

Nonetheless, Smith failed to make the necessary improvements. On March 1, 2010, the district superintendent informed Smith by letter that he planned to recommend that the School Board not renew her contract.

In April 2010, Jochems reprimanded Smith again for numerous issues relating to the VGLA binders containing students’ confidential IEP materials, the most significant of which was that she took the materials home—a violation of state law and regulations. Additionally, with the legal deadline for completion of the binders fast approaching and with the binders not yet completed, the school cancelled approval of leave it had previously granted for Smith to attend a conference. Smith nonetheless took sick leave and secretly attended the conference. This was the last straw for Jochems, who asked the superintendent to terminate her. Smith was terminated effective June 22, 2010.

Smith subsequently filed suit in federal district court alleging three claims under the ADA: failure to provide reasonable accommodations, retaliatory termination, and wrongful discharge. Loudoun moved for summary judgment on all claims, and Smith opposed the motion.

The district court denied Loudoun’s motion as to the reasonable-accommodation claim but granted it as to the causes of action for retaliatory termination and wrongful discharge. Regarding these latter two claims, the court concluded that Smith had failed to come forward with facts or evidence to dispute or contradict several legitimate bases for termination set forth by Loudoun and that Smith had failed to provide any evidence that Loudoun’s proffered reasons for termination were a pretext for either retaliation or discrimination.

The case twice proceeded to trial on Smith’s claim of failure to provide reasonable accommodation. The first trial ended in a mistrial, and the second yielded a verdict for Smith in the amount of \$310.00.

Given the facts, the Fourth Circuit summarily affirmed the grant of summary judgment to the employer on Smith’s retaliation and wrongful discharge claims.

AUTHORS' NOTE: An interesting factual case from a number of angles. The school handled the accommodation issues well at first. However, as so often happens, when new management came in, the accommodations granted by the prior administration were rolled back. The school LOST at trial on Smith's accommodation claim, but it was a somewhat pyrrhic victory for Smith as she received only \$310. Even though the accommodation difficulties may have led to Smith's declining performance (and clearly impacted her attitude), that did not render the school's LNDR for her termination (poor performance) pretextual.

EMPLOYEE RETIREMENT INCOME SECURITY ACT ("ERISA")

Plotnick v. Computer Sci. Corp., 875 F.3d 160 (4th Cir. 2017).

The Fourth Circuit AFFIRMED summary judgment for the employer/plan sponsor on plaintiffs' claim that amendment to top-hat plan violated ERISA.

Panel: Motz, Duncan, Wynn

Opinion: Duncan

Plaintiffs Jeffrey Plotnick and James Kennedy, former executives of Computer Sciences Corporation ("CSC"), brought claims under § 1132(a) of ERISA alleging denial of benefits under their deferred executive compensation plan after a plan amendment changed the applicable crediting rate.

As select, highly compensated CSC executives, Plotnick and Kennedy were eligible to participate in the Computer Sciences Corporation Deferred Compensation Plan for Key Executives (the "Plan"). The Plan is a type of unfunded, deferred-compensation plan commonly known as a "top-hat plan," through which key executives could elect to forgo compensation during their employment in exchange for payments in retirement.

Plan participants' deferrals accrue in a notational account, and the company makes payments to participants after their retirements from CSC's general assets. CSC applies a crediting rate to participants' notational account balances. In practice, CSC pegs the crediting rate to a market-based valuation fund, though Plan documents do not require this. Furthermore, since the Plan is unfunded, CSC applies this crediting rate to calculate each participant's payout but need not invest actual assets in the correlating valuation fund. After retirement, Plan participants receive their deferred income, plus credits earned according to this crediting rate, via either a lump-sum payment or in annual payments over a predetermined number of years. If a participant decides to take annual payments, the Plan directs that CSC make these payments in "approximately equal annual installments."

The Plan grants its administrator broad discretionary authority to delegate functions, to determine questions of eligibility, to interpret the Plan and any relevant facts for purpose of the administration of the Plan, and to conduct claims procedures. By its terms, the Plan also may be “wholly or partially amended by the [CSC] Board from time to time, in its sole and absolute discretion.” The crediting rate, in particular, is explicitly “subject to amendment by the Board.” However, the Plan cabins the Board’s authority to amend by mandating that “no amendment shall decrease the amount of any ... [participant’s account] as of the effective date of such amendment.”

After engaging in a lengthy and ultimately rhetorical discussion of which standard of review applied to the decision to amend the crediting rate in a top-hat plan (abuse of discretion or reasonableness), the Fourth Circuit concluded that the amendment to the crediting rate was appropriate under any standard. The court explained that it must and enforce “the plain language of an ERISA plan ... in accordance with its literal and natural meaning” and that the Plan language here explicitly permitted the amendment of the crediting rate.

AUTHORS’ NOTE: A weird and tedious opinion that declined to answer the only significant legal question (the appropriate standard of review for discretionary acts by the administrator of a top-hat plan). At the end of the day, the court simply reaffirmed what it has made clear repeatedly over the last few years: under ERISA, the language of the plan is king.

Gordon v. CIGNA Corp., 890 F.3d 463 (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the insurance company on beneficiary’s claim to recover the difference between benefit she received following husband’s death (which was the amount of insurance coverage for which he had been approved) and the amount of coverage he had been (mistakenly) paying for.

Panel: Agee, Wynn, Thacker

Opinion: Wynn

Steven Gordon worked for Oil Price Information Services, Inc. and paid premiums on life insurance policies that totaled \$300,000 in coverage. But when Steven Gordon died in January 2014, his insurer, The Life Insurance Company of North America (“LINA”), paid Steven’s wife and beneficiary, Kimberly Gordon, only \$150,000. The reason, LINA claimed, was because Steven Gordon had only been approved for \$150,000 in coverage—not for the full \$300,000 in coverage he had been paying for. When Kimberly Gordon sued for the difference between the two amounts, the district court granted summary judgment in favor of the insurance company.

During the time of Steven Gordon’s employment, Oil Price Information Services was a subsidiary of UCG Holdings, LP (collectively “UCG”). UCG employees were eligible to participate in the company’s group life insurance plan (the “Plan”). The policies provided by UCG were underwritten by the Defendant Life Insurance Company of North America (“LINA”), a wholly-owned subsidiary of Defendant CIGNA Corporation (collectively referred to as “CIGNA Defendants”). Every employee at UCG received \$50,000 in basic group life insurance, for which

UCG paid all premiums at no cost to the employee. Employees could also elect to purchase additional coverage and have the associated premiums automatically deducted from their pay.

The Plan documents allocate responsibilities between UCG and LINA. The “Administration Manual” provides that the Plan is self-administered, meaning that UCG, as the employer, was “responsible for day-to-day program administration,” and specifically defined UCG as the “Plan Administrator.” In that role, UCG’s responsibilities included, inter alia, “[v]erifying employee eligibility for benefits,” “[p]roviding enrollment materials to employees,” “[m]aking sure employees enroll accurately and on time,” “[h]andling changes to benefit elections,” and “[c]ompleting premium payment procedures.” UCG also was responsible for providing accurate record-keeping of “[i]ndividual-level information (such as beneficiary designations, applications, coverage change forms, and assignments),” as well as for providing employees with accurate and timely information about their benefits.

According to the manual, UCG’s responsibilities also included “Self Billing.” This structure meant that UCG—not LINA—maintained all employee-level coverage data, calculated employee premiums, and collected those premiums via payroll deduction. Then, at the end of each month, UCG prepared and submitted an invoice, along with a single, bulk premium to LINA. The bulk premium reflected the total monthly premiums for both basic and supplemental life insurance coverage under the Plan. The premium did not identify the names of individual policy-holders for whom payment was being made, nor did UCG list the amount being paid for any specific policy-holder.

Under its authority as Plan Administrator, UCG executed an “Appointment of Claim Fiduciary” form, in which it appointed LINA as “the designated fiduciary for the review of claims for benefits under the Plan.” In this role, LINA was “responsible for adjudicating claims for benefits under the Plan, and for deciding any appeals of adverse claim determinations.” LINA also had “the authority, in its discretion, to interpret the terms of the Plan ... [and] to decide questions of eligibility for coverage or benefits under the Plan.” However, notwithstanding LINA’s role as a fiduciary with respect to claims adjudication, the form explicitly stated that it “does not authorize [the] Claim Fiduciary any fiduciary responsibility with respect to the administration of the Plan except as provided” in the Claim Fiduciary form.

Steven Gordon began work with UCG in late March 2013. At that time, he enrolled in the Plan and attempted to obtain \$250,000 in supplemental coverage. Accordingly, UCG deducted approximately \$210 in monthly premiums—the amount associated with that level of coverage—from Steven Gordon’s pay during his employment at UCG. The amount deducted totaled just over \$1,260.

By July 2013, Steven Gordon had become seriously ill and was hospitalized multiple times. On January 27, 2014—less than a year after he began working for UCG—Steven Gordon passed away. After Steven’s death, Kimberly Gordon (the beneficiary of his life insurance policy), filed a claim with LINA seeking a payment of \$300,000 (the \$50,000 in basic group life insurance provided by UCG, as well as the \$250,000 in supplemental coverage paid for by her late husband). But LINA approved the claim for only \$150,000. The reason for the discrepancy stemmed from some technicalities in the policy requirements and UCG’s failure to correctly account for those nuances.

Under the terms of the Plan, employees who elected supplemental coverage had a “Guaranteed Issue amount”—that is, the amount of coverage the insurance company agreed to provide “without requiring the participant to submit medical evidence for approval.” The guaranteed issue amount under the Plan was \$100,000 in supplemental coverage (for a total of \$150,000 when combined with the \$50,000 of basic group life insurance provided by UCG). For anything more than \$100,000 in supplemental coverage, however, an employee needed to submit further information to verify insurability. According to the CIGNA Defendants’ records, they never received that additional required information from Steven Gordon, so he was never approved for \$250,000 in supplemental insurance. For that reason, the CIGNA Defendants agreed to pay Kimberly Gordon only \$150,000—that is, the \$50,000 of coverage paid for by UCG and the \$100,000 in supplemental coverage for which Steven Gordon was eligible without submitting any medical evidence.

Kimberly Gordon sought answers from UCG. In a letter to Kimberly Gordon’s counsel, UCG explained that when Steven Gordon had started employment with UCG, he had been given an “Enrollment Guide” discussing the position’s insurance benefits. This guide stated that, “[f]or any amount [of supplemental insurance] over \$100,000, you must provide evidence of insurability.” Because Steven Gordon never submitted that evidence, he was never approved by LINA for supplemental coverage above the guaranteed amount. UCG’s letter further confirmed that the Plan operated in practice as it was described in the Plan documents. In particular, UCG described the self-billing format, in which “[n]o specific employee information [wa]s forwarded to CIGNA, only employee count, volume, and [total] premium amount.” Admitting that this process led to errors in Steven Gordon’s case, UCG offered to refund Kimberly Gordon the \$1,260 in excess premiums deducted from her late husband’s pay. Instead, Kimberly Gordon sued. [Before the appeal, UCG and Ms. Gordon settled her claim against it, presumably for all or some of the \$150,000 in additional life insurance her husband thought he had].

The district court found that the errors leading to Steven Gordon’s reduced coverage resulted from mistakes by his *employer*, UCG, which administered the life insurance plan, not the insurance company. Thus, the insurance company did not breach any fiduciary duty it may have had under ERISA. Further, because of the nature of the “self-billing” arrangement in the Plan, LINA was unaware of what level of coverage any individual employee was paying for and, therefore, did not knowingly participate in a breach of trust by another fiduciary.

The Fourth Circuit agreed with the district court that, under the plain language of the Plan, UCG was the plan administrator and fiduciary regarding the collection of premiums and determination of coverage amounts. The court rejected Ms. Gordon’s argument that LINA exercised control over “plan assets” when it accepted the inflated premiums from her husband. It concluded that the premiums were not “plan assets” because the Plan was a “guaranteed benefit policy” and, as a result, only the insurance policy itself (not the individual premiums) was a plan asset for purposes of 29 U.S.C. § 1132(a).

AUTHORS’ NOTE: Again, the PLAN IS KING (for better or worse). This – like many other ERISA cases – presents an extremely sympathetic plaintiff. However, that does not matter. The plan

language controls. Period. Clearly, in this case, mistakes were made and fiduciary duties breached; but not by LINA. It simply sold UCG a group insurance policy. UCG messed up. UCG breached its fiduciary duties under ERISA. And, presumably, UCG made Ms. Gordon whole (or nearly whole).

Griffin v. Hartford Life & Acc. Ins. Co., 898 F.3d 371 (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the insurer on beneficiary's claim for wrongful termination of his LTD benefits.

Panel: Wilkinson, Niemeyer, Gergel (D.S.C.)

Opinion: Niemeyer

Scott Griffin became employed by MedQuist Transcriptions, Ltd., as a medical transcriptionist in April 2010. As an employee, he enjoyed the benefits of MedQuist's employee welfare benefit plan, which included life insurance, short-term disability benefits, and long-term disability benefits. MedQuist provided these benefits through group policies that it purchased from Hartford Life, which was also the administrator of the plan.

Griffin's long-term disability benefits were governed by a long-term disability policy that defined disability as follows:

Disability or Disabled means You are prevented from performing one or more of the Essential Duties of:

- (1) Your Occupation during the [180-day] Elimination Period;
- (2) Your Occupation, for the 24 month(s) following the Elimination Period, and as a result Your Current Monthly Earnings are less than 80% of Your Indexed Pre-disability Earnings; and
- (3) after that, Any Occupation.

(Emphasis added). The policy also stated that it was the claimant's responsibility to submit continuing proof of disability and provided that "[b]enefit payments will stop on the earliest of: (1) the date You are no longer Disabled; (2) the date You fail to furnish Proof of Loss; [or] (3) the date You are no longer under the Regular Care of a Physician," among other limiting events. Finally, the policy vested Hartford Life with "full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of The Policy."

In September 2011, Griffin stopped working due to pain in his forearm and wrist, which prevented him from typing. He submitted a claim for short-term disability benefits to Hartford Life, and Hartford Life approved his claim, paying him short-term disability benefits until March 2012, when those benefits were exhausted. Griffin then applied for long-term disability benefits, adding

to his claim complaints of pain not only in his forearm and wrist but also in his neck and right shoulder. After Hartford Life obtained medical records from Griffin's medical providers, it approved Griffin's claim for long-term disability benefits in May 2012. In its letter informing Griffin of its decision, Hartford Life explained that his benefits would continue as long as he continued to meet the definition of "disabled" in the long-term disability benefits policy.

Thereafter, Hartford Life periodically contacted Griffin to monitor his condition and periodically requested updated medical records from his attending physicians. During this period, Griffin had been seeing Dr. Jonathan Carmouche, a neck and spine specialist, who concluded that Griffin's pain was caused by a herniated disc and recommended surgery. In March 2013, Dr. Carmouche performed the recommended surgery. A month later, he reported to Hartford Life that Griffin "ha[d] done well thus far." And again in June 2013, he completed an "attending physician's statement" form for Hartford Life indicating that Griffin had "[i]mproved." But Dr. Carmouche did not complete the functionality section of the form, consistent with his earlier statements to Hartford Life that he does not provide physical functionality assessments.

Because Hartford Life did not have information regarding Griffin's functionality post-surgery, it referred his claim to a medical case manager, who reviewed Griffin's file and concluded that it was not clear whether Griffin had any limitations on his functionality. This prompted her to recommend that additional information be obtained from Griffin. Thereafter, Hartford Life repeated its efforts to obtain functionality opinions from Griffin's medical providers, but again unsuccessfully. When, in August 2013, Hartford Life told Griffin that it was unable to obtain functionality opinions, he stated that he had not visited Dr. Carmouche since June 2013 and that he could no longer afford to see his primary care physician. He did indicate, however, that he had recently visited Dr. Cesar Bravo to treat tendonitis in his right elbow. When Hartford Life inquired of Dr. Bravo, he reported that he had found no "significant bone or joint abnormality" in Griffin's elbow and concluded that Griffin's soft tissues were "unremarkable." Dr. Bravo, however, would not give Hartford Life a functionality opinion. Moreover, neither Dr. Carmouche's nor Dr. Bravo's records indicated any imposition of restrictions on Griffin's activities at that time.

In response to Hartford Life's further inquiry in December 2013 about Griffin's functionality, Dr. Carmouche told Hartford Life that he disagreed with a suggestion that Griffin was then "currently able to perform Sedentary Work on a full-time basis," but he added, "Not until [r]eleased by Dr. Bravo who is treating his tendonitis." But Dr. Bravo refused to provide Hartford Life with any functionality opinion, stating that he had seen Griffin only once. In further followups, both Dr. Bravo and Dr. Carmouche were consistently unwilling or unable to provide Hartford Life with a functionality opinion.

In February 2014, Hartford Life decided to send Griffin to another doctor to conduct an in-person medical examination to assess his functionality, but it was unable to locate an appropriate examiner close enough to Griffin at a reasonable cost. Accordingly, it decided to seek a peer-review assessment from Dr. Ronald Teichman based on Griffin's existing medical records. Dr. Teichman conducted the assessment and provided Hartford Life with a report in which he recounted that he had spoken to Dr. Carmouche and that Dr. Carmouche told him that he was "not convinced that Mr. Griffin w[ould] be able to tolerate working, even in a sedentary position," noting that Griffin had claimed that he could not "sit for more than 10 minutes." Dr. Carmouche added, however,

“[T]he likelihood is that the patient can actually do more than he thinks he can do.” Thus, Dr. Teichman concluded in his report:

I cannot recommend any restrictions or limitations [on Griffin] based on the very limited information that was sent to me. That does not mean that the client does not need restrictions. I just cannot recommend any based on this information.... Further, in discussion with Dr. Carmouche, he was, as I indicated at the beginning of this report, very hesitant to commit to any specific restrictions or limitations. He was, in fact, sufficiently hesitant that he declined to make any statements about what he thought the patient could perform, but rather, opted to order a functional capacity evaluation.

The case manager followed up with Dr. Teichman to obtain a more detailed assessment, but Dr. Teichman indicated that his only choice was to defer to Dr. Carmouche, who had stated that his patient reported being unable to sit for more than 10 minutes at a time. Dr. Teichman concluded that if that were so, it was “not compatible with functionality in a work environment.”

In March 2014, Griffin reached a point when he had been receiving long-term disability benefits for two years, and, under the policy, the applicable definition of disability then changed from the inability to perform one or more of the essential duties of his prior occupation to an inability to perform one or more of the essential duties of “[a]ny [o]ccupation.” Nonetheless, Hartford Life continued to pay Griffin long-term disability benefits based on Dr. Teichman’s deferral to Dr. Carmouche’s statement that Griffin had claimed he was not able to sit for more than 10 minutes at a time. In reporting to Griffin its decision to continue paying benefits, Hartford Life reminded Griffin that it would periodically be seeking continued proof from him of his disability.

Several days thereafter, however, Hartford Life decided to refer Griffin’s claim to its special investigations unit to uncover more information. It decided to do so because Dr. Carmouche had stated that Griffin likely had more functionality than he realized; Griffin was rarely at home when Hartford Life called; and Griffin repeatedly insisted that Hartford Life’s policy of following up on his condition every three months was too frequent.

The investigations unit thereafter videotaped Griffin leaving his home and driving to pick up his son from school. The investigator noted that Griffin “appeared to ambulate in a normal manner without observable bracing or support.” On a different day, investigators videotaped Griffin leaving his home, driving to two stores, entering one store and “walk[ing] throughout the store at a quick pace,” and then returning home about an hour later.

In May 2014, the investigations unit also conducted an in-person interview of Griffin to obtain his self-report of his medical history and current condition. In that interview, Griffin described his daily activities and explained that he felt that there were limits on his functionality. He also stated, however, that he had not seen a medical professional since November 2013 and that he was not consistently taking any pain medications. The investigator observed during the course of that interview that Griffin was walking, standing, and sitting without trouble, though at one point Griffin did stand up complaining of pain, and that he was capable of reaching and effectively using a pen.

Still lacking a current medical assessment of Griffin’s functionality, Hartford Life sent renewed requests to Griffin’s past medical providers for updated information. In response, both Dr. Bravo and Dr. Carmouche indicated that they had not seen Griffin in some time. Griffin’s chiropractor, Dr. Larry McGlothlin, did respond, returning a Hartford Life form in August 2014 stating that he was not currently providing restrictions or limitations on Griffin. But he also checked a box on the form indicating that Griffin “would [not] be capable of performing activity 40 hours a week” and added a note that he had restricted Griffin to two hours of activity per day in April 2012 and instructed him to see a surgeon. When Hartford Life followed up with a telephone call to determine whether Dr. McGlothlin’s opinion on Griffin’s functionality was current—as of August 2014—or was based on Griffin’s condition in 2012, Dr. McGlothlin said it was based on Griffin’s condition in 2012, which was before Griffin had undergone surgery. Dr. McGlothlin also told Hartford Life that when he last examined Griffin in July 2014, Griffin appeared to be moving well and that he had not seen the need to impose any restrictions.

Based on all of the information that Hartford Life had compiled, it then conducted an employability analysis and concluded that there were several available jobs near Griffin that he could perform with his capabilities. Accordingly, in September 2014, it sent Griffin a letter informing him that it was terminating his long-term disability benefits because it had determined that he was no longer disabled as defined in the long-term disability policy.

Griffin sued.

On appeal, Griffin argued that the district court should have applied a *devo novo* standard of review, rather than abuse of discretion because the Hartford employees that reviewed and denied his claim were employed by Hartford Fire Insurance Company rather than Hartford Life, although both are affiliated corporations wholly owned by The Hartford Financial Services, Group, Inc.

Regardless of the fact that Hartford Fire, rather than Hartford Life, paid the employees at issue, the record reflected that the employees were, at all relevant times, acting as agents of Hartford Life. As a result, an abuse of discretion standard was appropriate given the delegation of discretion to Hartford Life in the Plan.

On the merits of Hartford Life’s decision to terminate Griffin’s long-term disability benefits the court concluded that the decision was reasonable and therefore did not amount to an abuse of discretion. The record readily showed that Griffin received a fair and thorough consideration of his claim and that Hartford Life’s conclusion was reasonably supported by the available evidence. As Hartford Life explained in its letter to Griffin terminating his benefits, none of the medical providers whom Griffin had seen were willing to give a current opinion on Griffin’s level of functionality. Moreover, Hartford Life collected video surveillance evidence of Griffin that showed him walking at a quick pace and moving “without observable bracing or support.” And Hartford Life’s investigator, who conducted an in-person interview of Griffin, personally observed Griffin walking, standing, sitting, reaching, and effectively using a pen without significant trouble over the course of the interview. Griffin also disclosed during the interview that he was not then receiving any treatment for his condition and that he had not seen any of his medical providers for over six months. When Hartford Life sought recent updates from Griffin’s doctors on his level of

functionality, both Dr. Carmouche and Dr. Bravo responded that they had not seen Griffin in nearly a year and that they were not providing any functionality restrictions or limitations. Griffin's chiropractor, Dr. McGlothlin, did state that he had imposed restrictions on Griffin in 2012, but he clarified that he was not restricting Griffin anymore because, although Griffin had self-reported some pain, Dr. McGlothlin had observed him moving reasonably well.

Based on all of this information, Hartford Life engaged in an employability analysis and concluded that there were several sedentary positions available within a close distance of Griffin and within his capabilities. The report of the analysis clearly identified positions for which Griffin possessed the required skills and qualifications. Hartford Life thus reasonably concluded that Griffin was not incapable of performing any occupation, as he was required to demonstrate under the policy to be qualified as disabled.

AUTHORS' NOTE: This is a pretty standard outcome for LTD when the plan's definition of disability changes from "own occupation" to "any occupation." The plan administrator's review need not be perfect, of course, and there were certainly things Hartford Life could have done "better" in an ideal world. But, of course, we don't live in an ideal world.

Grabowski v. Hartford Life & Acc. Ins. Co., ___ Fed. Appx. ___ (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the insurance company on beneficiary's action challenging the decision not to pay accidental death and dismemberment benefits following her husband's death..

Panel: Wynn, Diaz, Harris

Opinion: Per Curiam

On April 15, 2013, Mark Grabowski flew from Binghamton, New York, to Los Angeles, California, as part of a business trip for his employer. Two days later, he collapsed and died at his employer's Los Angeles office of a pulmonary embolism. Prior to his death, Mark had participated in an employee benefit plan (the "Plan") that provided basic and supplemental accidental death and dismemberment ("AD&D") benefits through policies administered by Hartford. His wife, Linda Grabowski, applied for benefits under both policies, but Hartford denied her claims on the bases that Mark's death did not result from a traumatic accidental injury independent of all other causes and was caused or contributed to by sickness or disease. Linda challenged this denial by filing the suit under the ERISA. Applying an abuse of discretion standard, the district court affirmed the denial of benefits and granted summary judgment to Hartford.

The Fourth Circuit agreed with the district court, explaining that under the abuse of discretion standard, however, Hartford only had to offer a reasonable, and not the *most* reasonable, interpretation of plan terms. The policies under the plan conditioned AD&D benefits on the presence of an "accidental injury" and a "bodily injury resulting ... directly from an accident."

Hartford determined these circumstances were not present because Mark died from the natural cause of a pulmonary embolism in the absence of any trauma. The court deferred to Hartford’s interpretation that these circumstances do not qualify as accidental.

AUTHORS’ NOTE: A pretty standard abuse of discretion analysis. Critically, the court made clear that a “reasonable” decision or interpretation of policy language and/or claim information need not be the “most reasonable” or best interpretation or decision. In short, insurance companies have very broad discretion in interpreting plan documents.

EQUAL PAY ACT

EEOC v. Maryland Ins. Admin., 879 F.3d 114 (4th Cir. 2018).

The Fourth Circuit VACATED summary judgment for the employer on EEOC’s claim that state agency violated EPA by paying three female fraud investigators lower wages than those paid to male fraud investigators.

Panel: Wilkinson, Keenan, Floyd

Opinion: Keenan

Dissent: Wilkinson

The Maryland Insurance Administration (“MIA”) is an independent state agency that performs various functions related to the regulation of Maryland’s insurance industry and the enforcement of Maryland’s insurance laws. MIA is subject to the State Personnel Management System, a merit-based system, which establishes job categories based on the general nature of required duties and sets corresponding levels of compensation. Although MIA, as an independent state agency, is given discretion to set its employees’ salaries, MIA follows the hiring and salary practices of Maryland’s Department of Budget and Management, which promulgates a Standard Pay Plan Salary Schedule (the Standard Salary Schedule).

In accordance with the Standard Salary Schedule, when a new employee is hired, MIA assigns that employee to a grade level matching the position being filled. Each grade level carries an assigned base salary and a specific salary range consisting of 20 separate steps. After designating a new employee’s particular grade level, MIA assigns the new hire to an initial step placement based on prior work experience, relevant professional designations, and licenses or certifications. In selecting a particular step level, MIA also considers the difficulty of recruiting for the position, and, under Maryland law, also awards a new employee credit for any prior years of service in state employment for the purposes of determining that employee’s step in the applicable pay grade. Additionally, a Maryland government employee who transfers to a “lateral” position takes her assigned grade and step with her to the new position.

MIA employees work within one of six units, each comprising a different area of insurance regulation. At issue in this case was the Fraud Investigation Division. Employees working in the Fraud Investigation Division, or Fraud Investigators, are charged with investigating allegations of criminal insurance fraud perpetrated by individuals. Until July 2013, the Fraud Investigator position was classified at a grade 15 on the Standard Salary Schedule. At that time, based on an internal job study conducted by MIA, the position was reclassified at grade 16. Under the Standard Salary Plan, individuals hired as Fraud Investigators now are assigned to a step within the grade 16 classification according to their qualifications and work experience.

MIA advertises minimum and preferred qualifications for the position of Fraud Investigator. To be minimally qualified for hire as a Fraud Investigator, an applicant must have five years of fraud investigatory experience in such areas as white collar crime, financial fraud, insurance fraud, and investigations conducted under the supervision of prosecutors or other attorneys. Preferred or desired qualifications for the position include designation as a Certified Fraud Examiner, as well as experience working with attorneys and participation in court or administrative hearings.

This case involved three former MIA Fraud Investigators: Alexandra Cordaro, Marlene Green, and Mary Jo Rogers (collectively, the claimants). MIA hired Cordaro as a Fraud Investigator in December 2009. Cordaro had worked as a fraud investigator for a federal credit union for over two years, and as a criminal investigation and litigation paralegal for 12 years in the Baltimore County State's Attorney's Office. MIA assigned Cordaro to grade level 15, step four, with a starting salary of \$43,495. By the time she resigned from her position at MIA about five years later, Cordaro was earning \$49,916.

Marlene Green was hired as a Fraud Investigator in November 2010. Green held a bachelor's degree from Johns Hopkins University, and had more than 20 years of experience working for the Baltimore City Police Department. During the course of that employment, Green worked for approximately 13 years in an investigative capacity. In the year immediately prior to joining MIA, Green worked as an investigator for the United States Office of Personnel Management and the Office of the State's Attorney for Baltimore County. MIA assigned Green to grade level 15, step four, with a starting salary of \$43,759. By February 2013, when Green resigned from MIA, her salary was \$45,503.

Mary Jo Rogers transferred to the Fraud Investigation Division from another position within MIA in July 2011. Rogers earlier had worked for eight years as a police officer and a detective with the Baltimore County Police Department. Immediately before being hired at MIA, Rogers worked for an insurance company as a special investigator and an adjuster. MIA assigned Rogers to grade level 15, step five, with a starting salary of \$46,268. By November 2013, Rogers' salary was \$50,300.

During their tenure at MIA, Cordaro, Rogers, and Green learned that their salaries were lower than the salaries of certain male Fraud Investigators. In early 2014, after unsuccessfully seeking to correct these disparities, Cordaro and Rogers filed complaints against MIA with the EEOC. The EEOC later filed the present lawsuit against MIA on behalf of the three claimants, alleging gender-based salary discrimination in violation of the EPA. During the proceedings in the district court,

the EEOC identified as comparators four male Fraud Investigators: Bruno Conticello, James Hurley, Donald Jacobs, and Homer Pennington.

MIA hired Conticello as a Fraud Investigator in November 2010. Conticello held both a bachelor's and a master's degree in criminal justice, and had nearly 20 years of investigative experience working for various insurance companies and Maryland's Office of the Inspector General. He also had obtained a Certified Fraud Examiner designation. MIA assigned Conticello to grade level 15, step 10, with a starting salary of \$49,842. By late 2012, his salary was \$51,561.

Hurley was hired as a Fraud Investigator in November 2006. Hurley most recently had worked as an investigator with an underwriting insurance organization. He also had worked previously with MIA for a total of three years as a Fraud Investigator and as an investigator in MIA's property and casualty department. Altogether, Hurley had about 10 years of insurance-related investigative experience when he was re-hired at MIA in 2006. Hurley also had worked previously as a claim adjuster for several insurance companies, and had earned the designation of Certified Fraud Examiner. At the time of his most recent hiring at MIA, Hurley was assigned to grade 15, step six, with a starting salary of \$45,298. By the time he left MIA in October 2012, Hurley's salary was \$49,678.

MIA hired Donald Jacobs as a Fraud Investigator in May 2007. Jacobs had 11 years of experience as a Natural Resources Officer with the state of Maryland, primarily engaged in conducting marine patrols, and had worked for three years as an investigator in the Office of the Public Defender in Baltimore. This investigatory experience did not relate to fraud or white collar crime. Jacobs' starting salary at MIA was \$45,298, based on his assignment to grade level 15, step six. When Jacobs left MIA in June 2010, his salary was \$47,705.

Homer Pennington was hired as a Fraud Investigator in August 2007. Pennington had worked in the criminal investigation unit of the Baltimore Police Department for approximately 22 years before joining MIA. Pennington was hired at grade level 15, step five, with a starting salary of \$45,360. By May 2013, when Pennington left MIA, his salary was \$47,194.

The parties filed cross-motions for summary judgment in the district court. The court denied the EEOC's motion and granted MIA's motion. In dismissing the EEOC's claim under the EPA, the district court effectively held that the claimants had failed to meet their prima facie evidentiary burden. The court concluded that the male Fraud Investigators identified by the EEOC were not valid comparators because they were hired at higher steps than were the claimants. Alternatively, the court held that MIA had shown that the disparity in pay between the claimants and the male comparators was attributable to their relative experience and qualifications.

On appeal, the EEOC argued that it made a prima facie showing of an EPA violation by identifying four male Fraud Investigators who earned higher starting salaries than the three claimants, who were assigned lower salaries than the male comparators despite performing identical work. In addition, the EEOC contends that MIA did not establish as a matter of law that the disparity in pay between the claimants and the male comparators was due to the comparators' credentials and prior work experience.

Under the EPA, the plaintiff creates a presumption of discrimination when she establishes a prima facie case by demonstrating that (1) the defendant-employer paid different wages to an employee of the opposite sex (2) for equal work on jobs requiring equal skill, effort, and responsibility, which jobs (3) all are performed under similar working conditions. An EPA plaintiff need not prove that the employer acted with discriminatory intent to obtain a remedy under the statute as the EPA prescribes a form of strict liability.

Once a plaintiff has made the required prima facie showing, under the EPA, the burdens of production and persuasion shift to the defendant-employer to show that the wage differential was justified by one of four affirmative defenses listed in the statute: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) a disparity based on any factor other than gender. *See* 29 U.S.C. § 206(d)(1). To avoid liability, the defendant must prove one of these four affirmative defenses.

While an employer may be entitled to summary judgment on an EPA claim if the employer establishes an affirmative defense as a matter of law, the burden on the employer necessarily is a heavy one. The Fourth Circuit agreed with the Third and Tenth Circuits' explanation that the statutory language of the EPA requires that an employer submit evidence from which a reasonable factfinder could conclude *not* simply that the employer's proffered reasons could explain the wage disparity, ***but that the proffered reasons do in fact explain the wage disparity***. Thus, because the employer in an EPA action bears the burden of ultimate persuasion, once the plaintiff has established a prima facie case the employer will not prevail at the summary judgment stage unless the employer proves its affirmative defense so convincingly that a rational jury could not have reached a contrary conclusion.

The court then turned to the EEOC's evidence to prove its prima facie case. As to the first element, the record plainly established, and MIA did not dispute, that the claimants were paid less than the male comparators. Cordaro's and Green's respective starting salaries, of \$43,495 and \$43,759, were lower than the starting salaries of all four male comparators. Rogers' starting salary of \$46,268 was lower than Conticello's starting salary of \$49,842.

The record also showed that the claimants and the male comparators performed substantially equal work, as they all held the same position as Fraud Investigators. It was inapposite that *other* male employees at MIA performed substantially identical work but made less money than the claimants. An EPA plaintiff is not required to demonstrate that males, as a class, are paid higher wages than females, as a class, but only that there is discrimination in pay against an employee with respect to one employee of the opposite sex. The undisputed facts in the present record established that each claimant earned less than at least one male comparator performing substantially equal work. These undisputed facts alone satisfy the EEOC's prima facie burden.

This conclusion was not altered by the fact that the male comparators were hired at higher step levels than at least one of the claimants, allegedly based on their background experience, relevant professional designations, and licenses or certifications. Such experience and other factors are relevant only to any affirmative defense asserted by MIA, not to the issue whether the EEOC has satisfied its prima facie burden. Instead, at the prima facie case stage the only question is whether the claimants and the identified comparators worked jobs requiring "equal skill, effort, and

responsibility,” and whether each claimant was paid less than one or more comparators. As both these requirements were met here, the EEOC established a prima facie case of wage discrimination under the EPA.

Because the claimants established a prima facie case of discrimination under the EPA, MIA was not entitled to summary judgment unless a rational jury could not have rejected MIA’s proffered reasons for the wage disparities. Here, MIA asserted one affirmative defense, namely, that a factor other than the comparators’ gender justified the wage disparity. In support of this defense, MIA offered two allegedly gender-neutral reasons for the disparity: (1) MIA’s use of the state’s Standard Salary Schedule, which classifies each position to a grade level and assigns each new hire to a step within that grade level; and (2) the comparators’ experience and qualifications. However, MIA had not adduced evidence sufficient to require a factfinder to conclude that either of these two reasons *actually occasioned* the undisputed wage disparities.

MIA cannot shield itself from liability under the EPA solely because MIA uses the state’s Standard Salary Schedule and awards credit for prior state employment or a lateral transfer within the state employment system. Although the Standard Salary Schedule is facially neutral, MIA exercises discretion each time it assigns a new hire to a specific step and salary range based on its review of the hire’s qualifications and experience. A fact finder faced with the present record could have determined that, when exercising this discretion, MIA at least in part based its assignment of the claimants’ step levels on their gender with a resulting diminution of their assigned starting salary. Therefore, while MIA uses a facially gender-neutral compensation system, MIA still must present evidence that the job-related distinctions underlying the salary plan, including prior state employment, in fact motivated MIA to place the claimants and the comparators on different steps of the pay scale at different starting salaries.

MIA additionally argued that the pay disparities are justified by the difference between the experience and qualifications of the comparators and the claimants. As an example, MIA notes that Hurley and Conticello both earned Certified Fraud Examiner designations, which MIA had advertised as a preferred designation during the hiring process. Further, MIA observes that Hurley, Conticello, and Jacobs previously had worked for the state of Maryland, and that Pennington had over 20 years of law enforcement experience.

The court agreed that qualifications, certifications, and employment history fall within the scope of the fourth affirmative defense which encompasses “a differential based on any factor other than sex.” 29 U.S.C. § 206(d)(1). And, certainly, the factors cited by MIA *could* explain the wage disparity between the claimants and the comparators. Nevertheless, as we have emphasized, a viable affirmative defense under the EPA requires more than a showing that a factor other than sex *could* explain or may explain the salary disparity. Instead, the EPA requires that a factor other than sex *in fact explains the salary disparity*.

The present record did not show, as a matter of law, that the reasons proffered by MIA do in fact explain the salary disparities. The claimants each had extensive prior investigative or law enforcement experience, and, at the very least, their prior experience is relevant to the position of Fraud Investigator and to the decisions fixing the claimants’ starting salaries, and creates an issue

of fact for the jury to decide whether MIA in fact objectively weighed the comparators' qualifications as being more significant than the claimants' qualifications.

Accordingly, the Fourth Circuit vacated the lower court's entry of summary judgment for MIA and remanded this case for trial.

Dissent

Judge Wilkinson's dissent was motivated primarily by federalism concerns where a federal agency was enforcing a federal statute, in federal court, against a state agency. Judge Wilkinson also believed that MIA's pay decisions were clearly explained by the differences in background and experience among the comparators as compared to the claimants.

AUTHORS' NOTE: This is certainly a significant decision in the realm of EPA law. Unfortunately, there are not that many EPA claims brought each year. In fact, this may be the only EPA case in my 11 years of doing this talk.

FAIR LABOR STANDARDS ACT ("FLSA")

Randolph v. Powercomm Constr., Inc., 715 Fed. Appx. 227 (4th Cir. 2017)

The Fourth Circuit REVERSED the district court's award of attorneys fees to the plaintiffs following a settlement and REMANDED for recalculation, including the deduction of fees spent pursuing time-barred claims and the consider a proportional reduction based on the settlement amount compared to the total alleged damages.

Panel: Shedd, Thacker, Floyd

Opinion: Per Curiam

Plaintiff Gregory Randolph initiated this lawsuit by filing a proposed class action under the Maryland Wage & Hour Law and a proposed collective action under the FLSA. Randolph alleged that Defendants, his former employers, failed to pay their employees the required wage for overtime work. For relief, Randolph sought unpaid wages with interest, economic damages allowed by the MWHL and FLSA, attorney's fees, and a declaration that Defendants had violated the MWHL and FLSA.

In March 2014, the district court conditionally certified the case as a collective action under the FLSA, and, by July 2014, 64 additional employees or former employees had joined the lawsuit. In September 2014, Plaintiffs filed a second amended Initial Disclosure under Rule 26(a)(1)(A) asserting that they were entitled to about \$790,000 in damages, including approximately \$263,000 in unpaid overtime wages and \$527,000 in liquidated damages. In August 2015, the district court

dismissed 10 Plaintiffs after concluding that the statute of limitations barred their claims and granted the remaining Plaintiffs' motion for nonconditional certification of a collective action.

In April 2016, the district court approved the parties' settlement of this action for \$100,000 exclusive of attorney's fees. Plaintiffs' counsel subsequently filed a motion for attorney's fees in the amount of \$227,577. The district court granted in part and denied in part Plaintiffs' motion for attorney's fees and ultimately awarded \$183,764 in attorney's fees after Plaintiffs filed a revised motion.

Under the FLSA, a prevailing plaintiff-employee is entitled to an award of "a reasonable attorney's fee." 29 U.S.C. § 216(b). The Fourth Circuit had previously outlined a three-step process for arriving at a reasonable attorney's fee:

First, the court must determine the lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate.

Second, the court must subtract fees for hours spent on unsuccessful claims unrelated to successful ones. When "all claims involve a common core of facts much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.

Third, the court should award some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff.

The court thus began with Defendants' contention that the district court abused its discretion by failing to reduce the award at step two of the fee analysis. The district court declined to deduct from the award time spent by Plaintiffs' counsel pursuing the claims of the 10 dismissed Plaintiffs. In doing so, the district court cited the general principle that an award need not be reduced for unsuccessful claims that share a common core of facts with successful claims. However, the district court provided no discussion of the application of that principle to this case. Because the district court failed to adequately consider time spent pursuing claims on behalf of the dismissed Plaintiffs at step two of the fee analysis, the Fourth Circuit felt it was constrained to vacate the fee award, and remand for the district court to conduct a proper analysis at step two.

The court then went on to address the district court's step three analysis "to offer additional guidance on remand." The "most critical factor" in determining a reasonable fee is the degree of success obtained by the plaintiff according to the Supreme Court. When considering the extent of the relief obtained, one must compare the amount of the damages sought to the amount awarded. This is not to say that courts should "reflexively reduce fee awards whenever damages fail to meet a plaintiff's expectations in proportion to the damages' shortfall" and courts should not reduce a fee award "simply because the plaintiff failed to prevail on every contention raised in the lawsuit." Ultimately, however, "the court must ask ... whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award."

Here, the district court declined to reduce the fee award based on the results obtained because Plaintiffs received (in the district court's view) 38% of their claimed damages and the court did

not want to discourage plaintiffs' attorneys from reaching reasonable settlements by reducing the fee award. Although the latter justification may be persuasive, the Fourth Circuit concluded that the district court clearly erred in determining the percentage of claimed damages received by Plaintiffs. The district court seems to have arrived at the 38% figure by dividing the settlement amount (\$100,000) by the amount of unpaid wages claimed in Plaintiffs' second amended 26(a)(1) disclosure (\$263,305). However, the district court overlooked the fact that Plaintiffs pursued liquidated damages, resulting in a total alleged damages amount of \$789,916. When the settlement amount is divided by this figure, one discovers that Plaintiffs received about 13% of the damages that they sought. While the district court was not required to proportionally reduce the award to account for this disparity, the court certainly erred in relying on the 38% figure to support its reasoning. Therefore, the court ordered that, on remand, the district court should also reconsider its finding at step three that the relief obtained represents 38% of the relief claimed by Plaintiffs for claims that accrued within the statute of limitations.

AUTHORS' NOTE: This one is a little bit unusual in that it found that the district court abused its discretion. But it also provides helpful guidance for attorney fee calculations for prevailing parties.

Schilling v. Schmidt Baking Co., 876 F.3d 596 (4th Cir. 2017).

The Fourth Circuit REVERSED the dismissal of plaintiff's claims for unpaid overtime under the FLSA, concluding that they were employees whose work affected, in part, the safety of vehicles weighing less than 10,000 lbs.

Panel: Agee, Keenan, Harris

Opinion: Keenan

Professional motor carriers, like Schmidt Baking Company, generally are exempt from the FLSA's requirement that employers pay "overtime" wages for hours worked in excess of 40 hours per week. However, Congress waived this exemption for motor carrier employees whose work, in whole or in part, affects the safety of vehicles weighing 10,000 pounds or less. The Fourth Circuit concluded that the plaintiffs here fall within the group of employees protected by the above waiver and, thus, are entitled to overtime wages for hours worked in excess of 40 hours per week.

The plaintiffs, Ronald Schilling, Russell Dolan, and Jonathan Hecker (collectively, the plaintiffs), worked as district sales managers for the defendant, Schmidt Baking Company, Inc. (Schmidt), for a period of time after 2008. The plaintiffs were nonexempt salaried employees and frequently worked more than 40 hours in a given week. For all hours worked, the plaintiffs were paid at the regular wage rate, and were not paid overtime wages for hours worked in excess of 40 hours per week.

During the plaintiffs' employment, Schmidt provided baked goods to restaurants, grocery stores, and other small businesses across several states in the Mid-Atlantic region. Schmidt entered into contracts with independent operators who executed some of these deliveries. Those contract

operators owned or leased “box trucks,” which weighed over 10,000 pounds, to move the goods throughout the delivery network. Schmidt also maintained a limited number of company vehicles at each of its depots. This fleet included trucks of a variety of sizes, some weighing less and some weighing more than 10,000 pounds.

When the various operators were unable to complete their deliveries, the plaintiffs often were required to perform those deliveries. Because of the quantity of deliveries and the limited number of drivers, the plaintiffs spent between 65% and 85% of their time each week making deliveries. The type of vehicles the plaintiffs used to make the deliveries varied according to the delivery requirements of a given day, but the plaintiffs used their personal vehicles for between 70% and 90% of the deliveries they made. Each of the plaintiffs’ personal vehicles weighed less than 10,000 pounds.

The plaintiffs filed suit under the FLSA, the Maryland Wage and Hour Law (the MWHL), and the Maryland Wage Payment and Collection Law (the MWPCCL), alleging that they were entitled to payment of overtime wages for hours worked in excess of 40 hours per week. Schmidt moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), or in the alternative, for summary judgment under Rule 56. The district court treated Schmidt’s motion as a motion to dismiss and granted the motion without a hearing.

The Fourth Circuit began its discussion with a look at the history and purpose of the FLSA, recalling that, in the midst of the Great Depression, Congress enacted the FLSA to combat the “evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.” Congress intended that the FLSA protect the rights of those who toil. To that end, the FLSA established a federal minimum wage and required employers to pay “a rate not less than one and one-half times the regular rate” to employees who work more than 40 hours in a single workweek.

The FLSA, however, exempts certain classes of employees from its overtime protections. One such exemption is the Motor Carrier Act (MCA) Exemption, the scope of which is defined by reference to the MCA. The MCA grants the Department of Transportation (the DOT) regulatory authority over the maximum hours of service for employees of “a motor private carrier.” 49 U.S.C. § 31502(b)(2). The MCA Exemption provides that the FLSA’s overtime-wage requirements do not apply to “any employee with respect to whom the Secretary of Transportation [DOT] has the power to establish qualifications and maximum hours of service,” meaning, any employee subject to the MCA. See 29 U.S.C. § 213(b)(1); see also 49 U.S.C. §§ 31502(b), 13102 (defining the scope of the Secretary of Transportation’s regulatory authority).

In 2005, Congress passed an amendment to the MCA to apply only to carriers using “commercial motor vehicles,” that is, vehicles weighing at least 10,001 pounds. Consequently, for those persons or entities who operated vehicles weighing 10,000 pounds or less, the DOT had no regulatory authority and the MCA Exemption in the FLSA would not apply. These carriers thus were subject to the FLSA’s overtime requirements.

In June 2008, however, Congress enacted the SAFETEA–LU Technical Corrections Act of 2008 (TCA). As relevant here, Section 305 of the TCA reinstated the pre-SAFETEA-LU definition of

“motor carrier.” This correction restored the Secretary of Transportation’s authority to regulate motor carriers, regardless of the weight of the vehicle driven. See 49 U.S.C. § 13102(16) (2008) (defining “motor vehicle”). Despite this broadening of the DOT’s regulatory authority, the TCA also amended the FLSA to narrow the class of employees covered by the MCA Exemption. Section 306(a) of the TCA provides that “[S]ection 7 of the Fair Labor Standards Act [imposing overtime compensation requirements] ... shall apply to a covered employee notwithstanding section 13(b)(1) of that Act [the MCA Exemption].” Thus, even if an employer is subject to the jurisdiction of the Secretary of Transportation, that employer still may be obligated to pay its employees overtime wages if the employees meet the TCA’s definition of a “covered employee.” In relevant part, the TCA defines a “covered employee” as “an individual”:

- (1) who is employed by a motor carrier or motor private carrier ... ;
- (2) whose work, in whole or in part, is defined—
 - (A) as that of a driver, driver’s helper, loader, or mechanic; and
 - (B) as affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce ...; and
- (3) who performs duties on motor vehicles weighing 10,000 pounds or less.

The central issue in this case, was whether the plaintiffs are “covered employees” under the TCA, entitling them to overtime compensation under the FLSA.

Schmidt argued that because the plaintiffs worked on a mixed fleet, or a fleet consisting of vehicles weighing both more and less than 10,000 pounds, the plaintiffs were subject to the MCA Exemption and, therefore, were not entitled to overtime compensation. In Schmidt’s view, if an employee spends more than a de minimis amount of time operating large vehicles, the TCA exception does not apply.

In response, the plaintiffs contended that they qualified for the TCA exception to the MCA Exemption. The plaintiffs argue that because a “covered employee” is an employee who drives small vehicles “in whole or in part,” and because the plaintiffs spent 70% to 90% of the time they spent making deliveries driving small vehicles, the plaintiffs plainly satisfied the statutory definition. Therefore, the plaintiffs claim, they were entitled to overtime wages for hours worked in excess of 40 hours per week.

The Fourth Circuit agreed with the plaintiffs.

The Fourth Circuit found compelling the reasoning of the Third Circuit in *McMaster v. Eastern Armored Services, Inc.*, 780 F.3d 167 (3d Cir. 2015), where the Third Circuit held that a driver employed by a motor carrier was entitled to overtime compensation under the FLSA because she spent part of her work week driving a vehicle weighing less than 10,000 pounds. In *McMaster*, the plaintiff’s duties consisted of driving armored vehicles of varying weights within the defendant’s

mixed fleet. *Id.* at 168. Because the plaintiff spent 51% of her work days working on vehicles weighing 10,001 pounds or more, and 49% of her work days working on vehicles weighing 10,000 pounds or less, her job placed her “squarely within” the TCA’s requirement of working “in whole or in part” on smaller vehicles. *Id.* at 168–70.

The court found the Third Circuit’s reasoning consistent with both the plain language of the TCA and the purposes of the FLSA. When interpreting a statute, the Fourth Circuit recognized that it must first consider the plain meaning of the statutory language, considering all the words employed rather than isolated phrases, the specific context in which that language is used, and the broader context of the statute as a whole.

Using a plain language analysis, the Fourth Circuit concluded that the text of the TCA plainly provides that employees working on mixed fleet vehicles are covered by the TCA exception. The structure of the TCA exception makes clear that an employee need only work on smaller vehicles “in part” to qualify for overtime compensation, thereby placing drivers of mixed fleets within the FLSA’s requirements. Sections 306(c)(1), (2), and (3) of the TCA collectively list requirements that an employee must meet in order to be excepted from the MCA Exemption and entitled to overtime wages. The language of Section 306(c)(2), which modifies the two subsections that follow, refers to individuals “whose work, in whole or in part” meets the requirements of those subsections. Further, there is nothing in the language or structure of the statute indicating that Congress intended to limit the reach of the TCA to exclude employees working on mixed fleets of vehicles.

Additionally, the court observed that the purpose of the FLSA is “remedial” in nature and that exemptions to the FLSA “are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.” The court’s interpretation of the TCA exemption also further the purposes of the FLSA.

AUTHORS’ NOTE: An important case for a very small subset of employees.

☪ ***Degidio v. Crazy Horse Saloon & Restaurant, Inc.*, 880 F.3d 135 (4th Cir. 2018).**

The Fourth Circuit AFFIRMED the district court’s refusal to enforce “arbitration agreements” between exotic dancers and strip club finding that the agreements were invalid and unenforceable.

Panel: Wilkinson, King, Floyd

Opinion: Wilkinson

Plaintiff Alexis Degidio filed a putative collective and class action against defendant Crazy Horse Saloon and Restaurant, Inc. (“Crazy Horse”), a well-known Myrtle Beach, S.C. strip club.

Degidio performed as an exotic dancer at the Crazy Horse in 2012 and 2013. Crazy Horse classified entertainers who performed at its club as “independent contractors.” The entertainers were not paid by Crazy Horse, but were instead compensated through customer tips.

Degidio alleged that Crazy Horse misclassified her and other putative class members as independent contractors and that it further violated the minimum wage and overtime provisions of the FLSA and various provisions of the S.C. Payment of Wages Act.

Over the course of litigation, Crazy Horse adopted three distinct strategies to defeat Degidio’s claim. First, Crazy Horse attempted to win the judicial action on the merits by filing multiple motions for summary judgment. Second, it repeatedly asked the district court to certify questions of state law to the South Carolina Supreme Court. And third, it sought to compel arbitration on agreements executed *after* the commencement of the suit. However, it was only after the district court had resolved on the merits a number of legal issues that Crazy Horse asked the court to enforce the arbitration agreements.

“As the ensuing chronology makes clear, Crazy Horse was disdainful of orderly judicial process and lacking in the respect that opposing parties in an adversary proceeding are due.”

Crazy Horse began its maneuvers when it answered Degidio’s complaint on October 8, 2013, but did not move to compel arbitration. The parties then participated in discovery until November 2014. In November and December 2014, at the very end of the discovery period, Crazy Horse began entering arbitration agreements with entertainers who had worked at the club.

The arbitration provision was contained in a **lease** that Crazy Horse distributed to entertainers who used its facilities. Crazy Horse told entertainers that they were required to sign the lease as a condition of performing at the club. The agreement waived the signatory’s right to participate in any class action against Crazy Horse, including any class that might be certified in this case. Prior to executing the agreements, Crazy Horse did not inform the district court that it was communicating with potential class members about pending litigation.

In December 2014, Crazy Horse moved for summary judgment on all claims. Crazy Horse’s motion for summary judgment relied on evidence obtained in discovery, including deposition testimony, to argue that its entertainers were legally classified as independent contractors and thus not entitled to the protections of the FLSA. Crazy Horse did not mention arbitration in this motion for summary judgment. The next day, Degidio moved for Rule 23 class certification for the state law claims and conditional certification of a collective action under the FLSA.

On January 19, 2015, Crazy Horse opposed Degidio’s motions for FLSA conditional certification and Rule 23 class certification and—for the first time in the litigation—argued that the district court should compel arbitration against any entertainers who had signed arbitration agreements. In support of its motion to compel arbitration, Crazy Horse submitted signed declarations in which entertainers explained why they chose to sign the agreement. All of the entertainers stated that they preferred to be independent contractors because they enjoyed having the freedom to work at other clubs, set their own work schedules, and keep the money they received in tips. Crazy Horse also

filed an affidavit from its CFO Laura Watson explaining that Crazy Horse had begun entering arbitration agreements with entertainers in November 2014.

On September 30, 2015, the district court found that entertainers who performed at Crazy Horse were employees for purposes of the FLSA. Based on this finding, the district court granted Degidio's motion for conditional certification of an FLSA collective action and authorized Degidio's counsel to send notice to putative plaintiffs. The district court also questioned the enforceability of the arbitration agreements as they pertained to this action. The district court expressed concern "that potential class members have been misled about the nature of the plaintiff's claims, the implications of being classified as an employee, and what an employee would need to show to recover under the FLSA."

Shortly after notice had been sent to potential class members informing them of their right to opt into Degidio's FLSA collective action, on October 26, 2015, Crazy Horse filed another motion for summary judgment. In the motion, Crazy Horse argued only that it was entitled to summary judgment on Degidio's remaining SCPWA claim. It again did not mention arbitration.

After Crazy Horse filed that summary judgment motion, between November 2015 and January 2016, more than a dozen new plaintiffs joined this litigation. Nine of those plaintiffs had signed the arbitration agreements Crazy Horse sought to enforce.

Moreover, on November 30, 2015, only a month after it had filed a motion for summary judgment on Degidio's SCPWA claims, Crazy Horse began serving written discovery on the opt-ins, including each opt-in who signed an arbitration agreement. Crazy Horse asked the opt-ins to produce documents relating to their sources of income, their work history, the number of hours they worked, and the remuneration they received from defendants. All of these questions probe merits issues that are relevant to Degidio's SCPWA and FLSA claims, but are unrelated to the question of arbitrability.

The district court denied Crazy Horse's motion for summary judgment on June 3, 2016.

Seven days later, Crazy Horse moved to certify several questions of South Carolina law to the South Carolina Supreme Court. The district court properly denied the motion because it had earlier ruled on the exact same questions at Crazy Horse's request. Undeterred, Crazy Horse filed a second motion to certify the wages issue to the South Carolina Supreme Court on August 11, 2016.

Before the district court had ruled on Crazy Horse's second motion to certify state law questions to the South Carolina Supreme Court, on October 31, 2016, Crazy Horse filed another motion for summary judgment. The case had now been ongoing for more than three years, and more than nine months had passed since the latest opt-in had joined the FLSA collective action. This time, Crazy Horse sought to compel arbitration against the nine plaintiffs who had signed arbitration agreements in November and December 2014.

On January 26, 2017, the district court entered an omnibus order denying Crazy Horse's second motion to certify questions of state law, rejecting the motion to compel arbitration, and granting Degidio's motion for conditional class certification. As to arbitration, the court found that Crazy

Horse had obtained the arbitration agreements through a unilateral, unsupervised, and misleading pattern of communication with absent class members initiated more than a year after the pendency of this case. It thus declined to enforce the arbitration agreements.

Crazy Horse appealed this decision to the Fourth Circuit.

The Fourth Circuit noted the strong federal policy favoring arbitration set out in the Federal Arbitration Act and that courts must stay “any suit or proceeding” pending arbitration of “any issue referable to arbitration under an agreement in writing for such arbitration.” 9 U.S.C. § 3. However, the court noted, the policy undergirding the FAA is not without limits.

For example, a litigant may waive its right to invoke the Federal Arbitration Act by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay. This is because “[a]rbitration laws are passed to expedite and facilitate the settlement of disputes and avoid the delay caused by litigation,” not to provide “a means of furthering and extending delays.” Two factors specifically informed the court’s inquiry into actual prejudice: (1) the amount of the delay; and (2) the extent of the moving party’s trial-oriented activity.

Crazy Horse employed judicial proceedings to pursue a litigation strategy for over three years, and it did so to the detriment of plaintiffs in this case. Instead of filing a motion to compel arbitration at an early stage in the litigation process, Crazy Horse filed multiple motions for summary judgment, served discovery, and twice asked the district court to certify questions of state law to the South Carolina Supreme Court. This was litigation activity aimed at obtaining a favorable ruling on the merits of the case. In fact, Crazy Horse had already obtained favorable rulings from the district court to the effect that Degidio’s claims for minimum wages and overtime under the SCPWA were preempted.

In pursuing this merits-based strategy for three years, Crazy Horse actively sought to obtain a favorable legal judgment. In doing so, it forced plaintiffs and the district court to spend unnecessary time and resources on issues that might have had to be reargued before an arbitrator. This conduct could not be more at odds with the FAA’s goal of facilitating the expeditious settlement of disputes.

The only possible purpose of the arbitration agreements was to give Crazy Horse an option to revisit the case in the event that the district court issued an unfavorable opinion. In other words, Crazy Horse did not seek to use arbitration as an efficient alternative to litigation; it instead used arbitration as an insurance policy in an attempt to give itself a second opportunity to evade liability. If the court were to countenance Crazy Horse’s actions, it would give defendants a perverse incentive to wait as long as possible to compel arbitration. Generally, arbitration agreements are signed before the commencement of any litigation. When such agreements are executed during the pendency of litigation, there is an increased risk that arbitration will operate not to expedite the resolution of disputes, but to prolong the entire process and to give defendants a second opportunity to contest unfavorable judgments. “This all turns the arbitral process on its head. Instead of giving the parties to an arbitration agreement one neutral arbiter, it grants defendant two bites at the apple.”

Additionally, the Fourth Circuit expressed deep concern with the arbitration agreements themselves. The arbitration agreements that Crazy Horse presented to potential plaintiffs, it found, painted a false picture of the entertainers' legal posture. Specifically, the agreements suggested that the entertainers' ability to keep tips and set their own schedules was a result of their designation as independent contractors, and that this designation would be imperiled if the entertainers joined Degidio's suit. For example, Paragraph 7.C of the agreement, which summarized the benefits of being an independent contractor, specified that an entertainer's ability to "choose the days or evenings to appear and perform at the club" was contingent on the entertainer retaining her status as an independent contractor and signing the arbitration agreement. Paragraph 7.B further emphasized that if the entertainers were found to be employees, then Crazy Horse "would be required to collect, and would retain, all Performance Fees paid by guests to Performer."

In their declarations, the entertainers appear to have been operating under the misunderstanding that they would be able to keep their tips and flexible work schedule only if they were independent contractors, and that they would be able to assure themselves of that status only by signing the arbitration agreements. But the benefits that seemingly led the entertainers to sign arbitration agreements are available to both employees and independent contractors alike. Insofar as the entertainers signed the arbitration agreements because they thought that employment status would deprive them of any say-so over the conditions of their employment, the agreements are misleading.

Finally, the court was concerned that the agreements were all presented to plaintiffs in a furtive manner. The agreements in this case were all obtained after potential plaintiffs met with Crazy Horse's CFO or counsel. The setting here was ripe for duress: Not only were arbitration agreements executed without knowledge of the court and in the context of an employment relationship in which the employer alone could profess the requisite legal expertise. They falsely suggested that participation in the lawsuit would deprive potential plaintiffs of important professional rights. The combination of these circumstances rendered defendant's conduct indefensible from the get-go. The district court was right to describe the "circumstances here" as "distinct and disturbing," and it correctly denied enforcement of these sham agreements.

AUTHORS' NOTE: Some good news on the arbitration front! Arbitration agreements, in fact, have limits. The court never uses the "u" word² in its opinion, but that is the legal term of art that lurks in the background of Judge Wilkinson's analysis. These agreements were procedurally unconscionable. Of course, we know that the Supreme Court does not care much for procedural unconscionability in the arbitration context, at least not in "normal" cases. But here, the circumstances were certainly different than in Concepcion and Italian Colors and justified a departure from SCOTUS's unforgiving arbitration jurisprudence. [And, wow, just when you think strip club operators could not get any sleazier.]

² Unconscionable.

Balbed v. Eden Park Guest House, LLC, 881 F.3d 285 (4th Cir. 2018).

The Fourth Circuit REVERSED the district court’s grant of summary judgment to the employer on plaintiff’s claims for unpaid minimum and overtime wages.

Panel: Motz, Agee, Floyd

Opinion: Motz

Eden Park Guest House is a small family-owned bed and breakfast located in Takoma Park, Maryland. In July 2015, Eden Park hired Balbed to serve as its innkeeper. The parties entered into a written agreement, in which Eden Park paid Balbed \$800/month and provided her with a room in the inn, laundry, utilities, and daily breakfast. In exchange, Balbed agreed to answer phones, make reservations, reply to emails, check guests in and out, serve breakfast to guests, clean public areas and guest rooms, and manage Eden Park’s social media presence.

The agreement set forth a daily schedule that divided Balbed’s time into three categories: (1) serve breakfast to guests daily (for a total of seven hours per week); (2) clean the guests rooms and common spaces five days a week (for a total of twenty-two hours per week); and (3) as necessary, check in guests between 4:00 p.m. to 9:30 p.m. and close the bed and breakfast at 10:00 p.m. “unless otherwise specified.” Thus, the contract provided Balbed would work 29 hours per week on the first two categories, but did not specify the amount of time required for the third—checking guests in and out, as necessary—or for the additional duties listed that did not fall into any of these three categories: answering phones, making reservations, replying to emails, and managing Eden Park’s social media presence.

Eden Park contended that the contract required 29 hours of work per week, entitling Balbed to \$1107.80/month.³ Eden Park maintained that it compensated Balbed with an amount in excess of this because it paid Balbed \$800/month and provided her lodging that it valued as worth between \$850/month and \$1800/month. Balbed challenged that assessment of the lodging’s value and claims that, notwithstanding the contract, she worked in excess of 100 hours per week nearly every week without a day off.

Eden Park moved for summary judgment, maintaining that the parties’ written contract constituted a “reasonable agreement” under 29 C.F.R. § 785.23, and that this exempted Eden Park from all other FLSA requirements. The district court agreed concluding that 29 C.F.R. § 785.23 carved out an exception to the other FLSA regulatory requirements for recordkeeping and calculation of in-kind wages. Because the court found the parties’ contract constituted a reasonable agreement within the meaning of § 785.23, it granted summary judgment to Eden Park.

This case involved the interaction of several regulations promulgated by the Department of Labor pursuant to its authority under the FLSA. The FLSA, of course, requires employers to pay their employees an hourly minimum wage, 29 U.S.C. § 206(a), at either the federal wage rate or the

³ Four weeks of 29 hours each at \$9.55 per hour, which was the local minimum wage at the time.

applicable state or local rate, whichever is higher. The statute entitles employees to overtime pay for all hours worked over forty per week at one and one-half times their ordinary rate of pay. *Id.* § 207(a)(1).

Section 203(m) of the statute provides that “wages” include cash and, under certain circumstances, “the reasonable cost ... to the employer of furnishing [the] employee with board, lodging, or other facilities.” 29 U.S.C. § 203. The Department of Labor regulations, promulgated pursuant to § 203(m), provide that to claim the credit for lodging as wages, an employer must ensure that:

1. The lodging is regularly provided by the employer or similar employers, 29 C.F.R. § 531.31;
2. The employee voluntarily accepts the lodging, 29 C.F.R. § 531.30;
3. The lodging is furnished in compliance with applicable federal, state, or local law, 29 C.F.R. § 531.31;
4. The lodging is provided primarily for the benefit of the employee rather than the employer, 29 C.F.R. § 531.3(d)(1); and
5. The employer maintains accurate records of the costs incurred in furnishing the lodging, 29 C.F.R. § 516.27(a).

U.S. Dep’t. of Labor, Wage and Hour Div., Field Assistance Bulletin No. 2015-1 (Dec. 17, 2015).

Section 207(a)(1) of the statute provides for the calculation of overtime hours. 29 U.S.C. § 207(a)(1). A Department of Labor regulation promulgated pursuant to § 207(a)(1) sets forth rules regarding the calculation of hours worked where an employee lives on the employer’s premises:

An employee who resides on his employer’s premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. ...

29 C.F.R. § 785.23 (2004) (emphasis added).

Eden Park contended that the FLSA regulations that govern the § 203(m) lodging credit do not apply and that the value of room and board need not conform to § 203(m)’s requirements (contained in 29 C.F.R. § 531 and 29 C.F.R. § 516) if an employer and employee reach a “reasonable” agreement under 29 C.F.R. § 785.23. Eden Park’s contention was incorrect.

In fact, 29 C.F.R. § 785.23 simply provides a limited exception to the general requirement that an employee must be compensated for all hours actually spent at work. Thus, that regulation allows employers and employees to reach a “reasonable agreement” regarding the number of hours presumptively worked when an employee resides on the employer’s premises. This narrow exception to determining hours worked has no bearing on an employer’s obligations under § 203(m) when supplementing cash wages with in-kind compensation like board or lodging.

The employment agreement between Eden Park and Balbed had to comply with the requirements that govern not just 29 C.F.R. § 785.23, but also § 203(m). However, the district court failed to make a finding as to whether Eden Park’s in-kind compensation conformed to the requirements under § 203(m) and its implementing regulations. Nor did the court assess all the “pertinent facts” in determining the reasonableness of the employment agreement under 29 C.F.R. § 785.23.

Eden Park estimated that the lodging it provided to Balbed as in-kind compensation had a value between \$850/month and \$1800/month. The \$850 estimate relied on the asserted knowledge of the local rental market by the inn’s General Manager. The \$1,800 estimate rested on the price Eden Park charged guests to stay in an upstairs guestroom. Thus, according to Eden Park, even if its agreement with Balbed required her to work not just 29 but 40 hours per week, the value of the lodging (\$850–\$1800 a month), combined with the \$800 monthly cash wages and other in-kind benefits (utilities and breakfast), exceeded the minimum wage. But in calculating the value of the lodging and other in-kind items, Eden Park relied on their purported market value, which includes profit. Department of Labor regulations promulgated pursuant to Section 203(m) prohibit this type of alteration. See 29 C.F.R. § 531.3(b).

The regulations provide only two ways to calculate the value of in-kind compensation—reasonable cost or fair value—and an employer must use whichever is less. 29 C.F.R. § 531.3(c). The reasonable cost of housing “does not include a profit to the employer.” 29 C.F.R. § 531.3(b). As for fair value, the regulations make clear that an employer may only use the fair value of housing as the amount credited toward wages if the fair value is equal to or lower than the amount the employer actually pays for the housing. 29 C.F.R. § 531.3(c). The regulations direct employers to calculate the actual cost of providing lodging to an employee by apportioning the monthly mortgage, rental payments, and utility payments. See 29 C.F.R. § 531.4; see also DOL § 203(m) Manual.

Eden Park made no attempt to meet these requirements. Moreover, Balbed maintained that Eden Park cannot do so now because the inn failed to keep contemporaneous records. See 29 C.F.R. § 516.27(a) (“[A]n employer who makes deductions from wages of employees for ‘board, lodging, or other facilities’ ... shall maintain and preserve records.”). DOL regulations require an employer claiming the § 203(m) wage credit for lodging to keep two kinds of records: (1) records regarding the cost to the employer of providing the housing and (2) records regarding wage calculations taking lodging into account. See 29 C.F.R. §§ 516.27(a)(1), (b). Since Eden Park did not produce such records, Balbed contended that Eden Park is precluded from using the value of the lodging as in-kind compensation.

The court concluded that if Eden Park could provide a reconstruction of records that the district court deemed reasonable, those reconstructed records could be used to assess Balbed’s appropriate

wages. See 29 C.F.R. § 516.27(a)(2) (“No particular degree of itemization is prescribed. However the amount of detail shown ... should be sufficient to enable ... [an] authorized representative to verify the nature of the expenditure and the amount by reference to the basic records.”). On remand, the Fourth Circuit instructed, if Eden Park offers the evidence required by § 203(m), the district court should make a finding as to the reasonable cost of the lodging and other in-kind benefits that Eden Park provided to Balbed.

Finally, the court considered the hours required by the agreement under the 29 C.F.R. § 785.23 analysis. That regulation reflects a recognition that in employment relationships where employees reside on the employer’s premises, it may be difficult to determine the exact number of hours worked. For this reason, 29 C.F.R. § 785.23 provides that “any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.” 29 C.F.R. § 785.23 (emphasis added).

Courts have found that an agreement reached pursuant to this regulation “is binding if it is reasonable in light of ‘all of the pertinent facts’ of the employment relationship.” Balbed argued that, notwithstanding the value of the in-kind benefits, the contract was not a “reasonable agreement” under 29 C.F.R. § 785.23. However, the Fourth Circuit left it to the district court to determine, on remand, whether the contract falls within the “broad zone of reasonableness” accorded to 29 C.F.R. § 785.23 agreements after examining “all of the pertinent facts” in the employment relationship.

Thus, on remand, the district court should consider how many hours Balbed presumptively worked each day by examining whether Balbed was “engaged to wait” or “wait[ing] to be engaged” during the “check-in” hours specified in the contract. The face of the contract suggests that Balbed was required to work 29 hours at a minimum, and dictates periods of time where Balbed would be essentially “on-call” (4:00 p.m. to 9:30 p.m. each night). Under the FLSA, hours worked include all time spent performing tasks for the benefit of the employer or waiting to perform such tasks (i.e. being “engaged to wait”). The Supreme Court has explained that whether waiting time is work time under the FLSA raises “a question of fact to be resolved by appropriate findings of the trial court Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. Whether Balbed was “engaged to wait” or “wait[ing] to be engaged” during the “check-in and closing time” therefore constitutes a question of fact to be resolved by the district court.

AUTHORS’ NOTE: A very fact intensive case, with unusual facts, which also deals with the complicated interplay between multiple DOL regulations. Important for the very small group of employees who reside on the employer’s premises, but not of broad applicability.

Velasquez v. Salsas and Beer Restaurant, Inc., ___ Fed. Appx. ___ (4th Cir. 2018).

The Fourth Circuit held that employer coverage is an element of an FLSA claim, but is not jurisdictional, and AFFIRMED summary judgment for the employer.

Panel: Floyd, Harris, Shedd (S.J.)

Opinion: Per Curiam

The Supreme Court has created a “readily administrable bright line” rule in determining whether a threshold limitation on a statute is a jurisdictional requisite. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Only when Congress “clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional” will it be treated as such; conversely, “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” The FLSA does not clearly demonstrate that enterprise coverage is jurisdictional, and rather constitutes an element of an FLSA claim.

In concluding that Velasquez failed to prove an element of his claim, the district court relied on material outside of the pleadings, and therefore the alternative ruling constitutes a sua sponte entry of summary judgment for Defendants, which is fine so long as the losing party was on notice that she had to come forward with all of her evidence.

Defendants never filed a motion for summary judgment in the district court, and explicitly noted that they were the nonmoving parties in the matter. However, Defendants asserted in their response to Velasquez’s motion for summary judgment that they were entitled to judgment as the nonmoving party. In support of that contention, Defendants asserted that Velasquez failed even to seek discovery materials related to either prong of enterprise coverage, that SBR’s gross annual income was less than \$500,000, and that there was no evidence that Velasquez was engaged in interstate commerce during the course of his employment with SBR. Second, Defendants expressly denied in their answer that enterprise coverage existed. Because Defendants specifically contested the existence of enterprise coverage and argued that Velasquez failed to prove enterprise coverage, Velasquez was aware that he needed to demonstrate the existence of such coverage.

There was no evidence that SBR or its employees engaged in interstate commerce as defined by the FLSA. Accordingly, the court affirmed the district court’s judgment.

AUTHORS’ NOTE: A weird case. Remember plaintiffs, you must PROVE coverage by a federal statute if the defendant explicitly denies coverage in its Answer.

☪ **Weckesser v. Knight Enterp. S.E., LLC, ___ Fed. Appx. ___ (4th Cir. 2018)**

The Fourth Circuit AFFIRMED the district court’s order refusing to compel arbitration, finding that the parties had not signed a valid arbitration agreement.

Panel: Motz, Traxler, Diaz

Opinion: Diaz

Jeffrey Knight, Inc. (“Jeffrey Knight”), a Florida corporation, is the parent company of defendant Knight Enterprises, which provides customers with high-speed cable, television, and telephone installation services. Patrick Weckesser worked as a service technician for Knight Enterprises.

“Weckesser’s *joust* with Knight Enterprises began when he sued the company in federal court in South Carolina.”⁴ Weckesser claims that he and other technicians were improperly categorized as independent contractors rather than employees and are therefore owed overtime pay, back pay for unpaid wages, and treble damages under the FLSA and SC law.

Knight Enterprises asked the district court to compel arbitration based on paperwork Weckesser signed when he began to work for the company. One document, styled as an “Independent Contractor Services Agreement” (the “Services Agreement”), set forth the terms (some in capitalized text) governing Weckesser’s work for Knight Enterprises. It also provides that the agreement, “together with its related written documents, contains the entire understanding between the parties with respect to the matters set forth herein.” The Services Agreement itself contains no reference to arbitration. It does, however, provide that the parties “knowingly and intentionally waive their right to a trial by jury in order to expedite the handling of any dispute hereunder.” The Services Agreement is dated September 11, 2015, and signed by Patrick Weckesser, on behalf of himself, and Brian Vaughn, on behalf of Knight Enterprises.

Weckesser and Vaughn signed another document called an “Arbitration Rider and Class Action Waiver” (the “Arbitration Rider”). The Arbitration Rider provides that any dispute between the parties must be “referred to and finally resolved by arbitration in Tampa, Florida.” It also includes a class action waiver, requiring that any claim “be brought in the respective party’s individual capacity, and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiff, or similar proceeding.” The Arbitration Rider explains (in all-capitalized text):

The parties understand that they may have had a right to litigate th[r]ough a court, to have a judge or jury decide their case and to be a party to a class or representative action. However, they understand, agree, and choose to waive such rights and to have any claims decided individually, through arbitration as provided herein. Each party voluntarily and irrevocably waives any and all rights to have any dispute heard or resolved in any forum other than through arbitration as provided herein. This waiver includes, but is not limited to, any right to a trial by jury.

Like the Services Agreement, the Arbitration Rider is dated September 11, 2015, and was signed by Weckesser and Vaughn. But this time, the document identified Vaughn as signing not on behalf of Knight Enterprises, but on behalf of its parent company, “*Jeffrey Knight, Inc. d/b/a/ Knight Enterprises.*” And the opening sentence of the Arbitration Rider states that the agreement was “entered into by and between Jeffrey Knight, Inc. d/b/a Knight Enterprises ... and the undersigned Independent Contractor.”

⁴ Look at Judge Diaz getting punny! The bold italics of Judge Diaz’s (several) puns is mine.

Knight Enterprises asked the district court to stay or dismiss the proceedings and to compel arbitration based on the Services Agreement and the Arbitration Rider. Its argument was threefold: (1) the identification of Jeffrey Knight rather than Knight Enterprises in the Arbitration Rider was a clerical error that had no effect on the force of the agreement; (2) and in the alternative, Knight Enterprises was entitled to enforce the arbitration agreement between Weckesser and Jeffrey Knight as a third-party beneficiary; and (3) in any event, the court should use its powers in equity to force the parties to arbitrate. The district court rejected each of these contentions and denied the motion.

The Fourth Circuit began its analysis by noting that “[a]rbitration is ‘a matter of contract,’ and courts ‘must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.’” *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013)(emphasis added by BSC). Although the Supreme Court has long recognized and enforced a liberal federal policy favoring arbitration agreements, a court cannot force a party to arbitrate a claim unless that party has agreed to do so. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Further, the FAA does not purport to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).

Thus, to determine whether the Arbitration Rider created an enforceable agreement between Weckesser and Knight Enterprises, the court looked to principles of South Carolina contract law.

Under South Carolina law, courts must, to whatever extent possible, enforce a contract *as written*. A court “has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction.” *Lowcountry Open Land Tr. v. Charleston Southern Univ.*, 376 S.C. 399, 656 S.E.2d 775, 781 (2008). “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.... If the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132, 134 (2003).

In applying S.C. contract law to the Arbitration Rider, the Fourth Circuit concluded that, on its face, the Arbitration Rider is plainly an agreement between Weckesser and Jeffrey Knight. It says as much in its opening sentence, and it purports to be signed by an agent of Jeffrey Knight.

Nevertheless, Knight Enterprises asked the court to find that the references to Jeffrey Knight (rather than Knight Enterprises) in the Arbitration Rider were, as Knight Enterprises puts it, a “clerical error,” a “simple misnomer,” or “merely a scrivener’s error,” rather than an accurate identification of the parties to the agreement. The Fourth Circuit rejected this argument. The court noted that Jeffrey Knight is an actual legal entity; that it might require employees of its subsidiaries to sign an arbitration waiver to cabin its own liability; that “Jeffrey Knight, Inc.” bears little typographical semblance to “Knight Enterprises S.E., LLC,” and that the Arbitration Rider sets dispute resolution in Jeffrey Knight’s backyard (Tampa, Florida, where Jeffrey Knight is based) as the venue for arbitration and the source of applicable substantive law, whereas Knight Enterprises is at home in South Carolina. Finally, the court noted that the Services Agreement already contains a provision that governs dispute resolution between Weckesser and Knight Enterprises—it states that the

parties waive their right to a jury trial – and to hold that the Arbitration Rider applied to Knight Enterprises “would scatter its dispute resolution terms among separate documents.”

Against this evidence, the court concluded, “there’s little in the text of the agreements to suggest we shouldn’t hold the parties to their words.”

The best evidence for Knight Enterprises was a statement in the Arbitration Rider that it is “in addition to the terms of the [Services Agreement] between the parties.” But this solitary statement isn’t enough to overcome the evidence that points the other way. At best, this phrase injects some ambiguity into the agreement. “And ambiguity alone can’t *ride to the rescue* of Knight Enterprises.”⁵ Further, the contracts at issue appear to be form contracts of adhesion and to the extent the agreements are ambiguous, the “basic contract law principle *contra proferentem* counsels that court construe any ambiguities in the contract against its draftsman.”

Knight Enterprises implored that in the special context of arbitration agreements, a feather must be placed upon the scale on the side of arbitrating claims. While the federal policy and presumption in favor of arbitration is strong, “that presumption is no *armor* for Knight Enterprises here.”

Here, the Fourth Circuit concluded, “the parties here must abide by what the agreement says. The Arbitration Rider binds Weckesser and Jeffrey Knight to arbitration of their disputes and is silent as to claims arising between Weckesser and Knight Enterprises.”

The Court also rejected Knight Enterprises’s argument that it should nevertheless be considered a third-party beneficiary of that contract and thereby receive its benefits. Looking only at the four corners of the Arbitration Rider, the court could find no indication that parties intended Knight Enterprises to be a third-party beneficiary. As the text of the Arbitration Rider doesn’t show a clear intent to make Knight Enterprises a third-party beneficiary, the court declined to rewrite the contract to say otherwise.

The Fourth Circuit also rejected Knight Enterprises’s invitation to use equitable estoppel principals to force arbitration.

AUTHORS’ NOTE: This case – taken together with Degidio v. Crazy Horse (above) and Lorenzo v. Prime Communications, L.P., 806 F.3d 777 (4th Cir. 2016)(arbitration provision in Handbook was not binding where employee signed an Acknowledgment Form stating that the provisions of the handbook were not contractual) – pretty clearly show that the Fourth Circuit is willing to place limits on arbitration that may appear (at first blush anyway) to run counter to the Supreme Court’s recent arbitration jurisprudence (specifically AT&T v. Concepcion and American Express v. Italian Colors Rest.). Each of these recent employment arbitration cases dealt with validity of purported arbitration agreements, specifically how they were entered into and what the plain language of the agreements say and mean. In each case, the court reviewed the circumstances of entry critically and interpreted the agreements literally. While the Fourth Circuit has clearly followed the holdings from Concepcion and Italian Colors (and even quoted Italian Colors in this

⁵ Punny, punny! I also note the repeated use of contractions in the Court’s opinion. I’m not judging, but I didn’t think one was supposed to use contractions in formal legal writing. Just sayin’.

case) its analysis is more holistic than what SCOTUS did in either of those cases, especially on the circumstances of execution. So, **THERE ARE LIMITS TO THE ENFORCEMENT OF PURPORTED ARBITRATION AGREEMENTS IN THE FOURTH CIRCUIT** (which is great)!

Note also that all three of these recent cases – Weckesser, Degidio, and Lorenzo – were FLSA cases. Does that matter? It does not appear this was relevant to the Fourth Circuit, but it could be a way to distinguish this line of cases and attempt to cabin this harder-look to FLSA cases.

FAMILY AND MEDICAL LEAVE ACT (“FMLA”)

Shoemaker v. Alcon Labs., Inc., ___ Fed. Appx. ___ (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the employer.

Panel: Agee, Keenan, Diaz

Opinion: Per Curiam

In September 2013, Amanda Shoemaker began work at Alcon, a lens manufacturer, on temporary assignment from a staffing agency. Fourteen months later, Alcon hired her as a direct employee. Shoemaker worked primarily at the wet aberrometer station (“wet-ab”), where she manually input information into a computer program as part of the lens quality verification process. Within six months of her employment, Shoemaker made five documented errors. As a result, in May 2015, Alcon issued Shoemaker a warning letter and placed her on a ninety-day Performance Improvement Plan. Shoemaker successfully completed the Plan, but Alcon informed her that if she failed to maintain an overall acceptable level of performance, her employment would be subject to immediate termination.

In early 2015, Alcon transferred Shoemaker from the wet-ab station to the cosmetics station, which required her to inspect lenses through a microscope for extended periods of time. Shoemaker began experiencing neck and back pain, headaches, and dizziness. Her symptoms worsened as she continued to work on cosmetics. She mentioned these symptoms to her supervisors when they came by during routine walk-throughs, but never said that her symptoms prevented her from performing her job.

On October 9, 2015, Shoemaker suffered a dizzy spell and briefly passed out. When she informed her supervisor that she was feeling faint, he suggested she take an extended break. He then transferred her from the cosmetics station back to the wet-ab station. Although Shoemaker continued to experience problems with neck and back pain and dizziness, returning to the wet-ab station helped alleviate her symptoms.

Two weeks later, Shoemaker made a significant mistake at the wet-ab station. She failed to properly process four lots of lenses, which cost Alcon \$2 million in potential revenue and took several weeks to fix. Shoemaker’s supervisors met with her to discuss the errors and reported that

she “showed no remorse or concerns for the oversight” and exhibited a “nonchalant attitude.” As a result, Alcon started to review Shoemaker’s employment status.

A few days later, Shoemaker visited a physician, Dr. Guzzo, regarding her neck and back pains and dizziness. Dr. Guzzo gave her a letter recommending that she “work in another setting until evaluated by an optometrist and pending further workup.” Shoemaker gave the letter to a supervisor who left the note in his desk and did not convey the message to human resources.

On November 15, 2015, Shoemaker called to say she would not be at work, even though she had exhausted her paid time off. She provided no excuse. The next day, Alcon issued Shoemaker a final warning letter. Several weeks later, Alcon terminated Shoemaker’s employment, citing persistent quality issues and her absence after exhausting her paid time off.

Shoemaker sued alleging that Alcon (1) interfered with her rights under the FMLA, (2) retaliated against her for exercising her FMLA rights, and (3) discriminated against her based on her disability in violation of the WVHRA.

As to her FMLA interference claim, the Fourth Circuit agreed with the district court that nothing Shoemaker told Alcon and no information she provided Alcon regarding her symptoms or condition qualified as notice that she needed medical leave. In fact, the court found, Shoemaker has still never asserted that she needed or intended to take leave to address her condition. The court acknowledged that an employee seeking leave for the first time for an FMLA-qualifying reason need not expressly assert rights under the FMLA or even mention the FMLA, however, it pointed out that “she still needs to provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request.” As “there was no leave request” here, Alcon lacked notice of Shoemaker’s potential need for FMLA leave and her interference claim failed.

As to Shoemaker’s retaliation claim, the Fourth Circuit concluded (as did the district court) that Shoemaker failed to establish that she engaged in any FMLA-protected activity.

Finally, Shoemaker argued that the district court erred in dismissing her WVHRA disability discrimination claim. The district court rejected Shoemaker’s WVHRA claim because she failed to offer any evidence linking her termination to her disability that would give rise to an inference of discriminatory intent. The court found instead that Alcon accommodated Shoemaker’s health issues and only fired her after she made a costly mistake and exceeded her paid time off without an excuse. The Fourth Circuit agreed with the district court and concluded that Shoemaker failed to establish a prima facie case that Alcon would not have terminated her employment but for her disability.

***AUTHORS’ NOTE:** A couple of take-aways here. **First**, employees must request a leave or at least give the employer information that indicates a leave is necessary in order to trigger FMLA rights. FMLA is, after all, about leave (that is what the L is all about). So, there must be some need for LEAVE as a result of a serious health condition. Otherwise, the FMLA is never triggered. **Second**, this is one of several cases this year where the Court concluded that the plaintiff did not establish a prima facie case of discrimination. In Ullrich (ADEA), Waters, (ADEA), Smith (ADA),*

McKinney (Title VII – retaliation), Melendez (Title VII – retaliation and discrimination), Lacasse (Title VII & ADA – discrimination), Tillery (Title VII – retaliation), Rayyan (Title VII – discrimination), Cooper (Title VII – discrimination and retaliation), Sanders (Title VII – retaliation), and Barnes (Title VII – discrimination), the Court concluded that the plaintiffs could not establish prima facie cases. Twelve such cases in one year is A LOT. The point of the prima facie case requirement is to weed out the cases that clearly lack merit but, at the same time, it is not intended to be an “onerous” burden. It appears that it is being overused.

TITLE VII & SECTION 1981 ☹

Munive v. Fairfax Co. Sch. Bd., 700 Fed. Appx. 288 (4th Cir. 2017).

The Fourth Circuit REVERSED the 12(b)(6) dismissal of plaintiff’s Title VII claim (but affirmed the dismissal of her claims under 42 U.S.C. § 1983).

Panel: Duncan, Harris, Hamilton (S.J.)

Opinion: Per Curiam

Kathleen Munive contended in her Complaint that, after she filed a charge of discrimination with the EEOC, her employer retaliated against her by failing to remove a reprimand letter from her personnel file as promised and that she lost out on a promotion because the letter remained in her file. The Fourth Circuit concluded that these facts were sufficient to state a plausible retaliation claim. Although reprimands and poor performance evaluations alone are much less likely to involve adverse employment actions, where there is a link between a reprimand and a more obvious adverse action like a transfer, discharge, or failure to promote, the plaintiff has adequately pled the “adverse action” element of a retaliation claim. A reasonable employee could well be dissuaded from opposing unlawful conduct if she knows that her opportunities for promotion could be lost by her employer refusing to remove a reprimand, as promised, because she has engaged in protected activity.

AUTHORS’ NOTE: Courts in the Fourth Circuit continue to struggle with the plausibility standard from *Twombly/Iqbal*. As time has passed, we have seen fewer plausibility appeals, but obviously they are still happening. One note of caution about this one. You could read the court’s opinion to say that a reprimand is never an adverse action for retaliation purposes. While it is true that the reprimand in **this case** was not an adverse action (and the plaintiff did not argue that it was), I would argue that some reprimands (depending on the case) could be adverse actions under *Burlington N. v. White*. The question of whether a reasonable employee would be dissuaded by a particular act by an employer is highly fact and case specific and depends on that the circumstances in each case. So, blanket categorizations of adverse actions for retaliation purposes (or at least those that fall short of discrimination “adverse employment actions” or harassment “tangible employment actions”) are nearly impossible to make.

McKinney v. G4S Gov't Solutions, Inc., 711 Fed. Appx. 130 (4th Cir. 2017).

The Fourth Circuit AFFIRMED summary judgment for the employer.

Panel: Duncan, Diaz, Thacker

Opinion: Duncan

John L. McKinney, Jr. asserted that G4S Government Solutions, Inc. (“G4S”) created a hostile work environment and retaliated against him for reporting racial harassment in the workplace. He also asserted a claim for intentional infliction of emotional distress (“IIED”). The district court granted summary judgment in favor of G4S on all counts. The district court found that the undisputed facts established that G4S was not liable for creating a hostile work environment because it was entitled to the Faragher/Ellerth defense as a matter of law, that no retaliation occurred because McKinney suffered no material adverse employment action, and that McKinney did not suffer severe emotional distress.

G4S hired McKinney in September 2005 to work as a Security Officer at the Radford Army Ammunition Plant (the “RFAAP”). RFAAP is operated by BAE Systems pursuant to a contract with the Department of Defense. BAE subcontracted with G4S to provide services at RFAAP including security, fire protection, copying and mail services, and janitorial services. McKinney is African-American.

G4S Senior Vice President Rich Allen oversaw G4S’s contract with BAE, which included RFAAP and a sister facility in Tennessee. Allen is also African-American. Rob Handel worked in G4S’s human resources department. G4S’s highest-ranking supervisor at RFAAP was Project Manager Shawn Lewis. Lewis reported to Allen, who reported to the president of G4S. During the relevant time period, J.C. Allison worked as the Security Chief, Greg Gravley worked as the Janitorial and Fleet Supervisor, and Ryan Gellner worked as the A Shift Captain.

In February 2012, McKinney was promoted to corporal (now called relief captain) and given a 16% raise. In September 2012, he was promoted to B Shift Captain, essentially the second shift, and given an additional 3.8% raise. In late May 2013 (after the May 23, 2013, events described below) he became the A Shift Captain, a position that McKinney prefers because of its normal hours, higher prestige, and greater responsibilities. McKinney remains employed in that position. He has not been demoted, and his salary has not been reduced since its increase in 2012.

McKinney recounted several racist incidents that occurred during his tenure at G4S. In 2011, janitor Joe Roth used the n-word in McKinney’s presence. In fall 2012, fire chief Jay Altizer told McKinney that G4S had hired a “colored boy” as a firefighter. However, the incidents of particular concern to McKinney occurred on May 23, 2013. McKinney observed Lewis, Allison, Gravley, and Gellner laughing in a common area near his office. After Allison, Gravley, and Gellner walked away, Lewis asked McKinney if he knew that there was a noose hanging on a nail inside a small

closed cabinet outside the security captain's office. Lewis showed McKinney the noose and directed McKinney to get rid of it, over McKinney's objection. As McKinney was walking away with the noose, Roth walked by and said, "I know what to do with that. I can use that around my house." Roth lives in a neighborhood with a large African-American population, and McKinney interpreted Roth's comment to refer to using the noose on his African-American neighbors.

Later that day, Lewis was standing on a ladder in the supply room when McKinney walked by. Lewis asked McKinney to come in and hold a box. McKinney had to get ready for his shift, and asked Gellner to hold the box for Lewis. As McKinney walked away, he heard Lewis and Gellner laughing. He walked back to the supply room, and saw Lewis standing on a ladder holding a white sheet over Gellner's head so that it formed a triangle-shaped cylinder that looked like a KKK hood. McKinney said "Really? ... You-all don't have to do that to get me gone. Only thing you have to do is just tell me." Neither Lewis nor Gellner responded. Gellner later apologized and explained that he had nothing to do with the incident.

On May 24, 2013, Allison gave McKinney two "Employee Counseling" forms that cited McKinney for his failure to complete paperwork that McKinney claims others had agreed to complete. The counseling forms were dated May 23, 2013, and McKinney signed and dated them as such, even though he did not receive them until the following day. McKinney characterizes these as "bogus write-ups."

G4S's policy prohibiting racial discrimination and harassment directed an employee to "immediately" report harassment to his "supervisor, a manager, or the Corporate Human Resources Department." On May 24, 2013, after he received the two counseling forms, McKinney complained to Lieutenant Colonel Byron Penland, the highest-ranking Army officer at RFAAP, about both May 23, 2013, incidents, the two counseling forms Allison gave to him, and the existence of a "dope pipe" with a Confederate flag sticker in a case at RFAAP that displayed confiscated items.

McKinney began recording his conversations with Lewis after the May 23, 2013, incident. He subsequently disclosed that he had over thirty hours of audio recordings from other conversations dating back to October 2012.

G4S Senior VP Allen visited RFAAP on May 31, 2013. Although McKinney made no attempt to talk to Allen, a receptionist informed Allen that McKinney was upset about an incident involving a noose and a white sheet, and that Lewis had been involved. Allen met McKinney and apologized, told McKinney that neither he nor the company tolerated such conduct, and that there would be an investigation. Allen gave McKinney his card and personal cell phone number, and told McKinney to contact him if he had any concerns. Allen then called Handel to let him know that he would be recommending that Handel conduct an employee census at RFAAP to address concerns related to employee morale, ethics violations, and leadership issues. He also mentioned racial issues but did not provide any details as to McKinney's complaint.

Handel visited RFAAP from June 4–6, 2013, to conduct his census and meet with employees. At a meeting on June 4, 2013, he learned about the noose and hood incidents from Penland. He subsequently met with McKinney on June 6, 2013. Allen returned to RFAAP on June 11, 2013,

and assured McKinney that there would be no retaliation for McKinney's report and that Handel would return to complete the investigation. Allen told Lewis, Allison, Gravley, and Gellner that Handel would conduct an investigation and that they were to treat McKinney with respect. McKinney alleges, however, that he was subsequently subject to retaliation: Lewis asked McKinney if he was going to quit; an unknown person dented his car and let the air out of his tires; Allison micromanaged him; and Allison, Gellner, and Gravley excluded him from meetings.

Handel returned on June 19, 2013, to meet with the individuals involved in the May 23, 2013, incidents. Lewis and Gellner denied that anything inappropriate was said or done with the folded canvas sheet, and the four men involved in the noose incident denied laughing or making racist comments. Allison opined that McKinney's complaints might have been intended to cover up his performance issues.

Before Handel completed his investigation, Lewis was placed on administrative leave and then terminated. On June 17, 2013, BAE security manager Walker Suthers told Allen he wanted Lewis removed from the contract at RFAAP when a replacement could be found, and Allen began looking for one. On June 20, 2013, however, Suthers told Handel that McKinney had filed an EEOC charge and that BAE now wanted Lewis removed immediately. Lewis was placed on administrative leave, and terminated on June 28, 2013. Handel ultimately recommended that all security supervisors undergo sensitivity training.

McKinney acknowledges that he has not been subject to racial harassment since May 23, 2013. Allen continued to check in with him, and McKinney's experience with Lewis's replacement had been positive.

As to McKinney's harassment claim, G4S conceded that McKinney could establish a prima facie case of a racially hostile work environment. However, G4S argued (and the district court agreed that G4S was entitled to the *Faragher/Ellerth* defense as a matter of law.

The Fourth Circuit first considered whether McKinney had experienced a "tangible employment action." McKinney claimed that the two counseling forms, his transfer to a new shift, "constant comments and negativity," and his exclusion from important meetings constitute tangible employment action. However, the court pointed out that none of these actions changed McKinney's salary, benefits, responsibilities at work, or employment status and, in fact, the only changes to his employment status during the relevant time-frame.

Turning to the elements of the *Faragher/Ellerth* defense, the Fourth Circuit concluded that G4S had exercised reasonable care to prevent and correct any harassing behavior: G4S had an anti-harassment policy and McKinney could not show that it "adopted or administered the policy in bad faith or that the policy was otherwise defective or dysfunctional." Although some employees did not comply with the policy, "[d]iscrete pockets of resistance do not show that the entire policy was defective or adopted in bad faith."

Additionally, G4S took prompt action to correct the harassing behavior. That Allison, Gellner, and Gravley escaped termination does not itself show that G4S did not adequately address harassment. Title VII requires that an employer take reasonable steps to stop harassment, not

dispense with appropriate procedures for dealing with the accused or discharge any accused harasser. Similarly, the fact that Lewis was terminated at BAE's request did not render G4S's response inadequate. "Even if G4S fired Lewis with mixed motives, this court inquires into the effectiveness of an employer's remedial action, not the motivation underlying it." Moreover, G4S independently decided to terminate Lewis; Suthers only requested that G4S remove Lewis from the contract at RFAAP.

Further, the court examined whether McKinney unreasonably failed to take advantage of G4S's preventative or corrective measures. As the court had previously noted, "any evidence that [the employee] failed to utilize [the company's] complaint procedure 'will normally suffice to satisfy [its] burden under the second element of the defense.'" *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998). In contravention of G4S's policy, McKinney did not "immediately" report to his "supervisor, a manager, or the Corporate Human Resources Department," Roth's 2011 use of the n-word, Altizer's 2012 "colored boy" comment, or the May 2013 noose and sheet incidents, even though he began to record his workplace conversations in an attempt to prepare to file suit. Failure to report harassment because of a generalized fear of retaliation or belief in the futility of reporting harassment deprives the employer of an opportunity to take corrective action and does not justify the failure to report or the decision to gather evidence by recording workplace interactions. The court also rejected McKinney's claim that he reported the noose and sheet incidents to Penland (who was not a G4S employee or someone G4S's policy directed employees to complain to) because going around G4S was the only way to get results at RFAAP.

Accordingly, the Fourth Circuit concluded that summary judgment in favor of G4S on McKinney's hostile work environment claims was proper as G4S was entitled to the Faragher/Ellerth affirmative defense as a matter of law because McKinney suffered no tangible employment action, G4S exercised reasonable care to prevent and correct harassing behavior, and McKinney unreasonably failed to take advantage of the preventive or corrective opportunities G4S established.

Turning to McKinney's retaliation claim, the court reiterated that the scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm, and applies to conduct that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). For the reasons that McKinney's two counseling forms did not constitute a tangible employment action – they had no effect on the terms or conditions of his employment – they also do not meet the retaliation standard of being materially adverse. Additionally, Allison gave them to McKinney before McKinney engaged in protected conduct. According to the Fourth Circuit:

"The two counseling forms and minor workplace grievances McKinney complained of would not have dissuaded a harassment victim from reporting misconduct. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 189 (4th Cir. 2004) (no adverse employment action from victim "being excluded from certain meetings and emails," receiving "negative employment evaluation," and being "ostracized by certain employees"); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 271-72 (4th Cir. 2001) ("uncivility of co-workers" insufficient to

establish adverse employment action, particularly where there is no allegation “that [the company] instructed ... co-workers to ostracize [the accuser]”).

Thus, the court concluded that summary judgment in favor of G4S on McKinney’s retaliation claims was proper.

Finally, as to McKinney’s IIED claim, his evidence was insufficient to establish that he experienced “extreme” emotional distress “where the distress inflicted is so severe that no reasonable person could be expected to endure it,” as required by Virginia law.

***AUTHORS’ NOTE:** A couple of issues here. **First**, the Court really seemed to require specific adherence to the reporting regime set out in G4S’s anti-harassment policy. I wonder whether that is wise. McKinney did report the harassment to Lt. Col. Penland, who he thought was in a position to help address it. And, in fact, Penland did so by reporting it to Handel. Under all the circumstances here – including the fact that the ring-leader seems to have been the highest ranking G4S employee on site – McKinney’s report seems to have been reasonable, at least initially. McKinney’s failure to report the incidents that occurred after Allen’s visit is less understandable, but the vast majority of the harassment was before that visit.*

***Second**, I am extremely troubled by the court’s holding on the retaliation claim. McKinney claimed that after he reported the harassment to Penland – and after Allen’s May 31 visit – several incidents occurred: Lewis asked McKinney if he was going to quit; an unknown person dented his car and let the air out of his tires; Allison micromanaged him; and Allison, Gellner, and Gravely excluded him from meetings. The court simply brushed these incidents aside by citing cases from 2001 and 2004, five and two years **BEFORE** Burlington N. v. White was issued in 2006. Further, Honor (2004) was a race discrimination and harassment case and, inherently, has no bearing on a retaliation claim after White. As to Matavia, which did involve retaliation, the Matavia court was applying a very different legal standard pre-White. Additionally, McKinney alleged that the “exclusion” was by both co-workers and his manager. This is very different than the purely co-worker “ostracism” at issue in Matavia. Given that the jury is supposed to be the arbiter of what a “reasonable employee” would think, there certainly appears to be enough here to justify a trial on the retaliation claim.*

*Relatedly, we have discussed this sort of “**doctrinal creep**” in other cases over the years. Doctrinal creep can be dangerous because it can give a legitimate sounding basis for what, ultimately, is a misstatement of the law used to justify a result. Surely all the lawyers involved in this case knew full well that Honor and Matavia addressed the meaning of “adverse employment action” before White and that White made those cases utterly irrelevant in the retaliation context. Yet, here they are cited and relied upon. The result, of course, is distortion of what the law used to support a debatable outcome.*

***Lastly**, one more in the “plaintiff did not establish a prima facie case” column.*

Melendez v. Bd. Of Educ. for Montgomery Co., 711 Fed. Appx. 685 (4th Cir. 2017).

The Fourth Circuit AFFIRMED summary judgment for the employer.

Panel: Niemeyer, Traxler, Keenan

Opinion: Per Curiam

For a plaintiff to survive summary judgment using direct evidence of discrimination, she must produce direct evidence of a stated purpose to discriminate and/or indirect evidence of sufficient probative force to reflect a genuine issue of material fact. Derogatory remarks may in some instances constitute direct evidence of discrimination, however, in the absence of a clear nexus with the employment decision in question, the materiality of stray or isolated remarks is substantially reduced. Here Ms. Melendez presented a single statement from her supervisor at the county board of education “that he did not want women working in the morning.” This single statement was insufficient to establish a direct evidence claim.

Under the *McDonnell Douglas* proof scheme, Ms. Melendez could not establish a prima facie case of sex discrimination, in that she did not suffer any “adverse employment action.” Melendez alleged three adverse employment actions: (1) a two-hour change in her schedule, (2) a negative performance evaluation and subsequent placement into BEMC’s Performance Improvement Process (PIP), and (3) constructive discharge.

The Fourth Circuit held that the two-hour schedule change did not adversely affect the terms, conditions, or benefits of the plaintiff’s employment and was not comparable to a decrease in compensation, job title, level of responsibility, or opportunity for promotion. Similarly, placement into PIP does not constitute an adverse action as, generally speaking, reprimands and poor performance evaluations alone are much less likely to involve adverse employment actions than the transfers, discharges, or failures to promote whose impact on the terms and conditions of employment is immediate and apparent. Absent some concrete consequence of a reprimand, like the actual denial of a promotion, the fact that a reprimand or poor evaluation might impact an ability to seek a reassignment likewise does not constitute an adverse employment action.

Additionally, the court concluded that Melendez was not constructively discharged as a matter of law. Mere dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign. Melendez’s displeasure with her work assignments and her disagreement with her negative performance evaluations do not suffice to support a constructive discharge claim.

As to Melendez’s retaliation claim, the court noted that there was no causal connection between any allegedly adverse action and any protected conduct. Melendez’s schedule change occurred before she drafted the letter that she identified as protected conduct. And even assuming her placement in PIP was an adverse action, this placement did not occur until March 2011,

approximately 10 months after she drafted the letter, negating any retaliatory animus that could be inferred from temporal proximity.

Finally, on Melendez’s harassment claim, the court held that the fact that Melendez was required to perform tasks consistent with her job description does not constitute harassment and the one potentially threatening incident was not, based on the evidence, motivated by sexual or retaliatory animus.

AUTHORS’ NOTE: This is a pretty standard McDonnell Douglas case overall. But is another example of the court finding that the plaintiff did not establish a prima facie case.

Lacasse v. Didlake, Inc., 712 Fed. Appx. 231 (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the employer.

Panel: Wilkinson, Keenan, Floyd

Opinion: Per Curiam

Didlake, Inc., is a 501(c)(3) non-profit organization that provides rehabilitative services to, creates employment options for, and renders other direct assistance to over 2,000 individuals with disabilities. In addition to helping its beneficiaries secure employment elsewhere, Didlake directly employs over 800 people through its janitorial services contracts with federal agencies. Didlake maintains a comprehensive anti-harassment policy, which every employee receives and must read at the start of employment. Didlake reviews the policy annually with all employees, and sends its human resources department to conduct on-site, small-group training on how to recognize and report impermissible harassing and retaliatory conduct. Didlake’s human resources department carefully adapted the training materials to contain fewer legal terms so that they can be understood by all of its employees.

Chantal Lacasse, a 26-year-old woman with epilepsy and learning disabilities, was first a beneficiary of Didlake’s job placement services. In 2013, Didlake directly employed her as a janitor at the Defense Logistics Agency at Fort Belvoir, Virginia (“DLA”). Despite her disabilities, the Virginia Department of Aging and Rehabilitative Services determined her eligible to work in a mainstream job in a supported employment environment—for example, with the assistance of a job coach. Didlake provided Lacasse with a job coach named Lyn Cardona, who helped Lacasse secure the DLA position and provided her with ongoing and onsite employment support services. As a janitor at the DLA, Lacasse was supervised by Didlake Janitorial Supervisor Brenda Morales. Morales was in turn supervised by Didlake Project Manager Roy Evo. Evo, who had over twenty years of relevant experience, was primarily responsible for ensuring that Didlake was performing to the government’s satisfaction.

Lacasse alleges that on Thursday, August 15, 2013, Evo found her in a supply closet near the end of her shift and kissed her. According to Lacasse, the incident ended abruptly because someone

knocked on the closet door. Lacasse did not tell anyone of this incident until a few days later on Saturday, August 17, 2013, when she told her parents. At work the following Monday, August 19, 2013, Lacasse told two individuals—a non-supervisory janitorial co-worker and an individual who works at the DLA but is not a Didlake employee—that Evo kissed her. These individuals relayed what Lacasse told them to Evo, who immediately reported these allegations to Didlake’s human resources department. Because this was at the end of Lacasse’s shift, the human resources department arranged to interview her the following morning.

On August 20, 2013, Kennedy and Cardona privately interviewed Lacasse to corroborate her claims. While the investigation continued, Lacasse was placed on paid administrative leave so she would avoid any further contact with Evo. Didlake kept Lacasse apprised of the status of the investigation throughout its pendency, and advised her of resources for assistance and support. Kennedy then interviewed Evo who denied the allegations, and several other potential witnesses who confirmed that Evo was interviewing job candidates during the time period in question on August 15, 2013. Evo was interviewing job candidates approximately from 10:40 a.m. to shortly after 12:00 p.m., and Lacasse’s timecard showed that she left the building at 11:57 a.m. Based on Evo’s confirmed alibi, Kennedy reported to her supervisor and Didlake’s senior staff that she could not corroborate Lacasse’s allegations. Evo subsequently resigned from his position and Egberto Garcia took over as Didlake’s Project Manager at the DLA in December 2013.

On September 30, 2013, Lacasse returned to work. On Lacasse’s first day back to work, Kennedy, Morales, and Cardona all personally met with her to review how she could report her concerns about other people’s behavior. Additionally, Didlake arranged for an exception to be made in the DLA’s policy prohibiting cell phones so Lacasse could carry her cell phone with her at all times, call her family if necessary, and feel more comfortable adjusting back to work. Didlake also offered Lacasse an opportunity to work with a more experienced female worker. Lacasse reported being very happy with this opportunity, and the periodic time study conducted by Didlake showed an increase in her productivity, for which she received a salary raise in November 2013.

In December 2013, however, Lacasse’s workplace behavior began to deteriorate. Between December 2013 and late April 2014, Lacasse was counseled and disciplined four times for inappropriate workplace behavior. In December 2013, Lacasse received her first written counseling after Morales caught her socializing with the DLA security guards outside of her assigned work area during work hours. On February 20, 2014, Lacasse received her second written counseling after she called her co-worker with mental and physical disabilities a “monkey.” On April 9, 2014, Lacasse received another written counseling, because a male co-worker complained that she was emasculating him by calling him “Granny” and “Benita.” Lastly, on April 21, 2014, Lacasse received her fourth written counseling for spreading rumors that a Didlake employee impregnated a second Didlake employee. The fourth counseling culminated in a three-day paid suspension. By policy, Didlake places an employee with a disability on a paid suspension when prior counseling fails to resolve an ongoing behavioral issue to allow the employee to regroup and become successful in the future.

Lacasse resigned from her DLA position on May 19, 2014, after reporting her unhappiness with her job. After Lacasse resigned, Didlake sought to assist her in determining her next steps, but Lacasse declined this offer. Lacasse filed suit against Didlake, alleging eight causes of action: (1)

battery, (2) assault, (3) false imprisonment, (4) intentional infliction of emotional distress, (5) hostile work environment in violation of Title VII, (6) retaliation in violation of Title VII, (7) disability discrimination in violation of the ADA, and (8) retaliation in violation of the ADA. Although Lacasse included Evo in her state law claims, because he was never served with process, the district court dismissed Lacasse's claims against him. Additionally, the district court granted summary judgment in Didlake's favor on all counts. Lacasse appeals summary judgment on all counts except for her retaliation claims.

The Fourth Circuit first dealt with Lacasse's state law claims against Didlake for assault, battery, false imprisonment, and intentional infliction of emotional distress under the theory of respondeat superior. Based on the evidence, the court agreed with the district court that Evo's alleged actions fell outside the scope of his employment and, therefore, Didlake was not liable for them.

Turning to Lacasse's hostile work environment claim under Title VII, the Fourth Circuit concluded that Didlake had a valid affirmative defense as a matter of law. Specifically, the court concluded that under *Faragher/Ellerth*, Didlake exercised reasonable care first to prevent and then to correct any harassing behavior by its employees. Didlake has instituted a comprehensive anti-harassment policy that was disseminated to its rank and file employees and enforced through its human resources department; it provided on-site, small-group training for its employees; and encourages the employees to report harassment to Didlake's human resources department. It also enforced its policies and took corrective actions in the wake of Lacasse's allegations. Further, Lacasse unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided, in that Lacasse failed to follow the established complaint procedure. Lacasse shared her allegation with two non-supervisory individuals, one of whom was not even a Didlake employee, but never with anyone in the official reporting channel. These individuals relayed the allegations to Evo, who immediately self-reported the allegation to Didlake.

Lastly, the Fourth Circuit concluded that summary judgment was appropriate on Lacasse's discrimination claim under the ADA because she suffered no adverse action. Lacasse alleges Didlake forced her to quit by making her working conditions intolerable after she made her sexual harassment allegations with counseling sessions that were punitive for someone with a cognitive learning disability. The court found that the work environment was not objectively intolerable. Contrary to Lacasse's claims of intolerable working conditions, the record showed that, between September 2013 and December 2013, Didlake proactively assisted her transition back to work from paid administrative leave after her sexual harassment allegations. Lacasse's immediate supervisor, her job coach, and Didlake's human resources director met with Lacasse personally to encourage her to report any concerns about other people's behaviors to them. Didlake even sought and obtained an exception to the DLA's policy so that Lacasse could carry her cell phone with her at all times. Lacasse was further paired with a more experienced female co-worker so that she could feel more comfortable transitioning back to work. And when the time study revealed an increase in Lacasse's productivity, Didlake increased her salary according to her increased productivity. Moreover, Lacasse's voluntary resignation sprung from her own dissatisfaction with a series of counseling sessions and suspension, which resulted from her own inappropriate workplace behavior.

AUTHORS' NOTE: I have the same concern here as I did with McKinney when it comes to strictly complying with the reporting scheme in an anti-harassment policy. Otherwise, I will only note that this is yet another case where the court concluded that the plaintiff did not present a prima facie case.

Tillery v. Piedmont Airlines, Inc., 713 Fed. Appx. 181 (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the employer.

Panel: Motz, Keenan, Thacker

Opinion: Per Curiam

Michael Tillery, a 67 year old African American man, worked as a ground control agent in Piedmont's operations department at Ronald Reagan Washington National Airport. An active member in the local union, Tillery represented his fellow employees in internal grievance proceedings and sometimes assisted them with external complaints to the EEOC. In 2011 and 2012, Tillery assisted three female employees in their sexual harassment complaints against a manager who was eventually terminated.

Lisa High ("High"), Piedmont's regional and administrative manager, made comments at two separate managers' meetings in 2013 that Tillery "was causing trouble again" with his union activities and that Piedmont "should simply retire [Tillery]" because of his representation of other employees. Tillery was not present at either meeting and heard about High's comments from two former co-workers. One of these co-workers also attended a meeting during which High and another employee made jokes about Tillery's age.

On March 18, 2014, a plane arrived at the airport and was scheduled to depart soon after. The flight crew radioed operations to request that four passengers with a connecting flight on the same plane remain onboard. Tillery was assigned to the B side position in operations that day, and his co-worker Sidy Bah ("Bah") was assigned to the A side position. Generally, the employee assigned to A side communicates with the flight crew, while the employee assigned to B side "keeps track of what A side is communicating with the crew and informs the rest of the company." Bah authorized the four passengers with a connecting flight to remain on the plane. However, the gate agent was not informed that the passengers remained on the plane and permitted several standby passengers to board, thus resulting in an overbooked flight. This caused a 22-minute flight delay while the extra passengers were removed from the plane.

According to Tillery's manager, Bernard Kingara ("Kingara"), Tillery admitted responsibility for the flight delay at the time of the incident. Kingara understood Tillery to mean that Tillery had authorized the passengers to stay onboard the plane, which Tillery was not permitted to do because he was assigned to the B side. A recording of the air-to-ground communications was not available at the time. Because Tillery was on a "Level 3 Final Warning" at the time pursuant to Piedmont's progressive discipline policy, Tillery was terminated shortly after the incident.

After listening to the recording of the air-to-ground communications, Piedmont later determined that it was not Tillery who authorized the passengers to remain on the flight. Nonetheless, Piedmont claims that Tillery was in fact responsible for the flight delay because he failed to communicate to the gate agent that four passengers remained on the plane. Piedmont did not take any disciplinary action against Bah as a result of the incident.

Tillery relied on the *McDonnell Douglas* burden-shifting framework to prove his race discrimination, retaliation, and age discrimination claims. Tillery's race discrimination claim failed because he was unable to establish a prima facie case. Specifically, Tillery's position was filled by three individuals hired after Tillery's termination, who, like Tillery, were all African American. Therefore, Tillery could not demonstrate a prima facie case of race discrimination, and the district court's award of summary judgment to Piedmont on this claim was proper.

Similarly, Tillery failed to establish a prima facie case of retaliation pursuant to Title VII or 42 U.S.C. § 1981. Here, the identified protected activity was Tillery's assistance of other employees pursuing sexual harassment complaints against Piedmont in 2011 and 2012. But those actions occurred more than a year and a half prior to Tillery's termination, which is too long to establish causation absent other evidence of retaliation. Additionally, High, the individual Tillery alleges made comments with retaliatory animus, did not participate in the decision to terminate Tillery. Therefore, Tillery's Title VII retaliation claim also failed.

Further, Tillery failed to establish a causal connection between his § 1981 protected activity and his termination. Tillery averred that he "had a conversation about race" with one of the decisionmakers involved in his termination, but as the district court pointed out, Tillery provided no details about when this conversation took place or about the decisionmaker's response so as to link this conversation to his termination. To overcome summary judgment, Tillery "must rely on more than conclusory allegations" or "mere speculation." The district court's award of summary judgment to Piedmont on Tillery's retaliation claims was, therefore, affirmed.

Piedmont also argued that Tillery failed to demonstrate a prima facie case of age discrimination because Tillery was not meeting its "legitimate expectations" at the time of his termination due to his disciplinary infractions. However, six weeks prior to his termination, Tillery's supervisor referred to him as "a seasoned and competent employee." Tillery thus crossed the threshold to establish a prima facie case of age discrimination.

Nonetheless, Tillery was unable to show that Piedmont's proffered reason for his termination was a pretext for age discrimination. ***"Even when, as here, the plaintiff employee has presented evidence that the employer's stated reason for the adverse employment action is false, an employer may still be entitled to judgment as a matter of law if no rational factfinder could conclude that the action was discriminatory."*** Neither High nor the other employee whom Tillery claims made derogatory remarks about his age participated in the decision to terminate his employment, and there is no evidence that the decisionmakers were aware of these comments. [Seriously, this is all there was in the opinion on this issue.]

Therefore the Fourth Circuit also affirmed the district court's award of summary judgment to Piedmont on this claim.

*AUTHORS' NOTE: This one is more than a little troubling. Like numerous other cases this year, the Fourth Circuit found that the plaintiff could not establish a prima facie case (on the retaliation claim). Here, honestly, that seems more clear-cut than some of the others. However, the court's ruling on Tillery's age discrimination claim is difficult to justify. The Fourth Circuit explicitly states here that Tillery had "presented evidence that the employer's stated reason for the adverse employment action was false." However, it then quickly holds that there was not even a jury question on pretext because none of the decisionmakers made ageist comments. **Both the court's logic and its application of Reeves v. Sanderson Plumbing were badly flawed.** The Supreme Court explicitly held in Reeves that a jury could find discrimination based solely on the falsity of the employer's LNDR combined with the evidence used to establish the prima facie case. Here, although not mentioned by the Fourth Circuit, the evidence showed that one of the people hired to replace Tilley was 20 years his junior. At least based on what I can see in the record, summary judgment on the age claim was inappropriate. Tilley established a prima facie case and presented strong evidence that Piedmont's LNDR was false. That, in and of itself, should have been enough to get to the jury on that claim. Ultimately, a jury may have found for Piedmont, but based on the evidence a reasonable jury could have found for Tilley.*

Hernandez v. Fairfax Co., 719 Fed. Appx. 184 (4th Cir. 2018).

The Fourth Circuit REVERSED summary judgment for the employer.

Panel: Keenan, Diaz, Harris

Opinion: Per Curiam

For more than 10 years, Magaly Hernandez has worked as a firefighter with the Fairfax County Fire and Rescue Department. In October 2013, she began working at Fire Station 42 where Jon Bruley was the station captain. Bruley, in turn, reported to Cheri Zosh, who served as a battalion chief.

Within the first few months of Hernandez's work at Fire Station 42, Bruley engaged in inappropriate conduct toward her, including blocking her path in the hallway, placing his chin on her shoulder, and positioning his body "right up against" her. Bruley engaged in this conduct despite Hernandez's repeated requests that she did not "like people that close to [her.]" Bruley also made several statements to Hernandez indicating his desire to see her in a bathing suit, and once asked Hernandez whether she would "be able to handle that big hose," a comment that Hernandez construed as being sexual in nature.

When Hernandez first reported this conduct to Zosh in April 2014, Zosh confronted Bruley directly. After speaking with Zosh, Bruley did not again make inappropriate comments to Hernandez or physically invade her personal space. Nevertheless, Bruley began monitoring and

tracking Hernandez’s activities and movements at work, and this behavior continued for many months. Hernandez later filed a formal complaint with the County’s equal rights office.

After Hernandez transferred to a different fire station, she was involved in a verbal confrontation with a male firefighter during a basketball game at the station (the basketball incident). The disagreement arose after the male firefighter aggressively and repeatedly threw a basketball at an unsteady backboard, disregarding Hernandez’s requests to stop. Based on this incident, the County conducted an investigation and later issued Hernandez a written reprimand for workplace violence and unbecoming conduct. The reprimand stated that during the verbal confrontation, Hernandez exhibited “aggressive” behavior by “challeng[ing] the [male] firefighter verbally,” and by “violating his body space with [her] aggressive head and arm gestures.”

Hernandez filed suit under Title VII alleging a hostile work environment based on sexual harassment and discrimination and a separate claim of retaliation. The district court entered summary judgment for the County.

The Fourth Circuit began by addressing Hernandez’s hostile work environment claim. The court found that Hernandez clearly satisfied the first two factors of her hostile work environment claim and thus focused its on the remaining issues whether Bruley’s offensive conduct was sufficiently severe or pervasive, and whether his conduct was imputable to the County.

Hernandez argued that Bruley’s harassing conduct threatened her physical safety and humiliated her to such a degree that a jury could conclude that Bruley’s conduct created a hostile work environment. In response, the County contends that Bruley’s conduct, while offensive, was too insignificant to support Hernandez’s claim when viewed objectively. Further, the County submits that Hernandez’s “near total lack of awareness” regarding Bruley’s monitoring of Hernandez’s activities further supported the district court’s conclusion that Bruley’s conduct was legally insufficient to support the claim of a hostile work environment.

The court rejected the County’s argument. As the court stated in *Boyer-Liberto v. Fontainebleau Hotel*, “[w]hether the environment is objectively hostile or abusive is judged from the perspective of a reasonable person in the plaintiff’s position” and requires consideration of the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

The Fourth Circuit concluded that the full record of Bruley’s conduct could support a jury determination that, viewed objectively, Hernandez was subjected to a hostile work environment based on her sex. In less than one year, Bruley physically invaded Hernandez’s personal space on numerous occasions and made sexually suggestive comments to her. Bruley also informed various colleagues that he suspected that Hernandez and Zosh were engaged in an inappropriate sexual relationship. Bruley repeated his offensive actions despite the fact that Hernandez repeatedly asked him to stop this conduct. Also, Hernandez was aware before she transferred to another station that Bruley “started tracking what [she] was doing at the station, who [she] was talking to, how [she] was doing certain things, who [she] was giving hugs to.” After Hernandez transferred to a different fire station, other employees informed her that Bruley continued to monitor her and knew when

she was working. The record additionally showed that Bruley compiled multiple binders with information he had collected about Hernandez. In view of the full range of Bruley's offensive conduct, we hold that a reasonable jury could conclude that Bruley's actions, when viewed objectively, created a hostile and abusive work environment.

Additionally, there were disputed questions of fact regarding whether the County disciplined Bruley in a reasonable manner for his harassing conduct such that its negligence results in the imputation of Bruley's conduct to the County. When Hernandez first reported Bruley's harassing conduct in April 2014, Zosh immediately addressed the concerns with Bruley. After this meeting, Bruley's physically intimidating behavior and inappropriate comments toward Hernandez ceased. However, a jury could determine that the County's later responses to Bruley's continued inappropriate conduct were inadequate. During the County's investigation into Hernandez's equal rights complaint against Bruley, the County became aware that Bruley had been monitoring Hernandez's activities. Nevertheless, the County did not review Bruley's binders of notes regarding Hernandez's activities. Further, in late 2014 when supervisors discussed with Bruley his conduct of tracking Hernandez's movements, those supervisors generally told Bruley to "focus on his work." Bruley interpreted his supervisors' comments as permitting his continued documentation of Hernandez as needed to support his own complaint of discrimination. In fact, the County did not specifically direct Bruley to "cease any tracking" of Hernandez until March 3, 2015. At that point, Bruley received a written reprimand and was threatened with termination.

On this record, a reasonable jury could conclude that the County's responses prior to the March 2015 reprimand were inadequate and were not reasonably calculated to end the harassing conduct. Accordingly, it was error to awarding summary judgment to the County on Hernandez's hostile work environment claim.

Finally, the Fourth Circuit held that summary judgment on Hernandez's retaliation claim was also improper. Hernandez contended that a jury could determine that the County issued her a written reprimand after the basketball incident because of her complaints about Bruley. The County argued in response that Hernandez's inappropriate conduct during the basketball incident was the basis for the written reprimand, negating any basis for a finding of retaliation.

At the outset, court observed that the written reprimand Hernandez received for "[w]orkplace violence" and "unbecoming conduct" arose from a verbal disagreement. On its face, the severity of the reprimand appears disproportionate to the brief, non-physical altercation. The County employee who investigated the basketball incident described it as "minor" when compared with other altercations between firefighters that he had investigated in the past. Further, the basketball incident and following investigation took place about four months after Hernandez had filed a formal complaint with the County's equal rights office. Although this length of time might not be sufficient on its own to establish a causal connection, the Fourth Circuit concluded that based on the relative severity of the reprimand, its timing, and the other evidence in the record leading up to Hernandez's protected activity, a reasonable jury could determine that the County retaliated against Hernandez.

AUTHORS' NOTE: This opinion is more strongly in line with the Fourth Circuit that we have come to know over the last few years. The court reinforced the position we have watched develop

over the last decade that the “sufficiently severe or pervasive” element of discriminatory harassment is almost always a jury question. Further, the court took a more holistic view of the evidence of retaliation than the district court did (and than the Fourth Circuit itself did in other cases this year) in concluding that there was a jury question on that claim as well. Interestingly, the court did this on Hernandez’s retaliation claim without hewing closely to the McDonnell Douglas framework. As an academic, I wrote about some of issues with McDonnell Douglas and how its application has become overly formulaic, when it was intended to be more holistic. I’m happy to say (at least in this case) the Fourth Circuit was of the same mind.

Rayyan v. Virginia Dept. of Trans., 719 Fed. Appx. 198 (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the employer, finding that the plaintiff failed to establish a prima facie case.

Panel:

Opinion: Per Curiam

Following his termination, Sinan Rayyan filed a civil action against his former employer, the Virginia Department of Transportation (VDOT) alleging racial and religious discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981.

Rayyan is a Muslim Arab-American man. He is a licensed professional engineer formerly employed by VDOT, where he initially held the position of Engineer Senior Project Manager. He eventually received the title of Engineer Senior Supervisor Project Manager and began supervising two other employees.

Rayyan began his employment with VDOT in January 2012 under the supervision of Kevin Northridge, a white male. Northridge reported to Michelle Shropshire, a white female. Northridge resigned from VDOT in December 2013. From December 2013 until Rayyan’s termination in January 2014, Rayyan was directly supervised by Shropshire.

During their first year of employment with VDOT, employees are on probationary status and receive quarterly probationary progress reviews. After completing their probationary year, employees receive annual performance reviews. Reviewers can assign one of three ratings: below contributor, contributor, or extraordinary contributor. VDOT only permits the termination of an employee if the employee receives a “below contributor” rating on a performance evaluation and another “below contributor” rating on the mandatory re-evaluation conducted three months after the first “below contributor” rating. To receive a “below contributor” rating, an employee must have received at least one written notice of a performance issue within the review cycle.

Rayyan received “contributor” ratings on his probationary progress reviews in 2012, all of which were authored by Northridge and reviewed by Shropshire. However, the reviews identified areas in need of improvement, flagging concerns such as “several projects have slipped beyond proposed

... dates,” the need to improve attention to detail, and the need to improve understanding of VDOT protocols.

In 2013, Rayyan received a series of reprimands from Northridge for his workplace performance. In March, Rayyan received a “Notice of Improvement Needed/Substandard Performance” regarding his continued “struggle with basic understanding of Department processes,” time management issues, and lack of quality control. In April, Northridge issued Rayyan a counseling memo reprimanding him for failing to prioritize projects as directed and for keeping inaccurate meeting minutes. Northridge issued another written counseling memo in June after Rayyan took a document signed by Shropshire, altered it, and reused the signature page without her knowledge or approval. Northridge issued a final memo in August regarding Rayyan’s failure to accurately communicate deadline information to team members.

In October 2013, Rayyan received a “below contributor” rating on his annual performance evaluation, authored by Northridge and reviewed by Shropshire. Pursuant to VDOT policy, this rating placed Rayyan on a 90-day performance improvement plan. Rayyan filed a grievance contesting his “below contributor” rating, and alleged that he was a victim of “Discrimination or Retaliation by Immediate Supervisor,” though he did not further specify to whom he was referring. The VDOT Civil Rights Division investigated the grievance, and closed its review approximately three weeks later due to insufficient evidence supporting Rayyan’s claim.

In January 2014, Shropshire, now Rayyan’s direct supervisor due to Northridge’s resignation, completed Rayyan’s performance re-evaluation and again ranked Rayyan as “below contributor.” Rayyan was subsequently terminated pursuant to VDOT policy. Rayyan sued.

To support his claims, Rayyan presented testimony of comments Shropshire had made. Daniel Harrison, one of Rayyan’s former supervisees, stated that Shropshire had made repeated comments that Rayyan was “‘dumb’ or ‘stupid’ while referring to the fact that [Rayyan] was ‘Arab’ and from the ‘middle east.’” Harrison further testified that several weeks prior to Rayyan’s termination, Shropshire told Harrison that she “didn’t want [Rayyan] around long.” Rayyan testified that Shropshire told him, “I don’t care where you come from. This behavior may be okay in your country ... but this is not how it’s done here in America.” Northridge also testified to overhearing this comment. Additionally, Rayyan testified that Shropshire instructed Harrison, who had been tasked with helping train Rayyan on VDOT protocols, to limit how much Harrison showed Rayyan during that training, that Shropshire limited Northridge’s ability to balance Rayyan’s heavy workload, and that Shropshire forced Northridge to change Rayyan’s October 2013 performance review rating from “contributor” to “below contributor.”

The Fourth Circuit first addressed Rayyan’s racial discrimination claim. Rayyan argued that he presented sufficient direct evidence of Shropshire’s discriminatory comments to survive summary judgment. The court disagreed because those comments did not directly reflect the alleged discriminatory attitude and bear directly on the contested employment decision. It concluded, that the “derogatory statements presented by Rayyan were stray remarks and lacked a nexus connecting them to his dismissal.”

Rayyan also argued that he could prevail using the *McDonnell Douglas* proof scheme. However, the Fourth Circuit concluded that Rayyan could not establish a prima facie case of discrimination, because the evidence reflected that he was not performing his job adequately. In fact, the written record of Rayyan’s job performance indicated that it was not satisfactory. Because of this failure, summary judgment was appropriate on both Rayyan’s race discrimination and religious discrimination claims.

As to Rayyan’s retaliation claim, the Fourth Circuit concluded that Rayyan failed to state a claim for retaliation because he did not present adequate evidence that his protected activity was the but-for cause of his termination. Rayyan filed his grievance with VDOT after he had already been placed on probation due to his “below contributor” review and related performance issues. According to VDOT policies, if an employee receives a “below contributor” review and does not improve their rating within three months, then their “supervisor shall demote, reassign, or terminate the employee.” As a result, Rayyan cannot establish that VDOT would not have dismissed him but-for his grievance filing. Thus, the district court did not err in granting VDOT’s summary judgment motion on Rayyan’s retaliation claim.

AUTHORS’ NOTE: More prima facie case failures from the plaintiff here. I am still not sure I understand why the court affirmed the dismissal of Rayyan’s retaliation claim, but it certainly gave it a much lighter look than the court did in Hernandez.

Cooper v. Smithfield Packing Co., 724 Fed. Appx. 197 (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the employer.

Panel: Duncan, Diaz, Xinis (D.Md.)

Opinion: Xinis

Plaintiff Lisa Cooper was a former employee of Defendant Smithfield Packing Company (Smithfield). Cooper sued Smithfield under Title VII and state tort law based on the actions of Tommy Lowery, a superintendent with whom Cooper worked. In a series of decisions, the district court dismissed Cooper’s First Amended Complaint; struck certain factual allegations from Cooper’s Second and Third Amended Complaints; and granted summary judgment to Smithfield on the lone remaining claim in Cooper’s Fourth Amended Complaint. On review, the Fourth Circuit held that the district court committed no error when it dismissed Cooper’s First Amended Complaint or in granting summary judgment in Smithfield’s favor and found any other alleged errors harmless.

Between 1995 and 2011, Cooper was employed by Smithfield, save for a short period when she had been terminated and then reinstated for reasons unrelated to this case. According to allegations in Cooper’s Fourth Amended Complaint, Lowery sexually harassed her on a regular basis between 2007 and 2011, repeatedly asking her to sleep with him, threatening her when she refused to sleep with him, physically brushing up against her, demeaning her relationship with her husband, and

requiring her to work in close proximity with him for no apparent reason. This pattern of abuse culminated in July 2011, when Cooper reported Lowery's behavior to Smithfield's human resources department (HR). After her initial verbal report, Cooper was asked by HR to provide a written statement, which she submitted the following day. The next day, while Smithfield continued to investigate the claims, Cooper resigned.

Cooper sued. Originally, Cooper asserted various state law tort claims and claims under Title VII for hostile work environment harassment, discrimination, and retaliation. The district court dismissed the discrimination and retaliation claims on the basis that Cooper did not plead an adverse employment action. It also dismissed the state tort claims for various reasons.

After the close of discovery, Smithfield moved for summary judgment as to the remaining hostile work environment claim. The district court granted summary judgment in Smithfield's favor on the ground that Lowery's misconduct could not be imputed to Smithfield.

On appeal, the Fourth Circuit first affirmed the dismissal of Cooper's various state law tort claims. It concluded that her pleading was insufficient to state a plausible claim for intentional infliction of emotional distress because she did not plead facts sufficient to raise the inference that Lowery's actions were "extreme and outrageous." Rather, in her First Amended Complaint, Cooper averred in a general and conclusory fashion that she was "subjected to sexual harassment ... which mostly consisted of sexually explicit comments" and that the harassment "worsened and included, but was not limited to, sexually explicit statements made to her, sexual advances made toward her, inappropriate sexual contact and making continuous physical and emotional threats." Devoid of any specific facts accompanying these characterizations, the First Amended Complaint simply failed to make out acts sufficiently extreme and outrageous to sustain an IIED claim.¹

As to Cooper's claims for discrimination and retaliation, the Fourth Circuit concluded that she had not adequately pled an adverse employment action or that similarly situated employees outside of her protected class received more favorable treatment to state a claim for disparate treatment. According to the court, Cooper's allegations that Lowery "requir[ed] her to work later than her male coworkers for no legitimate business reason," that Lowery required her to work in close physical proximity to him and complete "extensive menial tasks," and that "Lowery did not engage in aforementioned [sexually harassing] acts with any of the male employees" were "general and conclusory averments [that] do not adequately support a reasonable inference that Lowery discriminated against Cooper regarding an employment decision comparable to hiring, firing, promoting, or compensating an employee." Similarly, the court found that Cooper's allegations failed to assert a plausible claim for retaliation because her facts did not support the existence of materially adverse treatment sufficient to satisfy *Burlington N. v. White*.

Turning to Cooper's hostile work environment claim, the Fourth Circuit affirmed summary judgment for Smithfield "because liability for Lowery's actions could not, as a matter of law, be imputed to Smithfield." To reach this result, the court found that Lowery was a co-worker under *Vance v. Ball State* rather than a supervisor (despite the fact "Lowery provided informal evaluations of Cooper to the HR department, and seemingly had some input regarding vacation days and her work schedule, as well as the ability to make her work longer hours and control her work location).

Given Lowery’s status as a mere co-worker, “the evidence construed most favorably to Cooper does not support a finding that Smithfield was negligent—i.e., that it knew or should have known about Lowery’s harassment of Cooper and failed to take any corrective action.” Smithfield maintained a written anti-harassment policy reasonably calculated to prevent and address workplace sexual harassment, as well as a written code of conduct prohibiting harassment. Smithfield trained employees annually on anti-harassment standards, including the requirement to report violations of Smithfield’s code of conduct, and maintained a hotline for employees to report concerns anonymously. Further, the record evidence shows that Smithfield first learned of Lowery’s harassment only days before Cooper voluntarily resigned. Smithfield immediately began investigating Cooper’s claims and offered to change Cooper’s work assignment while the investigation was ongoing. Cooper then resigned before Smithfield could provide Cooper any meaningful redress. Taking the evidence in the light most favorable to Cooper, a finding of negligence on this record would be tantamount to requiring Smithfield to “exercise an all-seeing omnipresence over the workplace,” which the Court “will not do.”

AUTHORS’ NOTE: Where to being. A pitched battle on Twombly/Iqbal grounds. A narrow view of supervisory status. A cramped look at the evidence. I’ve got issues with this one. But that is OK. A couple of salient points.

First, this case points illustrates the wrong-headedness of Vance, in which an allegedly textualist analysis refused to apply the plain meaning of “supervisor.” If someone supervises your work, tells you what to do and when to do it, and can control your work hours and setting, that person is a supervisor based on the plain meaning of the word (or the original public meaning of the term in 1964). [Alas, I never wrote “Against Statutory Originalism” but still ...].

Second, implicit in the statement that “Cooper then resigned before Smithfield could provide Cooper any meaningful redress” is a significant legal point that I also considered writing about before I left academia: If the plaintiff in a harassment case resigned rather than return to the workplace where she was harassed, does that mean that she unreasonably failed to take advantage of corrective opportunities provided by the employer for Faragher/Ellerth purposes. [So not just not reporting, but even if reported, not sticking around to experience the workplace without the harasser.] I don’t know. But the court certainly walks right up to that line.

Sanders v. Tikras Tech. Solutions Corp., 725 Fed. Appx. 228 (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the employer.

Panel: Floyd, Thacker, Hamilton

Opinion: Per Curiam

Kaptoria L. Sanders appealed the district court's order granting summary judgment in favor of Tikras Technology Solutions ("Tikras") in her suit alleging race and gender discrimination in violation of Title VII, retaliation in violation of Title VII, and race discrimination in violation of 42 U.S.C. § 1981.

As to Sanders's claims for race discrimination under both Title VII and Section 1981, the Fourth Circuit concluded that Sanders failed to establish the fourth element of a prima facie case. Although Sanders was replaced in her position by a Hispanic male, that individual had more than twice the experience that Sanders had, and the two therefore were not similarly situated. Moreover, although the record may have demonstrated that Sanders's supervisor harbored some animosity toward her, there is no evidence that indicates any such animus was a result of Sanders's race or gender, and, thus, his actions did not support a Title VII claim. In short, Sanders's Title VII and § 1981 discrimination claims failed "for the simple reason that she [did] not demonstrate[] that similarly situated employees outside her protected classes were treated differently and/or received more favorable treatment than her."

As to Sanders' Title VII claim of retaliation, the court likewise concluded that Sanders failed to establish a prima facie case of retaliation. Sanders' complaint that she was being discriminated against because she was an African-American woman would constitute oppositional conduct if her subjective perception of discrimination had been objectively reasonable. ***But there is no evidence that connects any untoward behavior or comments with any form of racial or gender discrimination, and therefore Sanders' subjective belief that her supervisor was acting with discriminatory intent was not objectively reasonable.***

Because Sanders failed to establish a prima facie case of discrimination or retaliation, the Fourth Circuit affirmed the district court's judgment.

AUTHORS' NOTE: Yet another prima facie case failure. Also, as to Sanders's retaliation claim, the Fourth Circuit states that in order for "opposition" activity to be objectively reasonable, the plaintiff must connect "any untoward behavior or comments" with "any form of racial or gender discrimination." This seems to run directly counter to the Court's en banc ruling in Boyer-Liberto, where the Court emphasized that an employee need not wait for a hostile work environment to actually develop before her complaints become objectively reasonable and protected. Are not "untoward behaviors or comments" part and parcel to a hostile work environment? Given the historic breadth of retaliation doctrine – not to mention the Fourth Circuit's own en banc discussion of retaliation doctrine and the nature of objective reasonableness in Boyer-Liberto – encourage giving plaintiff's the benefit of the doubt at the prima facie case stage? Especially where, as here, the retaliation claim may likely fail at the causal connection or, more appropriately, the pretext stage?

There were several cases this year where the district court decision was based on an unpublished, per curiam opinion from the Fourth Circuit. Given the ready availability of these opinions, it seems important to ensure doctrinal cohesiveness and consistency.

Nnadozie v. Genesis HealthCare Corp., 730 Fed. Appx. 151 (4th Cir. 2018).

The Fourth Circuit REVERSED IN PART summary judgment for the employer.

Panel: Keenan, Wynn, Harris

Opinion: Wynn

This appeal concerns an employment discrimination action brought by two nurses and a nursing assistant against their former employers. They alleged discrimination and retaliation on the bases of race and national origin, in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The district court granted summary judgment for the employers on all counts. Although the Fourth Circuit mostly agreed with the district court’s disposition, it concluded that the district court erred by mischaracterizing Plaintiff Perpetua Ezeh’s two discriminatory hostile work environment claims (one on account of her race in violation of Section 1981, and the other on account of her national origin in violation of Title VII).

Patapsco Valley Center (“the Center”) is a long-term nursing care facility located in Randallstown, Maryland. The Center is managed by Defendant Genesis Eldercare Network Services, Inc. (“Genesis”) and staffed by Defendant Liberty Road Operations, LLC (“Liberty Road,” and collectively with Genesis, “Defendants”).

In late 2010, the Center was in a troubled state. During an August on-site investigation, the Maryland Department of Health and Mental Hygiene discovered several compliance problems. The Department thereafter imposed on the Center a monetary civil penalty and threatened to revoke its operational license. In response, Genesis installed new management at the Center by hiring Mary Hochradel (“Hochradel”) as Administrator and Denise Zimmerman (“Zimmerman”) as Director of Nursing. The new managers were told they were coming aboard “a poor performer,” and their job was to “turn it around” by evaluating staff and, if necessary, taking corrective action.

Plaintiffs Emanuella Nkem Nnadozie (“Nnadozie”), Perpetua Ezeh (“Ezeh”), and Sunday Aina (“Aina,” and collectively with Nnadozie and Ezeh, “Plaintiffs”) are former Center employees who worked under Hochradel and Zimmerman. All are of African descent. Plaintiffs allege that, upon arriving at the Center, Zimmerman immediately created a severe and hostile work environment and engaged in several acts of invidious discrimination. Despite commonalities among their claims, Plaintiffs proceed individually.

Plaintiff Nnadozie, a registered nurse, was born in Sierra Leone and raised in Nigeria. Notwithstanding her history of alleged poor performance at another Genesis-managed care center, Nnadozie applied for and was granted a transfer to the Center in September 2009. She assumed work as a Unit Manager and Assistant Director of Nursing, supervising the Center’s subacute unit. Between September and October of 2010, the Center issued Nnadozie an “Individual Performance Improvement Plan,” instructing her to improve her accountability, timeliness, and quality of patient care.

Tensions increased between Nnadozie and Center management after Zimmerman’s arrival. Nnadozie claims that Zimmerman pressured her to discipline African staff while preventing her from disciplining white staff. Moreover, Nnadozie and Zimmerman repeatedly argued over Nnadozie’s work performance. During one dispute, Zimmerman allegedly raised her hand to Nnadozie’s face and told her to “shut up.”

In January 2011, Zimmerman instituted a new attendance policy that required all Assistant Directors of Nursing in charge of units, like Nnadozie, to begin their shifts at 7:00 a.m. Nnadozie asked to be excused from this requirement, but management denied her request. Around that same time, Zimmerman assigned Nnadozie to oversee the Center’s dementia unit, in addition to her normal duties, and moved Nnadozie’s office to the Center’s basement—a location closer to the dementia unit.

Things came to a head when, after a dispute between Nnadozie and the Center’s medical director over patient care, Zimmerman issued Nnadozie a “Final Written Warning” on February 1, 2011. Three days later, Nnadozie resigned.

Nnadozie sued alleging discrimination on the basis of national origin.

Plaintiff Ezeh is a registered nurse from Nigeria. Before working at the Center, Ezeh worked for another Genesis-affiliated employer, Genesis Staffing, LLC. In April 2010, the Center hired her as an Assistant Director of Nursing for its dialysis unit.

Soon after Ezeh’s arrival, but before the leadership transition, Center management began complaining of Ezeh’s lack of preparedness. As a result, Ezeh was issued an “Individual Performance Improvement Plan” in September 2010. The Plan stated that Ezeh had exhibited “poor performance” and insisted that she improve her caregiving.

On June 10, 2011, Ezeh emailed the Center’s human resources manager to complain about “disrespect and insults” she had received from her new supervisor, Zimmerman. Later that month, Zimmerman gave Ezeh a “Management Performance Appraisal,” in which she rated Ezeh’s management, interpersonal, and communication skills as “marginal,” indicating Ezeh’s performance was “below what is expected” and fell “short of desired results.” A few weeks later, Ezeh took FMLA leave. At the start of her leave, Ezeh contacted the Genesis Corporate Hotline to complain again about ill-treatment from Zimmerman. Ezeh also wrote to Genesis complaining of “persecution and inequitable treatments based on color, race[,] national origin, and age” and claimed that “foreign nurses are denied work [at the Center] for no other reason except their [n]ationality.”

Following her medical leave, Ezeh met with Zimmerman, Hochradel, and a Genesis human resources manager to discuss going back to work. Rather than return to the Center, Ezeh informed the Center that she would instead seek a transfer back to her former employer, Genesis Staffing. Citing various infractions, Genesis refused to rehire her at either site.

Ezeh also alleged that, sometime between April and July 2011, Zimmerman told Ezeh that she believed “Africans [were] going to kill” her or make her “sick” by “putting voodoo on [her].” According to Ezeh, Zimmerman kept a “voodoo catcher” in her office for protection and would perform a “ritual in front of her door” before going inside. Ezeh also claims that Zimmerman screamed in her face on at least two occasions, spoke to her inappropriately, and commented that there were “too many Nigerians,” both at the Center and in her class at Baltimore City Community College, where Zimmerman worked as a teacher. Another former Center employee, Robin Ross (“Ross”), testified that voodoo was indeed a “big thing” for Zimmerman, and that Zimmerman would “often make comments about how she didn’t like the Africans and wanted them all out of the building.” In September 2011, Ross sent an email to Genesis’s corporate headquarters expressing concern about Zimmerman’s alleged request to help her “get rid of the African people at Genesis.”

Ezeh sued asserting claims of a hostile work environment, retaliatory termination, and other retaliation on the bases of both race and national origin under Section 1981 and Title VII.

Finally, Plaintiff Aina, born in Nigeria, began working as a geriatric nursing assistant at the Center in February 2009. Aina received disciplinary warnings from his supervisors almost immediately. Afterwards, Aina continued to have problems at work. In June 2011, he was issued a “Final Written Warning” and suspended without pay for allegedly failing to take proper care of a resident. Believing he had done nothing wrong, Aina disputed his suspension and contacted EEOC. When Aina returned to the Center post-suspension, Hochradel allegedly said that she wanted to fire him because “they have a lot of Africans here.” Aina eventually was fired after failing to report a bruise on a patient’s face.

Aina sued claiming hostile work environment, retaliatory termination, and other retaliation on the basis of national origin, under Section 1981 and Title VII.

On January 31, 2017, the district court granted summary judgment for Defendants on all counts. In so doing, the district court construed all of Plaintiffs’ allegations as being based solely on their national origin as “Africans” or “Nigerians,” and not on any “specific ethnic characteristic” that might reasonably fall under a broad understanding of race, as opposed to national origin. Because Section 1981 “prohibits discrimination on the basis of race, but ... does not bar discrimination purely on the basis of national origin,” the district court concluded that all of Plaintiffs’ Section 1981 claims failed. For that reason, the district court only analyzed Plaintiffs’ Title VII claims, disposing of each for failure to either present a triable issue of material fact or exhaust the available administrative remedies. Accordingly, the court entered judgment in favor of the Defendants. Plaintiffs timely appealed.

The Fourth Circuit first examined the plaintiffs’ claims under Section 1981. For purposes of Section 1981, the concept of “race” is much broader than our modern understanding of the term. Putting this understanding into practice, other circuits have found that Section 1981 protects against discrimination based on being Jewish, “Middle Eastern,” or Iranian. Similarly, with evidence of some nexus between ethnic or ancestral characteristics and workplace discrimination, there is no reason why a plaintiff cannot bring a Section 1981 claim on the basis of being “African” or “Nigerian.” Still, the scope of Section 1981 protection is not unlimited. Trying to draw clear

distinctions between someone's ethnicity and national origin can often amount to impossible hairsplitting. However, at the very least, a Section 1981 claim must allege race-based discrimination. In other words, allegations of discrimination based purely on national origin are insufficient to state a Section 1981 claim.

Here, neither Nnadozie nor Aina alleged race-based discrimination in their complaint. Instead, both plaintiffs alleged discrimination on the basis of national origin alone. Because Nnadozie and Aina failed to allege race-based discrimination under Section 1981, the Fourth Circuit agreed with the district court's dismissal of their Section 1981 claims.

That being said, the court disagreed with the district court's decision to dismiss those claims with prejudice.

The district court concluded that Plaintiffs' Section 1981 claims fail as a matter of law, thereby entitling Defendants to summary judgment and warranting dismissal with prejudice. In so doing, however, it is unclear whether the district court looked to the summary judgment record or solely considered the adequacy of the allegations in the complaint. Specifically, in dismissing Plaintiffs' Section 1981 claims, the district court neither cited nor referenced any evidence contained in the record. To the contrary, the district court's opinion referenced only the allegations made by Plaintiffs in their complaint. Because the extent to which the district court may have relied on evidence outside of the parties' pleadings is unclear, the Fourth Circuit treated the district court's disposal of Plaintiffs' claims as a judgment on the pleadings. Accordingly, the court remanded these claims to the district court for determination of whether the inadequacy of Plaintiffs' pleadings could be cured through amendment, thus rendering dismissal without prejudice appropriate.

As to plaintiff Ezeh, however, the Fourth Circuit concluded that, viewed in the light most favorable to Ezeh, the evidence in the record could allow a rational factfinder to conclude that Ezeh endured unwelcome conduct, based on her race, that was severe or pervasive enough to constitute a hostile work environment, and that such conduct is imputable to her employer.

Because of the evidence presented by Ezeh – particularly the “voodoo evidence” – if found credible by a factfinder, shows that Zimmerman stereotyped her African employees as voodoo practitioners, which, in conjunction with her other evidence, provides a basis for finding discrimination based on ethnicity or ancestry, and, therefore, on race. Further, the assumption, based on stereotype alone, that employees with shared ancestry also share a common religious practice is exactly the type of broad-brush appraisal suggesting an ethnic characterization. As such, the combination of the alleged voodoo commentary and hostility towards African employees provides a basis for a reasonable jury to conclude that Ezeh endured unwelcome, race-based conduct from her supervisor that was pervasive and severe.

As to the plaintiffs' other Title VII claims, the court found that they were time barred because the plaintiffs did not include them in their EEOC charges.

AUTHORS' NOTE: The Fourth Circuit, once again, reversed and remanded summary judgment in a hostile work environment case holding that a jury must determine whether the conduct at issue

was sufficiently severe or pervasive to alter the conditions of employment. Only once in the last several years has the Fourth Circuit allowed summary judgment in a case based on the “severe or pervasive” prong. While not a jury question per se ... it’s pretty close.

Barnes v. Charles Co. Public Schools, ___ Fed. Appx. ___ (4th Cir. 2018).

The Fourth Circuit AFFIRMED summary judgment for the employer.

Panel: Traxler, Keenan, Wynn

Opinion: Per Curiam

Bernard Barnes appealed the district court’s order granting summary judgment to Charles County Public Schools (“CCPS”) on his discrimination and retaliation claims pursuant to Title VII, the ADEA, and Maryland state law.

The Fourth Circuit concluded that the district court correctly granted summary judgment on Barnes’ failure-to-promote claim. While Barnes contended that he was more qualified than Murphy, the person chosen for the position, courts must “assess relative job qualifications based on the criteria that the employer has established as relevant to the position in question.” Although Barnes had more experience in the Operations Department, Murphy served as an assistant to the Assistant Superintendent who oversaw the Operations Department. And, while Barnes may not consider Murphy’s experience equivalent to his, Barnes “cannot establish pretext by relying on criteria of [his] choosing when the employer based its decision on other grounds.” Moreover, relevant job experience was only one factor considered by CCPS. The three panel members who interviewed all eight candidates unanimously agreed that Murphy was the best of the candidates for the position, and they were impressed by her passion for the position and vision for the department.

Barnes also claimed that CCPS’s use of subjective criteria demonstrated pretext. While “the use of subjective criteria is relevant to a claim of racial discrimination, standing alone it does not prove a violation of ... Title VII.” Barnes criticized the questions asked of the candidates, but the questions appeared standard in form and related to why he wanted the position, what his plans would be for the position, how he would motivate his subordinates, and how he believed the department furthered the employer’s mission. Moreover, even if Barnes were more qualified than Murphy, CCPS “could properly take into account ... more subjective factors like [Murphy’s] good interpersonal skills and [her] ability to lead a team.” Additionally, the panel members asked all of the candidates the same questions, further negating any inference of pretext in the use of these criteria.

Finally, Barnes contended that the hiring process contained several irregularities. However, “[t]he mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that the employer was motivated by illegal discriminatory intent.” Instead, “there must be some

evidence that the irregularity directly and uniquely disadvantaged a minority employee.” At best, Barnes’ evidence indicated that CCPS decided to hire Murphy prior to interviewing the candidates. Preselection in and of itself does not show an intent to discriminate.

Turning to Barnes’ retaliation claim, the court concluded that most of the allegedly retaliatory acts identified by Barnes were “materially adverse” under *Burlington N. v. White*, because there was no “direct or indirect impact on [his] employment.” Minor change in Barnes’ job duties, when viewed by a reasonable person, are not materially adverse.

However, Barnes’ receipt of a letter of warning did amount to an adverse action because Murphy warned Barnes that future disciplinary actions could result in further discipline, including termination. Nevertheless, Barnes did not present adequate evidence that Murphy’s issuance of the warning was causally connected to Barnes’s protected activity. Murphy issued the warning after receiving two reports from a principal about Barnes’ poor work performance and attitude. Barnes presented no evidence to indicate that the principal was aware of Barnes’ protected activity. An employee is not insulated from discipline simply because he engaged in protected activity. Moreover, Murphy issued Barnes the letter of warning more than one year after Barnes complained about discrimination.

Accordingly, the court concluded that Barnes failed to present a prima facie case of retaliation and affirmed summary judgment on this claim as well.

AUTHORS’ NOTE: This was a fairly uneventful application of firmly established law in the Fourth Circuit. Perhaps it would have made more sense to analyze it based on pretext, but here it would not have made much of a difference.

☹ **Strothers v. City of Laurel, 895 F.3d 317 (4th Cir. 2018).**

The Fourth Circuit REVERSED summary judgment for the employer.

Panel: Gregory, Diaz, Harris

Opinion: Gregory

As stated by the Fourth Circuit:

From day one of her employment at the City of Laurel, Felicia Strothers was singled out for harassment by her direct supervisor, Carreen Koubek. When Strothers complained to the director of her department, he revealed that Koubek had wanted to hire someone of a different race than Strothers, who is black. Strothers then submitted an informal memo detailing what she described as “harassment” and a “hostile environment.” She soon told the City that she intended to file a formal grievance. The City fired Strothers the very next day, before Strothers could submit her grievance. Strothers then filed a retaliation claim under Title VII of the 1964

Civil Rights Act. The district court dismissed the claim on summary judgment under the burden-shifting framework for failure to establish a prima facie case of retaliation.

On appeal, we are asked to determine whether a reasonable jury could find that Strothers complained about conduct she reasonably believed to be a Title VII violation and that her complaint caused her firing. Viewing the facts in the light most favorable to Strothers, we conclude that Strothers engaged in protected activity under Title VII when she complained about what she reasonably believed to be a hostile environment and that her engagement in protected activity caused the City to fire her. Accordingly, Strothers has established a prima facie case of retaliation, and the district court's grant of summary judgment was improper. We therefore reverse the district court's decision and remand for further proceedings.

In August 2013, the City of Laurel interviewed Strothers for an administrative assistant position in the City's Department of Communications. She was interviewed by four representatives from the City, including Peter Piringer, the Communications Director, and Carreen Koubek, the Community Services Officer. Director Piringer would later reveal to Strothers that Koubek did not want to hire Strothers and that Koubek "wanted someone of a different race." Despite Koubek's opposition, Piringer and others thought Strothers, who had over 20 years of experience, was the strongest and "most qualified" applicant and hired her anyway. This case centers on Koubek's alleged harassment of Strothers starting from her first day on the job.

When Piringer offered Strothers the job and before she accepted, Strothers informed him that she could not report to work until 9:05 a.m. each morning because of her children's bus schedule. Because the workday normally began at 9:00 a.m., Strothers offered to make up the five-minute difference by shortening her lunch break. Piringer accepted the proposed arrangement, and Strothers began as a six-month probationary employee, with her retention thereafter subject to evaluation.

Strothers' troubles began on day one and indeed, ten minutes before her start time. On her first day, October 7, Strothers reported to Koubek, her direct supervisor, at 9:05 a.m. Unbeknownst to Strothers, Koubek already marked her tardy. Although Koubek knew that Piringer approved Strothers' modified work schedule, she decided that Strothers had to be in the office by 8:55 a.m. Indeed, Koubek effectively superseded the director's decision and had begun keeping a detailed log of Strothers' daily arrival time. Koubek then told Strothers that she would have a few weeks during which she could arrive at 9:05 a.m. but would then have to find alternative arrangements for her children.

Despite purporting to give Strothers a few weeks to adjust her schedule, Koubek faulted Strothers for every arrival after 8:55 a.m., including on Strothers' first day. According to the arrival log that Koubek maintained, Strothers arrived between 8:54 a.m. and 9:06 a.m. each day, with four occasions on which Strothers called ahead and arrived five to twenty minutes later than usual. Koubek submitted the arrival log to Strothers' personnel file and told human resources, Piringer, and other City officials about Strothers' perceived tardiness. Koubek's memo indicated that every entry, including arrivals before 9:00 a.m., exemplified problematic behavior.

Koubek's notes also revealed that she tracked and faulted Strothers' every absence from her desk, including bathroom breaks. For instance, Koubek once noticed that Strothers had stepped away from her desk at 11:15 a.m. on a Wednesday and began to search for Strothers throughout the office before finding her in the bathroom ("Went out looking and she was in the bathroom. Reminded her to please let me know when she steps away from the desk."). Koubek then reportedly told Strothers, "Didn't I tell you to tell me when you leave your desk?" Koubek's notes confirm that Strothers would call, as instructed, before using the bathroom and that Koubek would record these breaks. Even when Strothers received permission to use the restroom, Koubek faulted Strothers for not reporting when she was done. Similarly, Koubek also tracked and timed Strothers' lunch breaks, as well as errands and other appointments.

Inexplicably, Koubek also faulted Strothers for lack of teamwork because Strothers did not ask her if she would like to have a massage appointment. Strothers had apparently cancelled her own appointment and made one for Director Piringer instead. Taking offense, Koubek wrote, "Nothing was said to me if I wanted to be included. Seems petty, but speaks volumes to lack of team work[.]" Based on the record, there is no indication that the appointment was intended to be a group or work-related event.

Finally, Koubek confronted Strothers regarding Strothers' dress on casual Fridays at the office. On casual Fridays, City employees could wear "business casual," which meant "no capris, no leggings, [and] no sweats," though jeans were permitted. On one such casual Friday, Strothers wore a pair of black pants that she asserted were jeans but that Koubek insisted were leggings. According to Strothers, Koubek grabbed and tugged Strothers' pants without asking permission to do so. Koubek also allegedly circled Strothers, lunged at her, and loudly berated her in front of the entire office for wearing those pants. Though Strothers maintained that she had worn the same pants on past casual Fridays without incident, she offered to change her pants. Koubek then required that Strothers deduct from her personal leave time the amount of time it took for her to go home and change. Koubek also reported the dress code incident to other City officials. The head of human resources for the City noted that he had never received a dress code complaint about anyone else.

Koubek then cited lateness and dress-code violations when giving Strothers a negative three-month performance evaluation. However, at her deposition, Koubek conceded that Strothers did everything she was asked to do. Indeed, Piringer, despite letting Strothers go, wrote a laudatory recommendation letter for her. He wrote, "[A]s the very first Administrative Assistant in this position, her background, life experiences and ability served her well and she was an asset to our organization during her short tenure with the office. She made friends quickly, has great interpersonal skills, is well-organized and can work independently.... She would be an asset to any employer." The director also refused to endorse Koubek's negative evaluation of Strothers.

Strothers had several meetings and exchanges with Director Piringer and other City officials about Koubek's behavior. During one of these interactions, Piringer disclosed that Koubek had wanted to hire "someone of a different race," even though Piringer and the head of human resources thought Strothers was the strongest candidate. Strothers also raised her concerns with City Council Member Frederick Smalls, who is black. She told Smalls that Koubek was being hostile towards

her because of her race. Smalls reportedly indicated that he was going to speak with the Mayor because he did not want a discrimination suit to come out of the dispute.

During Strothers' employment with the City, she was the only black employee that Koubek supervised. However, in 2015, Koubek did supervise another black employee, Joan Anderson. Koubek admitted that Strothers and Anderson, her only two black subordinates, were the only two employees that she had ever disciplined or reported to her superiors. Joan Anderson also told Strothers her belief that Koubek did not like black people and recommended that Strothers speak with Council Member Smalls about the harassment. Oliver Willford, a former part-time employee who is also black, similarly told Strothers that Koubek would treat him and his wife, who volunteered for the City, "like scum," and that they had previously complained to the City.

On February 26, 2014, Strothers sent an internal memorandum to Piringer complaining about Koubek's actions. The memo cited the dress code dispute as well as what Strothers perceived to be nonstop harassment from her first day, including Koubek's enforcement of the desk and bathroom policy. Strothers also objected to Koubek's submission of negative evaluations to her personnel file without her knowledge. Strothers characterized Koubek's actions as "harassment" and claimed that Koubek created a "hostile environment," one that she has never been subjected to in twenty years of office experience. She indicated that Koubek's actions had made going to work "difficult" and "unbearable." This memo did not cite Piringer's comment about Koubek's preference for a white candidate during hiring.

After Strothers submitted the memo, she and Piringer negotiated over whether he would investigate whether she was being unfairly targeted. Strothers also indicated that Koubek was "trying to railroad" her. The record does not show that any investigative steps were in fact taken. Strothers then sent Piringer an email expressing her intent to file a formal grievance against Koubek and requested the relevant forms, saying "Please have the grievance forms for me to complete upon coming in tomorrow morning."

The City fired Strothers the next day – the day she planned to file her grievance. Koubek sent the termination notice to Strothers, though the notice was formally drafted by Piringer. The stated reason for termination was tardiness.

Strothers sued asserting claims for race discrimination and retaliation. The district court dismissed her discrimination claim (for reasons that are not clear in the Fourth Circuit's opinion, and Strothers apparently did not appeal it) and eventually granted summary judgment to the City on her retaliation claim.

In granting the City's motion for summary judgment, the district court concluded that Strothers failed to show a prima facie case of retaliation. According to the district court, Strothers failed to show that her internal complaints to the City constituted protected activity under Title VII because she could not reasonably believe that the harassment she experienced was attributable to racial animus. The district court also concluded that Strothers could not show that her firing was caused by her engagement in protected activity, because the City was not aware that Strothers was complaining about a possible Title VII violation.

In considering Strothers’s appeal, the Fourth Circuit engaged first in a lengthy discussion of anti-retaliation law and, in particular, how it was broader than anti-discrimination law in several respects. The court specifically noted the following about the nature of protected opposition activity:

*[I]mportantly for this case, this Court, en banc, has held that the anti-retaliation provision protects employees **even when they complain of actions that are not actually unlawful under Title VII.** Boyer-Liberto, 786 F.3d at 282. Instead, complaining employees are protected if, at the time of their complaint, they “**have an objectively reasonable belief in light of all the circumstances that a Title VII violation has happened or is in progress.**” Id. (citation omitted). Because “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses,” Burlington, 548 U.S. at 67, 126 S.Ct. 2405, the greater breadth of the anti-retaliation provision ensures that employees feel free to come forward with their grievances, even when a violation is not yet conclusive based on what one witness might know. See Boyer-Liberto, 786 F.3d at 283.*

(emphasis mine).

Turning to the merits, the Court noted that it was “concerned only with Strothers’ ability to make a prima facie showing of retaliation under the burden-shifting framework, as that was the sole basis for the district court’s decision to grant summary judgment. Further, because it is patently obvious and undisputed that termination is a materially adverse action, we discuss only the first and third elements of the prima facie case—protected activity and causation.” [This disclaimer, if you will, was important given the tone and clarity of some of the court’s statements about the evidence.]

As to protected activity, the Fourth Circuit had no trouble quickly concluding that “a reasonable jury could find that Strothers had reason to believe that she was being subjected to a hostile environment.”

- Strothers experienced unwelcome conduct, as evidenced both by her repeated complaints and by the nature of Koubek’s conduct, noting “[i]t is hard to imagine a reasonable worker who would not find unwelcome Koubek’s constant surveillance, badgering, and criticism.
- Strothers had ample reason to believe that she was being mistreated “because of” her race. Piringer disclosed that Koubek wanted to hire someone of a different race than Strothers. Race—not experience, qualifications, or skills—was the differentiating factor that Piringer chose to highlight. Additionally, Strothers heard from former City employees who explicitly warned her about Koubek’s history of harassing black employees, that Koubek did not like black people, and that she singled them out for differential treatment. Against that history, Strothers was also aware that she was the only black subordinate employee and that she was the only one whom Koubek chose to surveil and scrutinize. Moreover, her being selected for such scrutiny apparently had nothing to do with her job performance, as Koubek herself acknowledged that Strothers did everything as instructed.

- There are sufficient facts for a reasonable jury to find that Strothers reasonably believed that Koubek’s actions were sufficiently severe or pervasive as to alter the terms or conditions of Strothers’ employment and create an abusive environment. The record clearly shows that Koubek significantly altered terms and conditions of Strothers’ employment. First, Koubek changed Strothers’ daily arrival time. Second, Koubek changed the dress code as applied to Strothers. Although the dress code allowed jeans on Fridays, Koubek took issue with Strothers’ “Nine West jeans,” publicly humiliated her, and forced her to take time off to change—not to mention Koubek’s possible act of battery. Third, Koubek instituted a policy that forbid Strothers from leaving her desk, including to use the restroom, without specific approval—a policy of which Strothers was unaware before accepting the job. And not only did Strothers have to receive Koubek’s permission for every use of the bathroom, she had to report the length of each trip.
- Finally, Koubek’s actions were attributable to the City. A reasonable jury could find that Strothers reasonably believed that Koubek was her supervisor and, alternatively, that she reasonably believed that the City was negligent in failing to address the ongoing harassment. Because Strothers is seeking to prove retaliation, rather than an actual hostile environment claim, she need only show that it was reasonable for her to believe that Koubek was her supervisor, not that Koubek actually met all aspects of the standard set forth in *Vance*. In light of the full constellation of Koubek’s actions, a reasonable jury could find that Strothers reasonably believed that Koubek could take tangible employment actions against Strothers and that Koubek was a “supervisor” for purposes of Title VII. Additionally, the City was negligent because the City knew or should have known of the harassment and failed “to take prompt remedial action reasonably calculated to end the harassment.”

Based on the foregoing, the court concluded that a jury could (easily) conclude that Strothers’s belief that she was complaining about unlawful activity by Koubek was objectively reasonable.

Looking next at causation, the Fourth Circuit reiterated that establishing a “causal relationship” at the prima facie stage is not an onerous burden. Purported victims of retaliation do not have to show at the prima facie stage that their protected activities were but-for causes of the adverse action. Based on the evidence in the record, the Fourth Circuit concluded that a reasonable jury could find that the City knew or should have known that Strothers was complaining about a Title VII violation and that her complaints caused her termination.

The City’s primary argument regarding causation was that it had no reason to think that Strothers was engaged in protected activity because her informal memorandum did not explicitly cite racial discrimination. The court quickly rejected this argument noting that it rejected a similar argument in *Okoli v. City of Baltimore*, where the employer argued that it was not on notice because a female employee only alleged “harassment” but not “sexual harassment” in her complaining email. Here, as in *Okoli*, the “City should have known that the alleged harassment and hostile environment pertained to racial discrimination given what it knew about Koubek and her relationship with Strothers.

Given the City's knowledge of Strothers's protected conduct, the only remaining question was whether the City took adverse action against Strothers soon after learning of her complaint, as temporal proximity is sufficient to establish a causal connection at the prima facie stage. Strothers submitted her informal memo on February 26 and sent an email on March 6, asking for grievance forms and saying that she intended to file a formal grievance on March 7. The City fired Strothers on March 7, the very next day. Because the lapse of one or even nine days is well-within what the Court has found to be a causally significant window of time, it concluded that Strothers had met her burden of showing causation at the prima facie stage.

AUTHORS' NOTE: This is the Fourth Circuit we have come to know over the last decade. The Court took a hard look at the facts, scrutinized how the district court drew inferences and evaluated the evidence, and rejected unsupportable arguments from the employer. It forcefully applied Boyer-Liberto and other recent cases, and even repurposed some old favorites like Williams v. Cerberonics and Causey v. Balog. There are a number of lessons and language here that (perhaps) the Fourth Circuit needs reminding of on occasion. For example, the Court here reemphasized that the plaintiff's burden at the prima facie case stage "is not an onerous burden." Yet, this year, we saw numerous cases where the plaintiff failed to present a prima facie case. Additionally, Boyer-Liberto significantly reformed the Court's retaliation jurisprudence, but this is the only case to apply it as strongly as its terms appear to require.

fin.

CHAPTER II

Social Media Discovery, Ethical Rules and Constraints on Plaintiff and Defense Lawyers

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CHAPTER II

An Overview of Handling Social Media in Your #Employment Law Practice Worth a Retweet, Like or Follow

Brian C. Groesser – Raleigh

Michael A. Kornbluth – Durham

Maureen M. Zyglis - Raleigh

Introduction	II-1
Items to Consider with Social Media: What Role Can it Play in Your Case?	II-1
Evidentiary Concerns: How Can Social Media Evidence be used at a Hearing?	II-2
Role of Social Media in Hiring, Monitoring & Firing	II-7
Hiring	II-7
Monitoring	II-8
Firing	II-11
Summary of Proposed 2018 Formal Ethics Opinion 5: Accessing Social Network Presence of Represented or Unrepresented Persons	II-15
Scope	II-16
Authorities and Rules	II-16

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An Overview of Handling Social Media in Your #Employment Law Practice Worth a Retweet, Like or Follow

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Twitter, Instagram, Facebook, YouTube, Tumblr, and Snapchat are all current forms of the ever-growing sensation of social media. These different platforms are constantly changing as are the ways we use them. And the inherent viral nature of social media has inevitably found its way into how we practice law. From attempting to use social media as evidence in your case, to advising your client on how to prevent it from being used against him or her, to handling every day workplace situations, it is vital for an attorney to understand the application and impact of social media even if the attorney is not an active user on his or her own.

A. Items to Consider with Social Media: What role can it play in your case?

Clients need to know that the other party will be examining what they have said or will say on the internet. Social media postings can be a treasure trove of evidence replacing the traditional and often more laborious routes of obtaining evidence. If your client's Facebook account, Twitter page or other personal pages are not set to private, anyone can access and preserve the information contained therein. It is recommended that clients be instructed to privatize their pages and limit their postings on such websites. A good rule of thumb for them to abide by should be if they do not want to have to address a picture or posting in a hearing or deposition, that they should not post it.

For the attorney, researching, obtaining and preserving social media postings throughout the case can be vital for fully leveraging your case. There may be a post about the employee making derogatory remarks about the employer. There may be pictures from a co-worker and

the employee routinely hanging out together outside of work and that co-worker is testifying on behalf of the employee. There may be comments from a manager or supervisor disparaging the employee either directly or indirectly. There may be comments on the company's page from others pertaining to the issue in your case that may show a trend or consistent type of behavior exhibited by the company. The possibilities are truly endless. The key is navigating how to avoid pitfalls that can doom your case and/or how to secure information that may make your case.

B. Evidentiary Concerns: How can social media evidence be used at a hearing?

There is a posting on social media that can now make or break your case. How do you get it into evidence or how do you keep it out? There are several factors to consider: (1) Authenticity; (2) Work Product, (3) Privacy Concerns, and (4) Hearsay. In North Carolina, Rule of Evidence 901 requires a proponent to produce evidence sufficient to support a finding that the matter is what the proponent claims it is. The social media posting or message has to actually be linked to the person who purportedly made it. If it cannot be linked to the person making it, the exhibit and information it contains will not be deemed as relevant or admissible.

The easiest way to meet this requirement is to ask opposing counsel to stipulate to the authenticity of the social media exhibit. If she agrees, then this hurdle has been met. If not, you can ask the person who purportedly made the posting, questions about it during discovery or testimony. Not surprisingly, the "it wasn't me" defense to the admissibility of such content is incredibly common. Individuals often claim that another person created or manipulated the evidence. Some courts examining such issues have found that the proponent must show that there was "no possibility" it was altered or manipulated in any way. *Connecticut v. Eleck*, 23 A. 3d. 818, 820 (Conn. App. Ct. 2011).

However, other jurisdictions across the country have recognized a lower standard for the matter to be admitted into evidence. For example, in the Georgia Supreme Court case of *Moore v. State*, 295 Ga. 709, 763 S.E. 2d 670, 674 (2014) citing *Burgess v. State*, 292 Ga. 821, 742 S.E. 2d 464, 467 (2013). the Court held that documents from electronic sources, such as the printouts from a website like Facebook, were subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence.

Of note, the author of some forms of social media does not have to be the witness through which the exhibit is authenticated. In a case in Tennessee, *Dockery v. Dockery*, No. E 2009-01059-COA-R3-CV, 2009, Tenn. App. Lexis 717 at *16-17 (Tenn. Ct. App. Sept. 21, 2009), the Court held that printouts of exchanged MySpace messages were properly authenticated when the recipient of the messages testified that the printouts were printed directly from her computer and accurately depicted the communications she had with the defendant. In support of the defendant’s argument that the MySpace printouts were not properly authenticated, the defendant claimed that a representative of MySpace could only authenticate the printouts. The Court rejected the defendant’s argument, stating that the printouts were properly authenticated by the recipient’s testimony as she had knowledge of the same and, further, that “a representative from MySpace was not a prerequisite to its admission.”

In some North Carolina cases, social media postings have been found to be self-authenticating if they meet the requirements of being kept in the regular course of business. [N.C. Rule of Evidence 902; N.C. Rule of Evidence 803]. In *U.S. v Hassan*, 724 F. 3d 104 (2014), the trial court in North Carolina ruled that the defendant’s Facebook pages and YouTube videos were “self-authenticating” under Rule 902(11) and were admissible as business records.

However, the Court also required the government prove that the Facebook pages were linked to the defendant, Hassan.

N.C. Rule of Evidence 902(11) authorizes the admission of records that satisfy the hearsay exceptions under N.C. Rule of Evidence 803(6)(A)-(C), as “shown by a certificate of the custodian” that satisfies three requirements:

1. That the records were made at or near the time by or from information transmitted by someone with knowledge;
2. That they were kept in the ordinary course of regularly conducted activity of a business; and
3. That making the record was a regular practice of that activity.

Defendant Hassan and his friend’s Facebook pages were captured via “screenshots” taken at various points in time by the government. The screenshots displayed their user profiles and postings. Meanwhile, the YouTube videos were obtained from Google’s server pursuant to a subpoena request. The government provided certifications from Facebook and Google that the Facebook pages and the YouTube videos in question were maintained as business records; the custodians certified that they “create and retain such pages and videos when (or soon after) their users post them through use of the Facebook or Google servers.” The government also tracked the Facebook pages and accounts to Hassan’s mailing and email addresses via Internet protocol (IP) addresses. Thus, there was little doubt that the postings were in fact attributable to the authors alleged. The Court then concluded that these materials were in fact “self-authenticating,” under N.C. Evid. R. 901(11).

Of note, issues with authenticity can also be addressed proactively with discovery. For example, one can request the social media postings themselves, as well as the author and contact

information for each relevant posting, whether the content has been altered, and whether the posts were made in an automated format in Interrogatories or Requests for Production of Documents. In addition, the attorney should request all of the information in native file format, including the metadata for the same.

However, such requests are commonly objected to on various grounds. For example, Plaintiff may argue that the request is “is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.” Many social media requests include “any and all” language that is often too broad to capture specifically relevant information for the case. The request should not be made for the mere purpose of a “fishing expedition.” When such is the case, the parties should confer to limit or narrow the scope of the request to a reasonable period of time and topics that are narrowly tailored to the issues in the case.

Another common objection is “this information is protected attorney work product.” However, unless the postings were made upon the advice of counsel, there is little merit to this argument especially when such privilege can be considered waived by publication to third parties. This objection also calls into question the ethical behavior of advising clients to delete, “clean up,” manipulate, or otherwise alter their social media platforms.

Finally, Plaintiff may object on the grounds that the request is an “invasion of privacy.” By their very nature, social media postings are intended for public dissemination. However, if the user has taken adequate steps to apply privacy settings, the argument of a reasonable expectation of privacy may be persuasive. The threshold for discovery responses, however, is not based on privacy, but rather based on whether the information requested would be relevant and non-privileged.

In addition to authenticity as addressed in the *Hassan* case, there are likely to be admissibility hurdles with hearsay. North Carolina Rule of Evidence 801 defines hearsay as a declarant's out-of-court statement used to prove the truth of the matter asserted. Rule 802 prevents such statements from becoming evidence, subject to exclusions and exceptions. The four ways social media evidence are most likely to be deemed admissible are the following: (1) Opposing Party's Statement [Rule 801(d)(2)], (2) Present Sense Impression [Rule 803(1)], (3) Excited Utterance [Rule 803(2)], and (4) Then-existing Mental, Emotional or Physical Condition [Rule 803(3)].

A statement that would otherwise be hearsay is not deemed as hearsay if it is an admission of a party and is used against that party. This includes statements made by the party in an individual or representative capacity, statements made and adopted as true, and statements made by an agent within the scope of the relationship. Statements made through social media will often fit this exclusion as long as they are being offered against, not by, the party who made the admission or adopted it. Several courts have therefore found these postings or content to come in under the exclusion criteria of Rule 801(d)(2).

Statements that are considered present sense impressions or excited utterances can be admitted into evidence as an exception to hearsay, as well. These statements are found to be reliable because the excitement of the event renders the declarant unable to intentionally misrepresent or misconstrue the event. However, the conscious effort made to compose and post some messages on social media may tend to make this exception less likely to apply. But when the circumstances are right, the exception may be applicable and Rule 803(1) and (2) can allow the exhibit into evidence.

Finally, a declarant's statement on social media can also be admitted into evidence under Rule 803(3) when it meets the criteria of the then-existing mental, emotional, or physical condition exception. This rule comes into play with social media when the individual has made a very candid statement regarding their feelings, emotions, or state of mind. If you are trying to use this exception to get a social media posting into evidence, one should establish that the statement is only representative of the individual's state of mind and not necessarily his or her beliefs. Please see *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007) and *Versata Software, Inc. v. Internet Brands, Inc.*, No. 2:08-cv-313-WCB, 2012 WL 2595275 (E.D. Tex. July 5, 2012).

Social media's impact in your practice is not limited to just when a claim is filed. Rather, much like viral content, its impact can spread to all areas of your practice. As the next section discusses, the use of social media can play a major role in creating a claim or avoiding one from being filed.

C. Role of Social Media in Hiring, Monitoring & Firing

The first issue employers need to think about with regard to social media policies and practices is the culture of their company, not only from the aspect of the existing culture, but also from the perspective of the kind of culture they hope to create. Likewise, job seekers and employees should consider the culture of a company and how that may or may not align with their personal values.

1. Hiring

There are positives and negatives to implementing internet investigations at the hiring stage. On one hand, employers may find employees who are a better fit and may be able to weed out potential problem employees through a social media search. Further, from a legal standpoint

this may help employers guard against negligent hire claims. On the other hand, conducting a social media search may also open a company up to potential discrimination claims (i.e. sex, race, age, etc), especially if conducted early on in the hiring process. Employers should tailor searches to fit their specific needs and focus on specific areas that are good for their business. Employers should look at identifiable characteristics which have been determined to be important in successful job performance. Employers should not ask employees or others who are already friends with an applicant to allow them access to private content as it may give rise to a violation of the Federal Stored Communications Act (SCA).

2. **Monitoring**

Monitoring social media usage remains a somewhat grey area of the law and social media policies often leave a great deal of room for interpretation. Employers should have clearly written guidelines regarding social media usage, and employees should read them. Employers should determine what information is important, both positive – volunteer work, a strong interest in their business field or well written posts or blogs – and negative – illegal drug use, discriminatory or hateful language, violence, or negative comments regarding prior employers or coworkers. This can be a way to reward employees for appropriate social media usage, not just to punish poor behavior.

As of January 2018, 26 states have enacted laws preventing employers and educational institutions from asking employees, job applicants and students for access to usernames or passwords for personal social media accounts. North Carolina and South Carolina are not among those 26. However, the Job and Education Privacy Act, House Bill 846, was passed by the North Carolina legislature in 2013. If enacted, this would prevent employers and colleges from requiring individuals to disclose access information for social media and personal e-mail

accounts. The bill prohibits employers from requesting or requiring an employee or applicant to log onto a social networking site or their personal e-mail in the presence of the employer so as to access the employee's or applicant's profile or account. It also prohibits an employer from monitoring or tracking an employee's or applicant's personal electronic communication by installation of software on a personal device. The bill does not preclude an employer from accessing publically available information and/or communications on a social networking site, and it also leaves a safeguard in place for employers in the financial services industry who are subject to State and Federal laws and regulations.

In 2015, South Carolina's State Employee Code of Conduct Task Force implemented a new code of conduct which restricted social media usage of government employees. Rule 4--Use of State Resources, states in part: "Unless specifically required by the agency to perform a job function, you may not use social media, including but not limited to Facebook, Instagram, and Twitter, while on duty or through the use of state resources or equipment."

The goal of social media policies is not just to have grounds for termination in writing. A goal of any social media policy is to keep employees from posting material or information that has a negative impact on an employer. An interactive process that addresses what does and does not violate the policy helps reinforce what an employee can and cannot do and again brings home why the policy is being implemented in the first place. This is also a chance for employers to clarify who the employees should talk with about concerns or procedures for reporting violations. Again, this is a topic meant for interactive discussion with employees, not simply something to be stated in a revised handbook and handed out at a monthly meeting.

Here are some tips for employers on developing and implementing social media policies:

- Define what constitutes “social media” and what activities are subject to the social media policy. Social media is growing on a daily basis so it’s best to use broad language and not just say Facebook or Twitter.
- Have a duty to report. There is no duty for an employer to seek out an employee’s social media usage. However, if an employer knew or should have known about content on a social media site, then the employer may be liable. (This is the same as a duty to report in the EEO policy.) Employers can also be held liable for harassment by supervisors outside of company hours if they knew or should have known of the conduct and failed to take appropriate action to address the situation.
- Integrate the policy with other company policies. The social media policy should not sit in isolation from other company policies dealing with computer/internet use at work, company owned electronic devices, EEO, codes of conduct, confidentiality, references to customers or former employees, etc.
- Encourage employees to disclose their relationship to the company if/when discussing the company, and to never misrepresent or otherwise conceal that relationship.
- Address friending or following the company, managers, or co-employees in the policy. Recognize that a supervisor friending a subordinate can feel coercive and that co-workers friending one another can result in cliques. This is yet another reason why blanket policies will not suffice.

- Think about the National Labor Relations Act (NLRA). Many employers, especially those operating in the Carolinas, mistakenly believe that if they are not dealing with unions, they do not need to worry about the NLRA and that it does not apply to them. However, the NLRA applies to nearly all employers and prohibits employers from limiting their employees from engaging in concerted activities.
- Ask for feedback. Employers should engage their employees and discuss social media policies with them. Employees should be educated about why the policies are being implemented and how the changes may affect them. When employees feel like they have a voice and are a part of the process, they are often more willing to accept and comply with policies.

Employers should educate their team about the potential problems caused by poor enforcement of policies, friending subordinate employees, coercing information out of other employees, etc. This is not something that should be left up to the discretion of every department head or manager. On the flipside, employees should not be offended if a manager declines a friend or follow request. Employees need to understand and respect the boundaries of a professional relationship created in the workplace.

3. **Firing**

North and South Carolina are at-will employment states and an employer can set standards for the conduct it expects employees to comply with in order to remain employed. Employees should be familiar with their employer's social media policies and expectations. Employees should be mindful in posting on social media and remember that all of their "friends" may not be so forever. Ex-boyfriends/girlfriends have been known to take a private post and

make it public, allowing an employer access to the information and the ability to make employment decisions based upon the same.

A. Examples of consequences of employees social media posts:

- A day care worker was fired before she even started her new job after she posted *"I start my new job today, but I absolutely hate working at day care. Lol, it's all good, I just really hate being around kids."*
- Similarly, a woman posted *"Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work."* Cisco made the decision for her and rescinded the offer.
- A middle school counselor posted the following comment on a Dallas TV stations' Facebook page covering the West Fertilizer Co. explosion in West, TX: *"It's amazing how the "whites" get angry when Obama speaks. Oh well....it is most of the whites who is getting blown away. So they will soon be wiped from the earth. Lol."* Her comment went viral and she was fired after public outcry that such a person should not be allowed to counsel children.
- In Philadelphia, a government worker lost his job after he tweeted: *"We start summer hours today. That means most of the staff leave here at noon, many to hit the links. Do you observe summer hours? What do you do?"*
- In Indiana, a CNA was fired after she posted a photograph on Facebook of a 51-year-old, paraplegic patient's buttocks after he had a bowel movement. She was quoted in court documents as saying to her co-worker, *"This is too funny. I need to take a picture of this."* The co-worker told investigators she

asked the woman not to take the picture and then went to her supervisor to report the incident once she saw it on Facebook.

- Former major league pitcher Mike Bacsik lost his job as a radio talk show host after tweeting “*Congrats to all the dirty Mexicans in San Antonio.*” during a Dallas Mavericks v. San Antonio Spurs game.

B. Here are some tips for employees on using social media:

- Do not disparage clients, co-workers, bosses, opposing counsel, judges, or jurors, no matter how much you may think they deserve it.
- Think about the image you want to portray before posting photos.
- Foster intelligent discussion when you can.
- Before posting or tweeting, imagine reading it aloud in front of your boss, your mentor, or the person you hold in the highest regard in your office.
- Proofread! Proofread! Proofread!

As we have seen across the country, employers can discipline or fire employees for their social media posts. Quick reactions from employers can head off negative publicity that frequently follows inflammatory social media posts. However, before making a decision, employers should allow the employee an opportunity to explain. The internet can be fallible and inaccurate, resulting in both false positives and false negatives.

Today’s social media landscape can be as familiar as an everyday ritual for some attorneys and as unfamiliar as a foreign language to others. It is also a quickly changing medium that often leaves users who have mastered utilizing one popular site in the dark as to how to use the newest app. The quick rise and fall of MySpace is an enlightening example. MySpace officially launched in 2004 and by late 2006 had over 100 million accounts. News Corp

purchased the rights in July 2005 for \$580 million.¹ By August 2008, the site peaked at just fewer than 75.9 million monthly unique users in the United States.² By May 2011, that number was cut by more than half to 34.8 million.³ The following month, News Corp sold the ailing site for \$35 million.⁴

Since MySpace first engaged the American public's curiosity of networking over the internet, other companies attempted to cash in and compete for the format allowing someone to tell all who will read/listen/click of his or her daily activities and thoughts. Facebook, Twitter, LinkedIn, YouTube, Vimeo, Tumblr, Instagram, Pinterest, and Snapchat are just a sample of the most popular sites/apps that are used today. The popularity of each site/app varies and shifts as trends often do. Sites that were used by young adults soon become unpopular when older adults start participating as well. In 2015, there were 179.7 million total social network users in the United States.⁵ Facebook, which overtook MySpace in popularity in the late 2000s, still had 156.5 million users in 2015.⁶ 20.5% of those users were made up of the 25-34 age group. However that number has remained static while Instagram, with its 60.3 million users in 2015, had 32.2% share in the 25-34 age group.⁷

The shifts in popularity can also be attributed to format and application. Instagram is an app-only device that utilizes pictures as posts. Facebook allows for pictures but also lengthy commentary on the meal you enjoyed or the presidential candidate of your preference. Twitter

¹ Jennifer Saba, "News Corp sells Myspace, ending six-year saga," *Reuters, U.S. ed.*, 29 June 2011. Web. 10 January 2016.

² Felix Gillette, "The Rise and Inglorious Fall of Myspace," *Bloomberg Business*, 22 June 2011. Web. 10 January 2016.

³ *Ibid.*

⁴ *See Saba.*

⁵ "Infographic: Who's Really Using Facebook, Twitter, Pinterest, Tumblr and Instagram in 2015 Social's biggest network isn't dying, but it is getting grayer" *Ad Week*, 12 January 2015, Web. 10 January 2016.

⁶ *Ibid.*

⁷ *Ibid.*

limits a user's comments to 140 characters. The changing landscape in site/app preferences and formats limits the ability of our State Bar to draft and enforce a rule applying to the ethical usage of those sites/apps without that rule becoming obsolete or inapplicable. As a result, only one ethics opinion has ever been drafted specifically relating to social media. That does not mean that the rules covering ethics do not apply to social media. The rest of this manuscript will focus on scenarios that confront attorneys' everyday with the use of social media in their practices

D. Summary of Proposed 2018 Formal Ethics Opinion 5: Accessing Social Network Presence of Represented or Unrepresented Persons

Proposed 2018 Formal Ethics Opinion 5, *Accessing Social Network Presence of Represented or Unrepresented Persons* ("FEO 5"), attempts to clarify the application of standard ethical rules in the context of modern social media usage. After defining terms and elaborating on the pertinent principles, FEO 5 discusses seven⁸ possible scenarios regarding a lawyer's communications with persons⁹ via social networks. The opinion has some controversial scenarios described below. Additionally, the opinion omits discussion of the scenarios in which a request to access restricted content is denied, but the lawyer still has the ability to post or communicate with the person via the social network.

FEO 5 states that a lawyer may access public social network information, may not use deception to access restricted¹⁰ social network information, may request access to restricted social network information (i.e. send a friend request), may utilize a third party to view or request access to information, and may not use a social network to elicit information from a

⁸ The seventh inquiry contains two distinct questions which are separated below as 7a and 7b.

⁹ "Persons" are defined as witnesses and opposing parties.

¹⁰ The opinion uses the term "restricted" to refer to information that can only be viewed by certain users designated by the owner, essentially information that is non- or semi-public. For example, on Facebook, some information, such as a name or workplace, is often visible to non-friends while other information, like a birthday or pictures, may only be viewed by the owner's friends.

represented person regarding the subject of the representation. The most surprising, or least intuitive, conclusion is that a request to access a represented person's restricted social network information does not violate ethical rules limiting communications with a represented person.

SCOPE

FEO 5 applies to "social networks," which the opinion broadly defines as "internet-based communities that individuals use to communicate with each other and to view and exchange information." Whereas the term "social media" is common in everyday usage, FEO 5 eschews this term, which is seemingly limited rhetorically to "media," in favor of the broader term "social network" which encompasses social media websites such as Facebook. FEO 5 provides a non-exclusive list of websites that qualify as "social networks": Facebook, Twitter, Myspace, Instagram, and LinkedIn. FEO 5 does not apply to communications with the lawyer's clients.

AUTHORITIES AND RULES

FEO 5 principally relies upon Rules of Professional Conduct 4.2 and 4.3. Rule 4.2 restricts a lawyer's ability to communicate with a person on behalf of a client regarding the subject of the representation when the lawyer knows that the person is also represented in the matter. Rule 4.3 states that, when dealing with an unrepresented person, the lawyer may not give legal advice, other than the advice to secure counsel, and may not portray themselves as a disinterested party with regard to the subject matter. FEO 5 also incorporates Rule 4.1's prohibition on knowingly making a false statement of material fact or law to a third party and Rule 8.4's prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation. The opinion also notes a lawyer's duty of competence while discussing the changing landscape of social network use.

1: MAY A LAWYER REPRESENTING A CLIENT IN A MATTER VIEW THE PUBLIC PORTION OF A PERSON'S SOCIAL NETWORK PRESENCE?

Yes. The only caveat is that, with regard to social networks that inform the owner each time their profile is viewed (e.g. LinkedIn), a lawyer may not access the profile repeatedly in an effort to intimidate, embarrass, delay, or burden a third person.

2: MAY A LAWYER USE DECEPTION TO ACCESS A RESTRICTED PORTION OF A PERSON'S SOCIAL NETWORK PRESENCE?

No. Rules 4.1 and 8.4 plainly prohibit such conduct. Also, a lawyer also may not instruct a third party to use deception to gain access (see # 7a below).

3: MAY A LAWYER, USING HIS TRUE IDENTITY, REQUEST ACCESS TO THE RESTRICTED PORTIONS OF AN UNREPRESENTED PERSON'S SOCIAL NETWORK PRESENCE?

Yes. The lawyer may request access (or send a “friend request”) as long as they are honest within the meaning of Rule 4.1 and does not state or imply that they are disinterested within the meaning of Rule 4.3. If the request is accepted, the lawyer may post to the person’s social network presence or otherwise communicate using the social network so long as the requirements of Rules 4.3 and 8.4 are upheld (content is not false, deceitful, or misleading; lawyer explains his role in the matter; lawyer does not provide legal advice other than the advice to seek counsel).

4: MAY A LAWYER, USING HIS TRUE IDENTITY, REQUEST ACCESS TO THE RESTRICTED PORTIONS OF A REPRESENTED PERSON'S SOCIAL NETWORK PRESENCE?

Yes. This is the most controversial of the opinions. The proposed opinion states that a “passive communication” like a friend request does not implicate the policy underlying the limitations on contacting a represented individual embodied in Rule 4.2. The lawyer is not eliciting information, but rather seeking access to the platform on which the person voluntarily shares information. Furthermore, if the request is accepted, the lawyer need not seek permission to view the social network presence.

5: IF THE LAWYER'S REQUEST FOR ACCESS TO VIEW RESTRICTED PAGES OF A REPRESENTED PERSON'S SOCIAL NETWORK PRESENCE IS ACCEPTED, MAY THE LAWYER POST COMMUNICATIONS TO THE PERSON'S SOCIAL NETWORK PRESENCE?

Yes and no. A lawyer may not elicit information that the represented person would not have posted but for the lawyer's communications. If the lawyer wishes to elicit information regarding the subject of representation, then consent must be obtained pursuant to Rule 4.2. However, communications or posts that are unrelated to the subject of representation or intended to illicit information are not prohibited. These principles apply regardless of whether the lawyer and represented person were already connected on a social network before the legal matter commenced.

6: MAY A LAWYER REQUEST OR ACCEPT INFORMATION FROM A THIRD PARTY WITH ACCESS TO RESTRICTED PORTIONS OF A PERSON'S SOCIAL NETWORK PRESENCE?

Yes. Lawful and informal discovery is permitted. The caveat being that a lawyer may not direct or encourage a third party to use unlawful means, deception, or misrepresentation.

7a: MAY A LAWYER DIRECT A THIRD PARTY TO REQUEST ACCESS TO RESTRICTED PORTIONS OF A REPRESENTED PERSON'S SOCIAL NETWORK PRESENCE?

Yes. The principle is the same as espoused in # 4 above. However, if the lawyer knows or reasonably should know that the third party used unlawful means, deception, or misrepresentation then the lawyer may not use the information without first disclosing its source to the opposing attorney and the court.

7b: IF SO (see 7a), MAY THE LAWYER DIRECT THE THIRD PARTY TO COMMUNICATE WITH THE REPRESENTED PERSON AND POST TO THE PERSON'S SOCIAL NETWORK PRESENCE?

Yes and no. Consistent with # 5 above, the lawyer may not direct the third party to elicit information regarding the subject of representation

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CHAPTER III

Supreme Court Review and Supreme Court Review Panel

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CHAPTER III
2018 Supreme Court Commentary: Employment Law

Julianne “Julie” Theall Earp – Greensboro
Judge Henry F. Floyd – Richmond, VA
Jonathan R. Harkavy - Greensboro
Daniel C. “Danny” Lyon - Charlotte

Introduction.....	III-1
Statistical Setting of the 2017 Term	III-2
Decisions of the 2017 Term.....	III-4
Labor Relations	III-4
Employee Compensation and Benefits.....	III-17
Employment Discrimination and Retaliation.....	III-24
Adjective Cases.....	III-29
Sundry Cases	III-35
Grants of Certiorari for the 2018 Term	III-37
Additional Commentary	III-41

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I thank Nahomi Harkavy, my tireless editor, muse and devoted partner in life and lawyering, for her helpful insights, always sharp blue pencil, and enduring patience with her husband, the author. I am also grateful to Harvard Law School’s Labor and Worklife Program and Professors Sharon Block and Benjamin Sachs for hosting my summer writing and research. I am, of course, solely responsible for the content and tone of this article.

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The October 2017 Term of the Supreme Court of the United States ended not a moment too soon for working people and their labor organizations. Indeed, the 2017 Term’s punctuation point on June 27, 2017, its last opinion day, was a much anticipated decision¹ that poses serious financial and operational challenges - as well as intriguing opportunities for structural change and new forms of collective activity - for public sector labor unions. But, the term’s dramatic ending, including the resignation of Justice Kennedy, illustrates only a portion of the Court’s relentless pursuit of an agenda in lockstep harmony with the collective voice of American business. At nearly every pivotal moment, the Court ruled in ways likely to increase the disparity of economic, social and political power between workers and those who employ them. In short, this term was as frightful for working people and their labor unions as it was fruitful for employers, business owners and other proponents of deregulating the American workplace and undermining the administrative state.

Looking more deeply at this term’s decisions, especially in light of the evolving nature of work itself and the widening chasm in negotiating power between workers and business owners, the wisdom of continuing to regard the employment relationship as essentially a contractual one between employees and employers presumed to have roughly equal bargaining power is more open to question than ever. As you read this article, therefore, consider whether the time is nigh for re-characterizing today’s employment relationship in a more economically fair, socially sensible and jurisprudentially logical way that will better honor federal and state legislative mandates while achieving a greater degree of workplace justice. The object, of course, is for the

¹ *Janus v. Am. Fed. of State, County and Municipal Employees, Council 31*, 585 U.S. —, 200 L. Ed. 2d —, 138 S. Ct. — (2018), *infra*, section III.

path of employment law, like the arc of the moral universe (as first depicted by Theodore Parker and later paraphrased more popularly by Martin Luther King, Jr.,)² to continue to bend toward justice.

* * * *

Section I of this article provides a brief statistical setting for describing and analyzing the 2017 Term’s decisions. Section II summarizes all of the employment-related decisions of the term. The cases are arranged by broad substantive topics, with some short commentary at the beginning of each topical subsection. Additionally, an abbreviated personal take on each principal decision is offered in the italicized paragraphs that follow the individual case summaries. That personal commentary ranges from the practical to the political to the philosophical, including the likely impact of these decisions on all stakeholders, including working people, business owners, benefit providers and labor organizations. Section III is a descriptive listing (current as of the date of this article) of grants of certiorari presenting employment-related issues for the impending October 2018 Term. Section IV concludes this article by offering additional personal commentary on the employment relationship, how the Court dealt with it during the 2017 Term, and what to expect as the nature of employment itself continues to evolve and the disparity of economic, social and political power between business owners and working people (and their unions) widens.

I. Statistical Setting of the 2017 Term

The following observations, drawn from data about the 2017 Term, is intended to offer the reader some useful perspective in assessing the Court’s work in the employment area. As usual, I have gratefully relied for some background data on the SCOTUS blog’s annual Stat Pack,³ an impressive and timely compilation of current and historical statistics covering the Court’s docket.

First, the Court rendered only 59 signed opinions after oral argument on the merits, a remarkably small number of decisions over nine active months of decision-making opinion writing. Counting one affirmance by an equally divided vote, one *per curiam* opinion after oral argument and 11 summary reversals, the Court rendered a total of 72 opinions for the 2017 Term.⁴ Of that total, 47 decisions were in civil cases, with the balance in criminal, *habeas* and original jurisdiction cases. Thus, the 10 cases covered in this article that touch the employment relationship constitute more than 20% of this term’s civil docket. The Court’s refocus on the employment relationship stands in contrast to last term’s concentration on other aspects of

² Rev. Martin Luther King, Jr. at Wesleyan University commencement address on June 8, 1964, paraphrasing Rev. Theodore Parker, “Ten Sermons of Religion” (1853). See <https://quoteinvestigator.com/2012/11/15/arc-of-universe/#note-4794-1> (last accessed July 22, 2018).

³ Kedar S. Bhatia, Stat Pack for October Term 2017, SCOTUSBLOG (June 29, 2018), http://www.scotusblog.com/wp-content/uploads/2018/06/SB_Stat_Pack_2018.06.29.pdf (last accessed July 21, 2018).

⁴ One oddity is that not a single decision on the Court’s entire docket, civil and criminal, came from the Fourth Circuit, a distinction shared by no other circuit. The Fourth Circuit’s absence from the fray is remarkable, for that court is typically a busy one in the labor and employment area.

business cases, including particularly a large number of intellectual property issues. With the Court now at full operating strength for the entire term, it dealt with two labor relations cases of enormous consequence, as well as two cases construing substantive employment regulation and two adjective cases arising in the employment discrimination context.

Second, the voice heard most often throughout the labor and employment decisions was Justice Ginsburg's. Indeed, her opinions could be said to have nearly dominated the 10 main cases covered in this article. Justice Ginsburg authored principal opinions in 7 of the 10 decisions, with 4 opinions for the Court majority and 3 principal dissents. Chief Justice Roberts joined all four of her opinions for the Court, meaning that he must have assigned all those opinions to Justice Ginsburg. As the senior Justice in dissent in the three cases in which she wrote the principal dissenting opinions, Justice Ginsburg apparently assigned those opinions to herself. One other interesting, if slightly gossipy, note: Taking up where they left off last term, Justices Ginsburg and Gorsuch wrote competing principal opinions in 2 of the 10 cases and voted against each other in all 6 of the split decisions, including the five cases decided by 5 to 4 votes. All in all, Justice Ginsburg's central role in shaping and expressing the Court's employment jurisprudence was quite apparent in the labor and employment decisions of the 2017 Term.

Third, the notable level of unanimity that marked the 2016 Term dissipated in large part during the 2017 Term. In contrast with the relatively anodyne cases last term, this year's more controversial and contentious issues near the core of the majority's deregulatory project were bound to yield more disagreement. As a result, 19 of the 72 opinions were decided by 5 to 4 votes, more than one-quarter of all decisions. Given a higher level of disagreement among the Justices, it is not surprising that the pace of the Court's decisions was notably slow, with many cases argued early in the term languishing until being decided toward the end of the term.

Fourth, whether employment and labor relations remain on the civil docket's center stage remains to be seen. So far, as noted in section III, the 38 grants of certiorari include 10 cases that touch on workers or the employment relationship in some meaningful way. Few of these cert grants, however, directly involve substantive employment or labor issues. But, percolating in the lower federal courts and state courts are questions of some moment for employees and employers alike. Chances are that the Court will add at least one or two more questions of high interest for those who follow its employment jurisprudence.

Finally, from the latest available data published by the U.S. Department of Labor⁵, union membership in 2017 totaled 7.2 million (or 34.4%) in the public sector and 7.6 million (or 6.5%) in the private sector. Overall, the 14.8 million union members in both the public and private sectors comprised 10.7% of all working people. Contrast that statistic with a union membership rate of 20.1% (or 17.7 million union members) 35 years ago in 1983, the first year for which these statistics were available.

⁵ U.S. Department of Labor, Bureau of Labor Statistics News Release date January 19, 2018, at <https://www.bls.gov/news.release/pdf/union2.pdf> (last accessed July 23, 2018).

II. Decisions of the 2017 Term

A. Labor Relations

On its last opinion day of the 2017 term, the Court, by simple majority fiat, disrupted the long standing and finely balanced relationship among public sector labor unions, their constituents and public employers. The Court's decision making payment of fair-share (or agency) fees entirely voluntary for public employees, is summarized in extensive detail below because of its significance for all stakeholders - and for labor and First Amendment jurisprudence. The Court's opinion is, in a carefully chosen word, the most stunning - if not entirely unexpected - labor relations development in a generation. And yet, the agency fees case portrays only a portion of the havoc wrought in the labor relations area by a cohesive five-Justice majority seemingly bent on doing the bidding of business owners that, to be blunt, want to get rid of labor unions. Several weeks earlier, in another much-anticipated (and similarly unsurprising) decision, the same majority embraced mandatory individual arbitration of FLSA wage theft claims by subordinating the National Labor Relations Act's⁶ employee protections to the employer community's overriding preference for individualized arbitration. Instead of attempting to harmonize the NLRA and the Federal Arbitration Act⁷, the five-Justice majority seized the moment to insulate employers from judicial scrutiny of their own misconduct while impoverishing employee rights that Congress sought to protect. That decision, too, is summarized below in details commensurate with its importance.

A final development growing out of one of this term's decisions is worth mentioning here because of its potential effect on how the NLRA is administered. On July 10, 2018, the President issued an executive order⁸ giving politically appointed agency heads greater authority over the hiring and oversight of administrative law judges ("ALJs"). The executive order removes the ALJs from the "competitive service" and places them in the "excepted service" where they will be more exposed to the political whims of administration appointees who are running the agencies. Because the ALJs working for the National Labor Relations Board ("Board" or "NLRB") are subject to this order, the effect on enforcement of the NLRA by a newly overseen cadre of judges is a matter of some concern. The executive order is a direct consequence of **Lucia v. Securities and Exchange Commission, 585 U.S. —, 200 L. Ed. 2d —, 138 S. Ct. 2044 (2018)**. There the Court held that the SEC's administrative law judges are not mere employees appointed by agency staff, but are "Officers of the United States" and can only be appointed under the Constitution's Appointments Clause by the President, "Courts of Law" or "Heads of Departments." In the wake of this decision, the President quickly issued the July 10, 2018 executive order that will undoubtedly affect the selection and oversight of NLRB administrative law judges who play such a central role in enforcing labor law in the private sector. You can safely put the Court's decision in *Lucia v. Securities and Exchange Commission, supra*, therefore, in the "win" column for corporate America and other proponents

⁶ National Labor Relations Act, 29 U.S.C. 151, *et seq.* ("NLRA")

⁷ Federal Arbitration Act, 9 U.S.C. 1, *et seq.* ("FAA")

⁸ Executive Order Excepting Administrative Law Judges from the Competitive Service (July 10, 2018) last accessed on July 24, 2018 at <https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/>.

of deregulation and in the “lose” column for working people, their duly chosen labor representatives, and the law itself.

Janus v. Am. Fed. of State, County and Municipal Employees, Council 31, 585 U.S. —, 200 L. Ed. 2d —, 138 S. Ct. 2448 (2018)

Mark Janus, a child-care specialist employed by the Illinois Department of Healthcare and Family Services, is among 35,000 public employees in Illinois represented by American Federation of State, County, and Municipal Employees, Council 31 (the “Union”). Janus refused to join the Union because he opposes the Union’s bargaining positions, believing that the Union does not appreciate Illinois’ current financial crises and the best interests of Illinois citizens like himself.

Neither Janus nor any other public employee represented by the Union are required to join the Union and pay dues. Because the Union is required by law to represent both members and non-members alike in each bargaining unit, however, those employees who do not join the Union pay a “fair-share” or “agency” fee to cover the so-called “chargeable” portion of union expenses attributable to collective bargaining and connected activities. In no event may these fees be attributable to so-called “nonchargeable” expenses for the Union’s political and ideological activities. The Union determines the chargeable and nonchargeable portions of its total expenses, audits that determination and certifies the result (i.e., the agency fee) to the employer. The employer then deducts the agency fee from the non-member’s wages without requiring employee consent. Every year the Union sends non-members a required notice explaining the basis for its calculation of the agency fee, and non-member employees may challenge the Union’s determination.⁹ In this case, the agency fee for Mark Janus and other non-members was 78.06% of full union dues. Janus’ employer thus deducted \$44.58 per month from his pay.

The Republican Governor of Illinois first challenged the state statute authorizing agency fees by filing an action in federal court seeking that the law be declared unconstitutional. The Attorney General of Illinois intervened to defend the state law. Janus and two other state employees moved to intervene on the Governor’s side. The district court held that the Governor lacked standing because the agency fees did not cause him any personal injury. But the district court also ruled “in the interest of judicial economy” to permit Janus and the other two employees to file their own complaint. They did so, claiming all non-member fee deductions are “coerced political speech” in violation of the First Amendment. The district court, recognizing that the intervenors’ claim was foreclosed by *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), granted the Union’s motion to dismiss, and the Seventh Circuit affirmed that judgment. Janus then sought review, asking that *Abood* be overruled and that public sector agency fee arrangements be deemed unconstitutional. The petition was supported by 10 *amici* briefs, and the Court promptly granted certiorari at the first conference after distribution. 27 *amici* briefs on the merits were then filed in support of Janus, including one by the United States, which also moved separately to participate in oral argument. 39 *amici* briefs on the merits were filed in

⁹ There is no indication in the Court’s opinions that Janus challenged the agency fee after receipt of the required explanation.

support of the Union and the Illinois Attorney General. The case was argued on February 26, 2018, almost exactly two years after the death of Justice Scalia, who would have been the tie-breaking vote in the previous attempt to overrule *Abood* and virtually outlaw fair-share fees.¹⁰

The Court reversed the Seventh Circuit’s judgment, overruled *Abood*, held that Illinois’ agency fee arrangement violates the First Amendment rights of non-members, and ruled that agency fees may only be deducted from a non-member’s wages if there is clear and convincing evidence of the non-member’s freely given waiver of her First Amendment rights.

Justice Alito’s opinion, joined fully by the Chief Justice and Justices Kennedy, Thomas and Gorsuch, first rejects as “clearly wrong” the Union’s argument that Janus had moved to intervene in the Governor’s jurisdictionally defective lawsuit. Justice Alito reasons that because the district court did not grant intervention but simply treated Janus’ amended complaint as the operative complaint in a new lawsuit, that made any jurisdictional issue disappear. Conceding that Janus’ complaint, however, was docketed under the number originally assigned to the Governor’s complaint, instead of under a newly assigned number, Justice Alito concludes that Article III jurisdiction “does not turn on such trivialities.”

On the merits, Justice Alito first concludes that *Abood*’s holding that agency shop arrangements like the one here are constitutional is not consistent with “standard” First Amendment principles. Compelling individuals to “mouth support” for views they find objectionable violates their right not to speak or associate for expressive purposes. From that pronouncement, the opinion concludes that compelling a person to subsidize the speech of other private speakers raises “similar” concerns and cannot be “casually” allowed. Reviewing prior First Amendment cases to determine the appropriate level of scrutiny for compelled speech, Justice Alito rejects minimal scrutiny as “foreign” to free speech jurisprudence, but finds it unnecessary to apply strict scrutiny urged by Janus. Instead, it suffices to apply “exacting scrutiny” to the agency shop regime: Under “exacting” scrutiny a compelled subsidy “must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” Slip. opin., p. 10; *see also, Knox v. Service Employees, etc.*, 567 U.S. 298, 310 (2012).

Applying the exacting scrutiny test to *Abood*’s defense of the agency fee arrangement, Justice Alito rejects agency fees as a necessary means of achieving the state’s interest in “labor peace” - i.e., the avoidance of conflict and disruption if employees were represented by more than one union. (Indeed, the Court assumes, without deciding, that labor peace is even a compelling state interest.) Citing the federal government, the Postal Service and 28 states that do not permit agency fees as examples, Justice Alito declares that labor peace can readily be achieved by less restrictive means than agency fees. In like manner, the Court also rejects the risk of “free riders” as a justification for agency fees. In fact, the Court questions the notion of free-riding itself and rules that avoiding free riders is not even a compelling interest. Slip opin., p. 13. Moreover, Justice Alito concludes that even without agency fees, unions will seek exclusive bargaining status in order to increase their power and obtain the privileges that go with that status. As to the burden of discharging its duty of fair representation for members and non-members alike, Justice Alito suggests ways other than agency fees for a union to address the

¹⁰ *Friedrichs v. California Teachers Ass’n*, 578 U.S. — (2016) (affirmed *per curiam* by an equally divided vote)

problem. He suggests that non-members could be charged for union representation in disciplinary matters or could even be denied representation altogether. Finding that agency fees cannot be justified on the ground that it would otherwise be unfair to saddle the union with the duty of fair representation, the Court holds that agency fees cannot be upheld on free-rider grounds.

Addressing additional arguments by the Union, the Court first finds that the Union cannot point to any founding era practice that remotely resembles assessing agency fees against public employees and thus concludes that *Abood* is not supported by the majority's view of the original understanding of the First Amendment. The Court then engages in a lengthy analysis of *Pickering v. Board of Ed. of Township High School, etc.*, 391 U.S. 563 (1968), and concludes that *Abood* was not based on *Pickering* and that *Pickering* provides no basis for sustaining Illinois' agency fee arrangement. Justice Alito notes that *Pickering* was developed for one employee's speech and its impact on the employee's responsibilities. Agency fees, on the other hand, involve a blanket requirement requiring all employees to subsidize union speech, whether they agree with it or not. Moreover, *Pickering's* framework was designed to determine whether the speech of an employee interferes with governmental operations, not what happens when the government compels or requires subsidization of speech.¹¹ And, the categories of what is and is not permissible under *Pickering* and *Abood* do not "line up" as to speech protections.

Even if *Pickering* were to apply, the Court finds that Illinois' agency fee arrangement would not survive its application. Unlike employee speech required by an employer as part of an employee's duties, where the words are really those of the employer, see *Garcetti v. Ceballos*, 547 U.S. 410 (2006), here union officials are said to be speaking on behalf all bargaining unit employees when they are negotiating with the employer. The majority next finds that union speech paid for by agency fees is "overwhelmingly of substantial public concern." Justice Alito cites such topics as budget problems, unfunded pensions, and whether to pursue wage and tax increases or trim public benefits to address Illinois' financial difficulties. Speech funded by agency fees also touches on matters of educational policy, child welfare and other issues of public consequence and debate, including controversial ones such as climate change and gender identity, among many others. Under *Pickering's* rubric, the remaining question is whether Illinois' interest in bargaining with an adequately funded exclusive bargaining agent can justify the "heavy burden" that agency fees impose on non-members First Amendment interests. Finding "questionable" the Union's argument that the absence of agency fees would cripple public sector unions and thus impair governmental operating efficiency, the majority concludes that the balance tips "decisively" in favor of the non-members' free speech rights. Accordingly, Justice Alito concludes that nothing in the *Pickering* line of cases requires the Court to uphold every speech restriction imposed by a governmental employer - and particularly this one.

Next, the Court declares in an extended explanation that *stare decisis* does not counsel against overruling *Abood*. Noting that the doctrine is at its weakest when dealing with Constitutional speech rights that have been wrongly denied, the majority identifies five factors that are most important in deciding whether to overrule a past decision. First is the quality of the decision's reasoning. *Abood* was "poorly reasoned" in the majority's view because it judged

¹¹ The Court specifically notes that the question of whether *Pickering* applies at all to compelled speech is not one being decided here.

agency fees under too deferential a standard, inappropriately relied on private sector cases upholding the agency shop, improperly conflated exclusive representation and agency fees as constitutionally approved practices and failed to appreciate the difficulties in distinguishing between chargeable and nonchargeable union expenditures.

The second factor in the *stare decisis* calculation is the workability of the precedent at issue. Here, the majority reiterates that the line between chargeable and nonchargeable expenditures is “impossible” to draw with precision. Justice Alito also opines that challenging a union’s chargeability determination is a daunting, expensive, laborious and difficult task for non-members to undertake. Likewise, the third and fourth factors - consistency with related decisions and recent developments - do not support applying *stare decisis* here. Noting the growth of public sector unions since *Abood* and a parallel increase in public expenditures, Justice Alito points out that state financial difficulties and the political debate over public spending and debt have given collective bargaining issues a “political valence” that *Abood* did not appreciate. Additionally, *Abood* has become an “anomaly” in First Amendment jurisprudence by failing to employ “exacting” scrutiny. And, in Justice Alito’s words, the case “sticks out” when viewed against the Court’s many decisions holding that public employees generally may not be required to support a political party. Stressing that the Court has no occasion here to reconsider its political patronage cases, the majority takes comfort in ending the “oddity” of treating the compelled patronage and compelled speech cases differently.

The fifth and final factor in determining whether to abandon a precedent is reliance. While recognizing that reliance can be a strong reason for adhering to established law, in this case the majority concludes that the Union’s reliance on agency fees (including what it bargained away in order to obtain and keep those fees) “does not carry decisive weight.” Indeed, the Court emphasizes that public sector unions have been on notice for years regarding misgivings about *Abood* by some members of the Court. Justice Alito also notes that collective bargaining agreements are generally of short duration anyway and that unions could have bargained for greater protection if they had deemed agency fees so essential. Given *Abood*’s “uncertain” status for years and the lack of clarity it provides, the majority concludes that reliance is not a factor supporting *stare decisis* here. While recognizing the unions may suffer “unpleasant transition costs” in losing the support of agency fees, those disadvantages are outweighed by what the majority characterizes as billions of dollars of “windfall” payments unions have received under *Abood* for 41 years. Accordingly, the majority concludes that the Court has the requisite “special justification” for overruling *Abood*.

In a brief concluding section, the majority rules that public sector unions and states “may no longer extract agency fees” from non-members unless there is clear and compelling evidence showing that each employee has “freely given” a waiver of her First Amendment rights and that she affirmatively and clearly consents to pay agency fees. The Court then repeated that *Abood* was wrongly decided and is now overruled and that the judgment of the Seventh Circuit is reversed and the case remanded for further proceedings consistent with the majority’s opinion.

Justice Kagan, joined fully by Justices Ginsburg, Breyer and Sotomayor, dissented in an opinion noting that “judicial disruption” does not “get any greater than what the Court does today.” The dissent first examines *Abood* and concludes that it struck a balance between the

interests of public employers and objecting employees so that the latter would only be obliged to pay for a union's "collective bargaining, contract administration and grievance adjustment" expenditures. Far from being "poorly reasoned" as the majority repeatedly opined, *Abood* itself recognized that employees could not be compelled to fund a union's political and ideological activities outside the collective bargaining sphere and took that limitation into account in striking the balance between competing interests.

The dissent takes issue with the majority's misapprehension (willful or not) about why agency fees are necessary to a workable regime of exclusive union representation. The majority, according to Justice Kagan, is not only dismissive of the problem of free riders, but refuses to appreciate that, by law, unions have to serve members and non-members alike. As Justice Kagan points out, the key question is not whether unions *want* to be exclusive representatives, but whether they will be *able* to carry out an exclusive representative's duties without fair-share fees.

In like manner Justice Kagan disputes at length the majority's claim that *Abood* fails to fit First Amendment doctrine. In striking the proper balance between employee speech rights and state employer managerial interests, *Abood* faithfully applied the test originating in *Pickering*, *supra*, by permitting employee speech rights to prevail when the state, acting outside its role as employer, exploits the employment relationship for other (e.g., political and ideological) ends. The dissent then shows that the majority is wrong in disapproving a deferential approach to employee speech. In particular, the dissent explains that the majority's conclusion that compelling speech requires more exacting justification than restricting speech lacks force, pointing out that compelled speech is, at most, compelling a subsidy that others will use for expression - just like mandatory state bar fees for attorneys, university activity fees for students and mandatory commodity association fees for marketing materials.

Additionally, the dissent takes issue with the majority's pronouncement that union speech about workplace matters necessarily involves "public" questions about how state funds should be raised and spent. Justice Kagan's rejoinder is that speech about terms and conditions of employment is just that - it is about the workplace and not about matters of public interest under *Pickering*. Otherwise, every picayune disciplinary dispute would raise a federal constitutional issue. So too here, according to the dissent. Most workplace issues in the public sector necessarily affect how public money is spent, but bargaining and arguing about those issues does not make them matters of public concern that justify restricting the state's prerogatives when it is acting as an employer. In short, *Abood* comfortably fits with the Court's public employee speech cases, and overruling it creates an anomaly - "an unjustified hole in the law, applicable to union fees alone." Dissenting slip opin., p. 19.

Expressing even greater disdain for the majority's opinion, the dissent argues that overruling *Abood* "subverts all known principles of *stare decisis*." *Ibid*. Demonstrating that *Abood* is embedded in the law and that its central rationale has been cited favorably and consistently for many years, Justice Kagan rejects as a "spectacular" failure the majority's claim that *Abood* is now an "outlier" precedent. Likewise, the majority's reliance on its own recent opinions criticizing and chipping away at *Abood* is the kind of bootstrapping that mocks *stare decisis*, according to the dissent. "Workability" is also not a justification for overruling *Abood*, because the line between collective bargaining and politicking (i.e., between chargeable and

nonchargeable activities for expense purposes), while not pristine perfect, has stood the test of time and has not spawned even a single circuit split on expense classification issues. Finally, the dissent puts the notion of reliance on settled expectations into perspective. Justice Kagan points to thousands of current labor contracts covering millions of workers that provide for agency fees in reliance on *Abood's* rationale. The dissent as well points to 22 states, the District of Columbia and Puerto Rico (and two other states for police and firefighter unions) that, in reliance on the Court's adherence to *Abood*, authorize fair-share fees. Labor unions in those jurisdictions will now have to reconfigure and restructure their ability to perform their duties. That the majority dismissed the settled expectations of both the State of Illinois and the Union as entailing no more than some "unpleasant transition costs" and "adjustments" provoked the dissent to conclude that the Court had trivialized *stare decisis*.

Taking a broader look at what the majority is doing, Justice Kagan concludes the dissent with a number of pungent observations. The dissent first observes that there is no "sugarcoating" the Court's opinion. Justice Kagan then notes that this decision prevents the American people (acting through state and local officials) from making important choices about workplace governance. And, the majority is doing so by "weaponizing" the First Amendment and turning it into a sword against workaday economic and regulatory policy. Pointing out again that speech is a part of all human activity and that virtually all economic and regulatory policy touches speech, the dissent warns about the prospect of judges applying the First Amendment to overrule citizens' choices as it did here in the public workplace. The opinion concludes by saying that the First Amendment ". . . was meant for better things. It was meant not to undermine but to protect democratic governance - including over the role of public-sector unions." *Ibid*, p. 28.

Justice Sotomayor also filed a one-paragraph separate dissent saying that although she joined the majority in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), she now disagrees with the Court's subsequent interpretation and application of that opinion and agrees fully with Justice Kagan's observation that *Sorrell* has allowed courts to wield the First Amendment aggressively as it does here.

* * * *

The decision to overrule Abood and impoverish, if not destroy, the public sector agency shop that has fostered stable labor relations for state and local governments for more than four decades was neither surprising nor unexpected, particularly from this five-Justice majority that, like the Blues Brothers, appears to be on a "mission from G-d"¹² to deregulate the workplace and undermine the regulatory state.¹³ Nonetheless, the decision is a rude shock. Not only is the holding a potentially debilitating stab to the financial heart of public sector labor unions, but the majority's free speech rationale is a disturbing portent of more to come from activist Justices ready and willing to use the First Amendment in frankly partisan fashion as an anti-democratic weapon. And, lurking within the Court's reasoning is an unsettling view of stare decisis that

¹² Dan Ackroyd as Elwood Blues in *The Blues Brothers*, a 1980 movie almost as old as *Abood* itself. See <https://www.imdb.com/title/tt0080455/> (last visited July 17, 2018.)

¹³ Jeffrey Toobin, "After Kennedy," *The New Yorker*, pp. 19-20 (July 9 and 16, 2018)

foreshadows trouble for politically targeted precedents involving such critical issues as abortion rights, sexual orientation, gender discrimination and personal dignity.

*Perhaps the most disturbing immediate consequence of the Court's decision for working people, labor unions and public employers is the uncertain, but potentially devastating, financial impact on labor unions operating in the public sector. Partisan anti-labor groups are already threatening lawsuits to recover what Justice Alito referred to as "windfall" receipts by unions of "billions" of dollars of agency fees from non-consenting employees over the last 41 years.¹⁴ Despite the facial illegitimacy of attempting to use a retroactive judicial time warp to claw back agency fees that could not reasonably have been regarded as constitutionally infirm before June 28, 2018, the financial risk to public sector labor unions should not be taken lightly, given the Court's bromance with the business community when it comes to anti-union initiatives. Nonetheless, this threat could ultimately dissipate in the face of defenses such as estoppel, good faith and limitations. Moreover, labor unions could try to put a stop to claw-back efforts by challenging what looks to be a conspiratorial denial of equal protection for the speech and associational rights of labor unions and their members.¹⁵ See also, *infra*, pp. 45-48.*

*Compounding the financial threat from loss of fair-share fees is a virtual flash mob campaign (apparently well-funded by anti-union groups and individuals) to encourage union members to resign their membership, stop paying dues or fees and become full-fledged free riders like Mark Janus.¹⁶ While labor unions, particularly those in the education field where union membership rates are among the highest¹⁷, have stepped up their own efforts to promote the benefits of union membership, it remains to be seen whether the unions' impending budgetary difficulties will be compounded by an erosion of their membership base. And, just to make the situation more stressful, clever solutions such as direct state employer payments to unions in lieu of agency fees are now part of an internecine squabble about the best repair technique for the Janus problem. Compare Benjamin Sachs and Sharon Block, "How Democratic lawmakers should help unions reeling from the Janus decision" accessed from June 27, 2018 posting in *Vox* at <<https://www.vox.com/the-big-idea/2018/6/27/17510046/public-unions-janus-reforms-fees-decline-reform-supreme-court-hope>> with Chris Brooks, "Viewpoint: Boss Can't Be Janus Fix," accessed from July 25, 2018 posting in *Labor Notes* at <<http://www.labornotes.org/blogs/2018/07/boss-can-t-be-janus-fix>>*

This decision's troublesome aftermath is not a one-way street. For public employers, too, the post-Janus situation is not without its problems. To the extent that unions lose financial

¹⁴ See, W. Baude, "Can Unions be sued for Janus Claims?" (July 19, 2018) accessed at: <http://reason.com/volokh/2018/07/19/can-unions-be-sued-for-janus-claims>.

¹⁵ As to equal protection for union-oriented speech, see Kagan, Michael, "Speaker Discrimination: The Next Frontier of Free Speech" 42 Fla. State Univ. L. Rev. 765, 800-802 and 816 (2015) ("[F]reedom of speech in a democracy involves the right to have a voice and an opportunity for self-expression, independent of the content of what one chooses to say." Last accessed on July 25, 2018 at <http://scholars.law.enlv.edu/facpub/901>.

¹⁶ Noam Scheiber, "Trump Nominee is Mastermind of Anti-Union Campaign," *The New York Times* (July 18, 2018) at <https://www.nytimes.com/2018/07/18/business/economy/union-fees-lawyer.html> (last accessed July 22, 2018).

¹⁷ The Bureau of Labor Statistics' latest information shows a union membership rate of 40.1% for local government workers comprising teachers, police and firefighters, among other groups. See U.S. Department of Labor News Release of January 19, 2018, *supra*, p. 4 at n.5.

means and have fewer resources available for servicing contracts, conducting grievance meetings, and working with employers to resolve workplace and bargaining issues, public employers may find that conducting an efficient human resources operation is not as workable as it was under the venerable Abood regime.

From a doctrinal perspective, the majority's embrace of "compelled speech" as a rationale for elevating its concern for free-riders like Mark Janus over labor peace and the financial integrity of labor unions is a fearful prospect for democratic oversight of economic and social matters. Justice Kagan's observations about a weaponized First Amendment are thus spot on from the vantage point of a citizen observer. And, the compelled speech rubric will know few bounds, as the Court demonstrated in ***NIFLA v. Becerra*, 585 U.S. —, 200 L. Ed. 2d —, 138 S. Ct. — (2018)**, just two days before the Janus decision. In that case the Court held that telling women at a licensed pregnancy center clinic that free or low-cost abortion services are available is compelled speech that likely violates the First Amendment rights of the center. Also, the Court held that requiring an unlicensed pregnancy center to tell women seeking services that the clinic is not licensed by the state to provide medical services is likely to violate the First Amendment rights of that clinic. Stripping away legal niceties, the majority's willingness to protect anti-abortion groups in NIFLA the way it protects anti-union activists (and those for whom they shill) in Janus exposes in raw fashion how the First Amendment can be used as a weapon of economic and social control or regulation. It is a scary prospect.

Finally, the Court sent a wavering signal about this decision's applicability (or not) to private sector fair-share fees. Slip opin. at n. 24 and text. Justice Alito notes that whether agency fee payments in the private sector (which are merely permitted to be imposed on employees by contract in contrast with required payments by public sector employees) involve state action necessary to invoke the First Amendment is now "more questionable" than when Abood was decided. On the other hand, the five-Justice majority must be feeling some heat from anti-union forces to find a way to disestablish the private sector agency shop¹⁸, and there have been rumblings to that effect in prior cases. Nonetheless, Justice Alito's majority opinion also notes that when private sector unions bargain with employers, they are not engaging in speech on matters of public concern. So, weak though its signal may be, there is some basis for concluding that Janus provides little comfort for those who want to do away with agency fees in the private sector.

***Epic Systems Corp. v. Lewis*, 584 U.S. —, 200 L. Ed. 2d 889, 138 S. Ct. 1612 (2018)**

Three lawsuits consolidated for argument and decision comprise this case.¹⁹ In all three actions employees sought to challenge what is now commonly known as employer wage theft - that is, underpayment of employees in violation of the wage and hour requirements of the FLSA.

¹⁸ See, e.g., Hassan Kanu, "Private Sector Unions in Crosshairs After Right-to-Work Win," (*Bloomberg Law*, July 3, 2018) last accessed on July 29, 2018 at: <https://biglawbusiness.com/private-sector-unions-in-crosshairs-after-right-to-work-win/>.

¹⁹ *Epic Systems Corp. v. Lewis* ["Epic"]; *Ernst & Young LLP v. Morris* ["E&Y"]; and *NLRB v. Murphy Oil USA, Inc.* ["Murphy Oil."]

Because the employees' claims of wage and hour violations on an individual basis are too small to justify the expense of individual litigation, the employees here sought to challenge their wage losses on a collective or class basis in each case. In both Epic and E&Y the employer sent emails to its employees requiring them, as a condition of continued employment, to acknowledge their assent to mandatory individual arbitration of all "disputes," thus implementing the employer's ban on both judicial relief and any collective litigation whatsoever. Likewise, in Murphy Oil the employer required each applicant and employee to sign an agreement waiving judicial relief and collective litigation of all workplace disputes.

In the E&Y case, (which the Court majority uses as an exemplar of the three disputes) a junior accountant, Stephen Morris, sued E&Y in federal court after losing his job. He claimed that the employer had misclassified junior accountants as "professional" employees and thus violated the FLSA and California law by paying them salaries without overtime pay. Morris sought to represent a nationwide class of junior accountants on a collective basis under the FLSA and a class basis under state law and Rule 23 of the Federal Rules of Civil Procedure. The district court granted E&Y's motion to compel individualized arbitration. The Ninth Circuit reversed, reasoning that the FAA's "savings clause" excuses enforcement of an arbitration agreement that violates another federal law. Concluding that an agreement requiring individualized arbitration violates the NLRA by barring employees from engaging in "concerted activity," the Ninth Circuit - over a dissent - declined to enforce E&Y's arbitration agreement. The Supreme Court granted certiorari, consolidated the E&Y case with Epic and Murphy Oil, and heard oral argument on the first day of the 2017 term.

The Court, in a 5 to 4 decision, reversed the Ninth Circuit's judgment in E&Y and ruled that arbitration agreements mandating individual arbitration of FLSA wage theft claims must be enforced and that neither the FAA's savings clause nor the NLRA suggests otherwise. Justice Gorsuch's majority opinion first posits that the FAA "pretty absolutely" requires the courts to enforce an agreement by employees to arbitrate individually all workplace disputes with their employers, citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013). The Court then holds that the FAA's savings clause permitting courts to refuse enforcement of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" cannot apply to defenses that target only arbitration (as opposed to defenses such as fraud or duress that apply to all agreements.) Even the defense of illegality in this case (based on the NLRA's protection for concerted action) impermissibly disfavors arbitration's individualized and informal nature and thus falls outside the FAA's savings clause.

The majority then concludes that the NLRA's protection of employee concerted activity does not conflict with enforcement of the class waivers under the FAA. Justice Gorsuch resists inferring a clear command in section 7 of the NLRA to avoid enforcement of the class waivers. Indeed, Justice Gorsuch sees no protection in section 7 for collective litigation, instead regarding the NLRA as dealing only with organizing and collective bargaining in the workplace and not collectively litigating in court or arbitration proceedings. The majority also declares that no deference is due to the NLRB's interpretation of section 7 rights as a limit on class waivers, noting that the Board and the United States filed competing briefs in this case. (Justice Gorsuch

also gratuitously - and perhaps invitingly - adds that no party has suggested that the Court “reconsider” the *Chevron* deference doctrine.)

Finally, the majority takes issue with a number of points raised by the dissenters. Criticizing the dissent’s “vast” construction of the NLRA’s protection of concerted activities, Justice Gorsuch criticizes both the dissent’s reading of the Court’s prior arbitration cases and its reliance on labor history, including most pointedly the legislative history of the NLRA’s protection for concerted activities. As to policy arguments, Justice Gorsuch worries that collective or class litigation - whether in court or arbitration - might unfairly pressure defendants to settle unmeritorious claims. Any under-enforcement of the wage and hour laws is, therefore, solely a matter for Congress to address. Accordingly, the Court reversed the judgments in *Epic* and *E&Y* and remanded those cases for further proceedings consistent with the Court’s opinion. The Court also affirmed the judgment in *Murphy Oil*.

Justice Thomas filed a concurrence joining the majority in full, while adding that the employees also cannot prevail under his view that the FAA’s saving clause is limited to defenses that concern the *formation* of the arbitration agreement. Because the employees’ argument here is that the NLRA makes class waivers illegal, that is a public policy defense falling outside the savings clause’s concern with contract formation.

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, dissented, expressing the view that the majority’s decision is “egregiously wrong” in (among other things) subordinating the employee protections of the NLRA to mandatory individual arbitration under the FAA. Accordingly, the dissent makes an “urgent” appeal for “Congressional correction” to the majority’s elevation of individualized arbitration over the right of workers to act in concert.

Examining American labor history in some detail, Justice Ginsburg first explains that Congress sought in the NLRA and its forerunner, the Norris-LaGuardia Act, 29 U.S.C. 101, *et seq.* (“NLGA”) to address an imbalance in bargaining power resulting from employer tactics (such as yellow-dog contracts forbidding union affiliation as a condition of employment) to hinder workers from acting in concert for their mutual benefit. The NLRA and NLGA were thus specifically intended to insure that employees could “act collectively in order to match their employers’ clout in setting terms and conditions of employment.” Dissenting slip opin., p. 3. And, as Justice Ginsburg stresses in reviewing 75 years of Board decisions - from an FLSA decision in 1942 through a 2011 NFL lockout case brought by Tom Brady and a group of football players - the Board has constantly safeguarded from interference the employees’ right to litigate collectively.

The dissent then demonstrates that, contrary to the majority’s premise, collective litigation falls within the text and scope of NLRA’s section 7 right to engage in concerted action. Given the dissent’s view that the employees’ right to litigate their FLSA wage theft claims is protected by section 7 of the NLRA, Justice Ginsburg concludes that the “give up class claims or lose your job” waivers interfere with, restrain or coerce employees in the exercise of their right to act in concerted fashion and are thus unfair labor practices outlawed by the NLRA.

Next, the dissent contradicts the majority’s view that the FAA’s requirement that arbitration agreements be enforced according to their terms requires subordination of the NLRA’s protections for employees’ concerted activities. Again reviewing legal history - this time the need to enable merchants of roughly equal bargaining power to avoid delay and expense by entering into binding arbitration as a way to resolve disputes quickly and cheaply - Justice Ginsburg shows that Congress never endorsed arbitration of employment disputes, especially on a “take it or leave it” basis. While disagreeing with the Court’s embrace of an expanded scope of arbitration over the last 35 years, Justice Ginsburg ventures that, even accepting those decisions, “nothing compels the destructive result the Court reaches today.” Indeed, the dissent argues that adhesive class waivers are unlawful under the NLRA and thus are not enforceable under the FAA because they fall within the traditional contract defense of illegality. Furthermore, Justice Ginsburg notes that applying the rule that illegal promises will not be enforced is different from applying a rule (such as the one in *Concepcion, supra*) that specifically targets arbitration for unfavorable treatment. Because the NLRA neither facially nor impliedly discriminates against arbitration, agreements that are illegal under the NLRA cannot be enforced under the FAA.²⁰

Finally, the dissent predicts under-enforcement of laws protecting working people, including an inability to address widespread wage theft. Citing a judicial finding that an employee utilizing E&Y’s arbitration program would have to spend \$200,000 to recover less than \$2000 in overtime pay, the dissent demonstrates how financial considerations, as well as fear of retaliation, can deter individual claimants from seeking redress by themselves. Stressing also that the Court has repeatedly protected group action to enforce the anti-discrimination laws, Justice Ginsburg adds: “I do not read the Court’s opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a groupwide [*sic*] basis, which some courts have concluded cannot be maintained by solo complainants.” *Ibid.*, p. 29 (citation omitted). Pointing out other untoward consequences, such as conflicting awards, secrecy of outcomes and limits on precedent, the dissent ends by reminding that Congress did not issue an edict that mandates individual arbitration of FLSA claims. Instead, Justice Ginsburg emphasizes that it is simply the Court’s readiness to enforce adhesive “take it or leave it” class waivers that is the problem. Because the FAA itself demands no such suppression of the NLRA’s guarantee of the workers’ right to take concerted action for their mutual aid or protection, the majority’s decision is wrong.

* * * *

Given the majority’s frankly unabashed embrace of mandatory individual arbitration - in response to the unrelenting call for it by the collective voice of the business community - this decision is no surprise at all. The result is, nonetheless, another shocking one because it entrenches today’s dramatic power disparity between employees and employers. In the near term, at least, enforcement of the FLSA may be adversely affected, as Justice Ginsburg predicts in her dissent. But, taking a longer view, the result could be changed in an instant by a Congress that makes more explicit that class and collective litigation is protected activity that the FAA’s

²⁰ The dissent also shows that even if the NLRA and the FAA cannot be harmonized, the later-enacted NLRA should control, either as an implied repeal of any conflict with the FAA or as a law that pinpoints collective employee activities as legally protected more so than the FAA.

arbitration policy does not limit or impair. Indeed, the majority conceded that Congress could amend the Court's judgment, and, as noted above, the dissent expressly urged that it do just that. So, once again, the lesson here is that elections matter. A properly working democracy, if not a new Court majority, may yet determine the fate of compelled individual arbitration.

*What is also disturbing about the majority opinion is its ominous silence in the face of the dissent's statement of its understanding about harmonizing the FAA with Title VII. Justice Gorsuch, who is not shy about speaking his mind on every contested item, did not write a single word in response to Justice Ginsburg's pointed passage that essentially puts Title VII and other discrimination claims beyond the reach of the Court's approval of class waivers. The majority's silence in the face of Justice Ginsburg's "reading" of its opinion thus makes me a little nervous. Ultimately, however, there should be no question about reconciling Title VII with the FAA. As I pointed out in On Labor nearly two years ago in the wake of Italian Colors, *supra*, when Congress addressed workplace discrimination, it did not remain silent in the face of the FAA's policy of enforcing contractual obligations.²¹ Instead, Congress determined that vindication of Title VII's class-based rights is a matter of such transcendent importance that employees must have access to a special enforcement regime embodied in section 706(f). See 42 U.S.C. 2000e-5(f). Mandatory individual arbitration is inconsistent with this regime and would constrain enforcement of Title VII's anti-discrimination imperative. Class action waivers are thus contrary to Congress' command of ready and robust employee access to Title VII's full remedial scope and thus fall outside the narrow scope of the majority's holding in these FLSA wage theft cases.*

*A more general criticism of the Court's decision is that it illogically equates opposing individual arbitration with disfavoring arbitration generally. In effect, the Court majority, by judicial say-so, simply imbues arbitration with the attribute of an "individualized nature." But, that attribute for employment disputes is nowhere to be found in the FAA, by actual expression or fair implication. To the extent that purely bilateral arbitration might be inferred from the FAA, it is clear that Congress was targeting disputes between merchants, not disputes common to large groups of employees seeking to protect their wages, incumbency or status. In any event, mandatory individual arbitration of workplace disputes is essentially a creature of a Court majority in thrall to the business community's hostility to collective action by workers and to judicial oversight of employment claims. Privatizing resolution of employees' fair employment claims has thus driven the majority to the unsupportable *ipse dixit* that arbitration under the FAA can mean only bilateral arbitration unless the parties expressly agree otherwise.*

Other questions abound from this decision. For instance, what about the prospect of employers requiring, as a condition of employment, that all claims arising under the Employee Retirement Income Security Act of 1974 ("ERISA") be privately arbitrated in individual fashion? While that eventuality is not without complexities that would befuddle many an arbitrator, the suggestion has been made, and both the Department of Labor and the employee benefits bar may find this prospect difficult to swallow. Perhaps more vexing would be FAA pre-emption of state laws that forbid or significantly limit arbitration of sexual harassment claims. In the wake of the

²¹ Jonathan Harkavy, "Title VII's Protection Against Class Action Waivers," *On Labor* (September 12, 2016) posted at <https://onlabor.org/guest-post-title-viis-protection-against-class-action-waivers/>. For a more detailed analysis, see Harkavy, Jonathan Ross, Class Action Waivers in Title VII Cases after Italian Colors: Sidestepping the Individual Arbitration Mandate (August 4, 2014). Available at SSRN: <https://ssrn.com/abstract=2476646>.

#MeToo movement, some states are trying to foreclose private arbitration of sexual harassment claims. In New York, for example, starting with employment contracts (other than collective bargaining agreements) made after July 11, 2018, mandatory individual arbitration of sex harassment claims is effectively nullified. N.Y.C.P.L.R. 7515(a)(2), 7515(a)(4)(b)(i)-(iii). While this and other laws like it do not disfavor arbitration generally, there is likely to be litigation based on Concepcion and Italian Colors to nullify any such ban on compelled individual arbitration.

*Finally, this decision highlights a denial of equal protection to workers seeking to speak, associate and litigate collectively in order to vindicate their right to lawful wages. Consider that business owners, after all, speak collectively against workers' rights to the Supreme Court and elsewhere through the Chamber of Commerce, the National Right to Work entities and other organizations. Impairing the correlative right of employees to speak collectively is the type of "speaker discrimination" that calls urgently for equal safeguarding across the board of the right to speak and litigate collectively. See, M. Kagan, "Speaker Discrimination: The Next Frontier of Free Speech," *supra*, n. 14 and text.*

B. Employee Compensation and Benefits

Wage and benefit decisions were an important component of the Court's employment law docket for the 2017 Term. One opinion that ostensibly deals only with a tiny cohort of automobile dealer employees actually changed, in stealth fashion after decades of established precedent, how the FLSA's exemptions are to be interpreted and applied from now on. Another opinion in a railroad pension case looks like a win for workers at first glance, but may turn out to be a contributor to financial trouble for railroad pension plans and their beneficiaries. The third opinion, rendered in summary fashion, makes an important statement about how collective bargaining agreements are to be interpreted, and by doing so instructs union representatives and employers alike about drafting enforceable benefit clauses.

Encino Motorcars, LLC v. Navarro, 584 U.S. —, 200 L. Ed. 2d 433, 138 S. Ct. 1134 (2018)

Hector Navarro is a "service advisor" at Encino Motorcars, LLC ("Encino"), a Mercedes-Benz car dealership in the Los Angeles area. He consults with customers about their servicing needs and sells them servicing solutions. He works regular hours from 7 a.m. to 6 p.m. five days a week on the dealership premises. Because they worked more than 40 hours per week, Navarro and a group of current and former service advisors sued Encino in 2012 to recover overtime pay under the FLSA.

Congress initially exempted all car dealership employees from the overtime pay requirement of the FLSA, but later narrowed the exemption to cover "any salesman, parts man, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft."²² In 1974 Congress enacted the present version of the exemption by adding to the language ". . . if he is employed by a nonmanufacturing establishment primarily

²² Fair Labor Standards Amendments of 1966, section 209, 80 Stat. 836.

engaged in the business of selling such vehicles or implements to ultimate purchasers.” 29 U.S.C. 213(b)(10)(A). The Department of Labor’s view has varied over the years, culminating with issuance of a rule in 2011 that interpreted “salesman” to exclude service advisors.

Encino moved to dismiss Navarro’s claims based on what it argued was a statutory exemption for service advisors. The district court dismissed the complaint, but the Ninth Circuit reversed, finding the FLSA’s exemption ambiguous and “inconclusive” and deferring under the *Chevron* doctrine to the DOL’s 2011 rule excluding service advisors from the statutory exemption. The Supreme Court vacated the Ninth Circuit’s judgment, holding that the DOL’s 2011 rule was procedurally defective because it undermined the reliance interests of the dealerships by changing the treatment of service advisors without a sufficiently reasoned explanation.²³ The case was remanded for the Ninth Circuit to address the scope of the exemption without any administrative deference. The Ninth Circuit held again that the exemption does not include service advisors because it was not Congress’ intent that service advisors be covered by the exemption from overtime regulation. The Supreme Court again granted certiorari.

The Court ruled that service advisors are exempt from the FLSA’s overtime requirements because they meet the statutory definition for inclusion in the exemption. Justice Thomas’ opinion for the 5 to 4 majority first frames the statutory question as whether a service advisor is a salesman primarily engaged in servicing automobiles. He concludes that under the “best reading of the text,” service advisors are just that. Based on dictionary definitions a service advisor is obviously a salesman, according to the Court. Again referring to dictionaries, Justice Thomas concludes that service advisors are integral to the servicing process and thus meet the definition of servicing as either maintaining or repairing a vehicle or providing a service. That service advisors spend their time with customers and not “under the hood” is of no moment because the statute does not require physical repairing as an element of servicing.

Justice Thomas rejected the Ninth Circuit’s reliance on the distributive canon that matches salesmen with selling and partsmen and mechanics with servicing, finding that the more natural reading of the text (which uses the disjunctive “or” multiple times) covers any combination of its nouns, gerunds and objects. Likewise, in an unelaborated passage, the Court rejected as a useful guidepost for interpretation the Ninth Circuit’s reliance on the principle that exemptions to the FLSA should be construed narrowly. Because the FLSA gives no textual indication that its exemptions should be construed narrowly, the Court, according to Justice Thomas, has “no license” to give this exemption anything but a “fair” (rather than a narrow) reading. Finally, the Court did not find persuasive the Ninth Circuit’s reliance on a DOL handbook from 1966-1967 or on the absence of service advisors in the legislative history of the exemption. In the latter regard, Justice Thomas noted that even “clanging” silence (of legislative history) cannot defeat the better reading of the statutory text.

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, dissented because service advisors are not salesmen, partsmen or mechanics, the only three occupations expressly exempted from the hours requirements of the FLSA under section 213(b)(10)(A). In the dissenters’ view service advisors neither sell nor service vehicles. Instead, they greet car owners,

²³ *Encino Motorcars, LLC v. Navarro*, 579 U.S. —, 195 L. Ed. 2d 382, 136 S. Ct. 2117 (2016).

solicit and suggest repair services to meet the owners' complaints and provide owners with cost estimates. Therefore, they should remain outside the exemption and within the FLSA's coverage. The majority's contrary view runs counter to what Congress sought to accomplish by limiting blanket exemptions of dealership employees from overtime pay requirements.

Parsing the statute, the dissent rejects the argument that because partsmen neither sell nor service, Congress must have intended the word "service" to mean something broader than repair or maintenance. But the dissent finds the premise of this argument flawed because partsmen are themselves involved in servicing vehicles, whereas service advisors sell services that are always performed by others. Moreover, the three jobs enumerated in the exemption involve work during irregular hours and sometimes off-site (especially in the farm equipment business), thus making compensable hours difficult to calculate and track. Service advisors, on the other hand, work a fixed schedule and are precisely the type of workers that Congress intended the FLSA to shield from "overwork." Thus, including partsmen in the exemption does not broaden the meaning of "service."

Finally, the dissent finds the dealership's reliance argument overstated and ultimately unpersuasive. Indeed, Justice Ginsburg suggests that the FLSA's affirmative defense for good faith reliance on superseded agency guidance "should shield" employers from retroactive overtime pay. The dissent also notes that service advisors who are paid on a commission basis (like the plaintiffs here) would be exempt under the FLSA from overtime coverage anyway if their commission compensation amounts to more than 150% of the minimum wage.

* * * *

What a litigation saga just for the purpose of deciding whether a small number of automobile dealership service advisors should be exempt from FLSA coverage! But there was, in reality, much more at stake here than the tiny cohort of service advisors whose exempt or non-exempt status under the FLSA was in question. Indeed, as the case turned out, the Court rationalized the victory for the car dealers by changing the way all exemptions from FLSA coverage are to be interpreted.

On the merits of exempting service advisors from FLSA coverage, to the extent that they are paid on a commission basis and their commissions amount to more than 150% of the minimum wage, they would, as Justice Ginsburg notes, be exempt from FLSA coverage in any event. Now, think about those service advisors who are paid on a commission basis. Their income is obviously based on the value of what they sell. So, if they are being paid for selling services, why do they not simply fit the definition of "salesmen" under the statute? At the very least, Justice Thomas' view that these workers fit the dictionary definition of "salesmen" is plausible - perhaps even more plausible than the dissent's view that Congress did not intend for service advisors to be exempt from coverage.

Much less plausible is the majority's rationale for abandoning the way FLSA exemptions have been interpreted for more than a half-century. Instead of an unadorned interpretation of the FLSA's text, which could have carried the day for employers, Justice Thomas and the majority reached out quite gratuitously to overturn the venerable interpretive rule that FLSA

exemptions should be construed narrowly. Citing the late Justice Scalia (not in an opinion, mind you, but in a book he authored!), the Court proclaims that it has “no license” to give FLSA exemptions “anything but a fair reading.” Exactly what this new “fair reading” interpretive guidepost means is left unexplained. As a result of this decision, therefore, both employers and employees are left in an unattractive position when trying to figure out whether a coverage exemption will be applicable under the FLSA.

Wisconsin Central Ltd. v. United States, 585 U.S. —, 200 L. Ed. 2d —, 138 S. Ct. 2067 (2018)

The Railroad Retirement Tax Act of 1937 (“Act”), enacted in the wake of the Great Depression, federalized struggling private railroad pension plans to provide retirement benefits for railroad employees akin to the social security system for other industries. 26 U.S.C. 3201, *et seq.* Private railroads and their employees pay a tax based on the employees’ “compensation,” and the federal government in return provides pensions for the employees. When the Act was passed railroads compensated their employees both with money and with food, lodging, railroad tickets and other in-kind benefits. Because the railroads had not previously calculated pensions based on those in-kind benefits, the Act likewise did not seek to tax those benefits. Instead, the Act taxes employee “compensation” which it defines as “any form of money remuneration.” 26 U.S.C. 3231(e)(1).

Wisconsin Central Railroad, seeking to encourage employee performance, adopted stock option plans as part of their compensation program for employees. The plan permits an employee to exercise these stock options in various ways: first, purchasing stock at the option price with the employee’s own money and holding it as an investment; second, purchasing stock at the option price and immediately selling a portion of it to finance the purchase; and third, purchasing the stock at the option price and immediately selling all of it at the market price, thus taking the profit immediately in cash. The third method, also referred to as the “cashless exercise” method, is used by about half of the employees in this case and by the vast bulk of employees at other railroads. The employee simply checks a box on a form, and the net proceeds are deposited into the employee’s bank account, just like a paycheck. The Government now argues that stock options like these that are readily convertible into money qualify as a form of “money remuneration” under the Act and are thus taxable as “compensation.” The railroads here say that stock options are not money and that the Act did not seek to count in-kind benefits as compensation. The Supreme Court granted certiorari to resolve a split of authority in the lower courts.

The Court, in a 5 to 4 decision, held that these employee stock options are not taxable “compensation” under the Act because they are not a form of “money remuneration.” In doing so, it reversed the contrary judgment of the Seventh Circuit. Justice Gorsuch’s majority opinion first relies on the dictionary understanding of the term “money” around the time of the Act’s passage, concluding that stock options were not commonly considered a medium of exchange. And, adding “remuneration” to the statutory phrase does not expand what counts as “money,” according to the majority. Justice Gorsuch then reasons that the broader statutory context (i.e., the Internal Revenue Code that distinguishes between “money” and “stock” and the Federal

Insurance Contributions Act (“FICA”) that taxes “all remuneration,” including benefits paid in any medium other than cash) points to the same conclusion as the dictionary analysis of the text.

Next, the Court rejects the Government’s position that “money” can sometimes mean property that is convertible into cash. That argument carries too far in Justice Gorsuch’s view, as almost anything can be reduced to a value expressible in terms of money. The Court also finds unpersuasive the Act’s specific exemption for qualified stock options, noting that this exemption does not mean that the railroads’ nonqualified options must be taxable. Nor would the Court, in Justice Gorsuch’s words, “rewrite” the exemption just to conform it to what the Government believes is a more sensible and consistent construct. Likewise, the Court finds unavailing the Government’s argument based on a 1938 agency interpretation of a companion statute (the Railroad Retirement Act of 1937) that suggests that in-kind benefits can sometime be regarded as “money remuneration.” Only if the employer and employee agree on the dollar value of those benefits and further agree that they are part of the employee’s compensation package would those benefits be taxable.

The majority also takes the occasion to reject the Government’s argument that the Court should defer under the *Chevron* doctrine to a more recent Internal Revenue Service interpretation giving “compensation” under the Act the same meaning as the term “wages” in FICA - except as specifically limited by the Act. Justice Gorsuch says that it is “clear enough” that the term “money” excludes “stock,” thus leaving no ambiguity for the IRS to fill and nothing to which the Court should defer. Moreover, since the Act does specifically limit “compensation” to “money remuneration,” the agency interpretation on its own terms would not help the Government.

Finally, the Court specifically criticizes the Seventh Circuit majority for suggesting that it would make good practical sense for the Act to cover stock as well as money. Justice Gorsuch seizes the moment to lecture the lower court majority that written laws “are meant to be understood and lived by. . . [and] if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost.” Addressing the dissent on this point, Justice Gorsuch allows that every statute’s meaning is fixed at the time of enactment, but that does not trap us in a monetary time warp, for “new applications may arise in light of changes in the world.” Thus, what qualifies as a medium of exchange may depend on the “facts of the day.” So, electronic transfers - unknown in the 1930’s - would be included as “compensation,” but stock and stock options were not recognized as mediums of exchange then and are not so recognized now.

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, dissented, expressing the view that the Act’s language is ambiguous and that traditional tools of statutory interpretation support the Government’s consistent interpretation of the Act to include stock options as “any form of monetary remuneration paid to an individual for services rendered.”

The dissent first criticizes the majority’s reliance on dictionary definitions to conclude that “money” and “mediums of exchange” have fixed meanings and are not ambiguous. Finding those terms infused with at least some ambiguity, Justice Breyer opines that if it were up to him, he would find the stock options here to be a form of “money remuneration” because for many

employees this form of compensation strongly resembles a paycheck as it hits the employees' bank accounts almost immediately.

Looking next to the traditional tools of statutory interpretation, Justice Breyer concludes that the purpose of Congress was to exclude certain “nonmonetary” benefits that are not transferable or are otherwise difficult to value (such as free transportation for life.) The dissent then regards the Act’s history and notes that an earlier version of the Act explicitly excluded from taxation the kinds of incidental benefits that are difficult to value. The final version of the Act dropped those specific exclusions as superfluous. Stock options, however, are not in-kind benefits because their only value to employees is their financial value as additional compensation. Based on the retirement statute’s purpose and history, therefore, the dissent would find the stock options to be a form of “money remuneration” and thus taxable “compensation” under the Act.

Lastly, the dissent directly addresses a number of other points made by Justice Gorsuch in the majority opinion. Given the conflicting interpretations of the statutory text, the dissent would “give weight” to the interpretation of the Government agency charged with administering the Act. Particularly persuasive is the fact that the Treasury Department has never deviated from its original contemporaneous interpretation of the Act just after it was passed. Only in recent years have the railroads objected to the taxation of stock options. Moreover, the dissent noted that a 1938 opinion from the general counsel of the Railroad Retirement Board (“Board”), as well as a 2005 Board General Counsel opinion both support taxation of stock options as part of an employee’s compensation. Justice Breyer also explains that the majority’s reliance on a 1986 General Counsel memorandum about in-kind benefits was written by a deputy general counsel who was discussing free rail passes and not stock options. In short, Justice Breyer concludes that the Treasury Department’s interpretation is a reasonable one that promotes uniformity in the treatment of stock options by both the Act and FICA.

* * * *

One cannot readily tell from the Court’s decision not to tax employee stock options as compensation whether it is truly a “win” for railroad employees. Indeed, I would not be quick to put this one on the scorecard as a victory for employees. Given that railroad pensions have to meet a critical need for an increasing number of baby boomer retirees in a rapidly changing industry, and given that taxation of employee compensation is a prime determinant of pension funding, and given that employers are increasingly turning to stock options for employees at all levels, the Court’s ruling may ultimately have a negative impact on the retirement security of thousands of railroad workers and their families.

Neither opinion in the case makes clear who the parties are and how this case got to the Court’s merits docket. What actually happened is that Wisconsin Central, LTD and two other domestic railroad subsidiaries of publicly traded Canadian National Railway Corporation (“CN”) sued in federal district court to recover both the employer and employee shares of taxes paid on stock options issued by the three railroads to their employees under a CN stock option plan intended to incent employees to perform more profitably. On cross-motions for summary judgment, the district court ruled against the Government’s position that the stock options should

be taxable as “compensation” under the Act. The Seventh Circuit ruled 2 to 1 in an opinion by Judge Posner that the stock options should be treated as a form of “money remuneration” and are thus taxable under the Act. The railroads filed a petition for certiorari, supported by several other individual railroad companies that also issue stock options and by the principal association of American railroad companies - a sort of Chamber of Commerce for the railroad industry.

Put this case in the group of decisions attacking the regulatory state. The not-so-subtle criticism of Judge Posner’s reliance on agency interpretation of the Act is emblematic of the emerging judicial orthodoxy of a freshly reconstituted majority that the Chevron doctrine illegitimately grants too much power to administrative agencies and has to go - just like the Court said during the case law run-up to *Janus*’ overruling of *Abod*.

CNH Industrial N.V. v. Reese, 583 U.S. —, 199 L. Ed. 2d —, 138 S. Ct. 761 (2018)

In 1998 CNH Industrial N.V. and an affiliate (“CNH”) agreed to a collective bargaining agreement with the United Automobile, etc. Workers (“UAW”) providing group health care plan benefits to certain employees who retire under the CNH pension plan. The group health care plan was incorporated into the collective bargaining agreement and “r[an] concurrently” with it. The 1998 collective bargaining agreement contained a general durational clause stating that it would terminate in May of 2004. The bargaining agreement also stated that it disposed of any and all bargaining issues, whether or not presented during negotiations. When the 1998 agreement expired in 2004 a class of CNH retirees and surviving spouses sued for a declaratory judgment that their health care benefits had vested for life, and they sought an injunction to prevent CNH from changing them.

The district court first granted CNH’s summary judgment motion based on *M&G Polymers USA, LLC v. Tackett*, 574 U.S. — (2015) (requiring collective bargaining agreements to be interpreted according to ordinary principles of contract law without inferences presuming lifetime vesting of benefits.) Upon reconsideration, however, the district court awarded summary judgment to the retirees. The Sixth Circuit affirmed, concluding that the collective bargaining agreement was ambiguous as to lifetime vesting and that it could thus rely on extrinsic evidence supporting lifetime vesting. CNH filed a petition for certiorari that was promptly supported by numerous *amici* represented by a number of experienced Supreme Court litigators in prominent D.C. firms. The *amici* included the Chamber of Commerce and the National Association of Manufacturers. No briefs opposing certiorari were filed by anyone other than the retirees themselves. The case was distributed to the Court for the January 5, 2018 conference and re-listed three times after that.

The Supreme Court granted certiorari on February 20, 2018, and, without ordering briefing on the merits, summarily issued a unanimous *per curiam* opinion reversing the Sixth Circuit’s judgment because it did not comply with *Tackett*’s “direction to apply ordinary contract principles.” Because the 1998 collective bargaining agreement could not reasonably be read as vesting health care benefits for life, it could not be considered ambiguous on that point. The

Sixth Circuit’s contrary conclusion did not rest on any express or implicit contract terms or industry practices; instead, it rested on the same so-called *Yard-Man* inferences that the Court had rejected in *Tackett* (*i.e.*, ambiguity, like vesting itself, can be inferred from express termination provisions for other benefits while tying health care benefits to pensioner status.) Reaffirming that using the *Yard-Man* inferences is “not a valid way to read a contract,” the Court made clear, once and for all, that these inferences cannot create ambiguity any more than they can create presumptive vesting. The Court punctuated this point by concluding that, upon canvassing the circuits, no other Court of Appeals would find ambiguity in these circumstances. And, finally, the Court concluded that the 1998 collective bargaining agreement’s general durational clause applied to all benefits unless the agreement specified otherwise. Had the parties meant to vest health care benefits for life, they could have said so in the text, according to the Court. Because they did not do so, the health care benefits here expired in May of 2004 when the 1998 agreement itself expired.

* * * *

Make no mistake. The Court’s decision, while rendered in summary fashion without briefing on the merits, is nonetheless a critical one for all collective bargaining stakeholders. On a purely practical level, the importance of this case for retirees and those about to retire (and their eligible beneficiaries) is hard to overstate. Retiree health care in today’s uncertain human welfare environment is a prime benefit that unions and their constituents value highly.

This decision’s importance is equally significant on the broader level of drafting and enforcing collective bargaining agreements generally. This is the ostensible point of the several industry and business amici who supported CNH’s petition. Their objective was to drive a stake through the heart of the Yard-Man inferences. That objective was achieved, perhaps at the expense of judicial discretion to weigh as many factors as possible (including extrinsic evidence) that bear on the meaning of a collective bargaining agreement. Prizing judicial control and bright-line clarity over a more comprehensive and holistic evaluation of contract language, the Court put a premium on negotiating more precise contract language to protect employee benefits.

In short, the Court’s decision is not simply a swipe at the Sixth Circuit or a mere reaffirmation of the Court’s rejection of Yard-Man inferences in Tackett. Far from it. The Court here took advantage of an opportunity to let unions, employees and their lawyers know in no uncertain terms that if a negotiating point (such as retiree healthcare benefits) is an important one, the text of the collective bargaining agreement has to deal with that point expressly and unequivocally. Lesson learned!

C. Employment Discrimination and Retaliation

No decision construed the substance of any employment discrimination or retaliation statute, other than one whistleblower case summarized below that limited the scope of the anti-retaliation provision of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act

(“Dodd-Frank.”)²⁴ But overshadowing the employment discrimination and retaliation area is the Court’s widely reported decision in the case of a Colorado baker who refused on religious principle to bake a cake for a gay couple’s marriage celebration. That case, which delivered much less than it promised, is covered in brief summary fashion in this section, too. Despite the fact that it was not an employment case, the employment bar (not to mention citizens interested in maintaining a working democracy) would be well-advised to study it with care.

Digital Realty Trust, Inc. v. Somers, 583 U.S. —, 200 L. Ed. 2d 15, 138 S. Ct. 767 (2018)

Paul Somers was employed by Digital Realty Trust, Inc. (“Digital”), a real estate investment trust that owns, acquires and develops data centers, as a vice president from 2010 to 2014. Shortly after reporting to senior management about suspected securities law violations, Somers was fired. He did not make any report to the SEC. Nor did he file an administrative complaint within 180 days of his termination, thus making him ineligible for relief under the Sarbanes-Oxley Act.²⁵ Instead, Somers filed suit in federal court alleging a whistleblower claim under the Dodd-Frank Act.

Dodd-Frank defines a “whistleblower” to mean a person who provides information about securities law violations to the SEC. That definition is narrower than “whistleblower” under the earlier Sarbanes-Oxley Act,²⁶ which applies to all employees who report misconduct to the SEC or internally to the employer. However, Dodd-Frank’s anti-retaliation provision protects an employee (i) who provides information to the SEC, (ii) participates in an SEC proceeding based on provided information, or (iii) makes disclosures that are protected under Sarbanes-Oxley or other laws subject to SEC jurisdiction. The SEC, pursuant to Congressional authority in Dodd-Frank, issued Rule 21F-2 that defines a whistleblower, for purposes of anti-retaliation protection, as one who provides information to the SEC or internally and who has a “reasonable belief” that the information relates to a possible securities law violation. 17 C.F.R. 240.21F-2(b)(1)(i)-(ii).

Digital moved to dismiss based on the ground that Somers was disqualified as a statutory whistleblower under Dodd-Frank because he did not report any law violations to the SEC. The district court denied the motion, finding the statute ambiguous as to agency reporting and deferring under the *Chevron* doctrine to SEC Rule 21F-2 described above that does not require providing information to the SEC in order to acquire “whistleblower” protection. On an interlocutory appeal, the Ninth Circuit affirmed on a divided panel vote. The Supreme Court granted certiorari to resolve a circuit split about whether whistleblower status under Dodd-Frank is dependent on providing information to the SEC.

The Court, in an opinion by Justice Ginsburg, joined by the Chief Justice and Justices Kennedy, Breyer, Sotomayor and Kagan, ruled that Dodd-Frank’s anti-retaliation provision does not extend to an individual who has not reported a violation of the securities laws to the SEC.

²⁴ 124 Stat.1376 (2010). The pertinent provision construed by the Court is codified at 15 U.S.C. 78u-6(a)(6).

²⁵ To sue under Sarbanes-Oxley, the employee must timely seek to exhaust an administrative remedy with the Secretary of Labor. 18 U.S.C. 1514A(b).

²⁶ Sarbanes-Oxley Act of 2002, 116 Stat. 745. The whistleblower definition is codified at 18 U.S.C. 1514A(a)(1).

Justice Ginsburg’s opinion for the Court stresses that when a statute includes an explicit definition, the Court is bound to follow it even if it varies from a term’s ordinary meaning. In this case Dodd-Frank’s definitional section supplies “an unequivocal answer” about the reach of the definition. It extends only to those who report information to the SEC.

Looking beyond Dodd-Frank’s text, Justice Ginsburg concludes that the statute’s purpose and design corroborate the requirement of reporting to the SEC. Congress’ objective in Dodd-Frank was to disturb a corporate code of silence and motivate employees to tell the SEC and other appropriate law enforcement officials about fraudulent conduct. The balance of the Court’s opinion is devoted to rejecting Somers’ and the Solicitor General’s position that the whistleblower definition applies only to Dodd-Frank’s incentive award program and not to its anti-retaliation provision. Despite the more limited reach of Dodd-Frank’s protection and despite worries about leaving auditors, accountants, attorneys and other financial professionals vulnerable to discharge when complying with Sarbanes-Oxley’s requirement to report information internally before doing so externally, the Court declined to depart from the statutory text. Likewise, Justice Ginsburg rejects arguments by Somers and the Solicitor General about the consequences of the Court’s narrow interpretation of its protective reach. Justice Ginsburg even offers that there is nothing preventing the SEC from adopting different means of reporting - including testimony protected under Dodd-Frank.

Finally the Court expressly declines to accord any deference to SEC Rule 21F-2 in light of the statute’s clear and conclusive definition of “whistleblower.” In short, Justice Ginsburg says, Dodd-Frank’s unambiguous whistleblower definition precludes the SEC from more expansively interpreting that term. Accordingly, the Court reversed the Ninth Circuit’s judgment and remanded the case for further proceedings consistent with this opinion.

Justice Thomas, joined by Justices Alito and Gorsuch, filed an opinion concurring in the Court’s judgment, but concurring in its opinion only to the extent that it relies on Dodd-Frank’s text. Justice Thomas’ concurrence takes exception to any reliance on legislative history, specifically a single Senate Report that purports to support the “purpose” of Dodd-Frank. In direct response to that concurrence, Justice Sotomayor, joined by Justice Breyer filed a separate concurring opinion disagreeing with the suggestion by Justice Thomas that a Senate Report is not an appropriate source for the Court to consult when interpreting a statute. Agreeing with Justice Thomas that legislative history is not the law, Justice Sotomayor writes that legislative history can still corroborate and fortify our understanding of the legislative text. And, committee reports like the Senate Report here, are a particularly reliable source for ensuring fidelity to Congress’ intended meaning.

* * * *

The result appears at first blush to be so clearly compelled by the text that it seems a bit unusual for Justice Ginsburg to devote so much effort to non-textual support for the Court’s conclusion. On the other hand, had the Court’s opinion simply stopped with its reliance on the statute’s text, we would not have been treated to the informative dialogue about legislative history between the rival concurring opinions of Justice Sotomayor and Justice Thomas. The

hilarious colloquy in the Senate Report, quoted at length by Justice Thomas, is well worth a few moments of your time.

On the merits, the Court's unanimous conclusion about what Congress intended is not quite as open-and-shut as the Court indicates. The "whistleblower" definition is just that - a definitional section over which the parties disagreed about its application just to Dodd-Frank's award provision or also to the law's anti-retaliation provision. The operative anti-retaliation provision, however, arguably embraces the Dodd-Frank definition and then goes beyond it to protect individuals who provide information about securities fraud internally, sometimes as a necessary prerequisite to reporting to the SEC (as Sarbanes-Oxley contemplates.) Perhaps a more holistic approach to interpreting the statute might have yielded a different answer about the reach of the anti-retaliation prohibition. At the very least, the Court's fixed focus on one definitional snippet of Dodd-Frank's full text is a little less than what one expects from the Court's interpretation of a law whose overriding purpose is to encourage disclosure of fraudulent practices.

For Paul Somers and employees in his position, as well as the accountants, lawyers and other professionals who are obliged to review corporate financial information and address fraudulent practices, the holding of this case is a nightmare. To be sure, the Sarbanes-Oxley protections remain for those who do not report information about securities violations to the SEC. But those employees then have to run an administrative gauntlet promptly upon learning that the employer has retaliated against them for daring to make an internal report. To strengthen Sarbanes-Oxley's anti-retaliation protection, Congress enacted Dodd-Frank. But to what end now that the Court has essentially said that reprisals for internal reporting can go virtually unpunished? This consequence adds not just to my unease with the result here, but it also magnifies my uncertainty about the Court's rush to a result that the Dodd-Frank Congress could hardly have anticipated.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. —, 200 L. Ed. 2d —, 138 S. Ct. 1719 (2018)

Jack Phillips, an expert baker and devout Christian, owns and operates Masterpiece Cakeshop, Ltd., a Colorado bakery. In 2012, before Colorado recognized same-sex marriages, Phillips told Charlie Craig and David Mullins, a same-sex couple, that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages. He told the couple that he would sell them other baked goods, such as birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission under a Colorado law that prohibits discrimination on the basis of sexual orientation by businesses engaged in sales or services to the public.

The Commission's Civil Rights Division found probable cause for a violation of the state anti-discrimination law, and it referred the case to the Commission, which in turn referred the case for a formal hearing before a state administrative law judge. The state ALJ ruled in favor of the couple, rejecting Phillips' First Amendment claims that requiring him to create a cake for the couple would compel him to express a message with which he disagreed in violation of his right

to free speech and would also violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed the ALJ's decision. The Court granted certiorari after the petition was distributed 19 separate times for consideration at conference. After review was granted, the case attracted 50 *amicus* briefs in support of Phillips (including one from the United States) and 45 *amicus* briefs in support of Colorado's decision favoring the couple.

The Court, in an opinion by Justice Kennedy, ruled 7 to 2 that the Commission's actions violated Phillips' free exercise rights under the First Amendment. The Court concluded that in light of certain comments made by some of the Commissioners, there was evidence of impermissible hostility toward Phillips' sincere religious beliefs motivating his objection to making a cake for Craig and Mullins. Moreover, the Commission had treated differently the cases of other bakers who voiced objection to anti-gay messages on cakes. Justice Kennedy concluded that the Commission's hostile and disparate treatment of Phillips' case violated a duty of neutrality under the First Amendment's Free Exercise Clause toward Phillips' sincerely held religious viewpoint. Accordingly, the Court reversed the judgment of the Colorado Court of Appeals.

Justice Kagan, joined by Justice Breyer, filed a concurring opinion addressing the disparate treatment of Phillips' case and the case of three bakers who objected to selling cakes with offensive anti-gay messages. In Justice Kagan's view the cases can be treated differently in a manner not hostile to religious exercise. Justice Gorsuch, joined by Justice Alito, filed a concurring opinion expressing a view opposite that of Justice Kagan. In his opinion, Phillips is entitled to the same result as the three bakers, regardless of his biased decision not to sell wedding cakes to gay couples. Justice Thomas, joined by Justice Gorsuch, filed an opinion concurring in the Court's judgment, but stressing that the Court should not let pass the state's violation of Phillips' free speech right to dissent from any orthodoxy about gay marriage.

Justice Ginsburg, joined by Justice Sotomayor, dissented. In their opinion, Charlie Craig and David Mullins should win this case because the evidence of disparate treatment of the three bakers does not demonstrate hostility of the kind that signals a free exercise violation, and the comments of the Commissioners do not rise to the level justifying reversal of the state court's judgment. There is, of course, much more to Justice Ginsburg's dissent that could be reviewed, but this article about employment law is not the place for doing so.

* * * *

The foregoing is only the briefest summary of one of this term's most closely watched and nervously anticipated decisions. The article treats this decision in truncated fashion because its holding does not directly affect the employment relationship. After all, Jack Phillips was selling cakes to the public, not acting as a private employer. Nor was the Court's decision based on sweeping doctrine about gay rights, free speech, and the ability to sidestep laws of general application, as many observers had forecast (or feared.) Instead, Justice Kennedy's opinion makes clear that the result and reasoning are anchored to a duty of fair process and especially to the singular facts of how this case was handled and decided by the Colorado commission. So, why include the case at all in this term's review of employment and labor law?

The decision is included because of what it forecasts (or not) for enforcement of employment statutes as laws of general application. Bubbling just barely beneath the surface of this decision about fair process and procedure is the prospect of a free exercise or free speech limit on compliance with laws of general application, such as employment discrimination statutes. Cf. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. — (2014) (Application of Religious Freedom Restoration Act to employer’s religious-based objection to providing birth control for female employees.) Resolution of the tension between enforcing laws of general application and accommodating the First Amendment rights of business owners, until now thought settled by civil rights decisions decades ago, may emerge again as an issue on the Court’s docket. If that happens while the current majority endures (assuming Justice Kennedy’s successor will join with the other four deregulation Justices), one cannot safely predict how this issue of such democratic centrality will be resolved.²⁷

D. Adjective Cases

Time limits and tolling of those limits occupied the Court in three decisions, two of which grew out of employment disputes. Most notably, perhaps, is that the employee-plaintiff’s “victory” in two of these cases were the *only* decisions of the entire term in which an employee actually prevailed to any measurable extent on an employment or labor issue. In the other case, summarized first below, the majority’s constraint on the tolling doctrine may hamper employee class and collective litigation for years to come.

China Agritech, Inc. v. Resh, 585 U.S. —, 200 L. Ed. 2d —, 138 S. Ct. 1800 (2018)

Purchasers of China Agritech, Inc. (“CAI”) stock sought to allege violations of the Securities Act of 1934 in a series of class action suits. The governing anti-fraud securities law has a two-year statute of limitations and a five-year statute of repose. The accrual date for the limitations period was February 3, 2011. The accrual date for the statute of repose was November 12, 2009. Thomas Dean, a CAI shareholder, filed the first class action complaint on February 11, 2011. Upon notice required by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), six shareholders sought lead-plaintiff status. On May 3, 2012, the district court denied class certification, and the case thereafter settled and was dismissed in September of 2012. On October 4, 2012, Dean’s attorney filed a new (and still timely) complaint with a new set of CAI shareholder plaintiffs (the “Smyth plaintiffs”). Once again, after PSLRA notice and interest shown by eight shareholders in serving as lead-plaintiff, the district court denied class certification. The Smyth plaintiffs then settled their individual claims and dismissed their suit.

In 2014, a year and a half after the limitations period had expired, Michael Resh, who had not previously sought lead-plaintiff status in the other two actions, filed a third class action. Several other CAI shareholders moved to intervene, seeking lead-plaintiff status. The district court dismissed the class complaints as untimely, holding that the prior two actions did not toll

²⁷ For another interesting take on this case, see Andrew Strom, “Will Masterpiece Cakeshop and Janus Create a First Amendment Right to Strike for Teachers?” posted on April 5, 2018 in *On Labor* (accessed on April 5, 2018 at <https://onlabor.org/will-masterpiece-cakeshop-and-janus-create-a-first-amendment-right-to-strike-for-teachers/>).

the time to commence the third action. The Ninth Circuit reversed, holding that *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), requires that the timely filing of the two prior class cases tolled the period for filing a subsequent class action on behalf of persons described in the original complaints.

The Supreme Court granted certiorari and unanimously reversed the Ninth Circuit's decision. In an opinion by Justice Ginsburg, joined by every member other than Justice Sotomayor, the Court ruled that upon denial of class certification, a putative class member may not commence a new class action beyond the time allowed by the applicable statute of limitations. Under *American Pipe*, putative class members who wish to join an existing suit or file an individual action may do so because delaying individual claims until after class certification denial promotes efficiency and economy of litigation. But with class claims, efficiency favors early assertion of competing class representative claims. The rationale of *American Pipe* thus does not extend to successive class claims.

Moreover, the Court reasoned that both Federal Rule of Civil Procedure 23 and the PSLRA evince a preference for precluding untimely successive class actions. Not only does Rule 23 expressly provide that class certification be resolved early on, but the PSLRA's early notice and lead-plaintiff invitations procedure counsel against extending *American Pipe* to successive class actions. And, because the shareholders have no substantive right to bring untimely claims, the Court's clarification of *American Pipe*'s reach does not run afoul of the Rules Enabling Act. Finally, as a practical matter, Justice Ginsburg noted the absence of any showing that restricting *American Pipe*'s reach would engender duplicative or protective class action filings. Accordingly, the Court saw no reason in the Federal Rules to permit untimely successive class action filings.

Justice Sotomayor filed a separate opinion concurring in the Court's judgment as applied to cases (like this one) that are governed by the PSLRA. For class actions not governed by the PSLRA, however, Justice Sotomayor would not join the Court's judgment to the same effect.

* * * *

This decision's limit on use of the class action device appears to have little upside for employees, retirees and other individuals seeking to enforce their rights under the securities laws. It does, however, provide comfort to corporate defendants and their insurers who might face class claims when evidence is stale and the incentive to settle unmeritorious claims is high. The question here is whether the reach of the Court's decision will cover employment claims. Although the context of the case is a shareholder complaint under the securities laws, there is little reason why the efficiency rationale of this case and American Pipe should not constrain workers in pursuit of their employment rights.

From a pragmatic standpoint, therefore, there is not much quarrel with the Court's decision. It is one thing to permit putative class members to take advantage of American Pipe's tolling rule in order to assert their individual rights following rejection of class certification. But, it is quite another thing to permit - nay, encourage - an endless succession of class action filings, as Michael Resh sought to do in this case. To the extent that this case limits the right of

employees to litigate collectively, the reason for doing so makes good sense and would not wholly nullify the ability of employees to band together as claimants.

**Artis v. District of Columbia, 583 U.S. —, 199 L. Ed. 2d 473,
138 S. Ct. 594 (2018)**

Stephanie Artis worked as a health inspector for the District of Columbia (“District”). In November of 2010 Artis was told that she would lose her job. Thirteen months later Artis sued the District in federal court, alleging Title VII discrimination and three claims under D.C. law: whistleblower retaliation under the District’s whistleblower statute; termination in violation of the District’s false claims law; and a common law wrongful termination in violation of public policy. The claims arise out of Artis’ subjection to gender discrimination by her supervisor followed by retaliation for reporting the supervisor’s unlawful conduct.

On June 27, 2014, the district court granted the District’s motion for summary judgment on the Title VII claim and, pursuant to 28 U.S.C. 1367(c)(3), declined to exercise supplemental jurisdiction over the state law claims. The court specifically noted that Artis would not be prejudiced because 28 U.S.C. 1367(d) tolls the statute of limitations “during the period the case was here and for at least 30 days thereafter.” Artis thereafter refiled her state claims in D.C. Superior Court 59 days after dismissal of the federal action. The Superior Court granted the District’s motion to dismiss Artis’ claims as time barred because she filed them 29 days too late. The judge said that Artis could have filed a protective action during the two and a half years the federal case was pending and that 1367(d) gave Artis a grace period of 30 days to refile in state court and did not otherwise stop the limitations clock. The D.C. Court of Appeals affirmed, favoring the 30 day grace period over the stop-the-clock approach to 1367(d). The Supreme Court granted certiorari to resolve a division of opinion among state appellate courts.

Section 1367(d) provides that the period of limitations for state court claims joined with a federal claim “shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”

The Court, in an opinion by Justice Ginsburg, ruled 5 to 4 that the statute’s instruction to “toll” a state limitations period means to hold it in abeyance - that is, to stop the clock. Accordingly, the Court reversed the judgment of the D.C. Court of Appeals. Justice Ginsburg capsulizes the question as follows: Does “toll” mean to stop the clock or suspend the state limitations period while the federal action is pending or does “toll” mean that although the state limitations period continues to run, a plaintiff is given a grace period of 30 days after federal court dismissal to refile in state court?

Describing the “ordinary” meaning of “toll” as the equivalent of suspending a limitations period and finding that only one prior case had adopted a “grace period” interpretation, Justice Ginsburg turned to the statute’s text and finds that because the object of the word “toll” is the limitations period, the grace period argument “maps poorly” onto 1367’s language while the “natural fit” is the stop-the-clock approach. Adding 30 more days to the stop-the-clock approach

is not atypical and does not fortify the District's position. Nor does Congress' reliance on an unadopted American Law Institute proposal help the District.

The Court also rejected the District's argument that a stop-the-clock approach raises Constitutional questions in that 1367(d) exceeded Congress' powers because its connection to those powers is too attenuated or because it is too great an incursion on the State's domain. Pointing out that the Court disposed of the first question in a prior decision and that accepting the second point could result in wasteful, inefficient and duplicative state filings, Justice Ginsburg concluded by observing that a stop-the-clock approach to tolling under 1367(d) is suited to the purpose of limitations statutes to prevent surprises to defendants and to bar plaintiffs who have slept on their rights.

Justice Gorsuch's dissenting opinion (joined by Justices Kennedy, Thomas and Alito) goes to great lengths (literally and otherwise) to persuade that "tolling" in section 1367(d) is limited to a 30 day grace period and does not mean a suspension of the limitations period plus 30 days. Beginning with a metaphor about fences, Justice Gorsuch essentially agrees that the question here is whether to regard tolling in 1367(d) as a grace period or stop-the-clock concept. Tracing his take on the history of both approaches, Justice Gorsuch concludes that the grace period approach is rooted in the common law's "journey's account" based on giving a plaintiff who files in the wrong court a grace period to make a journey to the right court to refile. After recounting a parade of horrible consequences if a stop-the-clock approach is used, the dissent then recites a litany of what it regards as textual "clues" purporting to show that tolling cannot logically mean suspension and that it has to be limited by the grace period (i.e., journey's account) approach.

Beyond the textual "clues," Justice Gorsuch, writing metaphorically again, concludes that Congress must have had the common law grace period approach in mind in enacting 1367(d) and that the majority's stop-the-clock approach is little more than a judicial "reformation" of what Congress intended and thus disrespects Congress' authority and competency. The opinion even goes so far as to suggest that Congress may not have had constitutional authority under the Necessary and Proper Clause to intrude on state court proceedings by regarding tolling as a suspension of a state limitations period. Finally, reflecting what a number of states and their association cohorts told the Court in *amici* briefs, Justice Gorsuch concludes that the majority's approach flies in the face of federalism and, in dramatic final flourish, leaves the reader to question the propriety of virtually boundless federal authority.

* * * *

In the metaphorical blur of Justice Gorsuch's 19 page dissenting opinion, it is easy to lose one's way to the point of his narrative: The point is to deny a day in court to a plaintiff whose state claims were clearly tolled in the ordinary meaning of that word during the nearly three years that her case languished in federal court. When her federal claim was finally dismissed, it is indisputably clear that she had many months left to assert all of her state claims and had no need of any 30 day grace period to refile. And yet, three Justices joined Justice Gorsuch's opinion that she had only a grace period (or "journey's account") of 30 days to

engage counsel and pull together her resources to refile her claims in a markedly different forum. Somehow, that does not feel right.

Indeed, the swing vote against Justice Gorsuch’s “journey’s account” was Chief Justice Roberts. He joined Justices Ginsburg, Breyer, Sotomayor and Kagan to make a majority. The only mystery is whether he was in the majority from the beginning and thus assigned the opinion to Justice Ginsburg or whether he originally voted for the District and changed his vote after reviewing a draft of Justice Gorsuch’s lengthy “history lesson” that the majority dismissed. See, Linda Greenhouse, “The Chief Justice, Searching for Middle Ground,” The New York Times (February 1, 2018) accessed at <https://www.nytimes.com/2018/02/01/opinion/chief-justice-roberts-middle.html>.

Without personally reflecting on the tone of the dissent, which some readers might find a tad condescending and more than a smidgeon hectoring, something begs to be said about Justice Gorsuch’s prose. Sure, his phrasing is jaunty and conversational, almost to the point of being entertaining. But, his metaphorical narrative does the opposite of clarifying legal understanding or explaining application of legal concepts to real world facts. Metaphors divert the reader from factual evidence to fanciful images. Clever though it may be as a piece of advocacy, that is the stuff of Madison Avenue advertising or street-level politics. It is not, however, suitable for close and objective legal analysis that just might persuade.

Finally, as to Stephanie Artis’ three state law claims, she faces an uphill struggle based on the truncated description of what happened to her. According to the parties’ briefs, here’s a bit more detail about the underlying claims. Artis was hired onto a temporary team as a D.C. Department of Health code inspector in August of 2007. According to the District’s merits brief, Artis clashed with her supervisor, Gerald Brown, often. In April of 2009 she filed a claim with the Equal Employment Opportunity Commission (“EEOC”) alleging that Brown had filed reports with false work statistics and had verbally abused Artis with threatening language. In March and April of 2010, Artis filed additional grievances challenging Brown’s refusal to allow Artis to attend training classes that he had permitted males to attend, his refusal to conduct in-person evaluations of Artis and his improper dismissal of notices of infractions that Artis had issued as a health code inspector. On November 15, 2010, Artis learned that the Department had declined to renew her employment contract. She was given no explanation for the non-renewal other than a statement from the employer that “there is no cause for us releasing her, we are just not keeping her.” The district court, on summary judgment, said that “there is no Title VII case here” and dismissed Artis’ federal claim. Whether the district court’s decision was correct and whether Artis can ultimately prevail nearly a decade after her troubled tenure as a health code inspector can now be sorted out, thanks to the Court’s clarification of what tolling under section 1367(d) means.

Hamer v. Neighborhood Housing Services of Chicago, 583 U.S. —, 198 L. Ed. 2d —, 138 S. Ct. 13 (2017)

Charmaine Hamer sued Neighborhood Housing Services of Chicago (“NHS”) and Fannie Mae, a federal housing investment entity, alleging employment discrimination in violation of

Title VII and the ADEA. NHS moved for summary judgment, and the district court granted the motion on September 10, 2015. It entered final judgment on September 14, 2015. Under the Federal Rules of Appellate Procedure, Hamer's notice of appeal would have been due by October 14, 2015. Fed. R. App. Proc. 4(a)(1)(A). On October 8, 2015, Hamer's court-appointed attorneys and two private co-counsel moved to withdraw as counsel because of their disagreement with Hamer about pursuing an appeal. They also moved for a two-month extension of the due date for noticing an appeal so that Hamer would have adequate time to engage new counsel. The district court granted both motions on October 8, 2015, and ordered extension of the deadline for a notice of appeal to December 14, 2015. NHS did not object or move for reconsideration.

According to the docketing statement in the Seventh Circuit, Hamer filed a notice of appeal on December 11, 2015. The Seventh Circuit *sua sponte* questioned the timeliness of the appeal and order NHS to brief the point. For the first time in the brief it was ordered to file, NHS claimed that Hamer's appeal was untimely because Fed. R. App. Proc. 4(a)(5)(C) confines extensions to 30 days. The Seventh Circuit thereupon dismissed the appeal, concluding that it lacked appellate jurisdiction. NHS argued that because the 30 day rule is mandatory, it must be observed unless waived or forfeited. NHS did not, however, assert that the untimeliness of Hamer's appeal was jurisdictional, noting that the time limits lack a statutory basis. The Supreme Court granted certiorari.

The Court, in a unanimous opinion by Justice Ginsburg, held that the Seventh Circuit erred in treating as jurisdictional Rule 4(a)(5)(C)'s 30 day limit on extensions of time to file a notice of appeal. The opinion begins by explaining that while an appeal deadline prescribed by Congress in a statute is regarded as "jurisdictional" and thus subject to mandatory dismissal (regardless of forfeiture or waiver), a time limit prescribed only in a court-made rule is a mandatory claim-processing rule subject to forfeiture if not raised by an appellee. From this premise, the Court takes only 6 pages to demonstrate that Congress did not specify in 28 U.S.C. 2107 how long an extension may run except in cases where an appellant lacked notice of an entry of judgment against her. Noting that Rule 4(a)(5)(C) does prescribe a 30 day limit on extensions for filing a notice of appeal in all cases, Justice Ginsburg rejects NHS' argument that the Rule's limit has a statutory basis. Instead, Justice Ginsburg observes that the rule of decision here is clear and easy to apply: If the prescription appears in a statute, the limit is jurisdictional; otherwise it is a claims processing rule that is not jurisdictional.

Applying that rule, the Court concludes that the Seventh Circuit failed to grasp the distinction expressed in prior decisions between jurisdictional appeal filing deadlines and mandatory claims processing rules. Acknowledging that language in prior decisions about "mandatory and jurisdictional" time limits is erroneous and confounding terminology, the Court ruled explicitly that the 30 day time prescription, located here in a rule and not a statute, is not jurisdictional. Accordingly, the Court vacated the Seventh Circuit's judgment and remanded the case for further proceedings consistent with the Court's opinion. Additionally, the Court noted that its decision did not address issues Hamer had raised (but the Seventh Circuit failed to address), including (i) whether NHS's failure to object to the district court's overlong extension is a forfeiture; (ii) whether NHS should have filed its own notice of appeal to gain review of the

district court’s extension order; and (iii) whether equitable considerations support an exception to Rule 4(a)(5)(C)’s time limit.

* * * *

What can one say about a unanimous decision that so clearly and unequivocally provides a sensible bright-line rule for litigators to follow? Nothing, except kudos to the Court for doing so and a hat’s off to Justice Ginsburg for a concise opinion that disposes of the contested issues in plain language.

For Charmaine Hamer, however, the fate of her attempt to appeal is still undecided. Nonetheless, in a coda to its disposition of the case, the Court provides a template for Hamer’s new appellate lawyers to use in arguing that her notice of appeal was timely. As to prospects for winning her employment claims on the merits, that remains an uncertainty without information on which to make a prediction.

E. Sundry Cases

The two denials of certiorari summarized below are included because the opinions accompanying the denials portend further attacks by the Court on the practice of judicial deferral to administrative agency action.

Garco Construction, Inc. v. Speer, 584 U.S. —, 199 L. Ed. 2d —, 138 S. Ct. 1052 (2018)

Garco Construction, Inc. (“Garco”) contracted with the Army Corps of Engineers to build housing units on Malmstrom Air Force Base. After construction began, the base began denying access to certain employees of Garco’s subcontractors. Although the text of the base’s policy under the contract required only a “wants and warrants” check, the base interpreted its policy also to require a background check and to permit exclusion of individuals with criminal history, even if they did not have any “wants and warrants.” Garco’s request for an equitable adjustment of the contract was denied, as was its appeal to the Armed Services Board of Contract Appeals. The Federal Circuit, while acknowledging “some merit” to the argument that “wants and warrants” means only “wants and warrants,” deferred to the base’s interpretation of its access policy under *Auer v. Robbins*, 519 U.S. 452 (1997).

The Supreme Court denied Garco’s petition for certiorari. Justice Thomas, joined by Justice Gorsuch, filed a dissenting opinion saying that he would have granted certiorari to address whether *Auer* (and a 1945 case on which it was based) should be overruled. The dissent also notes that this form of administrative deference is “constitutionally suspect.”

Scenic America, Inc. v. Department of Transportation, 583 U.S. —, 198 L. Ed. 2d —, 138 S. Ct. 2 (2017)

Scenic America, Inc. (“SAI”), a group dedicated to preserving and improving the visual character of communities and countryside, challenged a 2007 guidance memorandum issued by the Federal Highway Administration (“FHWA”) interpreting a prohibition on “flashing, intermittent or moving” lights in certain Federal-State agreements to permit state approval of digital billboards that meet certain timing and brightness requirements. The district court ruled against SAI’s claims, and the D.C. Circuit concluded that the beautification group lacked standing to challenge the validity of the guidance memorandum. The Supreme Court denied SAI’s petition for certiorari, but Justice Gorsuch issued a statement respecting denial that was joined by the Chief Justice and Justice Alito.

Justice Gorsuch’s statement posits that some courts are suggesting that an administrative agency’s interpretation of an ambiguous term in a contract between the agency and a third party should always prevail so long as the agency interpretation falls within a zone of reasonableness. Likening this development to the *Chevron* doctrine as applied to contract interpretation, Justice Gorsuch openly suggests that whether *Chevron*-type deference has any place in construing contract language “is surely open to dispute.” Along the way in his statement, Justice Gorsuch also takes a gratuitous swipe at *Chevron*’s settled applicability in statutory interpretation cases. Finally, the statement concurs in the denial of certiorari because jurisdictional and fact-bound issues make this case a difficult vehicle for examining the agency deference issues that he seems so anxious for the Court to address.

* * * *

To say that the deregulatory Justices are salivating at the prospect of reducing, if not eliminating, judicial deference to agency interpretations of statutes understates their enthusiasm. This pet project of the business interests is finally emerging from the shadows with the appointment of Justices Gorsuch and a successor who will toe the deregulatory mark even better than Justice Kennedy. Just like the business community’s campaign to get rid of Abood, this campaign to get rid of Chevron, Auer and their judicial and administrative deference brethren appears to be in full swing, even if it may take a few more terms to succeed.

The potential impact of this development on labor and employment law is significant. Regulation of the employment relationship is still largely a federal construct, with a multitude of agencies administering a myriad of laws governing labor relations, labor union administration, employment discrimination, workplace retaliation, wage and benefit payments, income taxation and fiduciary responsibility for healthcare, retirement and other benefits. The possibility that agenda-oriented judges might exercise greater control over how federal agencies are obliged to apply the statutes they administer is as disturbing as it is contrary to the intent of the Congresses who enacted those laws.

III. Grants of Certiorari for the 2018 Term

What the grants of certiorari for 2018 Term portend for employment and labor law in the 2018 Term is unclear at this point, except for one thing: There is little way that the upcoming term could be as momentous for workers, unions and employers than the one just ended.

As of the Court's last sitting on June 28, 2018, review had already been granted in 38 cases, a small increase over last year at this time. Putting aside original jurisdiction, criminal and civil post-conviction cases, the Court's merits docket now has 26 civil cases, of which 10 of those (or about 38%) can fairly be said to affect in some material way either the employment relationship itself or the way in which employment disputes are resolved. And, at least 2 other grants pose issues that grow out of an employment context. While opportunities for outright judicial reconfiguring of the employment laws may look scarce, the Court's general interest in resolving employment relationship questions does not appear to be flagging.

Erring, therefore, on the side of inclusion, here are all the cert grants as of the end of June, 2018, that touch in some way on the employment relationship, working people, labor unions or the manner in which employment disputes may be resolved or litigated.

Mount Lemmon Fire District v. Guido, No. 17-587

The Court granted certiorari to decide whether the ADEA's 20-employee minimum that applies to private employers also applies to political subdivisions of a state (in this case a local fire district.) The case is to be argued on the opening day of the new term, October 1, 2018.

A group of associations of state and local subdivisions filed an *amicus* brief voicing their collective view that the ADEA's jurisdictional threshold for private employers should apply in like manner to public sector employers for reasons of equity, efficiency and sound social policy. Congress, however, did not expressly include a minimum coverage threshold for public employers in enacting and amending the ADEA, so the grant of review will put the deregulatory majority to an interesting interpretive test. For employees, nothing short of federal protection against age discrimination is at stake.

Henry Schein Inc. v. Archer and White Sales Inc., No. 17-1292

The question presented by the petition is “[w]hether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is “wholly groundless.”

No *amici* have yet appeared, but chances are that the business community's collective voice will be heard on an issue that could limit the scope of arbitration in ways unacceptable to employers and their owners. Although the context of this case is commercial, there is little doubt of its direct applicability to employment agreements that delegate questions of arbitrability to arbitrators in the first instance.

Lamps Plus Inc. v. Varela, No. 17-988

The question presented by the petition is “[w]hether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.”

Better translated, the question here is whether an arbitration agreement that is silent on the subject of class arbitration must be held to foreclose it under the FAA. Although employers are now scrambling to rewrite their employment agreements to waive or forbid class arbitrations expressly, for the multitude of agreements that say nothing one way or the other about class or collective actions, this case should be an instructive one.²⁸ The Chamber of Commerce weighed in early with a pre-grant brief that urges summary reversal of the Ninth Circuit on the ground that being faithful to the FAA means that class arbitration cannot be inferred simply from an agreement to arbitrate.

New Prime Inc. v. Oliveira, No. 17-340

The petition for certiorari presents issues about the FAA’s applicability to arbitration agreements between employers and independent contractors. Specifically, the petition asks the Court to resolve: (1) whether the FAA’s exemption of “contracts of employment” of workers engaged in interstate commerce is inapplicable to truckers who are independent contractors and (2) whether that exemption issue is a question of “arbitrability” to be decided by an arbitrator. The case is scheduled for oral argument on October 3, 2018.

The Chamber of Commerce and a number of other business community organizations have filed *amici* briefs on the side of the logistics company that employs independent truckers. Given the increase in different means of accomplishing work tasks by individuals and groups of workers who may not fit the traditional definition of “employee,” this case could expand the scope of mandatory individual arbitration and further insulate employers from having to deal with class and collective claims. For workers, the prospect of litigating employment-related claims in court could be narrowed even further than it is now.

Biestek v. Berryhill, No. 17-1184

The question presented by the petition for certiorari is whether Social Security disability benefits can be denied based on a vocational expert’s testimony when she refuses to disclose the data supporting her testimony.

A person is not eligible for social security disability benefits if the person can “make an adjustment to other work.” 20 C.F.R. 404.1520(a)(4)(v). In this case a vocational expert testified before an ALJ that “other work” was available to the claimant, a carpenter suffering from a

²⁸ If the Court ultimately concludes that FAA pre-emption is necessary because class or collective arbitration can be inferred from an agreement’s silence on the subject, then how will that square with the holding in *CNH Industrial N.V. v. Reese*, *supra*, that a promise of retiree healthcare benefits cannot be inferred from the absence of an express promise in a collective bargaining agreement? Or, might the holding in *CNH* be cited in this case in support of a summarily ruling that class arbitration can never be inferred from an agreement that is silent on the subject?

degenerative disc condition, among other ailments. On cross-examination of the expert, the claimant sought disclosure of the data on which her testimony was based. The expert declined to do so based on the “confidentiality” of her files. The ALJ credited the expert’s testimony and denied the disability claim. The Sixth Circuit affirmed, recognizing that its ruling was in conflict with the Seventh Circuit’s more stringent view about crediting experts who decline to produce data supporting their opinions. The Government opposed certiorari on the ground that the expert’s opinion was based on her 11 years of professional experience and that even under the Seventh Circuit’s approach to expert testimony, there would likely be no conflict about the result. Assessment of vocational expert testimony in Social Security disability cases arises in thousands of cases annually, so the Court’s grant of review may provide useful guidance to all stakeholders.

Nutraceutical Corp. v. Lambert, No. 17-1094

The question presented by the petition is whether equitable exceptions apply to the 14-day deadline to file a petition for permission to appeal an order granting or denying class certification.

Although this petition grows out of a false advertising and unfair trade practice case involving the sale of dietary supplements, the issue on which review was granted appears to affect all class and collective actions and, in fact, was expressly reserved in one of the 2017 Term’s employment cases, *Hamer v. Neighborhood Hous. Serv. of Chicago*, 584 U.S. —, at n.3 (2017), *supra* in Section II. From the Court’s decision in the new case we should learn whether mandatory non-jurisdictional claims-processing rules are subject to equitable exceptions so that late filings might be excused in certain circumstances.

Frank v. Gaos, No. 17-961

The question presented by the petition is whether a *cy pres* award of class action proceeds providing no relief to absent class members satisfies Rule 23’s requirement that a settlement binding the class be fair, reasonable, and adequate.

In this case the defendant (Google, Inc.) did not object to an \$8.5 million settlement that provided no compensation to class members, paid 25% of the settlement amount to class counsel and proposed *cy pres* awards to a number of institutions that had prior relationships with the defendant or class counsel. Two objectors challenged the approval of *cy pres* awards. After four *amici* briefs were filed in support of the petitioners and two post-distribution re-listings, the Court granted certiorari. It will have an opportunity to review what petitioners claim has become a more prevalent practice of *cy pres* awards in class cases where monetary distribution to the class is infeasible. Although the number of these awards in employment-related cases is likely quite small, and regardless of whether this device is being used more or is on the wane, the Court has given itself a chance to clarify the scope of a district court’s discretion to employ the *cy pres* mechanism or not.

BNSF Railway Company v. Loos, No. 17-1042

The question presented by the petition is “[w]hether a railroad’s payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.”

While the employee taxation issue is unique to railroad workers (who pay a tax on their wage compensation under the RRTA in lieu of FICA taxes), there is a broader regulatory question lurking in the case. The parties’ certiorari briefs reveal a dispute about *Chevron* deference, a *bete noir* of the business community (and some Justices) who are interested in controlling, if not dismantling, the administrative state. As of the end of June, however, neither the Chamber of Commerce nor any of its usual compatriots had filed any briefs or otherwise indicated any interest in the case.

Dawson v. Steager, No. 17-419

The petition for certiorari presents an intergovernmental tax immunity issue affecting state employees. Specifically, the question is whether West Virginia is prohibited from exempting from state taxation the retirement benefits of its former law-enforcement officers without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service.

Following distribution and two re-lists of the petition, as well as receipt of the Solicitor General’s invited view that certiorari should be granted, the Court decided to grant certiorari to review this core dual sovereignty issue applying the non-discrimination intergovernmental immunity rule codified at 4 U.S.C. 111. The case promises to be of interest not only to state and federal workers, but also to constitutional law professors and tax mavens.

Air and Liquid Systems Corp. v. Devries, No. 17-1104

The petition for certiorari presents the following issue: “Can products-liability defendants be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute?”

The Court granted the writ after the Chamber of Commerce filed a supporting brief conveying the “concern” of American business that maritime law should effectively insulate makers of “bare metal” products (to which third parties added asbestos) against liability for asbestos-related injuries to maritime workers. In stark contrast with the Chamber’s expression of concern, the exposure to the lead plaintiff (who is now deceased) occurred six *decades* ago! Whatever the Supreme Court decides will certainly not help John DeVries.

Culbertson v. Berryhill, No. 17-773

The question presented by the petition is whether attorneys' fees subject to a 25% cap in Social Security benefits cases include only fees for representation in court or also fees for representation before the agency.

Acknowledging that it has been on both sides of the issue, the Solicitor General advised the Court that the United States would not defend the judgment of the Court of Appeals (which it had argued for below) and that the Court should grant certiorari and not support applicability of the 25% cap to both court and agency work. The promise of this case is a clarification of how the statutory cap on attorneys' fees should be applied.

IV. Additional Commentary

What comes to mind when assessing the October 2017 Term's labor and employment decisions? For me this year, it is the breathtaking neo-impressionistic work of Georges Seurat and his protege Paul Signac.²⁹ The pointillism that defines their art replicates the way this momentous term's decisions appear and thus suggests a means for looking at them with greater clarity. Standing back from each decisional dot on this term's jurisprudential canvas and looking in holistic fashion at the Court's body of labor and employment work, several impressions are revealed that bear mentioning here.

A. What first appears is an employment relationship that is so out of balance in terms of bargaining power between employers and workers that characterizing the relationship as a "contractual" one no longer seems sensible, supportable or fair. So, how should workers, employers and labor unions deal with the realities of such an imbalance of economic and social power in the employment relationship? Look to Congress, right? Legislation resulting from deliberation by elected representatives would be the preferred solution in a democracy, of course. In the short term, however, turning to a politically gerrymandered and a self-absorbed Congress does not (at least from the standpoint of workers and unions) look like a promising way to adjust the power balance between employer and employee — unless what some political observers regard as a "blue wave" turns out to be an azure tsunami in November of this year. The same goes for any solution based on the so-called "free market." Given that the imbalance of bargaining power is due in no small part to a labor market that is, in effect, rigged through anti-competitive practices³⁰ and a Court majority that has tilted the legal playing field to favor employer interests, "free market" solutions, such as self-help at the bargaining table or withholding labor on the picket line, are unlikely to be effective. That leaves the courts as a means to a more just (and consequently more productive) relationship between working people and those who employ them.

²⁹ Full disclosure: Writing this article during a summer of repeated visits to the Museum of Fine Arts in Boston (sometimes with grandchildren in tow) may have contributed to the author's putting his thoughts about the 2017 Term in an artistic context.

³⁰ The ability of employees to negotiate fair wages, for instance, has been adversely affected by no-hire, no-poach and non-compete agreements amongst competing employers that suppress wages in the labor market. And, not to be overlooked is enduring systemic gender and race discrimination in job classifications and wage rates.

But, what can the courts do about an employment relationship embodying such a gross disparity in negotiating strength between workers (or their labor unions) and employers? And, how can anyone regard employment obligations as enforceable *contract* terms when they are so clearly *not* the product of negotiations between rough bargaining equals? Return for a moment to the opening paragraphs of this article: Perhaps now is an appropriate time to consider characterizing today's employment relationship for what it is: one of economic and social imbalance that calls for some degree of fiduciary obligation either in addition to or in lieu of contractual duties. The adhesive "agreements" that the Court relied on to enforce class waivers in the three *Epic* cases are prime examples of what are emphatically *not* bargained-for mutual obligations between rough bargaining equals. Instead these so-called "agreements" are premised on the utter dependence of workers on their employers' willingness to hire or retain them. That relationship is one in which the common law would typically impose some degree of fiduciary responsibility on the party with dominant power.³¹ Even in feudal times, a lord of the manor owed a baseline duty of protection to the serfs who were tied to the manor's land and farmed it. Likewise, in ancient Biblical times "workers for hire" were owed prompt payment of wages, sustenance from the crops they grew and other duties of care and loyalty by those who hired them. *See, e.g.,* Michael Perry, "Labor Rights in the Jewish Tradition," (Jewish Labor Committee, 1993) (<http://www.jewishlaborcommittee.org/LaborRightsInTheJewishTradition.pdf>.) Suggesting that some degree of fiduciary responsibility attach to today's out-of-balance employment relationship, therefore, is not foreign to historical precedent.

Tinkering with the characterization of employment as a contractual creature would, of course, be a daunting undertaking. Virtually the entire construct of employment law, from the recently published Restatement³² to the treatment of employment rights and duties by both federal and state courts, is premised on the notion that employment is a matter of contract. But, neither would that undertaking be without modern precedent. Look at how some states have dealt with a burgeoning drug problem by creating drug courts with their own means of determining responsibility and rehabilitation. And, do not overlook the spate of specialized business courts in Delaware and elsewhere that exist, at least in part, to foster a favorable climate for business growth. Specialized employment courts with the ability to employ fiduciary principles where appropriate and accommodate worker representatives as a voice for workers are not, therefore, beyond our comprehension in returning balance to the employment relationship. But, details of how to deal with a re-characterized employment relationship are, of course, beyond the scope of this article. What is suggested here is simply that where a power imbalance is so obviously disfavoring or harming one side without justification, courts (or other decision-makers) should be able to impose some fiduciary obligation on the dominant party in order to nudge the two sides closer to roughly equal bargaining footing.

B. The second major impression revealed when one stands back from the decisional dots of the 2017 term is that the Court regards collective advocacy in a positive light and imposes no discernible limits on it when the business community acts in concerted fashion and uses its collective voice. One only has to look at the *amicus* submissions of the Chamber of Commerce to conclude that the five-Justice majority is listening carefully to the collective voice of the

³¹ *See, e.g.,* Matthew Bodie, "Employment as Fiduciary Relationship," 105 Georgetown L. J. 819 (2015); Tamar Frankel, "Fiduciary Law," 71 Calif. L. Rev. 795 (1983).

³² Restatement of the Law, Employment Law (The American Law Institute, 2015)

corporate community. But, when it comes to concerted litigation and collective advocacy by labor unions and working people, the five-Justice majority has utilized every strategy from approving class waivers in *Epic*, *Concepcion* and *Italian Colors* to eroding protection for employee concerted activities in *Janus* in order to muffle the voice of workers and their unions. No reasonable observer of this disparate treatment can miss the denial of equal protection for the First Amendment free speech and association rights of working people and their duly chosen representatives.

Is this disparate treatment of employers' and employees' right to a collective voice actionable? Assuredly, it should be, if First Amendment guarantees are to have legitimate meaning. As noted above, "speaker discrimination" may be a promising way to regard and repair this "equal voice" denial. See, M. Kagan, *supra* at p. 12, n. 14 and text. Troubling as it may be for the Court to have "weaponized" the First Amendment in *Janus*, as Justice Kagan's dissent suggests, all sides should at least have equal access to the weapon itself. That means there should be a remedy for judicial silencing of the collective voice of unions and workers, just as the Court conjured a remedy (as well as a right!) for Mark Janus and his fellow free-riders.

C. The third impression revealed by this term's decisions is the continued resilience of a partisan-inspired plan to neuter administrative agencies and thereby undermine the regulatory state. The five-Justice majority's insistent and threatening posturing about the *Chevron* doctrine looks just like a repeat performance of the Court's six-year orchestration to get rid of *Abood* and the public sector agency shop. Add to that *Encino*'s abandonment of the venerable rule interpreting FLSA coverage exemptions narrowly, and the impression about dismantling the regulatory state becomes even clearer.

But, the plot thickens a bit when one considers that *Chevron* is under a more intense attack just when openly pro-business partisans now control both the Executive Branch as well as the Congress. Having installed their own politically acceptable people in the agencies might be a reason to slow, if not halt, the attack on a doctrine that favors deference to agency interpretations of regulatory statutes. Whether that kind of political consideration will blunt the majority's open attack on judicial deference to administrative agencies remains to be seen. For the time being at least, the Court's cert grants so far for the upcoming term do not directly and openly seek to overrule *Chevron* or other judicial deference doctrines.

D. The final impression is truly a dismaying one. Looking at a vast array of decisional dots from this term and the years since Justice Alito replaced Justice O'Connor and Barack Obama became President, there appears to be an unmistakably partisan tint to the Court's labor and employment decisions.³³ To be sure, the Court majority has taken care not to nourish that impression by saying out loud that it favors one political party over the other. But, witness the partisan reaction to the *Janus* decision: The response, from the President on down, was to gloat

³³ Outside the labor and employment area, a distinct partisan hue is clearly visible in this term's decisions about removal of citizens from voter registration rolls, *Husted v. A. Philip Randolph Institute*, 584 U.S. —, 199 L. Ed. 2d —, 138 S. Ct. 1833 (2018), and outright political gerrymandering. *Gill v. Whitford*, 585 U.S. —, 200 L. Ed. 2d —, 138 S. Ct. 1916 (2018).

that by nullifying the public sector agency shop, the Court was effectively depriving the Democratic Party of union financial support just on the cusp of the 2018 mid-term elections.³⁴

While it would be naive to think that the Court is simply a non-political guardian of our Constitution and laws, the role of partisan politics - from the appointment of Justices to the persistent push to overturn *Abood* and thus do the bidding of only one segment of our political economy - is unsettling. Although the Court is unavoidably a political institution as a co-equal branch of government under the Constitution, the lengths to which its anti-regulatory majority has gone this term suggest that those Justices are not just calling balls and strikes. They are making up the playbook to favor just one team. To be sure, labor and employment law is both high stakes for workers and employers alike. And, more to the point, it is also a high intensity part of our jurisprudence that is located where employment and political partisanship seem inseparable. So, maybe some degree of partisan hue in the Court's labor and employment decisions is unavoidable. Nonetheless, the shadow of party politics over the decisional dots of the 2017 term is simply too apparent to ignore.

* * *

Finally, many in the worker and labor union community are still wringing their hands and gnashing their teeth over the 2017 term's decisions, while most in the business community are, with pretty good reason, celebrating how the Court treated employers. And, now there is a vacancy on the Court (and in the pro-employer majority.) But, "what's past is prologue."³⁵ What is now most important for workers, unions and employers alike is learning from the past in order to shape what will happen hereafter. To that end, if any lesson can be learned from the 2017 Term, it is the same one that has been preached in this space for years: ***Elections matter.*** Fragile though the right to vote may be in these fraught times, exercising that right is the surest path to personal autonomy, political equality and economic justice to which all stakeholders in the employment relationship - as well as all who are lucky enough to live in this country - should aspire.

Jonathan R. Harkavy
Cambridge, MA
July 31, 2018

³⁴ See, e.g., Alana Abramson, "The Supreme Court's Union Fees Decision Could Be a Huge Blow for Democrats," *Time* (June 29, 2018), accessed on July 30, 2018 at <http://time.com/5323537/supreme-court-janus-unions-fundraising/>.

³⁵ W. Shakespeare, *The Tempest*, Act 2, Scene 1 (ca.1610)

CHAPTER IV

ADA and FMLA

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CHAPTER IV

ADA and FMLA: Employment Rights of People with Disabilities & Employers

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Introduction – Intersection of ADA and FMLA IV-1
Basics of the ADA and FMLA..... IV-2
 Structure of the ADA..... IV-2
 Structure of the FMLA IV-5
Hot Topics in ADA & FMLA Jurisprudence IV-7
 ADA/FMLA Interplay..... IV-7
 Leave as an Accommodation IV-9
Light Duty or Job Restructuring as an Accommodation..... IV-10
Temporary Transitional Duty as a Reasonable Accommodation IV-12
Determining Essential Functions and Accommodations IV-14
Medical Documentation and Examination..... IV-14
Conclusion IV-15

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CHAPTER IV

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A. INTRODUCTION – INTERSECTION OF ADA AND FMLA

With strong bipartisan support in the early 1990s, Congress enacted, and Republican President George H. W. Bush and Democratic President Bill Clinton signed, two important laws impacting employees with disabling medical conditions. The Americans with Disabilities Act (“ADA”)¹ and the Family and Medical Leave Act (“FMLA”)² are distinct statutes that intersect in some instances when employees need leave from employment for their own health conditions or disabilities. In cases where both laws govern, an employer must provide leave under whichever statute provides the greater rights to the employee.³

Nearly 13% of Americans (1 in 8), an estimated 41 million people in the U.S. population, have a disability and the incidence is rising.⁴ People with disabilities face barriers entering the workforce as well as on the job and are disproportionately underrepresented – the rate of disability in the U.S. workforce is approximately 5.3%.⁵ In 2017, the employment rate for people with disabilities was 18.7 percent, while 65.7 percent of persons without a disability were employed.⁶ Similarly, “[t]he unemployment rate for persons with a disability was 9.2 percent in 2017, more than twice that of those with no disability (4.2 percent).”⁷ Both the ADA and FMLA aim to protect workers with serious health conditions, while balancing the needs of their employers. Like most laws, in practice they often fail to live up to their promise. Prior to 2009, the FMLA was viewed as too employee friendly. The ADA, conversely, was viewed as too employer friendly. Congress amended the ADA in an effort to balance the Act. Comparatively, the Department of Labor issued amended regulations for the FMLA, attempting the same. After nearly 10 years, neither law is completely meeting all of the objectives of either constituency.

What is certain, however, is that both laws when merged, have kicked off a “Leavolution”! Employers who do not understand these two laws will face considerable challenges and liability. Employees, too, would be well served to learn more about how these laws protect them, but also how they impose on them obligations with which they must comply to maintain protection.

¹ 42 U.S.C. § 12101, *et. seq.* (1991).

² 29 U.S.C. § 2601, *et seq.* (1993).

³ 29 C.F.R. § 825.702.

⁴ <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=1>, Cornell University Disability Statistics online resource.

⁵ Senate Committee on Health, Education, Labor and Pensions, *Fulfilling the Promise: Overcoming the Persistent Barriers to Economic Self-Sufficiency for People with Disabilities*, Majority Committee Staff Report 2 (Sept. 18, 2014).

⁶ Persons with a Disability: Labor Force Characteristics Summary, U.S. Bureau of Labor Statistics (June 21, 2018).

⁷ *Id.*

B. BASICS OF THE ADA AND FMLA

This paper will provide a basic background of the ADA and FMLA, and introduce some hotly contested legal issues at the intersection of the two statutes.

(1) Structure of the ADA

The ADA is a comprehensive civil rights law prohibiting discrimination on the basis of disability in employment, state and local government programs, public accommodations, commercial facilities, transportation, and telecommunications.⁸ Title I of the ADA, the focus of our discussion herein, prohibits discrimination in all employment practices — from application procedures, medical testing, and reasonable accommodations, to workplace policies and procedures, benefits, discipline, harassment, and termination.⁹ Title I applies to all state and local governments, as well as to private employers, employment agencies, and labor unions with 15 or more employees working 20 or more calendar weeks in the current or preceding calendar year. *Id.* The ADA only requires employers to accommodate a “known” disability.¹⁰

The ADA was designed to remove the barriers that prevent qualified individuals with disabilities from enjoying the same opportunities available to persons without disabilities.¹¹ Borrowing the definition of disability set forth in the Rehabilitation Act of 1973, the ADA defines a person with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activities.¹² This definition includes people who have a record of an impairment, even if they do not currently have a disability.¹³ Individuals with no disability who are regarded as disabled are also protected.¹⁴ Finally, the ADA also makes unlawful discrimination against a person based on that person’s association with a person with a disability.¹⁵

Excluded from the definition of disability under the act are: the illegal use of prescription or other drugs, psychoactive substance use disorders resulting from current illegal use of drugs, certain sexual disorders, compulsive gambling, kleptomania and pyromania.¹⁶ In addition, despite being otherwise qualified, an individual with a disability may not be protected by the ADA if she or he poses a “direct threat” to the health or safety of others in the workplace.¹⁷

⁸ 42 U.S.C. § 12101, *et. seq.*

⁹ 42 U.S.C. § 12111, *et. seq.*

¹⁰ 42 U.S.C. § 12112 (b)(5)(A).

¹¹ 42 U.S.C. § 12101.

¹² Compare ADA, 42 U.S.C. § 12102(2), and 29 C.F.R. § 1630.2(g)(1), with Rehabilitation Act of 1973, 93 P.L. 112; 87 Stat. 355 (1973) (current version at 29 USCS § 705). See also ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008) (ADA’s definition of disability intended to track definition set forth in original text of Rehabilitation Act of 1973).

¹³ 42 U.S.C. § 12102(1)(b).

¹⁴ 42 U.S.C. § 12102(1)(c).

¹⁵ 42 U.S.C. § 12112(b)(4).

¹⁶ 42 U.S.C. § 12114; 29 C.F.R. § 1630.3.

¹⁷ 42 U.S.C. § 12113; 29 C.F.R. § 1630.15(b)(2).

Under the ADA, a plaintiff must establish a *prima facie* case of discriminatory adverse action, which requires evidence demonstrating that (1) he was a member of the statutorily-protected class; (2) he was discharged or faced another adverse employment action; (3) at the time of the adverse employment action, plaintiff was performing his job at a level that met his employer’s legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.¹⁸

Reasonable Accommodations

A reasonable accommodation is any modification, adjustment, or change to the work environment that will enable a qualified person with a disability to perform the job or to access the benefits available to similarly situated employees who do not have a disability.¹⁹ Once an employee with a disability requests a reasonable accommodation, the ADA requires employers to make an “individualized assessment” of an employee’s request.²⁰ Following an employee’s request for an accommodation pursuant to the ADA, an employer can request medical documentation substantiating the employee’s need for an accommodation if the disability (or disabilities) and the nature of the employee’s physical limitations are not obvious.²¹ Other employees may receive information about a person’s disability only on a “need-to-know” basis.²²

If an employer can demonstrate that a particular accommodation would cause an undue financial hardship, the employer does not have to provide that accommodation.²³ However, an employer may establish undue financial hardship only after engaging the employee in a meaningful dialogue regarding the requested accommodation or proposing an alternative accommodation that would not be a hardship.²⁴

Title I of the ADA requires an employer to:

- engage both the employee²⁵ and his/her doctor in the interactive process;²⁶

¹⁸ Propst v. HWS Co., 148 F. Supp. 3d 506, 524, 2015 U.S. Dist. LEXIS 163717, *44-45 (*Citing Fields*, 493 Fed. App’x at 375-76 n. 4; *see also Ennis*, 53 F.3d at 58-59).

¹⁹ 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o).

²⁰ *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 199 (2002), *superseded by statute*, ADA AA, Pub. L. 110-325, 122 Stat. 3553 (2008) (the ADA AA does not abrogate the employer’s duty enunciated in *Toyota Motor Mfg. v. Williams* to make an individualized assessment of a requested reasonable accommodation); *see generally* 29 C.F.R. § 1630.2(o)(3).

²¹ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act. No. 915.002, Question 6 (October 17, 2002), *available at* <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited October 1, 2018).

²² EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act No. 915.002, Question 42 (October 17, 2002), *available at* <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited October 1, 2018).

²³ 42 U.S.C. § 12112(b)(5)(A).

²⁴ 29 C.F.R. § 1630.2(o)(3); *see also* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act No. 915.002, Question 5 and 9 (October 17, 2002), *available at* <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited October 1, 2018).

²⁵ *Wiederhold v. Sears, Roebuck and Co.*, 888 F. Supp. 2d 1065 (D. Or. 2012); 142 A.L.R. Fed. 311, *2. Under the ADA, an employer has “a good-faith duty to engage with [its employee] in an interactive process to identify a reasonable accommodation.” *Id.* at 581 (internal quotation marks omitted). *Whitney v. Stephenson*, No. 14-2079 (4th Cir. 2016)

- consider the essential functions of the position (as compared to non-essential functions and simply *how* the employer ordinarily goes about doing the job);
- consider possible ways the employee can perform the essential functions;
- consider which of those are reasonable; and
- consider what kind of hardship the employer will suffer by providing the accommodations.

From the employer’s perspective, this is a lot to consider, in a short period of time, only then to have lawyers, the EEOC, and federal judges critique the analysis. From the employee’s perspective, there is no guarantee that her proposed accommodation will be acceptable or that any accommodation will be considered reasonable or ultimately that any will be provided. If an employer fails to engage in the process, elements of a failure to accommodate claim that the plaintiff must prove include: (1) the employee had a disability within the meaning of the statute; (2) her employer had notice of the disability; (3) the employee could perform the essential functions of her job with a reasonable accommodation; and (4) her employer declined to make such an accommodation.²⁷ Thus, an employer who waits, without any understanding of the ADA and how it works, is at a decisive disadvantage in terms of compliance.

For an employee, she has the burden to demonstrate that a reasonable accommodation exists, which does not cause undue harm or cost her employer too much, that would enable her to perform the essential functions of her job. She also has to disclose personal medical information, and in some instances, sign a release to allow her employer to speak directly to her doctor, or undergo an intrusive examination by a doctor of the employer’s choosing. An employee is really left to the mercy of her employer, who may not understand or may associate stigma with her condition. She must make the case that her employer should take a risk, or hold her job, or have faith that her treatment or the accommodation will improve, facilitate, or enable her performance. If the employer fails to provide a reasonable accommodation that will enable her to carry out her duties, she must file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in a short time period -- within 180 days of any denial of an accommodation request or adverse employment action.

If she prevails, possible remedies include: injunctive relief (e.g. getting the job back or the promotion that was denied); damages, including back pay and punitive damages, if there is proof of intentional discrimination; and attorney’s fees.

Practice Tips

- Employers must make the job application process accessible for anyone who wishes to apply. Employees can ask for accommodations during the application process.
- A job application cannot ask about: illnesses, medication or medical treatment, substance abuse, disabilities, injuries or Workers Compensation.
- A potential employer cannot: ask whether a person has a disability, ask about the nature or severity of

²⁶ 29 C.F.R. § 1630.2(o)(3) (2012). Although the regulation uses the words "may be necessary," rather than mandatory terms, courts have consistently held that the interactive process is mandatory. *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007) (citing numerous cases from other circuits).

²⁷ See *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013). *Whitney v. Stephenson*, No. 14-2079 (4th Cir. 2016).

a disability, ask about use of medication, ask if someone has ever been in a hospital, or require a medical exam before making a job offer.

- A job application can ask whether an employee can perform the essential functions of the job, with or without a reasonable accommodation.
- An employer may select the most qualified applicant.
- The employer does not have to give preference to a qualified applicant with a disability.
- Once a job offer has been made, an employer is permitted to require a medical exam before an employee begins employment duties – as long as ALL employees are subjected to the examination and it is related to specific job functions.
- Once an employee is hired, an employer must provide reasonable accommodations to allow her/him to perform the essential job duties.

(2) Structure of the FMLA

The Family and Medical Leave Act (“FMLA”) mandates that covered employers provide eligible employees with up to 12 weeks of unpaid, job-protected leave for certain health-related and personal events; maintain their group health insurance benefits, and restore them to their same or an equivalent position upon their return to work.²⁸ The purpose of the FMLA is “to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.”²⁹ Persons sharing an “in loco parentis” relationship are covered under the act.³⁰ The FMLA also authorizes leave on an intermittent basis or working a reduced schedule under certain circumstances.³¹

Employers covered by the provisions of the FMLA include private employers with 50 or more employees employed at worksites within a 75 mile radius who are employed 20 or more weeks in the current or preceding calendar year.³² All public agency employers are covered.³³

Employees are eligible for FMLA leave if they have worked at least 12 months and 1250 hours in the previous 12 months for a covered employer.³⁴ An employee can request leave due to her or his own serious health condition or the serious health condition of an immediate family member.³⁵ “Serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by health care provider, *e.g., inter alia*, a period of incapacity or treatment for chronic conditions,

²⁸ 29 U.S.C. § 2601, *et. seq.*

²⁹ 29 U.S.C. § 2601(b)(2); *see also* 29 C.F.R. § 825.112 (a).

³⁰ *See* 29 C.F.R. § 825.122.

³¹ 29 C.F.R. § 825.203.

³² 29 U.S.C. § 2611(4)(a)(i), 29 U.S.C. § 2611(2)(B)(ii); *see also* 29 C.F.R. § 825.104(a), 29 C.F.R. § 825.105, 29 C.F.R. § 825.110(a)(3).

³³ *See* 29 USCS § 2611(4)(A)(iii), *citing* 29 U.S.C. 203(x) (“Public agency” means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States, including the United States Postal Service and Postal Rate Commission, a State, or a political subdivision of a State; or any interstate governmental agency).

³⁴ 29 U.S.C. § 2611(2).

³⁵ 29 U.S.C. § 2612(a)(1)(C) & (D); *see also* 29 C.F.R. § 825.110.

absences to receive multiple treatments that would likely result in incapacity if not treated, or substance abuse treatment if it is continuing treatment.³⁶ An employee's own serious health condition must be significant enough to render the employee unable to work.³⁷ Under the FMLA, an employer can request medical certification from the employee's health care provider to substantiate the need for the requested leave.³⁸

The FMLA exempts certain "key employees" from the guarantee that they will return to the same or equivalent position.³⁹ A "key employee" is a "salaried FMLA-eligible employee who is among the highest paid 10 percent of all employees employed by the employer within 75 miles."⁴⁰ Generally speaking, key employees are likely to be upper management personnel, corporate officers, and other high-ranking employees within the employer's business. The FMLA also grants educational institutions greater control over the length and nature of leave granted to "school employees."⁴¹ For instance, if the employee requests a period of leave within a few weeks of the end of the term, the educational institution will likely be able to insist that the employee's leave continue through the end of the term.⁴²

The responsibilities of employers under the Act include: posting information about the requirements and entitlements of the FMLA and providing additional written notice directly to employees.⁴³ The responsibilities of employees under the FMLA include providing at least verbal notice sufficient to inform the employer that he or she needs FMLA-qualifying leave, including the approximate timing and duration.⁴⁴ Specifically, an employee must give an employer 30 days notice if the need for leave is foreseeable.⁴⁵ Otherwise, an employee must give notice "as soon as practicable," which is generally one or two business days after the need is known.⁴⁶

If 30 days notice (or a shorter period of reasonable notice depending on when the employee learned of the need for foreseeable leave) is not given, an employer can delay granting the leave for the same amount of time the employee delayed giving notice.⁴⁷ However, the employer has the burden to prove the employee had actual notice of the FMLA notice requirements, which can be satisfied, in part, by proper posting.⁴⁸

Employees receiving disability or workers' compensation benefits are not on "unpaid" leave, but are receiving a portion of their regular pay – because the leave is "paid," an employer cannot require that

³⁶ 29 U.S.C. § 2611(11); *see also* 29 CFR § 825.113, 29 C.F.R. § 115.

³⁷ 29 U.S.C. § 2612(D).

³⁸ 29 U.S.C. § 2613(a).

³⁹ *See* 29 C.F.R. § 825.217(a).

⁴⁰ *Id.*

⁴¹ 29 U.S.C. § 2618.

⁴² *See* 29 U.S.C. § 2618(d).

⁴³ 29 U.S.C. § 2619.

⁴⁴ 29 C.F.R. § 825.302.

⁴⁵ 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302.

⁴⁶ 29 C.F.R. § 825.302(b); 29 C.F.R. § 825.303.

⁴⁷ 29 C.F.R. § 825.304.

⁴⁸ *Id.*

the employee use any accrued paid leave during this period.⁴⁹ Use of paid leave to “true-up” the pay substitution benefit must be by agreement. Thus, an employee may return to work with an entire bank of accrued, paid leave intact, because the other benefits ran concurrently with the FMLA entitlement.⁵⁰

In order to allege an FMLA violation, a plaintiff may allege *interference* with the exercise of FMLA rights or retaliation for exercising these rights.⁵¹ Section 2615 of the FMLA makes it “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.”⁵² An employee may present a *prima facie* case of *retaliation* by showing that (1) he engaged in activity protected by the FMLA; (2) his employer took adverse action against him; and (3) evidence exists which implies that the adverse action was causally connected to plaintiff’s protected activity.⁵³ If the employee does, then the employer will have to advance a legitimate business reason for the termination that is not the FMLA absence. An employer’s advancement of a legitimate business reason is, of course, subject to challenge by the employee who will be provided an opportunity to show pretext.

The Department of Labor (“DOL”) is responsible for enforcing the FMLA.⁵⁴ Unlike the ADA, the FMLA has no administrative exhaustion requirement, and an employee can either file with the Department of Labor or go directly to federal court.⁵⁵ A civil complaint must be filed within two years of the alleged violation, or within three years if the violation of the FMLA was willful.⁵⁶ Filing with the DOL, however, does not toll the statute of limitations for filing in court. Employees may bring suit against their employer for money damages, attorney’s fees and/or equitable relief, including in some actions brought against state or municipal employers by their employees, for violations of the FMLA.⁵⁷

C. HOT TOPICS IN ADA & FMLA JURISPRUDENCE

1. ADA/FMLA INTERPLAY

In cases where both the ADA and FMLA apply to a particular employee’s circumstance, such as when an employee requests leave from work due to a disability or medical condition, it could be considered a reasonable accommodation under the ADA or an FMLA leave, and the leave could be

⁴⁹ 29 C.F.R. § 825.207(e).

⁵⁰ *See Id.*

⁵¹ *Dotson v. Pfizer*, 558 F.3d 284, 294 (4th Cir. 2009).

⁵² 29 U.S.C. § 2615(a)(1).

⁵³ *Propst v. HWS Co.*, 148 F. Supp. 3d 506, 524, 2015 U.S. Dist. LEXIS 163717, *44-45 (*Citing Ranade*, 581 Fed. App’x at 183; *Mercer v. Arc of Prince Georges Cnty, Inc.*, 532 Fed. App’x 392, 399 (4th Cir. 2013); *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998)).

⁵⁴ 29 U.S.C. § 2617(b).

⁵⁵ *See* 29 U.S.C. § 2617; 29 C.F.R. § 825.400.

⁵⁶ *See* 29 U.S.C. § 2617; 29 C.F.R. § 825.401.

⁵⁷ *See* 29 U.S.C. § 2617; 29 C.F.R. § 825.400(c). *See also Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (finding that state employees have a cause of action against state for money damages).

intermittent or continuous, paid or unpaid. In cases where both laws apply, the employer must provide leave under whichever statute provides the greater rights to employees.⁵⁸

Practice Tip

Some disability-related reasons for leave may include: obtaining medical treatment, rehabilitation services, or physical or occupational therapy; recuperating from an illness or an episodic manifestation of a disability; obtaining repairs on assistive technology, such as wheelchairs, hearing aids, or prosthetic devices; or training a service animal or receiving training in sign language, Braille, etc.

If an employee qualifies for FMLA leave with a covered employer, the employee's right to leave is absolute and he or she must be granted the requested medical leave.⁵⁹ Unlike the ADA, the FMLA does not allow the employer to take the "reasonableness" of the requested leave into account.⁶⁰ An employee can also request that FMLA leave be extended beyond 12 weeks as a accommodation under the ADA, but this request must be reasonable.⁶¹ Leave under the ADA requires an individualized assessment.⁶² Factors and relevant criteria in determining the reasonableness of a leave request (*e.g.*, beyond 12 weeks) include: the length of requested leave, whether maintaining a position during a leave would constitute an undue hardship to the employer, the cost of the leave, overall financial resources of the covered entity, and the impact of the leave on the operation of the facility.⁶³ One court has held that there is no "bright line rule for determining a maximum duration of leave that can constitute a reasonable accommodation."⁶⁴ Under the ADA, the employer is also allowed to offer a different accommodation than leave as long as it is effective (this could include temporary reassignment or reduced hours).⁶⁵

Some key differences between the two laws pertain to available remedies. For example, the 11th Amendment bars suits for money damages in federal courts under Title I of the ADA by state employees

⁵⁸ 29 C.F.R. § 825.702.

⁵⁹ See 29 U.S.C. § 2612(a)(1).

⁶⁰ See *Id.*

⁶¹ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act. No. 915.002, Question 20 (October 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited May 6, 2009).

⁶² *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 199 (2002), *superseded by statute*, ADA AA, Pub. L. 110-325, 122 Stat. 3553 (2008) (the ADA AA does not abrogate the employer's duty enunciated in *Toyota Motor Mfg. v. Williams* to make an individualized assessment of a requested reasonable accommodation); see generally 29 C.F.R. § 1630.2(o)(3).

⁶³ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act No. 915.002, (October 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited May 6, 2009).

⁶⁴ *Cleveland v. FedEx*, 83 Fed. Appx. 74; 2003 U.S. App. LEXIS 24786 (2003).

⁶⁵ See generally 29 C.F.R. § 1630.2(o).

against the state, but permits suits for injunctive relief.⁶⁶ By contrast, money damages are available in federal court in suits by state employees against the state under the FMLA.⁶⁷

Other differences are definitional. For example, conditions such as a broken leg or pregnancy may constitute a “serious health condition” under the FMLA but not a disability under the ADA because they are not impairments or are not substantially limiting. On the other hand, a record of a “serious health condition” does not necessarily mean a record of an ADA disability, which must be a substantially limiting impairment. An employer does not violate the ADA’s protections of employee’s medical records by asking for medical certification under the FMLA, as long as the request is limited to information about the particular serious health condition for which the employee is seeking FMLA leave.⁶⁸

2. Leave as an Accommodation

A “job-protected leave” is time an employee takes away from work during which the employer must hold open the employee’s position. Employer leave policies that are finite, like strict, inflexible working hours for many positions, are unlawful. Limiting time off to earned paid days or even to the period mandated by the FMLA may also be unlawful. An employee who has exhausted her 12 weeks of unpaid leave under the FMLA (and her paid leave, which ran concurrently), may still be entitled to take additional leave under the ADA.

Title I of the ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual” in the terms, conditions, and privileges of employment.⁶⁹ Discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” unless the employer can demonstrate that the accommodation would represent an “undue hardship on the operation of the business” of the employer. 42 U.S.C. § 12112(b)(5)(A). Employers must account for employees with disabilities, who can perform the essential job functions, with some modification to policies, procedures, work environment or non-essential tasks.

Reasonable accommodations after a job-protected leave, or in the alternative to leave, may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modification of examinations, and/or the provision of qualified readers or interpreters.⁷⁰ Another common accommodation is a leave of absence to enable an employee to receive treatment for a disabling condition; federal regulations specify

⁶⁶ *Board of Trustees University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

⁶⁷ *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

⁶⁸ See EEOC Enforcement Guidance: The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (July 6, 2000), available at <http://www.eeoc.gov/policy/docs/fmlaada.html> (last visited May 21, 2009).

⁶⁹ 42 U.S.C. § 12112(a).

⁷⁰ See 42 U.S.C. § 12111(9)(B); see also 29 C.F.R. § 1630 App., 1630.2(o).

that an accommodation could include “permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment.”⁷¹

Employees may not be entitled to leave as a reasonable accommodation, if the leave is unworkable. The leave need not be taken altogether, and may be intermittent, but it has to work. The employee must exhaust all applicable job protected leaves, such as unpaid FMLA leave, before the employer must consider additional leave as an accommodation. All leave is not necessarily an accommodation, e.g., if it is provided to all employees. Moreover, the ADA does not account for leave already taken in the face of a current request – employers, and eventually courts, must determine whether a request for leave at a particular time, in the particular circumstances, is tolerable to the employer at that time.

D. LIGHT DUTY OR JOB RESTRUCTURING AS AN ACCOMMODATION

The phrase “job restructuring,” as an example Congress gives for an accommodation, lends itself to much debate. Job restructuring sounds like Congress meant large shifts in an employer’s job. But we also know that courts steadfastly hold that an accommodation is provided to permit the employee to perform all essential functions, not remove them.

An employer is not required to create a new job or strip a current job of its principal duties to accommodate a disabled employee. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 33 A.D. Cas. (BNA) 1113 (7th Cir. 2017); *Audette v. Town of Plymouth, MA*, 858 F.3d 13, 33 A.D. Cas. (BNA) 765, 130 Fair Empl. Prac. Cas. (BNA) 214 (1st Cir. 2017). Nor is an employer is not required to create or leave an employee in a permanent light duty position. *Sanford v. Thor Industries, Inc.*, 286 F. Supp. 3d 938, 2018 Fair Empl. Prac. Cas. (BNA) 45178 (N.D. Ind. 2018) (An employer need not create a new job or strip a current job of its principal duties to accommodate a disabled employee; nor is there any duty under ADA to reassign an employee to a permanent light duty position.). *Searls v. Johns Hopkins Hospital*, 158 F. Supp. 3d 427, 32 A.D. Cas. (BNA) 885 (D. Md. 2016) (A reasonable accommodation under the ADA or the Rehabilitation Act does not require an employer to reallocate essential job functions or assign an employee permanent light duty; the ADA simply does not require an employer to hire an additional person to perform an essential function of a disabled employee's position.).

So, what, then, does “job restructuring” mean. First, it means reassignment of non-essential functions. A reasonable accommodation under the ADA may include shifting marginal duties to other employees who can easily perform them; however, shifting an employee’s essential functions to other

⁷¹ See 29 C.F.R. § 1630 App., 1630.2(o); see also *Humphrey v. Mem’l Hosp. Ass’n*, 239 F.3d 1128, 1135-36 (9th Cir. 2001) (“We have held that where a leave of absence would reasonably accommodate an employee’s disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA.”); *Cehrs v. Northeast Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 783 (6th Cir. 1998); *Criado v. IBM*, 145 F.3d 437, 443 (1st Cir. 1998); *Rascon v. US West Comm’ns, Inc.*, 143 F.3d 1324, 1333 (10th Cir. 1998). *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017) (two months of leave is not a reasonable accommodation). *But*, see *US Airways v. Barnett*, 535 US 391 (2002) (reasonableness is rebuttable).

employees is not a reasonable accommodation.⁷² To provide a reasonable accommodation under the ADA, an employer may be required to modify the responsibilities of disabled employee's existing job or transfer the employee to a vacant position with different responsibilities; however, the ADA does not require employers to accommodate individuals by shifting an essential job function onto others.⁷³ While job restructuring may be a reasonable accommodation of disability in appropriate circumstances, such an accommodation only applies to restructuring non-essential duties or marginal functions of job.⁷⁴ While the ADA requires job restructuring of non-essential duties as a reasonable accommodation in appropriate circumstances, the ADA does not demand that an employer exempt a disabled employee from an essential function of the job as an accommodation.⁷⁵

The second instance where "job restructuring" may be viewed as an accommodation is when the employee works with a pool of employees where collectively, they have to get the job done. If all things being equal, there are some machines the employee can operate with their disability and some they cannot, then an employer may be required to restructure. For example, in *E.E.O.C. v. United Parcel Services, Inc.*,⁷⁶ a driver was excluded from being able to drive a DOT licensed truck because he had monocular vision. The court found that the company used drivers interchangeably and could easily task him with driving lighter trucks that did not have the DOT requirements against monocular vision. It found that UPS's manual called for making change in usual way of doing things so that qualified person with disability could participate, delivery service had complete flexibility in designing routes and assigning trucks, and could move vehicles around to accommodate disabled employees. Similarly, in *Colfor Manufacturing, Inc. v. Ohio Civil Rights Commission*,⁷⁷ the court found an accommodation in the form of job restructuring should have occurred because the employee could perform all of the essential functions of their job – a forge press operator. The employee's restriction was to avoid hot presses. The employer had accommodated work restrictions at employee's prior work site where he operated a cold press, witnesses testified that cold press work was performed at new work site, and plant manager testified that he would have tried to accommodate employee's restriction of no hot jobs.

⁷² *Asma Farha, M.D. v. Cogent Healthcare of Michigan, P.C.*, 164 F. Supp. 3d 974, 32 A.D. Cas. (BNA) 992 (E.D. Mich. 2016)

⁷³ *Siewertsen v. Worthington Steel Co.*, 134 F. Supp. 3d 1091, 32 A.D. Cas. (BNA) 590, 92 Fed. R. Serv. 3d 1233 (N.D. Ohio 2015); *Bare v. Federal Exp. Corp.*, 886 F. Supp. 2d 600, 26 A.D. Cas. (BNA) 1711, 83 Fed. R. Serv. 3d 380 (N.D. Ohio 2012).

⁷⁴ *Knutson v. Schwan's Home Service, Inc.*, 870 F. Supp. 2d 685 (D. Minn. 2012) (Under the ADA, reallocating the marginal functions of a job may be a reasonable accommodation for a disabled employee; however, an employer need not reallocate or eliminate the essential functions of a job to accommodate a disabled employee.); *Jones v. Allstate Insurance Co.*, 281 F. Supp. 3d 1211, 26 Wage & Hour Cas. 2d (BNA) 1508 (N.D. Ala. 2016), subsequently aff'd, 707 Fed. Appx. 641, 2017 A.D. Cas. (BNA) 313008, 27 Wage & Hour Cas. 2d (BNA) 802 (11th Cir. 2017) (While the ADA does not require the employer to eliminate an essential function of the plaintiff's job, the ADA may require an employer to restructure a particular job by altering or eliminating some of its marginal functions.).

⁷⁵ *Anderson v. ProCopy Technologies, Inc.*, 23 F. Supp. 3d 880, 29 A.D. Cas. (BNA) 1748 (S.D. Ohio 2014); *United States EEOC v AIC Sec. Investigations* (1995, CA7 Ill) 55 F3d 1276, 9 ADD 813, 4 AD Cas. 693, 66 CCH EPD P 43555, 32 FR Serv. 3d 61, 131 ALR Fed 665, reh, en banc, den (7th Cir. 1995) (employer required to restructure the job by eliminating certain physical requirements of the job -- removing non-essential elements of the position.).

⁷⁶ 149 F. Supp. 2d 1115, 11 A.D. Cas. (BNA) 497 (N.D. Cal. 2000).

⁷⁷ 2017-Ohio-9402, 102 N.E.3d 1157 (Ohio Ct. App. 7th Dist. Carroll County 2017).

Extreme care, however, should be had to make sure that the “restructuring” does not result in others having to work longer or harder or under more oppressive circumstances. Under the ADA, for purposes of failure to accommodate claim, accommodation that would cause other employees to work harder, longer, or be deprived of opportunities is not mandated.⁷⁸

The third instance concerns *HOW* the work is done. For example, telework is certainly contemplated as a viable accommodation under Rehabilitation Act or ADA in certain circumstances.⁷⁹

Of course, if the employer has existing light duty jobs -- as many employers do -- it may have to consider *reassigning* the employee with a disability (as discussed below) to one of those jobs if that is needed as a reasonable accommodation. The EEOC has taken the position that “if an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position.” EEOC Technical Assistance Manual, Ch. 9.4.

E. TEMPORARY TRANSITIONAL DUTY AS A REASONABLE ACCOMMODATION

One common question is whether an employer can create a light duty job for only a temporary period. The EEOC has stated that “an employer is free to determine that a light duty position will be temporary rather than permanent.”⁸⁰ In *Complainant v. McDonald*,⁸¹ the EEOC held that although the Veterans Administration put the employee in a temporary light duty job because of his lifting restrictions, it was not required “to transform its temporary light or limited duty assignments into permanent jobs to accommodate an employee's disability.” Courts have agreed with this position. For example, in *Frazier-White v. Gee*,⁸² the court held that the employer was not required to indefinitely extend the employee's temporary light duty assignment as an “inactive records desk clerk” where she continued to be unable to perform her security-related duties at the sheriff's detention center because of an injury. Likewise, in *Meade v. AT&T Corp.*,⁸³ the court held that contrary to the employee's argument, the employer was not required to indefinitely continue his temporary light-duty position where could not perform the essential functions of his facilities job due to his inability to climb and work outside in the cold. The court stated that “an employer need not create a permanent light-duty” or shift essential functions to another employee. In *Wardia v. Justice and Public Safety Cabinet Department of Juvenile Justice*,⁸⁴ the court held that the employer was not required to convert temporary light-duty control room positions in a prison into permanent positions as an accommodation. The court rejected the plaintiff's argument that this was required because the employer may have done this in the past for an employee for sympathetic or administrative reasons. In *Ivey v. First Quality Retail Service*,⁸⁵ the court held that although the employer offered the employee a temporary light duty job in which she did not have to perform her manual diaper packaging tasks, it was not required to provide her with a permanent light duty position because this

⁷⁸ *Gesinger v. Burwell*, 210 F. Supp. 3d 1177, 2016 A.D. Cas. (BNA) 322168 (D.S.D. 2016).

⁷⁹ *Merrill v. McCarthy*, 184 F. Supp. 3d 221 (E.D. N.C. 2016).

⁸⁰ EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 22.

⁸¹ (VA), 2015 EEOPUB LEXIS 198 (EEOC 2015).

⁸² 2016 U.S. App. LEXIS 6318 (11th Cir. 2016).

⁸³ 2016 U.S. App. LEXIS 14256 (6th Cir. 2016) (unpublished).

⁸⁴ 2013 U.S. App. LEXIS 238 (6th Cir. 2013) (unpublished).

⁸⁵ 2012 U.S. App. LEXIS 19860 (11th Cir. 2012) (unpublished).

would eliminate her essential functions. In *Graves v. Finch Pruyn & Co.*,⁸⁶ the court held that since the ADA does not require creating a new sedentary position for an employee with a mobility impairment, it also does not require the employer to keep the employee in that position for any longer than it chooses. Likewise, in *Johns v. Laidlaw Education Services*,⁸⁷ the court noted that an employer “does not have to convert temporary positions into permanent ones.” In *Buskirk v. Apollo Metals*,⁸⁸ the court noted that an employer is not “required to transform a temporary light duty position into a permanent position.”

In *Beaver v. Titan Wheel International*,⁸⁹ the plaintiff claimed that he was permanently reassigned to a lighter wheel assembly job because of his leg amputation, while the employer claimed that the assignment was only temporary. Although the court stated that it would not punish an employer for doing a good deed such as a temporary placement, the facts indicated that the assignment was not clearly temporary. Specifically, the court noted that the plaintiff had been assigned to the lighter job for nearly 1-1/2 years, and “there were no meaningful discussions” between the employer and the employee as to whether the new job was temporary or permanent. Therefore, the employer lost its motion for summary judgment on this point. Accordingly, if an employer wants the light duty job to be temporary, it should make this fact clear during the interactive process.

Along these lines, some employers limit the period of light duty jobs to the employee’s “maximum medical improvement” or limit the jobs to employees who eventually will be able to return to their jobs. Employers have a good argument that this practice is lawful since the employer did not have to even create the positions at all. For example, in *Smith v. Global Staffing*,⁹⁰ the court seemed to suggest that the employer did not violate the ADA by creating a modified duty job for the employee that lasted until his maximum medical improvement and resolution of his workers’ compensation issues. In *Ivey v. First Quality Retail Service*,⁹¹ the court held that it did not violate the ADA to create a light duty job on a temporary basis to “employees with work-related injuries who were expected to recover.” In *Delgado v. Certified Grocers Midwest, Inc.*,⁹² the court disagreed with the plaintiff that the employer’s allowing him to work in a light-duty position for longer than the contractual requirement was evidence that the position was not “temporary.” The court noted that it would not “punish” an employer for maintaining a “flexible rehabilitation program” and for often allowing employees to remain on light duty for “as long as they were reasonably expected to fully recuperate.” In *Collins v. Yellow Freight System*,⁹³ the Court suggested that limiting a modified work program to employees who were “temporarily” disabled from an on-the job injury does not violate the law. In this case, the employee had a permanent, non-work related back injury.

⁸⁶ 457 F.3d 181 (2d Cir. 2006).

⁸⁷ 2006 U.S. App. LEXIS 25513 (7th Cir. 2006) (unpublished).

⁸⁸ 307 F.3d 160 (3d Cir. 2002).

⁸⁹ 2001 U.S. App. LEXIS 7634 (7th Cir. 2001) (unpublished).

⁹⁰ 621 Fed. Appx. 899 (10th Cir. 2015).

⁹¹ 2012 U.S. App. LEXIS 19860 (11th Cir. 2012) (unpublished).

⁹² 2008 U.S. App. LEXIS 13497 (7th Cir. 2008) (unpublished).

⁹³ 2004 U.S. App. LEXIS 6158 (6th Cir. 2004) (unpublished).

F. DETERMINING ESSENTIAL FUNCTIONS AND ACCOMMODATIONS

When the U.S. Court of Appeals for the 4th Circuit issued its decision in *Stephenson v. Pfizer, Inc.*,⁹⁴ many on the employer defense side who follow ADA cases cringed. A pharmaceutical sales person, who spent almost the entirety of her 10 hour workdays outside of her home office traveling and meeting with physicians in their practices, disputed that driving was an essential function of her job. Instead, she argued, the ability to travel was the essential function. She argued she was denied any consideration of alternative ways in which she could accomplish the essential functions. While most all of her colleagues drove themselves from appointment to appointment, as Whitney also had done, she argued the ADA permitted her to explore how she traveled, and her employer was required to consider alternatives. To be sure, many alternatives may have been cost prohibitive. But since the employer put up no evidence to show what those costs were, or that they even considered them, the case was remanded for a trial to permit the jury to decide what the essential functions were and whether any of alternatives needed to have been offered or whether the undue burden or costs they would impose ruled them all out for consideration.

Why did employer-side ADA practitioners cringe? Because on the surface, it seems an almost certainty that driving is an essential function of a traveling pharmaceutical sales representative. And yet, after years of litigation, briefing, and reflection, the Court decided perhaps not. Perhaps the employer should have thought about the functions from a different angle. Perhaps the employer acted too hastily. What is clear is that employers should, and courts typically will, conduct a fact-specific inquiry into precisely which job functions are truly essential to the employee's position.

G. MEDICAL DOCUMENTATION AND EXAMINATIONS

When an employee requests a reasonable accommodation or modification under the ADA, only if the employee's disability and/or the need for accommodation is not obvious, may the employer ask the individual for reasonable documentation about his/her disability and functional limitations.⁹⁵ "When an employee seeks leave as a reasonable accommodation, an employer's request for documentation about disability and the need for leave may overlap with the certification requirements of the Family and Medical Leave Act (FMLA)."⁹⁶ Under the FMLA, employers can require medical certification of an employee's "serious health condition" or that of a family member.⁹⁷ Typically, an employer should request documentation within five (5) days of being notified of the need for leave and the employee must provide documentation within fifteen (15) business days.⁹⁸ Although deadlines accompany the medical documentation requirements, courts have required something along the lines of an interactive process (seven days to cure deficiencies)⁹⁹ where an employee misses the deadline or initially provides inadequate or insufficient information. Where the court "...determined the note was not acceptable, [employee] had

⁹⁴ 641 Fed. App'x 214 (4th Cir. 2015).

⁹⁵ 29 C.F.R. pt. 1630 app. 1630.9 (1997); see also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7191, 7193 (1995); EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 22-23, 8 FEP Manual (BNA) 405:7461, 7472-73 (1997) (articulates legal standard under which employer may request documentation for disabilities generally).

⁹⁶ Id.; 29 C.F.R. 825.305-.306, 825.310-.311 (1997).

⁹⁷ 29 C.F.R. § 825.305(a).

⁹⁸ 29 C.F.R. § 825.305(b).

⁹⁹ 29 C.F.R. § 825.305(c).

the right to cure the deficiency and attempt to meet the handbook requirements.”¹⁰⁰ An employee’s failure to comply may result in a denial of leave, or a postponement or delay in approval.

Practice Tips

- Employers must make the job application process accessible for anyone who wishes to apply. Employees can ask for accommodations during the application process.
- A job application cannot ask about: illnesses, medication or medical treatment, substance abuse, disabilities, injuries or Workers Compensation.
- A potential employer cannot: ask whether a person has a disability, ask about the nature or severity of a disability, ask about use of medication, ask if someone has ever been in a hospital, or require a medical exam before making a job offer.
- A job application can ask whether an employee can perform the essential functions of the job, with or without a reasonable accommodation.
- An employer may select the most qualified applicant.
- The employer does not have to give preference to a qualified applicant with a disability.
- Once a job offer has been made, an employer is permitted to require a medical exam before an employee begins employment duties – as long as ALL employees are subjected to the examination and it is related to specific job functions.
- Once an employee is hired, an employer must provide reasonable accommodations to allow her/him to perform the essential job duties.

H. CONCLUSION

Employers and employees should be mindful of the requirements of both the ADA and the FMLA when leave for a worker’s own health condition is needed or requested. Employers should have adequate posting of all requirements and clear procedures, and employees should take care to follow any required documentation and processes. When in doubt, obtaining legal advice early and often is always a good idea!

¹⁰⁰ *Krenzke v. Alexandria Motor Cars, Inc.*, 289 F. App’x 629, 633 (4th Cir. 2008) (citing *Miller v. AT & T Corp.*, 250 F.3d 820, 835 (4th Cir. 2001) and 29 C.F.R. § 825.305(d)).

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CHAPTER V

“Time Up” and “#MeToo” – Considerations of the Benefits and Ethics of an Early Private Settlement that Avoids Litigation and Public Defender

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CHAPTER V

“Time Up” and “#MeToo” – Considerations of the Benefits and Ethics of an Early Private Settlement that Avoids Litigation and Public Disclosure

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Lawmakers Take Aim: Will #MeToo Curb Nondisclosure or Arbitration Agreements..... V-1
EEOC Leads the Way in Preventing Workplace Harassment V-5

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Lawmakers Take Aim: Will #MeToo Curb Nondisclosure or Arbitration Agreements?

BY ILYSE SCHUMAN AND BETSY CAMMARATA ON JANUARY 9, 2018

In 2017, the #MeToo movement highlighted the prevalence of sexual harassment in the workplace, toppling prominent figures in numerous fields. Sexual harassment has been unlawful for decades, of course, yet this vexing problem remains.¹ In the wake of #MeToo, federal and state lawmakers are searching for new ways to complement existing antidiscrimination laws and help eliminate harassment. Although it may take several months for definite trends to solidify, this article identifies some legislative approaches we may see in 2018.

Limiting Enforceability of Nondisclosure or Confidentiality Agreements

Legislators have targeted nondisclosure agreements (NDAs) as a possible avenue for reform. Many organizations ask employees to sign NDAs for a variety of reasons, such as the protection of trade secrets. Where discrimination allegations are involved, however, employers sometimes insist upon an NDA as part of a settlement package. The NDA may require, for example, that the employee keep confidential all negotiations and the terms of the settlement. Such agreements might prevent the employee from disclosing even the existence of the settlement. Employees who breach these provisions may be obligated to pay some amount back to the employer. Opponents argue that these types of provisions prevent victims from going public with their accusations, thus enabling harassers and limiting transparency.

Some states have already contemplated bills that would curtail the use of NDAs in the resolution of harassment claims. Governor Cuomo of New York announced last week that he will propose a package of bills intended to remedy sexual harassment in the public sector, including a ban on confidentiality agreements relating to sexual assault or harassment, unless expressly authorized by the claimant.² The New York legislature, meanwhile, is considering a measure ([SB 6382A](#), [AB8765](#)) that would prevent the enforcement of certain NDAs. It would void “contract provisions which have the purpose or effect of concealing details relating to a claim of discrimination, non-payment of wages or benefits, retaliation, harassment or violation of public policy in employment” and specifically covers claims submitted to arbitration.

A bill pending before the Pennsylvania Senate ([SB 999](#)) focuses more specifically on NDAs in the sexual harassment context. It would void contracts executed after the effective date that: (1) prohibit disclosure of the name of anyone accused of sexual misconduct (including stalking); (2) suppress or attempt to suppress information relevant to a sexual harassment investigation; (3) impair or attempt to impair the ability of individuals to report claims; (4) attempt to waive a substantive or procedural right relating to a claim of sexual misconduct; or (5) require someone to expunge relevant

information from documents. For contracts executed prior to the effective date of the legislation, should it take effect, the bill would authorize employees to void agreements if entered into while under duress, incompetent or impaired, or a minor.

A California measure ([SB 820](#)) introduced on January 3, 2018, also seeks to eradicate secrecy in settlement agreements. Under this proposal, settlement agreements could be invalidated to enable parties to present underlying facts in a subsequent civil action. SB 820 provides that agreements preventing parties from disclosing facts giving rise to their dispute would be void as a matter of law, if the civil action alleges claims for sexual assault, sexual harassment, or workplace discrimination on the basis of sex. The law would affect agreements entered into on or after January 1, 2019. Nondisclosure restrictions could be included in settlement agreements only at the request of the claimant.

Additional bills affecting private employers are expected to appear in other states. A proposal limiting the use of NDAs has also been introduced at the federal level. The METOO Congress Act ([HR 4396](#)), currently in committee, would alter the procedures for the handling of harassment claims within the legislative branch.

Tax Consequences for Sexual Harassment Judgments or Settlements

Federal legislators employed a second tactic to rein in reliance on NDAs. The recently-enacted [Tax Cuts and Jobs Act](#) specifically addresses this issue. The new law amends section 162 of the tax code, which generally allows businesses to deduct certain ordinary and necessary expenses paid or incurred during the year as part of running the business. The amended tax law, however, erases that deduction for a settlement or payment related to a sexual harassment or abuse claim, if the settlement is subject to an NDA. Additionally, no attorneys' fees associated with such a settlement can be deducted.

Another tax-related proposal in the U.S. House would further reduce employer deduction opportunities under section 162. The STOP Act ([HR 4495](#)) would deny deductions for "any amount paid or incurred on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) . . . originating from . . . a claim or accusation" of criminal sexual abuse or sexual harassment. The bill defines "sexual harassment" to include "unwelcome sexual advances, requests for sexual favors, or other verbal or physical harassment of a sexual nature." It also explicitly covers payments made "to require the non-disclosure of or otherwise prevent" claims of sexual misconduct. On the whole, the measure appears to curb deductions for "any amount paid or incurred in connection with negotiating or settling" a harassment claim—whether or not an NDA is involved. Given the enactment of the Tax Cuts and Jobs Act, however, this standalone measure is not likely to advance.

Restricting the Use of Arbitration Agreements

As a third approach, legislators may attempt to restrict employer use of arbitration agreements. Many employers ask workers to sign arbitration clauses as a condition of their employment. Under such agreements, workers may be required to resolve any future employment-related disputes through arbitration, rather than through the judicial system.

Last month, federal lawmakers introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017 ([HR 4734](#), [S 2203](#)), which would significantly amend the Federal Arbitration Act. The bipartisan bill would invalidate predispute agreements (i.e., those signed before any dispute arose) that require arbitration of any sexual discrimination or harassment claims recognized under Title VII. This amendment would not apply to arbitration agreements between employers and labor unions, but no such provisions could limit the rights of employees to seek judicial review of their own claims.

New York's Governor Cuomo plans to propose a similar measure, which would void forced arbitration policies or clauses. The scope and details of that proposal remain to be seen.

Requiring Employer Disclosure of Settlements

Another federal bill before the U.S. House ([HR 4729](#)) would impose an additional disclosure requirement on employers that are obligated to submit an Employer Information Report EEO-1 annually. Covered employers would be required to indicate on that form "the number of settlements reached by the employer with an employee in the resolution of claims pertaining to discrimination on the basis of sex, including verbal and physical sexual harassment."

The bill liberally defines "settlements" to "include any agreement where anything of value is conferred to the individual raising the claim" in exchange for his or her decision to decline to pursue the claim. It applies to any agreement as well as any "internal mediation or other workplace resolution" that likewise resolves the matter. HR 4729 construes a wide variety of offensive conduct as "sexual harassment," such as unwanted touching, inappropriate verbal comments or gestures of a sexual nature, and "undue attention to or questions about a person's sexual relationships, sexual history, sexual orientation, or gender identity." The measure would also protect employees from retaliation and would require the EEOC to annually report information collected about settlements to Congress.

At the state level, Governor Cuomo is promoting a disclosure requirement for public contractors doing business with New York. He intends to introduce a measure that mandates annual reporting of the number of sexual harassment violations within such an entity, along with the number of NDAs entered into by the contractor.

Efforts to "shame" employers through such disclosures are likely to face stiff resistance from the business community. Although the federal bill is not expected to advance this session of Congress, employers should be mindful of these types of approaches, which seem to be gaining popularity and rely on the public disclosure of information to strong-arm employer compliance.³

Enhancing Training Requirements

Legislators, particularly at the state level, may explore the possibility of requiring employers to provide anti-harassment training for their employees in response to the upsurge in harassment allegations. A small number of states—primarily California and Maine—currently mandate such training for certain employers. The relevant agencies in roughly a dozen other jurisdictions strongly encourage anti-harassment training, but the vast majority of states do not require it.

Many employers already provide some sort of antidiscrimination instruction. But mandatory training may appeal to lawmakers looking for ways to reinforce civil rights laws and demonstrate a commitment to principles of workplace equality. In any event, now might be a good time for employers to conduct further antidiscrimination and anti-harassment training. Employers might also consider revisiting the content of their training materials and programs to ensure they are up-to-date, interactive, and generally as useful as possible.⁴

While we cannot predict which, if any, of the above laws might come to fruition, we can safely assume that employers will be feeling the aftershocks of the #MeToo movement for years. As employers review their anti-harassment policies, investigation procedures, and resolution practices, they should keep an eye out for these potential developments. We will continue to monitor legislative trends and will report on any significant progress in this area.

¹ Littler has recently published several articles on this topic. For further discussion, consult the following: [How Well Do Your Anti-Harassment Tools Work Overseas?](#); [Revisiting Your Sexual Harassment Policy During the #MeToo Uprising](#); [Dear Littler: Is an Employee's #MeToo Social Media Post a Harassment Complaint?](#); and [The Higher They Are, The Harder You Fall](#).

² Press Release, New York State, [Governor Cuomo Unveils 18th Proposal of 2018 State of the State: Combat Sexual Harassment in the Workplace](#) (Jan. 2, 2018).

³ Last year, for example, the California legislature approved a bill (AB 1209) that required large employers (with 500 or more employees in the state) to begin collecting and providing the Secretary of State with information relating to gender pay differentials. The bill mandated that the information be publicly available by July 1, 2020. Governor Brown returned the bill without his signature, however, over concerns that the proposal was ambiguous, would not gather data that would contribute to the state's efforts to ensure equal pay, and could be exploited to bring about more litigation. A similar type of law took effect in 2017 in Great Britain. See Tahl Tyson and Lavanga V. Wijekoon, [New Mandatory Gender Pay Gap Disclosures Will Soon Take Effect for Large Employers in Great Britain](#), Littler Insight (Mar. 13, 2017).

⁴ In 2016, the EEOC issued a report analyzing harassment-prevention training efforts and offering numerous recommendations for employers. See, e.g., Kevin O'Neill, Christopher Cobey & Marissa Dragoo, [Taking Workplace Training to the Next Level: EEOC Task Force Recommends Live, Interactive Harassment Prevention Training](#), Littler Insight (June 29, 2016). The EEOC task force's report is available [here](#).

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EEOC LEADS THE WAY IN PREVENTING WORKPLACE HARASSMENT

In the past twelve months, the country heard story after story of sexual harassment that just one year before might never have been told. The EEOC's mandate to enforce the nation's employment discrimination laws affords us a unique perspective and responsibility to address the pervasive problem of sexual harassment to which the rest of the nation is now awakening. For decades, the EEOC has educated workers and employers to prevent harassment and has also investigated, mediated, litigated and adjudicated many thousands of claims of workplace harassment based on sex, race, color, disability, age, national origin, and religion.

Combatting all forms of workplace harassment remains a top priority of the EEOC. From the launch of the Select Task Force on the Study of Harassment in the Workplace in 2015, to the release of the Co-Chairs' Report in 2016, and through this past fiscal year, the EEOC ramped up its role as enforcer, educator, and leader. The agency also focused on promoting best practices to stop harassing conduct before it becomes legally actionable, to create an effective anti-harassment system that encourages people to come forward, and to hold leaders and supervisors accountable. The EEOC continues to lead the way in preventing workplace harassment on multiple fronts. As described below,* the EEOC:

ENFORCING

L A W S T O
C O M B A T H A R A S S M E N T

EDUCATING

E M P L O Y E E S A N D E M P L O Y E R S

LEADING

B Y E X A M P L E

VIGOROUSLY ENFORCED THE LAW TO COMBAT WORKPLACE HARASSMENT

- > The EEOC filed 66 lawsuits challenging workplace harassment, 41 of which alleged sexual harassment. This is more than a 50 percent increase in suits challenging sexual harassment over FY 2017. EEOC's lawsuits sought to protect a wide-range of employees across the entire country, including servers, nurses, administrative assistants, customer service staff, truck drivers, welders, and other workers at cleaners and country clubs, sports bars and airlines, in factories, health care and grocery stores. In both June and August, the EEOC coordinated the filing of federal court cases around the country as a reminder that harassment violates the law.
- > Charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017.
- > For charges alleging harassment, reasonable cause findings increased to nearly 1,200 in FY 2018 compared to 970 in FY 2017. Successful conciliations reached nearly 500 up from 348 in FY 2017.
- > The EEOC recovered nearly \$70 million for the victims of sexual harassment through administrative enforcement and litigation in FY 2018, up from \$47.5 million in FY 2017.

MET THE HEIGHTENED DEMAND FOR INFORMATION AND ADVICE

- > Hits on the sexual harassment page of the EEOC's website more than doubled this past year, as many individuals and employers sought information to deal with workplace harassment.
- > The EEOC developed "What to do if you believe you have been harassed at work" to explain the steps to take if individuals felt they were being harassed at work.
- > The EEOC issued "Promising Practices for Preventing Harassment" to provide strategies to employers to reduce workplace harassment.

> EEOC staff conducted over 1,000 outreach events on harassment for more than 115,000 individuals and employers. Acting Chair Lipnic and Commissioners Feldblum and Burrows led our harassment outreach efforts with over 80 speeches and events, demonstrating the commitment of the EEOC's leaders to share our expertise and suggestions for promising solutions.

> The EEOC reconvened the Select Task Force on the Study of Harassment in the Workplace for a public meeting, "Transforming #MeToo into Harassment-Free Workplaces," to examine difficult legal issues and to share innovative strategies to prevent harassment, including app-based reporting, simple color-coded reporting, and panic buttons for hotel workers.

PROMOTED RESPECTFUL WORKPLACES

> In October 2017, the EEOC launched "Respectful Workplaces," a new type of training that teaches skills that promote and contribute to respect in the workplace, including how to step in when problematic behavior happens to others. EEOC staff trained over 9,000 employees and supervisors in Respectful Workplaces and over 13,000 in compliance trainings in the private, public and federal sector work forces.

> Numerous organizations have called on the EEOC to share its expertise or relied on the Co-Chairs Report as they revise their policies, procedures, and training programs to improve how they handle workplace harassment, including the U.S. House of Representatives Administration Committee and Women's Caucus, the Federal Judiciary Workplace Conduct Working Group, National Academies of Sciences, Engineering, and Medicine, Women's Caucus of the Maryland General Assembly, Illinois Senate Sexual Discrimination and Harassment Awareness and Prevention Task Force, Illinois House Sexual Discrimination and Harassment Task Force, Rhode Island Legislature, the Freedom Forum Institute of the Newseum, and Safety, Respect and Equity.

> For the first time in nearly a decade, more than 200 EEOC staff and leadership from across the country convened to develop new strategies for a more coordinated approach to the EEOC's oversight and adjudicative responsibilities in the federal sector, including innovative approaches to combat harassment and make the federal government a model workplace.

LED BY EXAMPLE

- > The EEOC revised its internal policies and procedures on the prohibition of harassing conduct in our own workplace in November 2017, based on the findings of the Harassment Task Force.
- > Acting Chair Lipnic created a Harassment Prevention Action Team in April 2018 to provide internal coordination on harassment prevention efforts across the agency's offices and programs.
- > Senior EEOC leadership participated in the Respectful Workplaces training program in May 2018.

MOVING FORWARD

The EEOC has accomplished much this past year as a leader, an enforcer of the law, an educator, and an expert on harassment prevention. But much more remains to be done and we will continue to look for ways to improve the work that we do. For example, the EEOC will implement a new training program for all EEOC investigators that uses a cognitive interviewing approach for harassment victims, will begin an outreach campaign encouraging reporting, and will provide our Respectful Workplaces training to all EEOC staff.

The EEOC will continue to go all out to do its part, but as the Co-Chairs recognized in the 2016 Co-Chairs' Report, we are only one player in this movement. To achieve the goal of reducing harassment and making workplaces respectful, safe, and productive, everyone in society must have a stake in this effort and do their part.

*All fiscal year 2018 numbers are preliminary prior to validation by the agency's Office of Enterprise Data and Analytics.

CHAPTER VI

The Art of Negotiations

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NORTH CAROLINA

BAR ASSOCIATION
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CHAPTER VI
The Art of Negotiation

DeWitt F. McCarley – Charlotte

Definitions.....	VI-3
Negotiation	VI-3
The Subject of Negotiation	VI-3
Tactics.....	VI-3
Strategy.....	VI-3
Types of Tactics and Strategies	VI-3
Style	VI-4
Components of Negotiation Process	VI-4
Planning and Preparation	VI-4
Opening Moves and Relationship Building	VI-4
Information Gathering and Exchange.....	VI-5
Offers, Proposals and Solutions.....	VI-5
Narrowing of Differences.....	VI-6
Closure	VI-6
Choosing a Strategy	VI-7
General Concerns	VI-7
Specific Issues to Consider in Choosing a Strategy.....	VI-7
Specific Tactics	VI-7
Competitive Tactics.....	VI-7
Cooperative Tactics	VI-9
Telephone Negotiations	VI-9
“Bottom Lines”; 6 Basic “Rules”	VI-10
Part II: Demonstration	VI-11

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The Art of Negotiation

34th Annual North Carolina/South Carolina Labor & Employment Law Program

**October 12-13, 2018
Asheville, NC**



A Review of Negotiation Skills & Tactics

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TABLE OF CONTENTS

Definitions

- Negotiation
- The Subject of Negotiation
- Tactics
- Strategy
- Types of Tactics and Strategies
- Style
- The Interplay of Tactics and Style

Components of Negotiation Process

- Planning and Preparation
- Opening Moves and Relationship Building
- Information Gathering and Exchange
- Offers, Proposals and Solutions
- Narrowing of Differences
- Closure

Choosing A Strategy

- General Concerns
- Specific Issues to Consider in Choosing a Strategy

Specific Tactics

- Competitive Tactics
- Cooperative Tactics
- Telephone Negotiations

“Bottom Lines”; 6 Basic “Rules”

Part II: Demonstration

- Participants
- Assumptions
- Audience Role
- Incentive

A REVIEW OF NEGOTIATION SKILLS

I. DEFINITIONS. (1)

A. Negotiation - Negotiation is a process in which two or more participants attempt to reach a mutually acceptable decision on one or more matters. The goal of negotiation is to reach a decision that provides the greatest possible benefit to you or your client.

B. The Subject of Negotiation -

1. Distributive: A distributive negotiation is the process of dividing a fixed quantity of resources. Common examples are contracts for purchase or construction, negotiations over salary, and settlement negotiations over money damages.

2. Integrative: An integrative negotiation is one where the parties' interests are not directly in conflict, and agreements are possible in which the level of satisfaction of both parties can be increased on the same issue. Common examples are: negotiation of a policy or the resolution of a specific problem or complaint.

3. Combination.

C. Tactics - Specific negotiating behaviors.

D. Strategy - A series of tactics to obtain at least the minimally acceptable resolution (goal).

E. Types of Tactics and Strategies -

1. Competitive: Competitive tactics and strategies are designed to undermine the other party's confidence in their position and induce them to agree to a conclusion less advantageous than they would have prior to the negotiation. Examples: high initial demands, threats, "take it or leave it" positions.

2. Cooperative: Tactics or strategies based on what is fair and reasonable (objective measures) and the use of concessions and compromises to encourage the other negotiator to reciprocate. Examples: reasonable opening offers, open sharing of information, use of promises rather than threats.

3. Problem Solving: An approach to negotiation designed to identify and maximize opportunity for joint or mutual gain. Most applicable to integrative subjects, such as policy development, complaint resolution or problem solving.

4. Combinations of the above.

F. Style: The impact and result of personality on the choice and use of tactics and strategies. Admittedly inexact...

II. COMPONENTS OF NEGOTIATION PROCESS.

A. Planning and Preparation.

1. Clearly define the subject, situation or problem.
2. Determine What Information is Needed. Familiar issues require less new information; unfamiliar issues require extensive information gathering.
3. Determine Goals. The negotiator must determine the minimally acceptable result ("bottom line") and the ideal or target result. Equally important is to assess the other side's goals and understand their bottom lines and targets! You should understand your opponent's needs as well as you understand your own. Compare your bottom line and target results with theirs and anticipate problems based on the comparison.
4. Rank Order the Goals. Rank order your goals and those of the other side.
 - a. Need: The things that you or they must obtain are the minimum requirements of the negotiation. Are there alternatives for you? Are there alternatives for them?
 - b. Want: The target or ideal results, but not absolutely required.
 - c. Giveaways: Those negotiable items that have value to one side but not necessarily to the other. These are the easiest items to give away or ask for in a bargaining or logrolling contest.
5. Choose a Strategy.
6. Prepare Notes or Outline: Include Need, Want and Giveaway items, and have specific information which may be required in the negotiation (e.g. cost projections, requirements, timeframes, or agreement language).

B. Opening Moves and Relationship Building. The initial orientation phase of a negotiation is critically important!

1. Gather baseline data on personality, style and probable negotiation

strategy of the other side.

2. Develop appropriate relationship with the other party. Most probably this would be an expectation of professionalism and trustworthiness.
3. Determine limits and qualifications on the authority of the opposing negotiator.
4. Seek agreement on goals or parameters for the negotiation.
5. Agenda Control: If you intend to exercise agenda control, you must make the opening move. If you object to the other party exercising agenda control, stop it fast.

C. Information Gathering and Exchange.

1. Questions are the most valuable negotiating tactic available to you.
2. Information gathering and exchange is easier and more natural in the early stages of a negotiation. Information gets "tight" during the later stages.
3. Use information obtained to confirm or refine your predictions of the other side's minimum and target goals.
4. Be conscious of what and how much information you are giving up. Trading of equivalent value information is a reasonable expectation; blurting out all your best data too early will leave you vulnerable in the later stages.

D. Offers, Proposals and Solutions.

1. Agenda Control: Should you start with the little issues or the big issues?
 - a. Least issues first: allows time to gather more information about the other side, their goals and strategies; builds relationship; prevents early breakdowns or impasses; builds "buy in".
 - b. Most Important Issues First: Quicker and more efficient; risks breakdown or impasse; tends to de-emphasize all issues past the "big ones".
 - c. Simultaneous Negotiation of Multiple Issues: Encourages concessions and trading ("logrolling"); no one issue kills a deal; but, beware, can end in "take it or leave it" package.

2. Who Should Make the First Offer?

a. If YOU make the first offer you exercise agenda control, set the tone of the negotiations, and define the proposed range of discussions and initial offers. However, you risk alienating the other side or missing the opportunity to gather more data.

b. If THEY make the first offer, you get more information about their strategy and goals. You retain flexibility. However, you lose agenda control.

3. Range of First Offers:

Extreme High---Reasonable Offers---First, Firm, Fair and Final or Low Offers---Take it or Leave it

E. Narrowing of Differences.

1. Your two goals are (1) to induce the other negotiator to agree to terms that are favorable to you, and (2) to determine what terms are acceptable to the other party.

2. Competitive tactics include threats, "walking out", real or feigned displays of anger, argumentative responses, and refusals to make concessions.

3. Cooperative tactics include making or proposing mutual concessions, use of promises to obtain concessions, explanation of position as opposed to argumentative statements, and the use of objectively reasonable information supporting your position.

4. Problem solving tactics for narrowing differences include brainstorming, mutual data gathering, and open sharing of information.

F. Closure.

1. Competitive tactics to force closure include deadlines, ultimatums and "final offers".

2. Cooperative tactics to conclude negotiations include reciprocal final concessions and "splitting the difference".

3. Always summarize the elements of the agreement to assure mutual understanding. Where appropriate, reduce the agreement to writing.

III. CHOOSING A STRATEGY.

A. General Concerns: There is no single strategy which is appropriate for all situations. Your choice of strategy should always be a conscious choice. The choice should remain flexible so that changes in the situation or the other party's strategy may be compensated for.

B. Specific Issues to Consider in Choosing a Strategy:

1. The Issue to be Negotiated. Example: A purchase contract for office furniture is a competitive negotiation.
2. The other negotiator's probable strategy and style. (Do you fight fire with fire, or fight fire with water?) Note that profession, age, gender, cultural background, and amount of authority may influence style.
3. Relative Power of Parties. The less power a negotiator has, the more cooperative the strategy should be.
4. The degree of risk acceptable.
5. Is this a "one-shot" negotiation or an on-going relationship or transaction? On-going relationships usually imply cooperation.
6. The history and context of this negotiation.
7. The values and norms of your organization.
8. Your personality.

IV. SPECIFIC TACTICS.

A. Competitive Tactics.

1. "Good Guy/Bad Guy": The use of an aggressive, competitive first negotiator to soften up the other side, followed by a pleasant, friendly negotiator who now seems eminently reasonable by comparison. When faced with this tactic, don't get aggravated or argue; simply sit and listen. When the "bad guy" has finished, then deal with the "good guy", BUT, consider the "good guy's" demands without comparing them to the "bad guy's" demands. In other words, ignore the "bad guy". Another **Counter Tactic** is to simply call their hand, i.e., point out that you know what they're doing.
2. Extreme Demands: If the other side tries to skew the midpoint between your

position and theirs by making a ridiculously extreme offer, there are two basic choices: (1) the competitive response is to make an equal but opposite extreme demand or (2) the cooperative approach is to ask for good faith substantiation of their position and to call their hand by labeling the behavior.

3. Higher or Shifting Authority: Don't allow the opposing negotiator to get you committed and then say "I have to check with my boss" on all of his commitments. Establish at the beginning of each negotiation the authority of the negotiator on the other side to make a binding decision. **Competitive Counter Tactic**: Claim you must also get permission from higher authority or threaten to walk out. **Cooperative Counter Tactic**: Remind the other party of agreements they made at the beginning of the negotiations, call their hand on the use of a dirty tactic, and remind them of basic principles of fairness and honesty. Some experts believe you should never negotiate with anyone who has less authority to make concessions than you do.

4. Incomplete or Ambiguous Terms: Revisiting any assumed, vague or undiscussed terms of a deal to gain an additional advantage or increase the other party's cost. A common example is a lowball price for an article, which then quickly escalates as all the extras or change orders are added to it. **Counter Tactic**: Admit that you didn't understand it and demand that you start back at step 1. This time, though, get the deal in writing and continually ask whether there are any other issues or items which could affect the item being discussed.

5. "Take It or Leave It" Ultimatums: When this occurs, always leave your opponent a way out, a way to save face. Do not assume that the ultimatum is true. Rather, you should begin testing pieces of the deal to see if they are genuinely bottom lines. The tactic could just be a test of your skill, or an act of frustration by your opponent. Express a lack of understanding and ask the other party to re-explain terms, needs assumptions, or the process.

6. The Actor: This tactic is the deliberate use of feigned emotions to create a specific response in the opposing party. Examples include appeals to sympathy, guilt induction, false anger, feigned confusion (Lt. Colombo), false friendship, and fear. The best **Counter Tactic** for each of these emotional ploys is recognition. Once you have recognized the tactic, you may choose whether to ignore it, return it in kind, call attention to it and refuse to proceed until it stops, or make any other appropriate response.

7. The Non-Negotiable Issue: This is a claim that a particular issue is controlled by a policy or rule that the negotiator does not have authority to change. It may be true that there is such a rule, but it may not be true that it cannot be changed. Test it by asking a lot of questions. Government officials can use this tactic very effectively.

8. Nibbling the Deal: When the negotiation is wrapping up, and both sides think they have a deal, one side may "nibble" the deal by asking for one more minor concession. **Counter Tactic**: Suggest that you will trade for an equally minor reciprocal concession.

B. **Cooperative Tactics.**

1. When in doubt, ask a question! Asking a question will almost always be beneficial in some way. It may give you new information, diffuse a tense moment, lead to mutual problem solving techniques, identify new alternatives, or simply buy you enough time to think of a better response.

2. Bring the Process into the Open: If competitive tactics are being used against you, or the negotiations appear to be bogging down for some reason, calling attention to the original goals, summarizing what has been decided so far, or exposing competitive tactics being used against you, may refocus the negotiations in a positive and constructive direction. Done competitively, it may backfire; done sincerely it will probably help the negotiations.

3. Mediators and Third Party Assistance: Sometimes bringing in an expert, a neutral third party or a mediator can break an impasse. For example, asking the advice or assistance of a recognized expert, or agreeing to take the case into mediation.

C. **Telephone Negotiations.**

1. If you have a choice, don't negotiate over the telephone. Negotiating by telephone tends to be more impersonal, involve less information exchange, and can become "bottom line" oriented much too fast. With no visual cues from your opponent, you must pay much more attention to the verbal cues (e.g. tone of voice, word choice and pacing).

2. If you must negotiate by phone, prepare extensive notes and an outline ahead of time. One advantage of telephone negotiation is that your opponent cannot see what you're doing, therefore, you can use notes, calculators, have other people in the room feeding you information, and make candid notes about your opponent's position.

3. If you must negotiate by phone, you make the call. If you wait for the other side to call you, they will be prepared and you will be caught off guard. A cooperative alternative is to agree on a set time for your negotiating call.

V. "BOTTOM LINES"; 6 BASIC "RULES"

1. Understand what you want.
2. Understand even better what the other side wants.
3. Consciously use your experience, knowledge, common sense and skills.
4. Don't allow the other side to intimidate you or confuse you such that you forget to follow Rule #3.
5. Ask questions.
6. When you get what you want, stop.

PART II: DEMONSTRATION

- Participants: Three members of the group will be chosen to participate in a demonstration negotiation. This is a role play exercise.
- Assumptions: Be as realistic as possible. Don't make up any facts or change known reality unless not doing so would force you to end the negotiation without reaching a conclusion.
- Audience Role: The audience will critique the participants and select a winner from among the three. The critique will be an open discussion of tactics, strategy and style.
- Incentive: The participant chosen by the group as the best negotiator will receive an incentive award.



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(1) Definitions adapted from Legal Negotiation, Theory and Applications, Donald G. Gifford, West Publishing, 1989, ppp. 13-24.

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CHAPTER VII-A

NLRB Traditional Labor Update

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CHAPTER VII-A
2018 NLRB Traditional Labor Law Update

Shannon R. Meares – Winston-Salem
John T. Merrell – Greenville, SC
Trisha S. Pande – Chapel Hill

Introduction.....VII-A-1
Case Summaries.....VII-A-2

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CHAPTER VII-A **2018 NLRB Traditional Labor Law Update**

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Introduction

The past year has brought significant change at the National Labor Relations Board and in the field of traditional labor law. In the fall of 2017, the Senate confirmed Board members Marvin E. Kaplan and William J. Emmanuel, and General Counsel Peter B. Robb. John F. Ring was confirmed as Chairman of the Board following the expiration of Phillip A. Miscimarra's term in April 2018. Most recently, President Trump nominated Mark G. Pearce to serve another term on the Board. If Pearce is confirmed, the Board will return to being fully composed with three Republican and two Democrat members.

In addition to experiencing turnover, the Board issued a number of high-profile decisions during December 2017 including *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017) (regarding bargaining unit composition); *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017) (concerning the legality of employer policies under the Act); *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017) (on unilateral changes after the expiration of a collective bargaining agreement); and *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017) (regarding the joint employer standard). Also in December 2017, General Counsel Robb indicated his office's priorities in Memorandum 18-02, "Mandatory Submissions to Advice," which rescinded guidance issued by his predecessor and instructed regional offices to submit certain cases to his office for advice.

The Board has also signaled its intent to review other key legal standards. For example, the Board invited amicus briefs regarding the use of employer electronic communication systems for Section 7 activity (*Caesars Entertainment Corporation*, 28-CA-060841), and whether misclassification of employees as independent contractors violates the Act (*Velox Express, Inc.*, 15-CA-184006). In March 2018, the Board requested information on the 2014 rule concerning representation case procedures. Last month, the Board published a draft rule regarding the joint employer standard.

Beyond the Board, the Supreme Court recently decided two cases with far-reaching implications for both unions and employers. In *Epic Systems Corp. v. Lewis*, 584 U. S. ___ (2018), a 5-4 Court upheld the validity of employment contract clauses requiring employees to waive their right to pursue disputes through joint legal proceedings. In another 5-4 decision, *Janus v. American Federation of State, County, and Municipal Employees Council 31, et al.*, 585 U.S. ___ (2018), the Court overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1997) which held that governments could require employees to pay fees covering the costs of collective bargaining. Indeed, labor law has experienced much change in the last year and trends suggest that more change is likely to come.

Case Summaries

Hy-Brand Industrial Contractors, Ltd., 366 NLRB No. 156 (Dec. 14, 2017)

The Board in this case overturned the joint-employer standard adopted two years earlier in *Browning-Ferris Industries of California*, 362 NLRB No. 186 (2015)¹ and returned to the prior joint-employer test requiring evidence that

the alleged joint-employer entities have actually exercised joint control over essential terms employment terms (rather than merely having “reserved” the right to exercise control), the control must be “direct and immediate” (rather than indirect), and joint-employer status will not result from control that is “limited and routine.”

The import of joint-employer status is that it creates joint and several liability if entities meet the standard. This has particularly become an issue recently in the franchisee-franchisor relationship.

In *Hy-Brand*, the employers discharged seven employees (five employees of Hy-Brand and two employees of Brandt) after the employees joined together and engaged in a strike protesting unsafe working conditions and substandard wages and benefits. Both employers’ employees shared identical workplace rules, 401(k), health, dental and life insurance benefits, and workers compensation policy, and jointly attended a common annual meeting. In addition, the same individual served as corporate secretary for both entities and he was involved in the decision to discharge all seven employees.

The ALJ, applying the *Browning-Ferris* joint employer test, determined that the employers were joint employers and thus jointly and severally liable for the unlawful discharges. Although the Board unanimously agreed with the ALJ that the entities were joint employers, the Board majority (Miscimarra, Kaplan, Emanuel) found that the *Browning-Ferris* joint-employer test applied by the ALJ was wrongly decided. Specifically, the Board criticized *Browning-Ferris* as improperly expanding joint-employer liability to include cases in which an employer had merely reserved the right of control without ever exercising it; when an employer had only exercised indirect control; and when control was only limited and routine in nature. The majority stated that the *Browning-Ferris* test went beyond the common law and thus beyond the Board’s statutory authority; it concluded that the common law test required at least some direct and immediate control, even where indirect-control factors are deemed probative. The Board concluded that the *Browning-Ferris* joint-employer standard was vague, unpredictable, and

¹ In *Browning-Ferris*, the Board majority (Pearce, Hirozawa, McFerran) held that it would no longer require that the putative joint employer possess and exercise the authority to control employees’ terms and conditions of employment when determining joint-employer status. Evidence of reserved control or indirect control, even if such control was never exercised or was exercised through an intermediary, was sufficient to establish joint employer status under that standard.

would entangle many unsuspecting employers in litigation, bargaining obligations, and secondary economic coercion.

In *Hy-Brand*, the Board expressly overturned *Browning-Ferris* and returned to the prior joint-employer test requiring evidence of direct and immediate control of employment terms. Although evidence of indirect control or contractually reserved authority can be probative, the Board stated that it is only relevant to the extent it supplements and reinforces evidence of direct control. Applying this test retroactively, the Board found that the employers were joint employers as the evidence demonstrated that the employees shared the same benefits and employment policies, and were required to attend common meetings. Further, the common corporate secretary was directly involved in the decision to unlawfully discharge the seven employees. Based on these facts, the Board majority concluded that the employers jointly exercised control over essential employment terms; their control was direct and immediate; and their joint control was not limited or routine in nature.²

In February 2018, the Board vacated the *Hy-Brand* decision after the Agency's Office of the Inspector General determined that Board member Emanuel should have recused himself from the case due to his ties with the law firm that represented Browning-Ferris.

Recent Developments: The Board is now using a proposed rule to do what it failed to accomplish in *Hy-Brand*. On September 14, 2018, the Board (McFerran dissenting) exercised its rulemaking authority and published, in the Federal Register, a proposed standard for determining joint-employer status. The Board, citing the volatility in the law governing the joint-employer relationship during the last three years, proposed that

an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as firing, hiring, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

The Board asserts that the proposed rule promotes collective bargaining and minimizes industrial strife as the new standard only "imposes bargaining obligations on putative joint employers that have actually played an active role in establishing essential terms and conditions of employment." The comment period closes November 13, 2018.

² Board members Pearce and McFerran dissented and criticized the majority for "reflexively" reversing *Browning-Ferris* even though: 1) the entities were clearly single employers, and thus there was no need to reach the joint-employer analysis; 2) adopting a new standard did not change the fact that the entities were joint employers; 3) no party asked the Board to reconsider the *Browning Ferris* standard; 4) the Board failed to abide by its established practice of giving notice it was considering a change in law; and 5) the *Browning-Ferris* decision is pending review in the D.C. Circuit.

Epic Systems v. Lewis, 584 U.S. 138 S. Ct. 1612, 211 LRRM 3061 (May 21, 2018)
(consolidated with *NLRB v. Murphy Oil*)

In [*Epic Systems*](#), the Supreme Court, in a 5-4 decision, ended the ongoing debate regarding the lawfulness of mandatory arbitration agreements providing for individualized proceedings or policies containing class or collective action waivers, holding that such agreements and policies are lawful and enforceable under the Federal Arbitration Act (FAA). The import of the decision is that employers are now permitted to maintain and enforce class-action waiver agreements and policies.

In *Murphy's Oil USA, Inc.*, 361 NLRB 774 (2014) the Board majority (Pearce, Hirozawa, Schiffer) reaffirmed its earlier decision in *D.R. Horton*, 357 NLRB 2277 (2012), enforcement denied in part, 737 F.3d 344 (5th Cir. 2013), and found that the employer violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that waived employees' right to maintain class or collective actions, and which employees reasonably believed barred them from filing charges with the Board. The Board reiterated that mandatory arbitration agreements that require individual arbitration are unlawful because they restrict employees' substantive Section 7 right to pursue their work-related legal claims together and emphasized that its decision did not conflict with the Arbitration Act. The Fifth Circuit on appeal denied enforcement, in relevant part, finding that such arbitration agreements do not violate the Act so long as they cannot reasonably be construed to prohibit employees from filing unfair labor practice charges with the Board.

The Supreme Court affirmed the Fifth Circuit's ruling. Justice Neil Gorsuch authored the opinion for the majority (Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, Clarence Thomas) and held that Congress, via the Arbitration Act, "has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings." The Court rejected the argument that such agreements conflict with the Act. Specifically, the Court held that nothing in Section 7 implicitly or explicitly "manifests congressional command to displace the Arbitration Act" and make mandatory class or collective arbitration agreements unlawful.

Since the decision, the Agency has worked expeditiously to resolve outstanding cases involving this issue.

PCC Structurals, Inc., 365 NLRB No. 160 (Dec. 15, 2017)

In [*PCC Structurals*](#), a 3-2 Board overruled the standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) for determining the appropriateness of a proposed bargaining unit when an employer contends additional employees must be included.

Under *Specialty Healthcare*, a unit was appropriate if petitioned-for employees were "readily identifiable" as a group and shared a community of interest using traditional criteria.³

³ Some of the factors examined when determining whether petitioned-for employees share a community of interest include job classification, departments, job functions, work

357 NLRB at 942-43. Once a unit was deemed appropriate under this standard, the burden shifted to the party demanding a larger unit to demonstrate that excluded employees shared an “overwhelming community of interest” with those in the petitioned-for unit. *Id.*

The *PCC Structurals* decision rejected the *Specialty Healthcare* standard as “fundamentally flawed.” *PCC Structurals*, 365 NLRB No. 160, slip op. at 7. Specifically, the Board asserted that the *Specialty Healthcare* test gave “extraordinary deference” to petitioned-for units and thus contravened the Board’s statutory directive to play an involved role in unit determination. *Id.*

Under the new standard articulated in *PCC Structurals*, the Board is required to determine “whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit.” *Id.* at 5. This standard substantially reduces the burden on employers challenging petitioned-for units.

Dissenting Members Pearce and McFerran criticized the majority for departing from precedent upheld by eight different federal circuit courts and undermining employees’ Section 7 rights to self-organization. *Id.* at 21. They also found problematic that the majority neither gave the parties opportunity to submit further briefing after review was granted nor issued an invitation for amicus briefs on whether *Specialty Healthcare* should be overruled. *Id.* at 14.

General Counsel Robb issued guidance on how regional offices should proceed with applying *PCC Structurals* in a December 22, 2017 Memorandum, OM 18-05.

The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017)

On December 14, 2017, in [*The Boeing Company*](#), the Board reversed its 2004 decision in *Lutheran Heritage*, which had established the previous standard by which employer work rules were evaluated for lawfulness. The Board, in its 3-2 decision in *Boeing*, highlighted six separate issues with the *Lutheran Heritage* standard and summarized that “paradoxically, *Lutheran Heritage* is too simplistic at the same time it is too difficult to apply.” The *Boeing* decision was not unexpected once the Trump Board was seated, as then-Chairman Miscimarra had previously stated in his dissent to a 2017 Board case, *William Beaumont Hospital*, that the *Lutheran Heritage* standard “defies common sense and is contrary to the Act in numerous respects.”

Instead of adhering to *Lutheran Heritage*’s standard, the Board reversed *Lutheran Heritage* and adopted a balancing test that weighs the employer’s justification for a rule or policy against its potential interference on activity protected by the National Labor Relations Act. In applying this test, the Board “will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” [Emphasis in original.]

location, skills and training, terms and conditions of employment, and employee interchange and contact. *United Operations, Inc.*, 338 NLRB 123 (2002).

Using its new standard, the Board reversed an administrative law judge’s finding that Boeing’s no-camera rule violated the Act. According to the Board, the employer’s legitimate business justification to protect proprietary information and national security interests outweighed any potential infringement on Section 7 rights of its employees. The Board provided further guidance by establishing three categories for how it will analyze employer rules moving forward:

- “*Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.”
- “*Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.”
- “*Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.”

Further Board decisions will be necessary to provide additional guidance as to the types of rules that belong in each “category.” However, as discussed in the next section of this manuscript, the NLRB’s Office of the General Counsel has already weighed in on the lawfulness of certain types of rules under the new *Boeing* standard.

GC Memorandum 18-04 (June 6, 2018)

On June 6, 2018, the NLRB’s Office of the General Counsel issued a new guidance memorandum ([GC Memo 18-04](#)) that contains updated guidance on how NLRB regional offices should review and interpret unfair labor practice charges involving employer handbook language and work rules. The guidance in the memorandum expounds on the NLRB’s decision in [The Boeing Company](#), 365 NLRB No. 154, which the NLRB issued on December 14, 2017, in which the Board announced a new standard for analyzing whether a work rule violates employees’ rights under the Act.

In the memorandum, the General Counsel analyzes several examples of common employer rules and provides guidance to the regional offices regarding the placement of such rules into the three *Boeing* categories and determining whether or not a complaint should be issued. As set forth in the memorandum, Category 1 rules are generally lawful and regional directors should dismiss any such charge absent withdrawal. Category 1 rules include the following:

- *Civility Rules*. A prohibition on “[b]ehavior that is rude, condescending or otherwise socially unacceptable” is an example of a lawful civility rule.
- *No Photography or Recording Rules*. A rule that prohibits the use of cameras or other recording devices is an example of a lawful rule.

- *Insubordination Rules.* A rule that states “[b]eing uncooperative with supervisors . . . or otherwise engaging in conduct that does not support the Employer’s goals and objectives” is prohibited” is an example of a lawful insubordination rule.
- *Disruptive Behavior Rules.* A prohibition against “[c]reating a disturbance on Company premises or creating discord with clients or fellow employees” is an example of a lawful disruptive behavior rule. However, employers may want to exercise care when using disruptive behavior rules to discipline employees for strikes or walkouts.
- *Confidentiality Rules.* Rules banning the discussion of confidential, proprietary, or customer information that make no mention of employee or wage information are generally lawful. “Do not disclose confidential financial data, or other non-public proprietary company information” is an example of a lawful rule.
- *Rules Against Defamation or Misrepresentation.* A rule against “[m]isrepresenting the company’s products or services or its employees” is a lawful rule.

Category 2 rules require an evaluation of the rule on a case-by-case basis using the *Boeing* standard. Category 2 rules include:

- “Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment . . . and do not restrict membership in, or voting for, a union.”
- Confidentiality rules broadly encompassing ‘employer business’ or ‘employee information’ (as opposed to confidentiality rules regarding customer or proprietary information . . . or confidentiality rules more specifically directed at employee wages, terms of employment, or working conditions . . .)
- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees . . .)
- Rules regulating use of the employer’s name (as opposed to rules regulating the employer’s logo/trademark . . .)
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media *on the employer’s behalf* . . .)”

Category 3 rules are unlawful to maintain. Category 3 rules include:

- confidentiality rules specifically regarding wages, benefits, or working conditions (for example, a rule stating employees are prohibited from disclosing salaries or the contents of employment contracts is unlawful); and
- rules against joining outside organizations or voting on matters concerning the employer.

The memorandum also advises the regional offices that they should no longer find unlawful any rule that could be interpreted as covering Section 7 activity and should now focus on whether the rule in question would actually be interpreted to cover Section 7 activity. The memorandum also instructs regional offices that “ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included.”

Raytheon Network Centric Systems, 365 NLRB No. 161 (Dec. 15, 2017)

In *Raytheon Network Centric Systems*, the Board overruled its recent decision in *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (*Du Pont III*), which held that after a collective bargaining agreement's expiration, a company could not follow an established past practice if there was any discretion in the company's decision.

Prior to *DuPont*, the Board and courts repeatedly held employers could lawfully take unilateral actions if consistent with past practice because doing so did not constitute a "change" in the terms and conditions of employment. *DuPont*, however, held that unilateral changes were impermissible, even if consistent with past practice, if the employer exercised any kind of discretion in the decision-making process (e.g., the Board had upheld changes where, for instance, the expired CBA provided for specific annual increases in co-pays or deductibles and the increase post-expiration was the same).

In this case, Raytheon always made minor modifications to its health care plan. Each year, the company or its provider tweaked coverages, expanded services, and modified plan options, and each year the employees selected from the available options. That was the parties' practice established from 2001 until 2012 when the union asked Raytheon not to change union members' health plans during renegotiation of the collective bargaining agreement. Raytheon moved forward with changes to the health plan, resulting in an unfair labor practice charge filed by the union. The ALJ held that the employer violated the Act when it implemented changes to the health care plan because the unilateral changes involved employer discretion.

On review, the Board overruled *DuPont* as inconsistent with the principles behind the Act. The Board held Raytheon's modifications to employee health care benefits in 2013 were a continuation of past practice involving similar plan modifications made at the same time every year from 2001 to 2012, i.e., the company did exactly what it had always done. The Board determined Raytheon's actions did not constitute a "change" in the terms and conditions of employment because they were similar in kind and degree with an established past practice of comparable unilateral actions. That the actions involved management discretion was irrelevant. Therefore, the Board found the company did not violate the Act by failing to give its union advance notice and the opportunity to bargain before making the changes consistent with past practice.⁴

⁴ Dissenting Members Pearce and McFerran contend that the majority's holding "frustrates the process of collective bargaining" and misinterprets the holding of the Supreme Court's decision in *NLRB v. Katz* 369 U.S. 736 (1962).

CHAPTER VII-B

Wage and Hour Update

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CHAPTER VII-B
Federal and North Carolina Wage and Hour Law Overview and Update

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Federal Wage and Hour Law: The Fair Labor Standards Act..... VII-B-1

- Minimum Wage..... VII-B-1
- Overtime VII-B-2
- Recordkeeping Requirements VII-B-5
- Individual Liability and Remedies VII-B-6
- Collective Action..... VII-B-6
- Sources of Authority..... VII-B-6

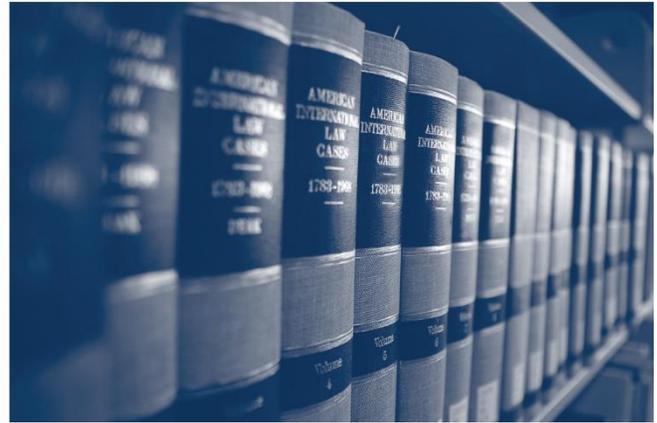
Other Federal Wage and Hour Statutes..... VII-B-7

- Service Contract Act VII-B-7
- Davis-Bacon Act VII-B-7

North Carolina Wage and Hour Act VII-B-8

- When Must Wages be Paid VII-B-9
- When Can Wages be Forfeited VII-B-9
- When Can an Employer Deduct or Withhold Wages VII-B-9
- Postings and Records..... VII-B-10
- Individual Liability and Remedies VII-B-10
- Recent Updates VII-B-11

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FEDERAL AND NORTH CAROLINA WAGE AND HOUR LAW OVERVIEW AND UPDATE

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Disclaimer: This is a general summary of the legal issues under Federal and North Carolina wage and hour law. This is not a comprehensive analysis or legal advice, and this information should not be relied upon solely to provide legal advice.

I. Federal Wage and Hour Law: The Fair Labor Standards Act.

The Fair Labor Standards Act (“FLSA”) is the federal law that, for most employees, regulates:

- **minimum wages**– what minimum wage an employer must pay an employee;
- **overtime pay** – when an employee is entitled to premium or higher pay because they have worked many hours;
- **recordkeeping** – what records must be maintained of hours worked and wages paid; and
- **child labor standards** – what restrictions are placed on employing individuals under 18 years old.

The FLSA covers full-time and part-time employees. It covers most private sector employers and federal, state, and local governments.

The FLSA was originally enacted in 1938. The FLSA has been amended many times over the years. The most notable amendments are: (1) the Portal-to-Portal Act of 1947, which clarified what time before and after actual work was compensable working time under the FLSA following a controversial U.S. Supreme Court decision; and (2) the Equal Pay Act of 1963, which established “equal pay for equal work” by prohibiting paying a lower rate of pay on the basis of sex for similar jobs. Aside from these amendments, the FLSA is basically the same. The challenge for attorneys and courts is in applying 1938 definitions of the industrial workplace to a 21st century global workforce.

The concept of the **workweek** is important for both minimum wage and overtime requirements. The workweek for purposes of the FLSA is set by the employer. It must be a fixed and regularly recurring period of 7 consecutive twenty-four hour periods, or 168 hours. It does not have to coincide with the calendar week. It can begin on any day at any hour. 29 C.F.R. § 778.105.

A. Minimum Wage.

The FLSA requires that an employer pay an employee a minimum amount of wages for all hours worked in a workweek. The current minimum wage is \$7.25 per hour. 29 U.S.C. § 206(a)(1)(C). Thus, if an employee works 30 hours in a workweek, they should receive a gross amount of \$217.50 (30 x 7.25) in wages. Except for the reasonable cost or fair value of board, lodging or other facilities to the employee, wages generally must be paid in cash or check. See 29 C.F.R. §§ 531.27 to 531.33.

There are many issues that arise with regard to determining whether an employee has been paid at least the minimum wage. There are also more complex forms of compensation that prove difficult, such as tipped employees (for example, waiters) and employees paid on a piece-rate basis. Two of the more common issues when it comes to the minimum wage are deductions and determining what hours have been worked.

- **Deductions**

Modern-day employers make many deductions from an employee's pay, including federal, state and local taxes, and health and welfare benefit premiums to name a few. These deductions may result in the employee receiving less than minimum wage for a workweek. For example, imagine an employee's rate of pay is \$8.25 per hour, a dollar above minimum wage. Let's assume the employee has an aggregate tax rate of 20% and has to pay a \$15 premium per week for health insurance. If the employee worked 35 hours in the week, his net pay would be \$216, for an average hourly amount of a little over \$6 per hour.

Some deductions are allowed even if they bring the employees actual net pay below minimum wage. Others can only be made if they do not bring the employees net pay below minimum wage. Generally speaking, taxes and payments for the benefit of the employee (such as health insurance premiums) may be deducted even though they may bring the employee's pay below minimum wage. See 29 C.F.R. §§ 531.38 and 531.40. Court orders for garnishment, child support and similar debts may also be deducted without regard to the minimum wage. 29 C.F.R. § 531.39. However, note that the Consumer Credit Protection Act, 15 U.S.C. §§ 1671 to 1677, and North Carolina law limit the amount of and type of garnishments that may be imposed on an employee.

- **Hours Worked**

The FLSA requires that an employer pay an employee the minimum wage for all hours worked. But the FLSA does not define what "work" is. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, the U.S. Supreme Court adopted a broad definition of work. It held that work includes all "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." 321 U.S. 590, 598 (1944). The Court later also said that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." *Armour & Co. v. Wantock*, 326 U.S. 126, 133 (1944).

Congress subsequently reined in the Court's broad definition with the Portal-to-Portal Act of 1947 by expressly excluding from hours worked:

walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform," as well as "activities which are preliminary or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a). Time employees spend commuting from their home to the location at which they perform their first principal activity, and from the location at which they perform their last principal activity to their home, is excluded from compensability by the Portal-to-Portal Act provided the employer does not require the employee to engage in an abnormally long commute or to perform other work during the commute. Use of an employer-owned vehicle during a commute does not, in and of itself, render the commute compensable. 29 U.S.C. § 254(a)(2).

The U.S. Department of Labor's ("DOL") "continuous workday rule" following the Portal-to-Portal Act significantly restricts the Act's impact on the FLSA. This rule says that employees must be compensated for all activities performed within the regular workday essentially in a large block of time, beginning when an employee's first principal activity is initiated and ending when the last principal activity is completed. As a result, the Portal-to-Portal Act does

not exclude from compensability time that employees spend walking, traveling, or waiting between performing their principal activities. Once that block of time has begun, it only ends when the employer completely relieves the employee from work for a long enough period of time for the employee to use the time effectively for his or her own purposes (for example, a 30 minute lunch break assuming the employee is not isolated in some remote area). See 29 C.F.R. §§785.18 to 19 and 790.6 to 790.7.

B. Overtime.

The overtime requirement of the FLSA requires that an employee receive one and one-half times their regular rate for all hours worked in excess of 40 in a workweek. Thus, an employee whose regular rate is \$10 per hour, who works 50 hours in a workweek, should receive gross pay in the amount of \$550 (\$10 x 40 plus \$15 x 10 or \$10 x 50 plus \$5 x 10). While there are many challenges to the overtime requirement, the most common are determining whether an exemption applies and what compensation is included in the “regular rate.”

▪ **Exemptions**

The most commonly utilized exemptions from the overtime requirements of the FLSA are the following:

1. Commissioned sales employees of retail or service establishments if more than half of the employee's earnings come from commissions and the employee averages at least one and one-half times the minimum wage for each hour worked, 29 C.F.R. § 779.412;
2. Drivers, driver's helpers, loaders and mechanics if employed by a motor carrier and if the employee's duties affect the safety of operation of the vehicles in transportation of passengers or property in interstate or foreign commerce, 29 C.F.R. § 782.2;
3. Salesmen, partsmen and mechanics employed by automobile dealerships, 29 C.F.R. § 779.372(a);
4. Computer professionals paid at least \$27.63 per hour, 29 C.F.R. § 541.400; and
5. Executive, administrative, professional and outside sales employees (“white-collar exemptions”) who are paid on a salary basis, 29 C.F.R. § 541 (white collar employees are also exempt from the minimum wage requirement). The regulations under Part 541 allow for what is called a “combination” exemption as well. This means that if an employee's primary duty is performing a combination of duties as an executive, administrative, professional, outside sales employee or computer professional (see 4 above), that employee may be exempt. 29 C.F.R. § 541.708.

To qualify for the executive, administrative, and professional exemptions in No. 5, employees generally must be paid at not less than \$455 per week on a salary basis. Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced for vacation or because of the quality or quantity of work. Before making any deductions from the predetermined amount confirm the deduction is authorized by the regulations. 29 C.F.R. § 541.602. Unauthorized deductions will invalidate the exemption. Exempt employees must be paid their salary for any week in which they perform any work, regardless of the number of days or hours worked.

On May 18, 2016, the Obama administration published revised final regulations significantly increasing the salary threshold from \$455 per week (or \$23,660 per year), which was set in 2004) to \$913 per week (or \$47,476 per year). That change was scheduled to take effect on December 1, 2016 and was expected to result in up to 4.2 million

workers currently exempt from the overtime requirements becoming non-exempt. Ten days before the implementation date, though, a federal judge in Texas issued a nationwide stay against the regulation. The Court held that the rule was not based on a reasonable construction of statutory provision establishing the white collar exemptions because increasing the salary threshold created a “de facto salary-alone test” while congress intended the exemptions to depend on employee duties. The Obama administration appealed the ruling to the Fifth Circuit. Upon the transition of administrations, the Trump administration did not drop the appeal because it wanted confirmation that the Department of Labor had the ability to utilize a salary basis test, even if the proposed changes were too high. After some additional procedural developments, the Fifth Circuit stayed the controlling appeal on November 6, 2017. In its motion for stay, the Department of Labor indicated it was examining what the proper salary level should be. Speculation is the Trump administration will proposed an increase in the midway point range between the current threshold and the Obama administration threshold.

Exemptions are complicated and must be carefully examined on an individual basis. Be sure to consult the applicable regulations for more information.

- ***How to Calculate the Overtime or Premium Rate***

Overtime is based on the employee’s “regular rate,” not just minimum wage or the employee’s regular hourly rate of pay. What gets included and not included in the regular rate requires an advanced analysis. The regular rate includes all compensation and other remuneration paid to the employee except for seven excluded categories. 29 U.S.C. § 207(e). The seven excluded categories are:

1. Sums paid as gifts, the amounts of which are not measured by or dependent on hours worked, production, or efficiency, 29 C.F.R. §778.200(a)(1) and 778.212;
2. Payments made for occasional periods when no work is performed such as vacation or holiday, reasonable payments for travel expenses or other expenses, and other similar payments to an employee which are not made as compensation for hours of work 29 C.F.R. §§ 778.200(a)(2) and 778.216 to 778.224;
3. Sums paid in recognition of services performed during a given period if either: (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior promise causing the employee to expect such payments regularly; (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees, 29 C.F.R. §§ 778.200(a)(3), 778.208 to 778.215, and 778.225;
4. Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits, 29 C.F.R. §§ 778.200(a)(4) and 778.214 to 778.215;
5. Extra compensation provided as a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day, 40 in a workweek, or in excess of the employee’s normal working hours or regular working hours, 29 C.F.R. §§ 778.200(a)(5) and 778.201 to 778.202;

6. Extra compensation provided as a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days, 29 C.F.R. §§ 778.200(a)(6), 778.203, 778.205, and 778.206; and
7. Extra compensation provided by a premium rate paid to the employee pursuant to an employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding 40 hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek, 29 C.F.R. §§ 778.200(a)(7), 778.201 and 778.206.

C. Recordkeeping Requirements.

The FLSA does not have any reporting requirements to the DOL. However, employers are expected to maintain certain records that are subject to inspection by the DOL. Generally speaking, an employer must maintain records of the following regarding each employee:

- full name and, on the same record, any identifying symbol or number if used in place of a name on any time, work, or payroll records (such as a personnel number);
- address including zip code;
- date of birth if younger than 19;
- sex;
- occupation;
- time and day of week when workweek begins;
- hours worked each day and total hours worked each workweek;
- basis on which employee's wages are paid (for example, hourly rate, salary, or piece rate);
- what that regular rate is;
- total daily or weekly straight-time earnings;
- total overtime earnings for the workweek;
- all additions to or deductions from wages;
- total wages paid each pay period; and
- date of payment and the pay period covered by the payment.

For at least three years, employers must preserve payroll records, collective bargaining agreements, and sales and purchase records. Employers should retain for two years records upon which wage calculations are based, including time cards, work and time schedules, and records of additions to or deductions from wages. The regulations regarding recordkeeping may be found at 29 C.F.R. § 516.

D. Individual Liability and Remedies.

The FLSA defines employer to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). Therefore, occasionally officers, shareholders, supervisors, managers and others will be subject to liability as an “employer” when they exert managerial responsibility and exercise control over the terms and conditions of the employee’s work. See, e.g., *Moon v. Kwon*, 248 F. Supp. 2d 201 (S.D.N.Y. 2002) (finding president was an employer because “he ‘played an intimate role in the day-to-day operations of the hotel, regularly worked out of an office in the hotel, supervised and determined the employee’s work responsibilities and employment conditions, and even claimed to have personally hired the employee and arranged housing for him.’”).

An employee may obtain the unpaid minimum wages and overtime for up to two years (three years in the case of willful violations) prior to the filing of the lawsuit, and an additional equal amount in liquidated damages. 29 U.S.C. § 216(b). Effectively, this means the FLSA has a 2 to 3 year statute of limitations. The employee may also recover reasonable attorneys’ fees and costs. *Id.* If an employer demonstrates that it acted in good faith and had reasonable grounds to believe its acts or omissions were not unlawful, a court may reduce or eliminate the liquidated damages amount. 29 U.S.C. § 260.

E. Collective Action.

The FLSA authorizes an opt-in class action, called a collective action, to be brought by an employee on behalf of similarly situated employees. 29 U.S.C. § 216(b). The FLSA provides that no employee shall be a party to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. *Id.* As a result, certification under the FLSA is a two-step process. First, the court makes a pre-discovery determination as to whether the purported class is “similarly situated,” and, if so, conditionally certifies the class and approves dissemination of notice to putative class members of their right to opt in. The court-controlled notice is provided to potential putative plaintiffs, rather than permitting unregulated solicitation efforts to secure joinder by those individuals. See *Adams v. Citicorp Credit Services, Inc.*, 93 F. Supp. 3d 441, 452-53, 456 (M.D.N.C. 2015). Second, after discovery is virtually complete, the court engages in a more stringent inquiry to determine whether the plaintiff class is in fact “similarly situated” in accordance with the requirements of § 216, and renders a final decision regarding the propriety of proceeding as a collective action. See *Beasley v. Custom Communications, Inc.*, 2016 WL 5468255, at *3, E.D.N.C. Sept. 28, 2016.

F. Sources of Authority.¹

There are many difference sources that help in the interpretation of the FLSA. Aside from court decisions and the statute, which may be found at 29 U.S.C. §§ 201 to 219, the DOL has published a comprehensive set of regulations to interpret and enforce the statute. The regulations range from 29 C.F.R. §§ 510 to 794. The most notable of these regulations are the following:

- recordkeeping (29 C.F.R. § 516);
- white-collar exemption regulations (29 C.F.R. § 541);

¹ Most of these sources are available on the DOL’s website, www.dol.gov, although many older opinion letters are only available through private sources such as Westlaw or BNA.

- overtime (29 C.F.R. § 778); and
- hours worked (29 C.F.R. 785).

Aside from the regulations themselves, there are several different publications by the DOL that may be used as authority in interpreting the statute. Historically, the most common interpretive guidance relied upon by practitioners has been opinion letters from the DOL. The opinion letters are either prepared by the DOL's Wage and Hour Administrator (and thus called Administrator Opinion Letters) or by someone else in the Wage and Hour Division (Non-Administrator Opinion Letters). These letters are drafted in response to fairly specific questions by the public, but can often be helpful in understanding similar situations. In 2010, the Administrator began publishing Administrator Interpretations instead of opinion letters. These are more broad and comprehensive interpretation memorandums intended to provide greater guidance than answering a specific employer's question.

The last guidance document from the DOL is its Field Operations Handbook ("FOH"). The FOH is an internal manual used by the Wage and Hour Division's investigators and staff for help in conducting investigations. Although the FOH is very challenging to read, it can sometimes provide some useful insight in how to interpret the FLSA and its regulations, as well as predicting an investigator's reaction to certain circumstances.

II. Other Federal Wage and Hour Statutes.

Although most employers and employees will be regulated by the FLSA, there are other federal wage and hour statutes that sometimes offer greater or different benefits or protections than the FLSA. The two more commonly invoked statutes are summarized below.

A. Service Contract Act.

The McNamara-O'Hara Service Contract Act ("SCA") requires federal contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees no less than the wage rates and fringe benefits found prevailing in the locality or the rates contained in a predecessor contractor's collective bargaining agreement. The prevailing wage rates and fringe benefits can be found in wage determinations issued by the DOL.² What is unique about the SCA is that it not only requires a higher minimum wage, but it may also require the employer to provide a certain amount of minimum fringe benefits.

B. Davis-Bacon Act.

The Davis-Bacon Act applies to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. Contractors and subcontractors must pay their laborers and mechanics no less than the locally prevailing wages and fringe benefits. Like the SCA, prevailing wages and fringe benefits are determined by wage determinations issued by the DOL.

² Wage determinations are available at a special DOL website, www.wdol.gov.

III. North Carolina Wage and Hour Act.

The North Carolina Wage and Hour Act (the "NCWHA" or "NC Act") is found in Chapter 95 of the General Statutes, N.C. Gen. Stat. §§ 95-25.1 to 95-25.25. The North Carolina Department of Labor has published Administrative Rules for the NC Act in Title 13 of the Administrative Code, 13 N.C. Admin. Code 12.0100 to .0807.³

The NC Act, much like the FLSA, contains minimum wage and overtime provisions. However, the NC Act specifically exempts from its overtime protections any person employed by an employer covered by the FLSA:

The provisions of G.S. 95-25.3 (Minimum Wage) [and] G.S. 95-25.4 (Overtime) . . . do not apply to:

- (1) Any person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act

N.C. Gen. Stat. § 95-25.14(a). Courts in North Carolina have routinely held that an employee seeking minimum wage or overtime compensation under the FLSA is exempt from the NC Act's protections and cannot state a claim under the NC Act:

North Carolina law provides that certain provisions of the NCWHA, including the statute that pertains to overtime (§ 95–25.4), does not apply if the employee works for “an enterprise engaged in commerce or the production of goods for commerce” as defined in the FLSA.

Robinson v. Affinia Group, Inc., 815 F. Supp. 2d 935, 946 (W.D.N.C. 2011) (Mullen, J.). A plaintiff cannot pursue violations under both the FLSA and the NC Act:

Plaintiffs have alleged in their complaint that [Defendant] is an employer engaged in commerce under the FLSA. North Carolina law mandates that there is no legal remedy for Plaintiffs' NCWHA claims as long as Plaintiffs also seek liability under the FLSA.

Simmons v. United Mortgage & Loan Investment, LLC, No. 3:07cv496, 2008 WL 2277488, at *3 (W.D.N.C. May 30, 2008) (Mullen, J.) (granting motion to dismiss under Rule 12(b)(6)); see also *Lopez-Galvan v. Men's Wearhouse*, No. 3:06cv537, 2008 WL 2705604, at *14 (W.D.N.C. July 10, 2008) (Reidinger, J.) (“Because it is undisputed that the Defendant is an enterprise as defined by the FLSA, the overtime provision of the North Carolina Wage and Hour Act is not applicable to the Plaintiff.”).⁴Since very few employers in North Carolina are not covered by the FLSA and because the NC Act's provisions largely parallel the FLSA, this manuscript does not provide more information on the NC Act's minimum wage and overtime provisions.

The NC Act, however, also has wage payment provisions. Among other issues, these provisions regulate when wages are to be paid, what wages have to be paid, and what withholdings employers can take from wages. These provisions cover all employees in North Carolina, regardless of whether they are covered by the FLSA, except for employees employed in federal, state and local government.

³ The NC Act and Administrative Rules are available on the N.C. Department of Labor's website, www.nclabor.com.

⁴*Accord Spencer v. Hyde County*, 959 F. Supp. 721, 728 (E.D.N.C. 1997) (Howard, J.) (“Because the court is persuaded that the FLSA covers the employer-employee relationship at issue in this matter, the court is convinced that [Defendant] is exempt from the [minimum wage and overtime] provisions of the NCWHA.”); *Jones v. Philip Morris USA, Inc.*, No. 1:03cv00122, 2004 WL 769456, at *3 (M.D.N.C. April 8, 2004) (Beaty, J.) (“The Court agrees with Defendant's contention that [Defendant] is engaged in the production of goods for commerce, and thus is exempt from the overtime requirement of the North Carolina Wage and Hour Act in relation to its employment of Plaintiff.”).

Under the NC Act, wages:

means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities.

N.C. Gen. Stat. § 95-25.2(16). However, for purposes of the provisions discussed below, wages also “includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.” *Id.* Under North Carolina law, tips are not considered wages but belong to the employee once left by the customer. 13 N.C. Admin. 12.0303(a) and 13 N.C. Admin. 12.0303(c). Tips may only be taken from the employee in accordance with a bona fide tip pooling arrangement consistent with Section 95-25.3. 13 N.C. Admin. 12.0303(c).

A. When Must Wages Be Paid?

Sections 95-25.6 and 95-25.7 discuss when an employer must pay wages to an employee. Employers are required to pay most wages and tips to current employees at least monthly, but can pay more frequently. N.C. Gen. Stat. § 95-25.6. Wages that are based upon a form of calculation, such as bonuses or commissions, can be paid annually provided that has been set out to the employee in advance. *Id.*

Different rules apply to a terminated employee. Wages must be paid on or before the next regular payday by the regular method (e.g., direct deposit) or by mail if requested by the employee. N.C. Gen. Stat. § 95-25.7. Commissions and similar compensation must “be paid on the first regular payday after the amount becomes calculable.” *Id.*

B. When Can Wages Be Forfeited?

Regular earned wages (hourly pay or salary), including overtime, cannot be forfeited. There are two provisions under the NC Act that specifically address and allow for the forfeiture of wages. Wages based on “bonuses, commissions or other forms of calculation” **cannot** be forfeited upon termination unless the employer has provided advanced notice. N.C. Gen. Stat. § 95-25.7. Likewise, vacation pay under an employer plan or policy **cannot** be forfeited unless the employer notifies employees in advance. N.C. Gen. Stat. § 95-25.12. The advanced notice for both must comply with the requirements of Section 95-25.13. Otherwise, the employees are not subject to forfeiture.

C. When Can an Employer Deduct or Withhold Wages?

Aside from the withholding of wages the employer is required or empowered to deduct by federal or state law (e.g., income taxes, etc.), the NC Act allows an employer to withhold wages under the following circumstances without penalty under the statute:

1. by advanced written authorization if the amount or rate of the proposed deduction is known and agreed upon;
2. by advanced written authorization and notice when the amount of the proposed deduction is not known and agreed upon ahead of time;
3. for cash shortages, inventory shortages, or loss or damage to an employer’s property after giving advanced written notice of the amount to be deducted seven days prior to the payday on which the deduction is to be made(except when the employee is separated, then the seven-day notice is not required);

4. for an overpayment of wages to an employee as a result of a miscalculation or other bona fide error, advances of wages to an employee or to a third party at the employee's request, and the principal amount of loans made by an employer to an employee, which are considered prepayment of wages;
5. if criminal process has issued against an employee, an employee has been indicted, or an employee has been arrested under North Carolina law for a charge incident to a cash shortage, inventory shortage, or damage to an employer's property, an employer may withhold or divert a portion of the employee's wages in order to recoup the amount of the loss, but if the employee is found not guilty then it must be reimbursed to the employee.

N.C. Gen. Stat. § 95-25.8. Each of these provisions have specific requirements under the NC Act and regulations. See 13 N.C. Admin. Code §§ 12.0304 and 0305.

If the employer withholds wages for the employer's benefit, including any of the five reasons listed above, the employer must:

- in non-overtime workweeks, only reduce wages to the minimum wage level; and
- in overtime workweeks, only reduce wages to the minimum wage level for non-overtime hours (no reductions may be made to overtime wages).

N.C. Gen. Stat. § 95-25.8(b).

D. Postings and Records

Employers are required to make certain postings and records under the NC Act. For one, employers must notify an employee at the time of hiring of the promised wages and place for payment, which can either be orally or in writing. N.C. Gen. Stat. § 95-25.13(1). Ideally, it should be in writing to avoid claims of additional promised wages.

The employer also must post or provide in writing the rules regarding forfeiture of wages as explained above under Part C, as well as providing advanced notice (at least 24 hours) of any changes to its rules or promised wages. N.C. Gen. Stat. § 95-25.13(2) and (3).

Employees must also be provided with an itemized statement of the deductions being taken from their paycheck. N.C. Gen. Stat. § 95-25.13(4). It can be electronic (e.g., for those employees being paid by direct deposit), but it must be printable by the employee. 13 N.C. Admin. Code § 12.0807.

E. Individual Liability and Remedies.

The NC Act, like the FLSA, defines employer to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." N.C. Gen. Stat. § 95-25.2(5). Therefore, there is the potential for individual liability under the statute.

If an employer fails to pay wages, the employee may sue for the unpaid wages as well as interest. N.C. Gen. Stat. § 95-25.22(a). The statute also authorizes an equal amount as liquidated damages. N.C. Gen. Stat. § 95-25.22(a1). If the employer shows that it acted in good faith and had reasonable grounds to believe its acts or omissions were not unlawful, a court may reduce or eliminate the liquidated damages amount. *Id.* The employee may recover costs and fees, including reasonable attorneys' fees. N.C. Gen. Stat. § 95-25.22(d). If the court determines the action was frivolous, it can award the employer costs and fees, including reasonable attorneys' fees. *Id.* The statute of limitations for claims is two years. N.C. Gen. Stat. § 95-25.22(f).

F. Recent Updates.

1. State Overtime Exemption Update: Employees of seasonal amusement parks or recreational establishments (defined as such an establishment that does not operate for more than seven months in the previous calendar year or meets a complex revenue accrual test) have always been exempt from the federal minimum wage and overtime protections under the FLSA. However, before this year, employees of these establishments fell under the NC Wage and Hour Act. On July 25, 2017, Governor Roy Cooper signed Senate Bill 82 into law, amending N.C. Gen. Stat. § 95-25.14(c) to include “[a]ny employee of a seasonal amusement or recreational establishment” as a class of employees exempt from the NC Act’s overtime and record-keeping provisions. Session Law 2017-185, entitled “Achieving Business Efficiencies,” became effective on January 1, 2018 and eliminated the overtime entitlement to employees under the Seasonal Amusement or Recreational Establishment exemption in the NC Act. However, the new law allows for employees to be paid minimum wage in North Carolina by removing previous verbiage that allowed for them to be paid at a rate less than minimum wage.

2. State Wage Payments Cannot Be Waived: A recent case in the Western District of North Carolina held that the North Carolina Wage and Hour Act parallels the FLSA and that therefore, state wage payment claims cannot be waived through a private release. See *Rehberg v. Flowers Baking Company of Jamestown, LLC*, 162 F. Supp. 3d 490, 506-07 (W.D.N.C. 2016).

3. In January of this year, the Wage and Hour Division again began releasing opinion letters. An index to the letters is available at <https://www.dol.gov/whd/opinion/search/index.htm?FLSA>.

4. Moving SB 303 into law - North Carolina Update on definition of franchisor; not an employer of franchise or franchise employees and thus no liability for the wrongful acts by local franchisees. (Note: This will not have any effect on the joint employment determination under Federal law.)

Hypotheticals

Misclassification

Technician’s job duties included installing hardware systems and cables at client locations and occasionally supporting hardware and software products. Third-party service provider advised company that position was exempt. Technician contended the position was non-exempt. Company reclassified position and offered a lump-sum payment of two years past overtime.

- a. Was position exempt?
- b. What was the impact, if any, of relying on the third-party service provider?
- c. What was the effect of the lump-sum payment offer?
- d. Can the “fluctuating workweek” method of overtime calculation be used to determine any damages?

Travel Time

1. An hourly technician travels from home to the Company’s office to obtain a job itinerary and then travels to the customer location. All travel is in a company vehicle.

- a. Any part of this time compensable?
 - b. Does it matter whether employee is in a company vehicle?
 - c. What about time between different customer locations?
2. An hourly technician travels by plane from North Carolina to Oklahoma City on a Sunday for a training class beginning at 8:00 a.m. on Monday at the Corporate Office. Technician is in training Monday to Thursday and flies back on Thursday night at 7:15 p.m.
- a. Is any part of this time compensable?

Joint Employment

Company Solar Excellence is building a solar panel farm in Gastonia. Company Premium Labor enters into an agreement with Solar Excellence to obtain the labor to build the facility. Premium Labor enters into an agreement with Company Gastonia Labor to staff the project. Premium Labor obtains the work hours for each individual staffed on the project from Gastonia Labor and bills Solar Excellence. Solar Excellence manages the project, although Gastonia Labor has a Project Manager on-site.

- a. When Gastonia Labor underreports overtime, what factors will determine possible joint employment liability?

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CHAPTER VIII

Implicit Bias

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NORTH CAROLINA

BAR ASSOCIATION
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CHAPTER VIII
Implicit Bias

Benjamin D. Reese, Jr., Psy.D - Durham

Do Lawyers Needs Implicit Bias Training VIII-1
Implicit Bias & the Implicit Association..... VIII-3
What Law Firms Can Learn from Starbucks VIII-7
Implicit Bias and Lawyers..... VIII-15

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Do Lawyers Need Implicit Bias Training?

By [Casey C. Sullivan, Esq.](#) on July 8, 2016 3:20 PM

Black children are regularly viewed as older and more suspicious than they are, leading to harsher treatment at the hands of authority figures. When imaging powerful figures, women rarely come to mind as often as men. Yet, pretty much everyone this side of Archie Bunker believes such biases are wrong. So why do they persist?

One of the answers is implicit bias, the subtle, often-unconscious associations connected to race, gender, and age that reinforce discriminatory stereotypes, often without our being aware of them. To counteract implicit bias, the Department of Justice recently announced that all of its law enforcement agents and prosecutors would receive training on unconscious bias. Should the rest of the legal profession follow?

Implicit Bias Matters

If your racist uncle's drunken comments are the tip of the bias iceberg, implicit bias is everything hidden under the water. They're the subconscious associations that shape our actions and reactions in the blink of an eye. They can make us less sympathetic to minority clients, more critical of younger or older colleagues, or less willing to accept women in positions of power -- even if our conscious mind knows better than to believe the stereotypes implicit biases are based on.

Those biases "present unique challenges to effective law enforcement," Deputy Attorney general Sally Yates said in a memo to DOJ employees. That's because unconscious bias "can alter where investigators and prosecutors look for evidence and how they analyze it without their awareness or ability to compensate."

Don't think implicit bias applies to you? You might be right! Go ahead and test it out. Thanks to researchers at Harvard, anyone with a computer and internet connection can see if unstated biases affect them. The Implicit Association Test asks you to pair two concepts, like women with leadership roles and men with homemaking duties. Then it reverses the pairing. If you have more ease with one match than the other, that could be implicit bias playing out.

Give it a try; you might be surprised at the results.

Implicit Bias Training Is Becoming More Common

The DOJ's implicit bias training seeks to "to promote fairness, eliminate bias and build the stronger, safer, more just society that all Americans deserve." And the mandate is wide-reaching. More than 28,000 DOJ employees will be affected, including 5,800 federal prosecutors and 23,000 federal agents.

But the DOJ isn't breaking new ground here. Many local law enforcement agencies have also been mandating implicit bias training, [Reuters reports](#). Police departments from Baltimore to New York and Seattle to New Orleans have instituted trainings to help officers recognize bias, often following outcry over police brutality.

Should lawyers follow the lead of the DOJ and local PDs? Of course. As ABA President Paulette Brown [wrote in response to the DOJ announcement](#), "When unconscious biases impact the fairness and equality of our criminal justice system, complacency is not an option."

Need a new hire for your firm? Consider [posting a job opening to Indeed, for free](#).

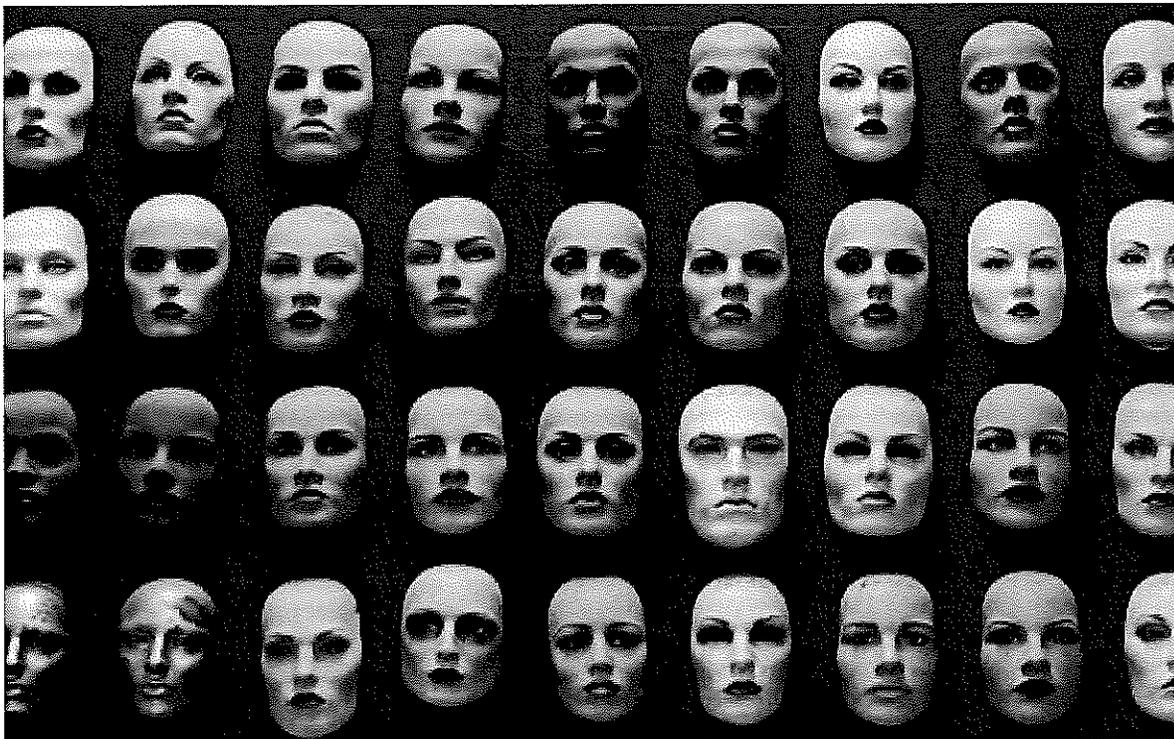
Related Resources:

- [Why the Department of Justice Wants to Force Its 28,000 Employees to Confront Unconscious Racial Biases](#) (Los Angeles Times)
- [Is Your Jury Biased Against Fat People?](#) (FindLaw's Strategist)
- [ABA to Beef up Ethics Rule on Workplace Discrimination](#)(FindLaw's Strategist)
- [3 Tips for Dealing With a Judge Who Hates Your Client](#) (FindLaw's Strategist)

How to Think about "Implicit Bias"

Amidst a controversy, it's important to remember that implicit bias is real—and it matters

- By Keith Payne, Laura Niemi, John M. Doris on March 27, 2018



Credit: Getty Images

When is the last time a stereotype popped into your mind? If you are like most people, the authors included, it happens all the time. That doesn't make you a racist, sexist, or whatever-ist. It just means your brain is working properly, noticing patterns, and making generalizations. But the same thought processes that make people smart can also make them biased. This tendency for stereotype-confirming thoughts to pass spontaneously through our minds is what psychologists call implicit bias. It sets people up to overgeneralize, sometimes leading to discrimination even when people feel they are being fair.

Studies of implicit bias have recently drawn ire from both right and left. For the right, talk of implicit bias is just another instance of progressives seeing injustice under every bush. For the left, implicit bias diverts attention from more damaging instances of explicit bigotry. Debates have become heated, and leapt from scientific journals to the popular press. Along the way, some important points have been lost. We highlight two misunderstandings that anyone who wants to understand implicit bias should know about.

First, much of the centers on the most famous implicit bias test, the Implicit Association Test (IAT). A majority of people taking this test show evidence of implicit bias, suggesting that most people are implicitly biased even if they do not think of themselves as prejudiced. Like any measure, the test does have limitations. The stability of the test is low, meaning that if you take the same test a few weeks apart, you might score very differently. And the correlation between a person's IAT scores and discriminatory behavior is often small.

The IAT is a measure, and it doesn't follow from a particular *measure* being flawed that the *phenomenon* we're attempting to measure is not real. Drawing that conclusion is to commit the *Divining Rod Fallacy*: just because a rod doesn't find water doesn't mean there's no such thing as water. A smarter move is to ask, "What does the other evidence show?"

In fact, there is lots of other evidence. There are perceptual illusions, for example, in which white subjects perceive black faces as angrier than white faces with the same expression. Race can bias people to see harmless objects as weapons when they are in the hands of black men, and to dislike abstract images that are paired with black faces. And there are dozens of variants of laboratory tasks finding that most participants are faster to identify bad words paired with black faces than white faces. None of these measures is without limitations, but they show the same pattern of reliable bias as the IAT. There is a mountain of evidence—independent of any single test—that implicit bias is real.

The second misunderstanding is about what scientists mean when they say a measure predicts behavior. It is frequently that an individual's IAT score doesn't tell you whether they will discriminate on a particular occasion. This is to commit the *Palm Reading Fallacy*: unlike palm readers, research psychologists aren't usually in the business of telling you, as an individual, what your life holds in store. Most measures in psychology, from aptitude tests to personality scales, are useful for predicting how *groups* will respond *on average*, not forecasting how particular *individuals* will behave.

The difference is crucial. Knowing that an employee scored high on conscientiousness won't tell you much about whether her work will be careful or sloppy if you inspect it right now. But if a large company hires hundreds of employees who are all conscientious, this will likely pay off with a small but consistent increase in careful work on average.

Implicit bias researchers have always warned against using the tests for predicting individual outcomes, like how a particular manager will behave in job interviews—they've never been in the palm-reading business. What the IAT does, and does well, is predict average outcomes across larger entities like counties, cities, or states. For example, metro areas with greater average implicit bias have larger racial disparities in police shootings. And counties with greater average implicit bias have larger racial disparities in infant health problems. These correlations are important: the lives of black citizens and newborn black babies depend on them.

Field experiments demonstrate that real-world discrimination continues, and is widespread. White applicants get about 50 percent more call-backs than black applicants with the same resume; college professors are 26 percent more likely to respond to a student's email when it is signed by Brad rather than Lamar; and physicians recommend less pain medication for black patients than white patients with the same injury.

Today, managers are unlikely to announce that white job applicants should be chosen over black applicants, and physicians don't declare that black people feel less pain than whites. Yet, the widespread pattern of discrimination and disparities seen in field studies persists. It bears a much closer resemblance to the widespread stereotypical thoughts seen on implicit tests than to the survey studies in which most people present themselves as unbiased.

One reason people on both the right and the left are skeptical of implicit bias might be pretty simple: it isn't nice to think we aren't very nice. It would be comforting to conclude, when we don't consciously entertain impure intentions, that all of our intentions are pure. Unfortunately, we can't conclude that: many of us are more biased than we realize. And that is an important cause of injustice—whether you know it or not.

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Confronting implicit bias: What law firms can learn from Starbucks

Ellen Yiadom Hoover • MAY 29, 2018



Implicit bias is pervasive. It is a consequence of our brains' quest for efficiency. Instead of laboring over every decision we need to make each day, our brains take shortcuts when making routine decisions. For example, each time you stop at a red light you don't contemplate what that means or what options you have. You simply stop because your brain has already processed what the red light means and, as a result, it uses very little energy in making that decision.

While most of these shortcuts are helpful, some of them can be misleading because they may be based on stereotypes. As Dr. Arin Reeves notes in her article *"The Ineffectiveness of Efficiency: Interrupting Cognitive Biases for Critical Thought,"*

"[our] biases lull us into thinking that we are thinking critically when, in fact, we are taking shortcuts based on assumptions...these shortcuts, while efficient, may be misinformed and inaccurate."

In this way, our brains reproduce the biases that exist. For example, our brains may incorrectly associate an African American male with criminal behavior or an Asian woman with submissiveness. Addressing implicit bias requires critical thinking about the decisions we make and the underlying assumptions that guide those decisions. While we may not need to engage in a deliberative process at each red light, it is essential to do so when making decisions related to employment, the criminal justice system or how to treat customers, for example.

Recently, Starbucks decided to take a step in addressing implicit bias by closing its U.S. stores and corporate offices on Tuesday, May 29 for an afternoon of implicit bias training. The curriculum for the training is being developed with input from national figures who have been dedicated to addressing racial bias such as former U.S. Attorney General Eric Holder and Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense and Education Fund.

The coffee retailer made this decision after a white store manager at a Philadelphia Starbucks called the police on two African American men because they did not purchase anything. A video of the incident went viral and led to several days of protests. Both Starbucks chairman, Howard Schultz, and CEO, Kevin Johnson, personally apologized to the men and appeared on television interviews, pledging to address implicit bias in their stores and offices.

While one afternoon of presentations will not end implicit bias in all Starbucks stores, it is an important first step in encouraging those who work for Starbucks to think critically about the split second decisions they make about individuals based on their appearances. It will help their employees better serve the public and bolster their reputation for being welcoming spaces for everyone.

The legal industry can learn a lot from Starbucks' approach. While implicit bias impacts all aspects of diversity and inclusion efforts, it is particularly damaging to the way in which associate work is assigned and evaluated in firms.

For example, a study performed by Nextions, LLC, found that partners who reviewed a memo written by a fictional African American male associate discovered more errors and provided more negative comments than an identical memo written by a fictional white male associate. The study included 60 partners from 22 different law firms, with about one-third being women and one-third being racial/ethnic minorities. Half of the partners received the memo written by the African American male associate while the other half received the memo written by the white male associate. On a scale from 1 to 5, with "1" indicating a poorly written memo and "5" a well-written memo, the memo written by the African American male associate received an average rating of 3.2/5 while the memo written by the white male associate received 4.1/5. Given that the memos were identical and in fact the fictional associates had the same name, Thomas Meyer, the only factor that could account for the significant difference in their scores was their race.

How do we explain this difference? It's possible that explicit bias (or conscious bias) played a role. However, the study notes that previous research had shown that implicit bias is more prevalent in our workplaces than explicit bias. How then do we address implicit bias in our firms? How do we encourage supervising attorneys (partners, counsel and senior associates) not to make these cognitive shortcuts when assigning work or when reviewing work product? I provide a few insights below on how firms can start this conversation.

1. Train Supervising Attorneys on Implicit Bias

In a statement from Starbucks, the company acknowledged that the training is only a first step: "The training is part of a longer, comprehensive effort to make

Starbucks even more diverse, equitable, and inclusive than it is today. This will include ongoing review and revisions of relevant store and corporate policies, guidelines and practices.” Starbucks acknowledges that they also need to reach out to local communities in order to fully address implicit bias and improve inclusion in their stores.

Likewise training supervising attorneys on implicit bias is an essential step in addressing concerns over the retention of diverse associates. We are more likely to force our brains to make critical decisions if we understand that some of our split second decisions are based on stereotypes. The first step to this awakening is to know that implicit bias exists.

While some law firms have implemented some form of implicit bias training, it's unclear how widespread these trainings are or their frequency. Given the role supervising attorneys play as the gatekeepers in law firms, I would suggest law firms implement mandatory implicit bias training for all supervising attorneys. Even if a firm has a dedicated diversity and inclusion professional, supervising attorneys must also be devoted to improving retention of diverse associates and creating more inclusive spaces.

Some states, such as New York and Illinois, have recently implemented a one credit diversity CLE requirement for attorneys. To assist with that effort and to ensure all Illinois attorneys, regardless of their firm or practice, have access to implicit bias training, the Illinois Supreme Court Commission on Professionalism recently developed an online course, *“Rebalance the Scales Course: Implicit Bias, Diversity, and the Legal Profession”*. The e-learning course features law firm attorneys, in-house counsel and law professors defining implicit bias and explaining the ways in which it operates within the legal industry. The course also provides exercises that encourage participants to challenge their biases, not only as lawyers, but in their daily lives.

2. Revamp the Assignment Process for Junior Associate

At the heart of an associate's experience at a firm is the nature of the assignments they receive. If the complexity of their assignments does not increase or their assignments lack variety, associates are unlikely to learn the skills and practice area knowledge that's essential to thriving in a firm. A formal assignment system that requires work to be distributed from a central source can be a great way to ensure all associates are receiving the kind of experience they need to advance in their careers. A system that requires associates to secure their own assignments may be difficult to execute for diverse associates given the prevalence of implicit bias. The results of the Nextions, LLC study, discussed above, suggest supervising attorneys may be more likely to give assignments to white associates than diverse associates because they are more likely to view the work product of white associates more favorably than diverse associates.

Additionally, beyond instituting a formalized assignment system, the hours of junior associates should also be tracked to ensure assignments are indeed being equitably distributed. Thankfully, since most firms require associates to keep track of their time, it should be relatively straightforward to determine which associates are busy and which associates could use additional hours. Given that the first through third years are crucial years for an associate's development, ensuring that associates are receiving relatively similar work experiences is essential to not only addressing implicit bias, but also associate retention generally.

Also, firms must look for ways to encourage supervising attorneys to work with different associates. Since some firms divide associates into client teams, it might be helpful to rotate associates through different client teams every year within the same practice group. Doing so will allow associates the opportunity to work with various clients and gain the experience needed for promotion while also building internal networks by working with different supervising attorneys. To the extent firms can formalize work opportunities available to

associates, the less of a role implicit bias can play in determining who gets certain assignments.

3. Restructure the Evaluation Process

In addition to formalizing the assignment process, firms need to also rethink how associates receive feedback and are evaluated. Receiving feedback can be one of the most difficult aspects of an associate's experience. As the Nextions, LLC study discussed above demonstrates, there is a difference in how white associates are evaluated versus diverse associates (at least African American male associates as the study indicates).

What are the consequences of receiving such an evaluation? For example one might assume that the African American male associate would become a better writer as the result of receiving a more critical review of his work. Unfortunately, even if his writing improves, the continued critical review of his work will hamper his chances of receiving additional assignments and being promoted, especially if his fellow white associates are not receiving the same level of critical review. His work product will constantly be under assault because supervising attorneys will look more critically at his work expecting to find more mistakes. After a few negative reviews of his work, he will have developed a reputation for not being a good writer and providing a shoddy work product, which will then impede his ability to get staffed on assignments going forward.

How can firms restructure their feedback or evaluation process to overcome implicit bias? The study suggests implementing interruption mechanisms that limit the impact of implicit bias on associate evaluations. These interruption mechanisms can include crafting evaluations that are more objective and that ask specific feedback and details on the work provided rather than simply asking supervising attorneys to rate an associate's work product. Firms should consider working with consultants to craft evaluation forms that allow for more objective responses that can reduce the impact of implicit bias.

4. Hold Supervising Attorneys Accountable

Finally, in order for the strategies discussed above to impact the work diverse associates receive and how that work is evaluated, supervising attorneys must be held accountable. Firms cannot simply pay lip service to implicit bias. Each firm's leadership must set the tone for supervising attorneys about the importance of attending trainings and being actively engaged in any changes to the assignment or evaluation process to reduce the impact of implicit bias.

Firms should consider implementing anonymous evaluations of supervising attorneys. While this may seem controversial, the goal is not to embarrass supervising attorneys, but to find ways to evaluate how effective efforts to address implicit bias are. If evaluations from diverse associates indicate a pattern for certain supervising attorneys, it might be worth addressing these concerns rather than leaving them unchecked. These evaluations are also a great way to improve the training and teaching skills of supervising attorneys generally.

While firms and supervising attorneys may want to continue operating as usual because it's comfortable and easy, they have to challenge themselves to make decisions that will improve the experiences of diverse associates as well as all associates. Ensuring that supervising attorneys are held accountable for actively working to address their implicit biases in the assigning and reviewing of associate work will improve the retention of all associates.

Conclusion

Confronting implicit bias in law firms will not be a simple task. In fact, firms will have to constantly work to ensure supervising attorneys are thinking critically about who they are giving assignments to and who they are not as well as how they evaluate diverse associates. Tackling implicit bias is

essential to addressing the lack of diversity in our nation's law firms. While implicit bias may be pervasive, law firms, like Starbucks, can take a step in the right direction by acknowledging its existence and seeking concrete solutions.

2018

Shadowing the Bar: Attorneys' own Implicit Bias

Chris Chambers Goodman

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Recommended Citation

Chris Chambers Goodman, *Shadowing the Bar: Attorneys' own Implicit Bias*, 28 LA RAZA L.J. 18 (2017).

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38HT2GB8C>

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SHADOWING THE BAR: ATTORNEYS’ OWN IMPLICIT BIAS

Chris Chambers Goodman*

“Everything we see, is a shadow of that which we do not see.”
Martin Luther King, Jr.

INTRODUCTION	18
PART ONE: IMPLICIT BIAS RESEARCH.....	19
A. Identifying Bias	19
B. The Stereotypic Association Between African Americans and Violence.....	21
C. The Stereotypic Association Between African Americans and Crime	23
D. Critiquing Implicit Bias	25
E. The Next Generation of Implicit Bias Research	28
PART TWO: IMPLICIT BIAS IN CRIMINAL CASES	30
A. Prosecuting Attorneys and Prosecutorial Bias	30
B. Criminal Defense Attorney Bias	32
C. Effects on Jurors	34
D. How Judges’ Implicit Bias May Affect Rulings.....	36
E. Implicit Bias in the Courthouse	38
PART THREE: IMPLICIT BIASES OF ATTORNEYS IN CIVIL LITIGATION	39
A. The Negligence Standard.....	39
B. Implicit Bias in Communication.....	40
C. Credibility Assessments that Rely on Implicit Biases	41
D. Representation Strategies Developed by Implicit Bias	42
E. Promoting the Fair Administration of Justice	42
PART FOUR: REDUCING THE IMPACT OF IMPLICIT BIASES IN CIVIL CASES.....	43
A. Notice Race.....	43
B. Recognizing the Importance of Cross-Cultural Competency	44
C. Moving Toward More Deliberative Decisions	47
CONCLUSION	48

INTRODUCTION

What is it that attorneys fail to see because of biases they do not believe they have? They are quicker to note explicit biases and try to counter them, yet so many do not even consider the possibility they may have acted according to implicit biases. While explicit biases are less pronounced, less tolerated, and less often spoken, unconscious biases impacts decision making every day, and there are many open questions still to explore.

For instance, what are the driving factors behind “prosecutorial discretion,” in charging decisions generally and the death penalty specifically?¹ When defense lawyers defend their clients, which “stock stories” do they use, which ones do they believe and which ones do they encourage in their efforts to convince the judges and juries whose decisions can be influenced by their own explicit and implicit biases? On the civil side, can attorneys become better at understanding why they may make certain strategic choices for one client and different strategic choices for another?

This article analyzes the implications of implicit bias in the legal profession, focusing on how the implicit biases of attorneys impacts litigants. Part one summarizes research in the cognitive science field defining bias and explains some of the Harvard Implicit Association Tests (IAT). Part two describes some studies conducted on juror and judicial bias in the courtroom, as well as those dealing with the bias of attorneys in criminal cases. Using this background, part three provides an analysis of the impact of an attorney’s implicit bias on her strategic decision making and conduct of civil litigation, its results for clients, and its impact on the justice system. Part three also provides an argument for the American Bar Association’s (ABA) proposed rule for a negligence standard regarding ethical regulations intended to ensure that lawyers work harder to overcome biases to better serve justice. The conclusion in part four proposes a framework for interrupting biased behaviors.

PART ONE: IMPLICIT BIAS RESEARCH

A. *Identifying Bias*

Bias is the pre-judging of a person based on his or her, perceived or actual, status of being a member of a particular group, without regard to that person’s actual conduct or performance. Biases can be explicit or implicit.

Explicit biases are easier to identify and explain. People who have explicit biases will express those biases, verbally or in writing. They are aware of their biases and admit to having the bias if asked or challenged. They are deliberate in relying upon those biases and have an animus—a mental state similar to purpose or knowledge. For instance, a person may say, “African American men are more prone to violence than white or Asian men.” When faced with a situation requiring him to assess the potential violence of an approaching man, he will readily admit to this bias being a part of his thought process in deciding whether self-defense strategies are needed.

DOI: <https://doi.org/10.15779/Z38HT2GB8C>

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1. See generally Chris Chambers Goodman et al., *Unpredictable Doom and Lethal Injustice: An Argument for Greater Transparency in Death Penalty Decisions*, 82 *TEMPLE L. REV.* 997 (2009); Theodore Eisenberg & Sherry Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 *DEPAUL L. REV.* 1539 (2004); Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 *ILL. B.J.* 40, 43 (2014); Shelly Song, *Race Consciousness in Imposing the Death Penalty*, 17 *RICH. J.L. & PUB. INT.* 739, 743–744 (2014). For a more in-depth discussion, see below pages 30–32.

By contrast, implicit bias is unintentional from a mental state perspective: People do not know they are speaking or acting in a particular way because of the influence of a bias. For instance, when participants were primed² with either pop or rap music and asked to evaluate a Black person's behavior, those primed with rap music noted the behavior as more aggressive and the individual as less intelligent.³ Similarly, a recent study asking participants to estimate height and weight based on photos of faces found people estimated that Black male faces belonged to taller and heavier bodies than white male faces; when in reality the white male faces were from bodies that were taller and heavier.⁴ These subjects did not intend to discriminate and were not conscious of the discrepancies between their estimates and reality. Still, those estimates can have an impact.

The implicit bias field has been developing over the past several decades.⁵ The research focuses on how human brains work to process information and make decisions. When people have time to evaluate information and make a decision, that decision can be more deliberate. Deliberate decisions are more thoughtful and purposeful, relying upon our analytical skills. By contrast, when making decisions quickly, people rely on intuition and on somewhat automatic processing by their brains. For instance, people know that a flame is hot and infer that a pot sitting on the stove over an open flame is hot. So, there is no need to think about whether or not to use to an oven mitt when lifting the pot from stove: people will reach for the oven mitt.

Similarly, lawyers may know the court house contains many white judges. So, when feeling some time pressure and stress having arrived late at an unfamiliar courtroom and upon seeing a Latina step into the room, the lawyer may ask her when the judge is expected to take the bench. This quick reaction may be based on an implicit bias and the lawyer may presume that the Latina is not the judge, or (more pejoratively) that she must be the clerk. If the attorney took the time to think about it, the attorney might not have made that assumption; but when faced with a quick decision, the brain defers to its well-worn paths to help process information quickly.

One well-worn path is that most judges are white men. Another well-worn path is that most people of color in the courtrooms are either parties or court employees. These are both true statements in the experience of many. And they both reveal potential implicit biases.⁶ Implicit bias is not easy to uncover, explain, or analyze. It is one's intuitive reaction in situations that generally are immediate or require fast-thinking and quick judgment calls. When confronted or simply asked, people are likely to reject the notion that they are biased and will deny that they behaved in a biased way.

The Harvard Implicit Association Tests are the "most well-known and highly regarded measure of implicit bias."⁷ According to data from the Race IAT, eighty-eight percent of white Americans have implicit bias against African Americans.⁸

2. Priming involves exposing a subject to a particular stimulus prior to the stated test and is described in more detail in Part I.B, below page 21.

3. Hyman, *supra* note 1, at 41.

4. John Paul Wilson et al., *Racial Bias in Judgements of Physical Size and Formidability: From Size to Threat*, J. OF PERSONALITY & SOCIAL PSYCHOL. 113 (2017); *see also* Amina Khan, *Black Men's Plight as "Superhuman"* L.A. TIMES, March 13, 2017, at B2.

5. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126, 1128 (2012).

6. *See generally* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).

7. Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321, 329 (2015).

8. *Id.* Some do have biases in favor of African Americans. *Id.*

Further, forty-eight percent of African Americans have an implicit bias that favors white Americans.⁹ There is significant support for the conclusion that, “in the aggregate, implicit bias can have a substantial impact on perception, judgment, decision making, and behavior.”¹⁰

While *having* bias is not necessarily the same as *acting* upon it, some people may call upon these biases when making decisions. For instance, these biases could influence someone’s decision on whether a defendant is guilty or innocent.¹¹ The next sub-section describes a selection of these studies.

B. *The Stereotypic Association Between African Americans and Violence*

Words can activate implicit biases. For instance, researchers often use a technique called “priming,” which involves exposing a test subject to some focused stimulus before the actual test occurs. The control group may have no priming or be primed with something intended to be neutral. In some IATs, when primed with “words associated with Blacks, such as slavery,” subjects were more likely to rate the ambiguous behaviors of a male as hostile even when the race of the male was not specifically identified.¹² This particular study involved mock jurors, who the researchers concluded were impacted in two ways: (1) they were more likely to consider ambiguous evidence as supporting guilt, and (2) they were more likely to believe that the defendant actually was guilty.¹³

In addition, test subjects were more likely to interpret ambiguous behaviors as aggressive when there are Black actors rather than white actors performing the action.¹⁴ Several studies have evaluated the association between African Americans and violence by analyzing whether a suspect’s race influenced the participant’s decision to fire a weapon at a suspect, as well as whether race influenced the time spent deliberating before making the decision as to whether or not to shoot.¹⁵

In one study, the researchers developed a simple video game with twenty different backgrounds and eighty different target images.¹⁶ Ten African American men and ten white men posed as models for the target images.¹⁷ The models appeared in the video game multiple times in different scenarios and positions.¹⁸ Sometimes the targets were armed with guns and other times they were not armed but holding “no-gun” objects.¹⁹ When participants played the game, they encountered a slideshow of

9. *Id.* at 329–30. Others do have biases against whites. *Id.*

10. Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. CIV. RTS. L. J. 1, 34–35 (2015) (citing examples in medicine, job applications, teacher expectations, and even labor arbitrations).

11. Thompson, *supra* note 7, at 330.

12. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626, 2635 (2013).

13. *Id.*

14. *Id.* at 2637.

15. Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002). The findings are necessarily limited because participants were (mostly white) undergraduate students, although the fourth study involved community members of both races and genders.

16. *Id.* at 1315.

17. *Id.*

18. *Id.*

19. *Id.* The “no-gun” objects used in this research were an aluminum can, a silver camera, a black cell phone and a black wallet.

different backgrounds. An image of a man randomly appeared and the participants were prompted to make a decision as to whether to shoot this target, after having been told they needed to react quickly to shoot *armed* suspects.²⁰ The results of the study show that potentially hostile targets were identified more quickly if they were African American, and participants were also more likely to miss an armed target if he was a white man.²¹

A second study repeated the first study with shorter time frames in which to decide, thus further activating the brain's automatic shortcut processes. Researchers found that participants "set a lower threshold" for shooting African American targets, which can be interpreted to mean that they were more willing to shoot "less threatening" African American targets.²²

A third study tested whether participants used stereotypic associations between African Americans and violence to help them decide whether to shoot. The subjects were forty-eight undergraduates (twenty-six female and twenty-two male) playing the same video game.²³ They also completed a questionnaire to examine whether they endorsed a negative stereotype of African Americans as dangerous or aggressive. The results suggested it was knowledge of the cultural stereotype rather than indirect personal prejudice that influenced the decision to shoot.²⁴ Knowing about stereotypes is more pervasive than ascribing to them, but if conduct is partially determined by this knowledge, rather than acknowledged prejudice, acting in response to it would not constitute purposeful discrimination. As intent or purpose is required for actionable state actor discrimination, the lack of intent negatively impacts the ability to effectively combat stereotypes in the justice system.

A fourth study in this group used the same video game parameters and the participants included fifty-two adults (in part, composed of twenty-five African Americans and twenty-one white Americans) selected from bus stations, malls, and food courts.²⁵ The results showed that the decision to shoot African Americans more quickly did not differ between white participants and African American participants.²⁶

The researchers' analysis of these studies led to four findings: (1) white participants made the correct decision to shoot an *armed* target more quickly if the target was African American; (2) white participants decided *not* to shoot an *unarmed* target more quickly if he was white; (3) the magnitude of bias varied with perceptions of the cultural stereotype and with levels of contact, but not with racial prejudice; and (4) a follow-up study showed that the levels of bias were the same among African American and white participants in a community sample.²⁷ The researchers concluded:

In four studies, participants showed a bias to shoot African American targets more rapidly and more frequently than White [sic] targets. The implications of this bias are clear and disturbing. Even more worrisome is the suggestion that mere knowledge of the cultural stereotype, which depicts African Americans as violent,

20. *Id.* at 1316.

21. *Id.* at 1316–1317.

22. *Id.* at 1319.

23. *Id.* at 1321.

24. *Id.*

25. *Id.* at 1324.

26. *Id.*

27. *Id.* at 1325.

may produce Shooter Bias, and that even African Americans demonstrate the bias.²⁸

This evidence shows the stereotype has an impact on the behavior of people deciding whether or not deadly force is warranted. If students and community members demonstrate this bias, the next question is to consider those who are charged with enforcing the law, and who have more opportunities to make a decision about whether or not deadly force is justified. The next section evaluates some of these studies.

C. *The Stereotypic Association Between African Americans and Crime*

The media plays a large role in molding our stereotypic associations. For example, “regularly seeing images of Black but not white criminals in the media may lead even people with egalitarian values to treat an individual Black as if he has a criminal background or assume that a racially unidentified gang member is Black.”²⁹ The association between Black people and crime and against white people and crime influences society at large and police officers in particular.

Another group of studies included police officers as subjects to analyze the influence of stereotypical associations on visual processing. These five studies aimed to identify whether a person’s preconceived notion about a person or group of people influenced what that subject perceived when viewing certain images or objects.³⁰

Specifically, the first study “investigated (a) whether the association between Blacks and crime can shift the perceptual threshold for recognizing crime-relevant objects in an impoverished context and (b) whether these perceptual threshold shifts occur despite individual differences in explicit racial attitudes.”³¹ The participants were primed with Black male faces, white male faces, or no faces. In an unrelated task, they were shown images of objects with incomplete pixels, such that it was difficult to identify the object initially; and as more pixels were added, the resolution gradually enhanced. The subjects were asked to push a button at the point when they thought they could identify the object and write down their guess.³² The images included both “crime-relevant (e.g., a gun or a knife) and crime-irrelevant (e.g., a camera or a book).”³³

The authors concluded that “black [sic] faces triggered a form of racialized seeing that facilitated the processing of crime-relevant objects.”³⁴ Further, in comparing the participants who were primed with white faces and those who were not primed with any faces, the authors found that the mere priming with white faces

28. Correll, *supra* note 15, 1327–28.

29. Girvan, *supra* note 10, at 32.

30. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004). The participants in these studies included police officers and undergraduate students.

31. *Id.* at 878.

32. *Id.*

33. *Id.* at 881. Although, given the shooting in South Carolina of an alleged unarmed Black man sitting in his car reading a book, perhaps a book now has become a crime object as well. Later evidence suggested that the man had a weapon in his car or on his person, but that his hand held a book, not a weapon. See *Protests Erupt After Man Killed in Officer-Involved Shooting in Charlotte*, CBS NEWS (Sept. 20, 2016), <https://www.cbsnews.com/news/person-killed-in-officer-involved-shooting-in-charlotte-north-carolina/>.

34. Eberhardt, *supra* note 30, at 880.

actually inhibited the detection of crime-relevant objects.³⁵ People are thrown off guard and have a more difficult time connecting crime objects with white faces, which may lead to both a lower expectation of danger from white actors and a lower percentage of deadly force engagements.

Participants in another study were all police officers, seventy-six percent of whom were white. First, they were primed with “crime words,” such as “violent, crime, stop, investigate, arrest, report, shoot, capture, chase, and apprehend.”³⁶ Then, the participants were asked to look at photos of sixty Black male faces (with features stereotypically associated with Blacks) and sixty white male faces.³⁷ Next, they were asked to participate in a surprise face-recognition task where they viewed images of Black “lineups” and white “lineups” and were asked to identify any faces they were shown during the previous task.

This study found the police officers were more likely to identify a face that was more “stereotypically Black” than the target they actually were shown when they were primed with crime words. “Priming police officers with [words associated with] crime caused them to remember Black faces in a manner that more strongly supports the association between Blacks and criminality.”³⁸ The authors determined:

Researchers have highlighted the robustness and frequency of this stereotypic association by demonstrating its effects on numerous outcome variables, including people’s memory for who was holding a deadly razor in a subway scene [¶] The mere presence of a Black man, for instance, can trigger thoughts that he is violent and criminal. Simply thinking about a Black person renders these concepts more accessible and can lead people to misremember the Black person as the one holding the razor.³⁹

From these studies, the authors drew five conclusions: (1) Black faces influence a participant’s ability to detect degraded images of crime-relevant objects such as guns and knives;⁴⁰ (2) showing crime-relevant objects to participants prompts them to visualize Black male faces—suggesting that the association of Black and criminality is bidirectional—i.e., when participants saw Black faces, they visualized violent objects and when they saw violent objects, they visualized Black faces;⁴¹ (3) these associations exist based on both positive and negative images because when the participants were exposed to positive stereotypical images involving Black people (basketball and athletics), the results were similar;⁴² (4) police officers associate the concept of crime with Black male faces and priming police officers with crime words or concepts “increases the likelihood that they will misremember a face as more stereotypically black [sic] than it actually was;”⁴³ and (5) the more stereotypically Black a face appears, the more likely police officers are to report that the face looks

35. *Id.*

36. *Id.* at 885–86.

37. *Id.*

38. *Id.* at 888.

39. *Id.* at 876.

40. *Id.* at 878.

41. *Id.* at 883.

42. *Id.* at 885.

43. *Id.* at 878.

criminal.⁴⁴ This association impact suggests there is a strong bias in police officers themselves that Black people are more likely to be engaged in criminal activity than white people, which impacts who is stopped, frisked, questioned, and detained in their community encounters.

Another IAT experiment identified a potential implicit racial bias in favor of guilt, despite the presumption of innocence.⁴⁵ Professor Demetria Frank discusses the applications of cross-racial identifications and their unreliability, as well as the overrepresentation of Black people in the criminal justice system.⁴⁶ From her evaluation of several studies, she concluded, “Whites are more likely to exhibit racial neutrality in decisions where race is a salient feature in the trial or when normative cues to avoid bias are strong.”⁴⁷ When attention is called to bias, people are on guard and make the effort to be race-neutral.

It is imperative that lawyers and judges understand the implications of these and other research studies. Lawyers and judges are often forming their own opinions and making decisions based on the evidence they are given, which includes eyewitness testimony. If implicit bias is so strong it can cause actual eyewitnesses to incorrectly remember who was the perpetrator during a crime, then implicit bias not only affects the lawyers and judges directly but also indirectly as they develop strategies and arguments in reliance upon this testimony.⁴⁸

D. Critiquing Implicit Bias

There are some notable challenges made against the implicit bias testing regime within the scientific community. Those challenges include: defining what is and is not implicit bias; physical processing of information used to measure implicit bias; whether the samples are sufficiently generalizable; what the level of correlation says about causation; how predictive the measures can be; and the impact of changing levels of implicit bias. On the first issue, there are questions about whether the distinction between explicit and implicit biases is a spectrum rather than a bright line. In other words, are we really measuring what we think we are measuring?

On the physical processing issue, one instrumental critique is that younger people generally have quicker reflexes and are better at video games and sending text messages with one finger per hand than older adults, which could lead to tests revealing greater levels of bias in older people. Any critique about varying reflex times would necessarily undermine the perceived validity of the test results because part of the IAT test relies upon measuring the difference in the amount of time it takes the subject to react when processing “two stimuli that are strongly associated (e.g., elderly and frail)” with “two stimuli that are less strongly associated (e.g. elderly and robust)”⁴⁹ to test out the existence and clarity of pathways.

44. *Id.* at 889.

45. See Demetria D. Frank, *The Proof is in the Prejudice: A Proposal Confronting Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 56, 20 (2016).

46. *Id.* at 22, 55.

47. *Id.* at 23.

48. The prevalence of wrongful convictions and the fact that racial minorities are more likely to be exonerated than the general population suggests an inference that they are targeted by the legal system more than whites. Song, *supra* note 1, at 774.

49. Pamela M. Casey et al., *Helping Courts Address Implicit Bias, Resources for Education*, National Center for State Courts (2012) at 3; see PROJECT IMPLICIT,

In terms of subject sampling, many of the subjects are college students, who are overrepresented in the data, and the studies that have used other subjects recognize disparate outcomes for other groups.⁵⁰ While participation in the IAT is open to all through its website,⁵¹ people self-select; and therefore extrapolations about their results may be misleading as to the general population.

On the issue of correlation and causation, critics question whether implicit bias governs people's actions. Even if the IAT tests accurately predict the existence of pathways that evidence implicit bias, they do not demonstrate that people act consistently with the implicit biases that the test measures.⁵² Some studies show that more than four percent of variance in discrimination-relevant criteria measures is predicted by the Black-white race IAT measures,⁵³ but if implicit bias accounts for only about four percent of behaviors,⁵⁴ over ninety-six percent remains; and that is no greater impact on behavior than what some have found from explicit bias. Others found an effect size of discrimination closer to zero.⁵⁵

Researchers measure what people do (such as who employers hire, or who juries find to be guilty), but cannot measure what they are thinking when they actually engage in that conduct. Nor do researchers know whether subjects are more likely to engage in biased conduct based on their implicit bias score. Studies show the IAT finds that many people have a high level of favorability for white males and words associated with leadership roles, but the IAT does not tell whether these subjects will actually give a hiring preference to white males when they have the opportunity to do so. We may know that certain individuals promoted white men in the past, but the IAT test does not explain whether their preferences for associating white males and leadership caused them, or played a role in their decision to promote a white male. The issue is that "behavior toward black [sic] people, or white people in isolation, cannot be operationalized as discrimination . . . since they fail to capture *differential* treatment. Hence, treating a black [sic] person badly is not discrimination per se; it only becomes discrimination if the treatment is worse than the treatment of an equivalent white individual."⁵⁶ Thus, the research does not explain whether people will act in accordance with their implicit preferences, nor whether their past acts were because of those implicit preferences.

On the issue of predictive validity, others also criticize the value of the IAT, noting "severe validity and reliability issues,"⁵⁷ and stating that:

<https://implicit.harvard.edu/implicit/faqs.html> (explanation of standard IAT test procedures).

50. Patrick Forscher et al., *A Meta-Analysis of Change in Implicit Bias* 32 (May 5, 2016) (unpublished manuscript) (on file with Research Gate) (showing different effect sizes for student and non-student samples).

51. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html>.

52. See Maurice Wexler, *The Survival of the Intentionality Doctrine in Employment Law: To Be or Not to Be* (Nov. 2016) (unpublished manuscript) (on file with author).

53. Anthony G. Greenwald et al., *Statistically Small Effects on the Implicit Association Test Can Have Societally Large Effects*, 108 JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY 553, 561 (2015).

54. Forscher, *supra* note 50, at 1–2. This article describes research synthesizing evidence from "427 studies (63,478 participants) to investigate the effectiveness of different procedures to change implicit bias. We also examine those procedures' effects on explicit bias and behavior. We found that implicit bias is malleable and that most procedures produce small changes." *Id.*; see also Rickard Carlsson & Jens Agerström, *A Closer Look at the Discrimination Outcomes in the IAT Literature*, 57 SCANDINAVIAN JOURNAL OF PSYCHOLOGY 278, 279 (2016).

55. Carlsson & Agerström, *supra* note 54, at 283.

56. *Id.* at 280.

57. *Id.* at 286.

[T]he most important finding of the present study is that the current literature is uninformative as to whether the IAT can predict discrimination or not, as it turned out that too many studies failed to measure or provide evidence of discrimination actually occurring in the first place. Hence additional empirical work is needed.⁵⁸

They “strongly caution against” applying the IAT based on any assumption that it can or does predict discrimination.⁵⁹ For instance, someone could show an amygdala reaction that equates with prejudice against Black people when tested, but actually treat Black and white people the same way in the real world.⁶⁰ That same person could be explicitly biased against Black people, and still refrain from treating them differently in a particular situation.

In a study that evaluated changes in levels of implicit bias, researchers found that while some procedures changed levels of implicit bias, their impact was very small. For instance, “[p]rocedures that associate sets of concepts, invoked goals or motivations, or tax people’s mental resources⁶¹ produce the largest changes in implicit bias, whereas procedures that induced threat, affirmation, or specific moods/emotions produce the smallest changes.”⁶² Appeals to fear, pride, and other emotions had the least impact on implicit bias measures. Conversely, “big picture” strategies addressing associations and goals are less tangible and had a larger impact in changing implicit bias levels. This study further notes that “even the procedures that produced robust effects on implicit bias had effect sizes that are ‘small,’ both by conventional standards and as compared to typical effect sizes in social psychology.”⁶³

Despite their limited impact on implicit biases, these procedures had no significant impact on explicit biases and behaviors.⁶⁴ The researchers were surprised to find “little to no evidence that the changes caused by procedures on explicit bias and behavior are mediated by changes in implicit bias.”⁶⁵ Recognizing the limitations of their analysis—that most of the studies relying upon university student samples can differ significantly from the larger world—they noted the need for further research to better understand “changes in implicit biases and their role in explicit bias and behavior.”⁶⁶ They concluded that it would be “more effective to rid the social environment of the features that cause biases on both behavioral and cognitive tasks, or equip people with strategies to resist the environment’s biasing influence.”⁶⁷

Instead of recognizing and measuring implicit biases, researchers suggest eliminating environmental biases altogether (“biases in the air” so to speak) or training

58. *Id.* at 285.

59. *Id.* at 286.

60. *Id.* at 280.

61. KAHNEMAN, *supra* note 6. As Kahneman explains when people are physically tired and/or emotionally exhausted, they are more likely to resort to well-worn paths of thought. *Id.*

62. Forscher, *supra* note 50.

63. *Id.* at 31.

64. The authors note “we found little evidence that changes in implicit bias mediate changes in explicit bias or behavior. Together, these findings suggest that implicit bias is malleable, but that changing implicit bias does not necessarily lead to changes in explicit bias or behavior.” Forscher, *supra* note 50, at 2.

65. *Id.* at 33.

66. *Id.* at 33.

67. *Id.* at 34–35.

people to make bias-free decisions. In order to make an implicit bias-free decision, one has to notice bias, identify it, and then act consciously; and recognizing and measuring biases are important steps on that path.⁶⁸ Other researchers, like Professors Greenwald and Banaji note that even taking these and other meta-analyses into account, “[t]his level of correlational predictive validity of IAT measures represents potential for discriminatory impacts with very substantial societal significance.”⁶⁹ These apparently small impacts in individual cases can add up to a significant impact on how litigants are treated in the court system in general and by individual attorneys and judges in particular.

In the same journal,⁷⁰ others reply that despite the additional research and analysis, “by current scientific standards, IATs possess only limited ability to predict ethnic and racial discrimination and, by implication, to explain discrimination by attributing it to unconscious biases.”⁷¹ The authors criticize Professors Greenwald and Banaji because they “focus on a set of implicit bias effects without considering the vast array of other realistic effects that could be competing with implicit bias in any setting.”⁷² The authors conclude with a word of caution noting:

[I]f one allows anything to grow unimpeded—be it money in the bank or an epidemic or the ripple effects of unconscious bias in a population—that phenomenon will eventually, with enough time, grow to gargantuan proportions. That is mathematically uncontested. Whether the small effects of unconscious bias that are suggested as at least possible from these meta-analysis will in reality grow, be contained or disappear in complex, real-world social systems is a question that should be resolved through vigorous empirical testing, not computer simulations and thought experiments that, by their nature, must rely on strong yet untested assumptions.⁷³

So, does the IAT really help?

E. The Next Generation of Implicit Bias Research

In responding to some of these critiques, others note too little attention has

68. Even Professors Carlsson and Agerström may agree despite their criticism of the predictive validity, because “the applied value of the IAT does not depend solely on its predictive validity of discrimination. In our own experience, simply using the IAT as a tool to learn about automatic associations can be a good way to start a rich discussion about attitudes, prejudices, and discrimination.” Carlsson & Agerström, *supra* note 54, at 286.

69. Greenwald, *supra* note 53, at 553–61. The study notes that “differences between the conclusions of the two meta-analyses notwithstanding, two important empirical findings were supported by both. First, both studies agreed that, when considering only findings for which there is theoretical reason to expect positive correlations, the predictive validity of Black-white race IATs is approximately $r=.20$. Second, even using the two meta-analyses’ published aggregate estimated effect sizes, the two agreed in expecting that more than 4% of variance in discrimination-relevant criterion measures is predicted by Black-white race IAT measures.” *Id.*

70. *Id.* at 562–71.

71. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Societal Significance*, 108 J. OF PERSONALITY & SOC. PSYCHOL. 562, 562 (2015).

72. *Id.* at 568.

73. *Id.* at 569.

been focused on the way decision makers justify their decisions after the fact.⁷⁴ It is not clear whether people make decisions and then explain how bias did not play a role in the decision or make decisions and then create an explanation showing that bias did not play a role, even if bias actually did have an impact. Professor Kang and others note:

[B]roadly speaking, this research demonstrates that people frequently engage in motivated reasoning in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.⁷⁵

The authors describe an experiment involving subjects evaluating finalists for a job as police chief, with one of each gender and different profiles that suggested either “book-smart” or “street-wise.” The subjects were asked to rank the candidates and then identify the factors that contributed to their ranking. Depending on which candidate they selected, the subjects ranked factors such as education and experience differently, leading the authors to conclude that “what counted as merit was redefined, in real time, to justify hiring the man.”⁷⁶ When the man had more experience and less education, the subjects noted that experience was ranked more highly after the fact. When the man had more education and less experience, education was ranked more highly after the fact.⁷⁷

The next question was whether this post-hoc valuation of factors was done consciously to provide a cover story or was merit “re-factored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story?”⁷⁸ Further research tested this question. Participants evaluated college admissions decisions for African American and white candidates, with variations in their GPAs and in the number of Advanced Placement courses taken. When asked to identify which criteria was most important, the rankings changed as to whether GPA was the most important factor depending on whether or not the white or

74. Kang, *supra* note 5, at 1156.

75. *Id.* at 1156.

76. *Id.* at 1157.

77. The authors explain:

[T]he ways that human decision-makers may steadily address criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests however that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence some employment decisions might be motivated by implicit bias but rationalized post-hoc based on nonbiased [sic] criteria.

Id. at 1159.

78. *Id.* at 1157.

the African American candidate had a higher GPA.⁷⁹

Even where the participants were not going to select who would be admitted because admission decisions had already been made and thought they were simply examining the most important criteria, their assessments of value varied such that the white applicant satisfied the higher-valued criterion. The process of “reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.”⁸⁰

This outcome suggests the subjects are not consciously trying to justify what they know to be biased decisions, but rather that the bias is truly unconscious and the brain engages in a dissonance-reducing rationalization. These authors also studied how jurors evaluate attorneys and what the implications of the juror evaluation of the attorney has for the client, which will be addressed in part two below.⁸¹

PART TWO: IMPLICIT BIAS IN CRIMINAL CASES

A. Prosecuting Attorneys and Prosecutorial Bias

Implicit bias can operate at many stages when we consider the choices prosecutors face during the various stages of a criminal case. Prosecutors have discretion when deciding whether to charge a person for a crime at all. Studies show prosecutors are more likely to charge Black suspects than white suspects in similar circumstances.⁸² For instance, on the issue of justified homicide and self-defense, the cell phone/weapon IAT results suggest that “prosecutors might be more likely to believe that the white victim was reaching for his cell phone, and thus, that the suspect acted unreasonably in shooting the deceased;” but when the victim is Black they are more likely to find that the suspect acted reasonably in discharging the weapon.⁸³ The bias operates doubly here, because the white victim is more likely to be perceived as reaching for a cell phone whereas the Black victim is more likely to be perceived as reaching for a weapon, and the Black suspect is more likely to be perceived “as reacting unreasonably in discharging his weapon”⁸⁴ against the white victim, whereas the white suspect is more likely to be perceived as “being in reasonable fear” of the Black victim, and therefore acting appropriately in discharging his weapon.

The prosecutor has discretion as to what level of crime to charge to each individual. The Black or Latino male “drug dealer” stereotype can impact whether a prosecutor files a simple possession charge or “with intent to distribute” charge.⁸⁵ Similarly, the decision to charge juveniles in adult court can be impacted by the race

79. See generally *id.* at 1158 (citing studies by Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision-Making*, 12 PSYCHOL. PUB. POL’Y & L. 36, 42, n.142 (2006)).

80. *Id.* at 1159 (citing Timothy D. Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious* n.147 (Belknap Press, 1st ed. 2004)).

81. See generally *id.* at 1167–1168.

82. Hyman, *supra* note 1, at 42. In charging decisions, studies have shown that “prosecutors are less likely to charge white suspects than black [sic] suspects,” even controlling for the level of prior criminal record. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806 (2012) (discussing the influence of implicit bias in charging decisions, pretrial strategies, and trial strategies).

83. *Id.* at 808.

84. *Id.*

85. *Id.* at 810.

of the individual.⁸⁶

Determining the level (or even availability) of bail is impacted by presumed ties to the community, which often are based on race, ethnicity, and socioeconomic status. Justice Hyman notes that “these discretionary decisions are closely tied to the prosecutor’s evaluation of the suspect’s behavior and whether a suspect *seems likely* to be a future danger to society.”⁸⁷ In short, “the perception of the defendant . . . in turn, alters the perception of the seriousness of the crime.”⁸⁸

But when is the prosecution evaluating the suspect’s behavior? If before arrest, such as in the decision whether to seek a warrant, the prosecutor is generally seeing things unfold through the lens of the police or investigator, who is interpreting and reporting the suspect’s actions, influenced by his or her own biases. When the prosecutor interprets the officer’s report, that interpretation is influenced by the prosecutor’s own biases. Thus, two levels of bias could creep in before the prosecutor even makes a charging decision.

If the prosecutor’s evaluation of the defendant’s behavior is post-arrest, common and expected reactions to being in jail—where one must not show fear or remorse, act “hard” and most of all be silent and self-protective—may leave an unfavorable impression with the prosecutor. The same person likely behaves very differently out in society on bail than when in prison or jail.

On the issue of plea-bargaining, the power of “in-group favoritism” impacts how empathetic a person will be when seeing or hearing about another person experiencing pain.⁸⁹ For instance, studies have shown people empathize more with a lighter-skinned person being subjected to pain than with a darker-skinned person being subjected to pain, particularly when the people being measured have lighter skin.⁹⁰ Empathy can lead to lower sentences; and the evidence shows that white defendants also receive more favorable plea bargains than Black defendants.⁹¹

In jury selection, peremptory challenges allow implicit racial bias to seep in when Black jurors are disproportionately stricken.⁹² Implicit bias seems to play a large role during the voir dire process with peremptory strikes often reflecting an attorney’s own unconscious stereotypes that govern which jurors to strike without reason.⁹³ For instance, the prosecutors may strike African American jurors who live in the inner city—applying a stereotype about Black Lives Matter supporters when any particular person in that group could be “tough on crime” based on its devastating impact on the community. The remaining jurors are likely to be those who the attorney believes fit a favorable stereotype and they too could actually hold counter-stereotypic views.

Thus, prosecutors will attempt to keep those perceived to be pro-law enforcement jurors (just as the defense may strike otherwise pro-defense jurors or keep pro-prosecution jurors), all because they assess the jurors based on what could be erroneous or inapplicable stereotypes. Even though the defense can offer a nonracial reason for the strike, that reason may be covering for implicit bias as an after-the-fact,

86. *Id.* at 811.

87. Hyman, *supra* note 1, at 42 (emphasis added).

88. *Id.*

89. Smith & Levinson, *supra* note 82, at 819.

90. *Id.* at 817–18.

91. Hyman, *supra* note 1, at 42.

92. Smith & Levinson, *supra* note 82, at 819.

93. Hyman, *supra* note 1, at 40, 43.

dissonance-reducing justification.⁹⁴

This potential for prejudice can continue into the conduct of the trial. The prosecutor hears and evaluates the testimony of the witnesses, and makes judgments about the credibility of those witnesses, which influence the substance of the prosecution's closing arguments. Black defendants are more often dehumanized by the words and phrasing used in the prosecution's closing arguments, such as referring to Black defendants as "animals."⁹⁵ Professor Frank cautions against references that implicate racial stereotypes.⁹⁶ Courts "seldom find that such references deny non-white defendants a fair trial,"⁹⁷ and therefore:

[U]ncharged acts admitted against non-White [sic] defendants likely assist jurors in filling any evidentiary gaps in the prosecution's case with implicit race associations. This phenomenon is consistent with studies demonstrating the jurors are more likely to convict racial minorities than non-White [sic] defendants when the evidence is ambiguous, versus weak or strong.⁹⁸

Prosecutors are using language that is persuasive to the jurors, and defense attorneys must employ counter-stereotype techniques in their efforts to vigorously represent the clients because judges are not likely to step in. Nevertheless prosecutors, as representatives of the state, must first pursue justice rather than any individual's interest, and this asymmetry suggests a more compelling case for curbing implicit bias in prosecutors over defense lawyers.⁹⁹

B. Criminal Defense Attorney Bias

Criminal defense attorneys also demonstrate implicit bias. Defense attorneys may be affected when primed with words or conduct associated with gangs or violence in their everyday practice. They may also be more likely to believe that ambiguous evidence relates to guilt or that the defendant is actually guilty in conformance with the stereotype.¹⁰⁰ Defense attorneys may also attribute a higher level of violence to conduct allegedly committed by Black defendants over white defendants. Defense lawyers also rely on stereotypes when they pick juries, making assumptions based on their race, and Lyon cautions:

[I]f we are using this process of elimination based on stereotypes, jurors will know it. And then we cannot get angry if the jurors return the favor by making the assumption that our young male minority client is guilty, a gang member, or otherwise dangerous and not

94. See Kang, *supra* note 5, at 1157–58. See also the accompanying text discussing dissonance-reducing post hoc justifications.

95. Hyman, *supra* note 1, at 42.; Smith & Levinson, *supra* note 82, at 820.

96. Frank, *supra* note 45, at 30.

97. *Id.* at 25 (citing numerous cases).

98. *Id.* at 34–35 (citing Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345).

99. For this point, I am indebted to my Pepperdine colleagues who participated in an April, 2017 faculty workshop on this article.

100. Richardson & Goff, *supra* note 12, at 2636.

deserving of respect.¹⁰¹

For public defenders, implicit bias may particularly affect decision making, given the triage circumstances of a need for quick action with few resources.¹⁰² Triage begins immediately, when public defenders prioritize cases based on whether or not the state can prove its case beyond a reasonable doubt or whether the public defender believes the client is “factually innocent.”¹⁰³

In a triage situation, public defenders allocate their resources first to the cases they can or should win. If public defenders fall under the spell of generalizations or stereotypes, they may miscalculate the merits of the case and the odds of winning it and thus decide to allocate fewer resources to what they perceived to be losing cases. For instance, public defenders subscribing to a stereotype that those who do not look their questioner in the eye are lying, may discount a witness’s potential testimony or choose not to put that witness on the stand. Without that witness, who while truthful, appears to the defense attorney to be untruthful, the case against the defendant may be stronger, resulting in a disservice to the client.

The prophecy becomes self-fulfilling, reinforcing the perception for similar clients or circumstances in the future. These implicit biases “can cause attorneys to treat stereotyped individuals in stereotype-consistent ways” and the attorneys’ “unconscious negative expectations may produce perceptions and attributions consistent with them.”¹⁰⁴ The client may sense this negative reaction and respond in a way that causes the attorney to confirm her opinion and “can create a vicious cycle of mutual distrust and dislike, adversely affecting the attorney’s triage decisions. Spending time with a client can, of course, change these initial impressions. But, an unpleasant initial interaction may reduce the defender’s desire to do so.”¹⁰⁵

One might think public defenders would be “better” on race issues, but as one former public defender learned, “there is no person without prejudices, myself included.”¹⁰⁶ For instance, when Professor Andrea Lyon had a Black defense client who became hostile and raised his voice, she succumbed to the “angry Black man” stereotype and decided to walk away from the client. Only later did she realize that the client might have been suffering from developmental disabilities, acting “tough” to cover-up the fact he could not follow her conversation and did not understand the multiple options she was presenting to him.¹⁰⁷ She attributes her decision in the moment in part to the concept of “race loyalty,” which occurs when people are accustomed to “assuming the best in people who match our race because of our desire to see our race (and ourselves) positively.”¹⁰⁸ The converse is also true, assuming the worst in people whose race is different from one’s own race, which can impact how one represents criminal defendants.

Implicit bias may be even more of a concern in death penalty defenses, though little has been recorded about the attitudes of death penalty attorneys

101. Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 767 (2012).

102. See Richardson & Goff, *supra* note 12, at 2633.

103. *Id.* at 2634.

104. *Id.* at 2638.

105. *Id.* at 2638.

106. Lyon, *supra* note 101.

107. *Id.* at 763–64.

108. *Id.* at 759.

specifically.¹⁰⁹ Taking the data sets of presentations made at training sessions for capital defense attorneys, researchers divided them into three groups: habeas corpus, trial lawyers, and law students.¹¹⁰ They found statistically significant differences in the results of the white-with-good-and-Black-with-bad IAT over the Black-with-good-and-white-with-bad for all three groups.¹¹¹

Interestingly, subjects did better when associating their own race with “good.”¹¹² Having more Black capital defense attorneys would likely lead to more comfortable associations of Black-with-good. Based on this study, diversity in this attorney pool can have an impact on the volume and level of bias made manifest. Given that forty-two percent of individuals on death row are Black, some states have taken the initiative to enact laws that give defendants a claim of racial discrimination in their post-conviction appeals.¹¹³ For example, North Carolina enacted the Racial Justice Act in 2009, allowing defendants to make a claim of racial discrimination in their post-conviction appeals.¹¹⁴ Professor Shelley Song suggests additional reforms in the criminal context.¹¹⁵ While her article specifically addresses death penalty cases, her suggestions are broadly applicable to criminal cases generally and several also apply to civil cases.

C. Effects on Jurors

We know skin color may impact juror decision making. With otherwise identical scenarios, the darker the skin of the alleged perpetrator, the more likely jurors in mock situations are to find the alleged perpetrator guilty.¹¹⁶ The “violent Black man” stereotype discussed above¹¹⁷ can also operate as character evidence as Professor Mikah Thompson notes, referring to the nature of implicit bias as “unspoken evidence”

109. See Eisenberg & Johnson, *supra* note 1. The authors begin with an assumption that “virtually nothing is known about the racial attitudes of lawyers in general, let alone defense lawyers or capital defense lawyers specifically.” *Id.* at 1540–41; see also Song, *supra* note 1, at 743.

110. See Eisenberg & Johnson, *supra* note 1, at 1545.

111. See *id.* 1549–50 (explaining that the IAT tests rely upon the subject’s ability to use key strokes with the left and right hands, and how quickly they can confirm their association between for instance photos flashing on the screen and particular words or sentiments).

112. They note “white subjects in all these groups provided more correct spot responses when white was paired with good. Black subjects in all three groups provided more correct responses when black [sic] was paired with good.” *Id.* at 1547.

113. Song, *supra* note 1, at 743–44.

114. *Id.* at 744.

115. Those recommendations include:

[L]imiting the liability shield of judges, removal of judges who show a tendency for racial bias, reversing convictions where the judges made racially motivated comments during the proceeding, eliminating prosecutors’ shields from civil and criminal liability for prosecutorial misconduct, preventing the use of peremptory challenges when they appear to be racially based, stopping prosecutors from using racially charged language in order to exaggerate jurors’ fears and reservations by judicial intervention at the moment a comment is made, standardize punishment for similar offenses, maintain a jury pool whose makeup reflects the community at large, participation of minorities in the trial process, and expanded notions of racism and racist behavior/attitudes, among others.

Id. at 778.

116. Hyman, *supra* note 1, at 43.

117. See Part I (B), *supra* note 107. See also the accompanying text.

often used at trial against African Americans.¹¹⁸ Various concepts of implicit bias come together to paint a picture of “stereotypical Blackness” that is often used against criminal defendants¹¹⁹ because “rather than offering inadmissible evidence of a Black defendant’s character for violence, the government can instead offer evidence of the defendant’s stereotypical Blackness, thereby playing upon the jurors’ implicit biases to establish the guilt of the defendant.”¹²⁰

The George Zimmerman trial (for the killing of Black teenager Trayvon Martin in Florida) provides an illustration of the idea of “stereotypical Blackness.”¹²¹ The racialized criticism of prosecution witness Rachel Jeantel (as “dumb,” uneducated and not credible) provides insight into the way jurors and Zimmerman viewed Jeantel and also how they possibly viewed the victim.¹²² If people watching the televised trial thought Trayvon had a similar character to Jeantel because of their friendship and common color, then her “stereotypical Blackness” could have been passed on to him throughout the trial¹²³ given that he was deceased and therefore not present. If no evidence was offered to “humanize” Trayvon Martin, all that remained was stereotypical Blackness, which could have acted as his character evidence.¹²⁴ As such, the jurors likely would perceive him as threatening or violent and would perceive Zimmerman as being more reasonable in fearing for his life and using deadly force in self-defense. Hence, the acquittal.

In addition to being influenced by implicit bias, Professor Thompson suggests that white decision-makers may be affected by the “transparency theory.”¹²⁵ The transparency theory is “the tendency of whites not to think about whiteness.”¹²⁶ In short, because whiteness is the norm, being a white person is not something that many white people tend to think about.¹²⁷ They do not actually reflect on their whiteness unless they are in a situation that calls them to compare themselves to someone who is not a white person.¹²⁸ This transparency phenomenon is dangerous for African Americans because it causes white people to disregard the existence and salience of white-specific norms for those who are not white people.¹²⁹

118. Thompson, *supra* note 7, at 323.

119. *Id.* at 323.

120. *Id.* at 322.

121. *Id.* at 335. There were very few *explicit* racial references (i.e., the prosecution was not allowed to say that Trayvon was “racially profiled, only that he was ‘profiled’”). *Id.* at 336. Implicit racial references and stereotypical Blackness were heavily involved in the testimony of Rachel Jeantel, Trayvon’s friend and the last person (besides Zimmerman) to speak to Trayvon before he died. *See id.* at 337. The trial was televised, and when Jeantel took the stand, she was attacked on social media for her “appearance, speech, and perceived level of intelligence.” *Id.* Further, she was compared to Precious, a fictional character in a 2009 movie who was illiterate, overweight and sexually abused. Jeantel was called “dumb, stupid, uneducated, hideous, nasty” and some stated that “she looked like a man.” *Id.* Juror interviews after the trial appear to support his theory that jurors did not think of Jeantel as intelligent or credible. *See id.* at 339–42. One juror specifically stated “I didn’t think [she] was very credible . . . I think she felt inadequate toward everyone because of her education and her communication skills.” *Id.* at 340–41.

122. *Id.*

123. *Id.* at 338.

124. *See id.* at 339.

125. *Id.* at 331.

126. *Id.*

127. Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969–70 (“To be white is not to think about it. I label the tendency for whiteness to vanish from whites’ self-perception the transparency phenomenon.”).

128. *See id.*

129. *See id.*

Professor Thompson examines Federal Rule of Evidence 404(a), which limits when character evidence (other than for credibility purposes) may be used against a defendant in a criminal trial.¹³⁰ Although the rule is meant to protect defendants from having unduly prejudicial evidence admitted, she suggests implicit bias combined with the transparency theory creates a different kind of character evidence not regulated by Rule 404(a): evidence of “stereotypical Blackness,” which is just as prejudicial.¹³¹ Therefore, when African Americans do not assimilate to these norms or seems unwilling to assimilate, they will face discrimination from jurors, even if those jurors have good intentions.¹³² Further, a Black defendant’s perceived failure to assimilate to white-specific norms can cause that defendant to fall into the category of “stereotypical Blackness,” which implicitly includes evidence “that he or she has a propensity for engaging in certain behavior.”¹³³ That behavior, based on the IAT studies discussed above, is aggressive, violent and often criminal.

D. How Judges’ Implicit Bias May Affect Rulings

A few studies identify implicit biases in judges.¹³⁴ Judges are “just as susceptible as are jurors to three cognitive illusions that hinder accurate decision making: anchoring, hindsight bias and egocentric bias.”¹³⁵ An IAT study showed:

[T]he white judges mostly showed a white preference while black [sic] judges showed no clear overall preference. When subliminally primed with black-associated words in a hypothetical vignette, judges who expressed a white preference on the IAT were more likely to impose harsher punishments on defendants in the story than those primed with neutral words. When race of the defendant was made explicit in a hypothetical vignette, black [sic] judges were appreciably more willing to convict the white defendant rather than the defendant identified as African-American.¹³⁶

Justice Hyman’s article recalls a moment when an attorney saw an African American woman exiting the judge’s chambers and exclaimed “you must be the law clerk.” It turned out the woman was not the law clerk but in fact the judge.¹³⁷ The justice then questioned whether this incident would affect the way the judge viewed that attorney moving forward in the case and how the judge’s rulings would be affected. If the judge’s actions were somehow influenced moving forward, this incident would affect not only the attorney but ultimately the client being represented.

Even this informed judicial perspective reveals a deeper level of hidden bias. Why would the judge let a personal slight impact her rulings? Perhaps because the author’s common sense tells him that some female judges would be offended by the

130. Thompson, *supra* note 7, at 323–27.

131. *Id.* at 334–35.

132. *See id.*

133. *Id.* at 332.

134. *See, e.g.,* Andrew Wistrich & Jeffrey S. Rachlinski, *Implicit Bias in Judicial Decision Making: How it Affects Judgment and What Judges Can Do About It*, in ENSURING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., ABA 2017).

135. Eisenberg & Johnson, *supra* note 1, at 1554.

136. Hyman, *supra* note 1, at 44.

137. Hyman, *supra* note 1.

assumption that they are not judges. Professors Kang and Banaji and others caution against the use of so-called “common sense” by judicial actors because theories and notions that were once considered common sense are less accurate now based on the literature and empirical research.¹³⁸ For instance, many may have considered it “common sense” that men on average are better drivers than women, but automobile insurance companies have studied the data and give women (especially when compared to young men) lower rates because their risk of accidents is lower.

Why would his common sense tell him the judge might be offended? Is it because of the stereotype that African American women are “unforgiving,” “hard,” “cold,” and perhaps are more likely to hold grudges over real or perceived slights than white males or other females? Quite probably. And so, she is second-guessed when a young white male judge would get the benefit of the doubt that he would not hold any such grudge if he instead had been mistaken for the law clerk or an off-duty bailiff. Implicit bias has an impact.

Another recent study of over 200 sitting judges analyzed the strength of positive stereotypes of white people and Christians, along with both negative and positive stereotypes of Asian people and Jewish people.¹³⁹ Self-reporting using IAT tests, the study found most judges “displayed strong to moderate implicit bias against Asians relative to whites and against Jews relative to Christians.”¹⁴⁰ The participants also completed a sentencing task—reading a file and making a sentencing decision where the race and religion of the defendant varied.¹⁴¹ Other findings include: (1) State judges gave longer sentences to white defendants than to Asian defendants;¹⁴² (2) Anti-Jewish, pro-Christian biases accurately predicted lesser sentences for Christian defendants,¹⁴³ and (3) male judges showed stronger anti-Jewish biases than female judges.¹⁴⁴

The behavioral realism approach posits that judges need to keep up with empirical research if they are going to implicitly or explicitly base their decisions on theories about how people behave. Do judges even want to address the issue of implicit bias? Professor Eric Girvan argues, “the law-science gap exists and persists in significant part because judges believe they lack the ability to effectively remedy non-purposeful discrimination of the kind described by work on implicit bias and are unwilling to take steps necessary to develop ways to do so.”¹⁴⁵ He criticizes judges for not doing a better job of “conforming their assumptions about human behavior to available social science.”¹⁴⁶ He notes a Westlaw search he did, revealing “more examples of cases in which a majority of the judges indicating that they are aware of the concept refused to alter anti-discrimination doctrine accordingly in cases in which a majority of judges acknowledged evidence of implicit bias as justification for

138. Kang, *supra* note 5, at 1160–63.

139. Justin D. Levison et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLORIDA L. REV. 63 (2017).

140. *Id.* at 97–98 (noting that 91.6% of the judges were non-Hispanic white, and 2% were Asian, and 11% were Jewish).

141. *Id.* at 101.

142. *Id.* at 104.

143. *Id.* at 109.

144. *Id.* at 104, 109, 106.

145. Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law* 94 OREGON L. REV. 359, 360 (2016).

146. *Id.* at 362.

liability.”¹⁴⁷

In other words, despite reasoning that implicit bias played a role in allegedly discriminatory behavior, the judges declined to extend the interpretation of anti-discrimination doctrine to permit or support a finding of liability. In one recent case, the U.S. Court of Appeal for the Fourth Circuit broke from this pattern, holding that “[i]nvidious discrimination steeped in racial stereotyping is no less corrosive of the achievement of equality than invidious discrimination rooted in other mental states.”¹⁴⁸ The court’s comment explained that while the circuit had “admonished district courts, albeit in unpublished, non-precedential decisions,” it is now “past the time when that admonishment should be given precedential force.”¹⁴⁹ Recognizing the “real risk” that legitimate claims based on subtle “stereotyping or implicit bias” may be dismissed by judges substituting their own rationales, the court reversed the district court’s dismissal.¹⁵⁰ Professor Girvan concludes, “if the antidiscrimination [sic] law-science gap is caused primarily by a lack of judicial knowledge, . . . the solution to it should be to inform judges of research supporting the psychological science of implicit bias and evidence of its applicability to the cases they are deciding.”¹⁵¹ Part four addresses these suggestions.

E. *Implicit Bias in the Courthouse*

In the courthouse, further research is needed on the impact of implicit bias on court personnel. Court workers may treat people differently based on what they look like and based on implicit biases. As Professor Debra Bassett notes:

Court clerks who accept court filings may unconsciously respond differently to individuals of different races leading them to provide more help to some individuals than to others. As a mundane example, suppose a litigant presents paperwork for filing, and the paperwork lacks a required two-hole punch across the top. The court clerk may reject the paperwork when offered by some individuals but in other cases may accept the paperwork and simply punch it themselves.¹⁵²

Differences in treatment can lead to real consequences for litigants—even impacting the outcome of their cases.

Another important facet of civil litigation is how few cases go to trial. We know that the attorney’s assessments of the case and its settlement value play a large role in the recovery options for civil plaintiffs. Implicit biases of settlement judges, mediators, and other dispute resolution actors may exacerbate the prejudice to the fair

147. *Id.* at 364, n.14, app. A–C.

148. *Woods v. City of Greensboro*, 855 F.3d 639, 651 (4th Cir. 2017).

149. *Id.*

150. *Id.* at 25–26.

151. Girvan, *supra* note 145, at 380.

152. Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1579 (2013). She continues: “Although rejecting paperwork lacking the two-hole punch probably will have little impact on the case, it potentially impacts public perceptions of the accessibility of justice.” *Id.* However, rejecting the filing could have significant consequences, if a deadline is imminent. She also notes that judicial law clerks can have a “powerful impact on how their judge approaches the case,” and “this bias can influence the ultimate outcome of the case.” *Id.* at 1579–80.

administration of justice.

PART THREE: IMPLICIT BIASES OF ATTORNEYS IN CIVIL LITIGATION

A. *The Negligence Standard*

The ABA Model Rules of Professional Conduct define as misconduct when a lawyer “reasonably should know” she is discriminating on the grounds of race, gender, ethnicity, religion, and other categories, or when such actions are prejudicial to the administration of justice.¹⁵³ The word “reasonably” invokes a negligence standard. When should an attorney reasonably know that her conduct is discriminatory? Do the implicit bias studies make it reasonable for attorneys to know that their conduct may be discriminating on the basis of race, ethnicity, or other prohibited categories? IAT research suggests that the answer is yes. Because we know implicit biases exist, there can be a finding of a prima facie “claim against any facile claim of colorblindness.”¹⁵⁴

The ABA model rule applies broadly to “conduct related to the practice of law,” and therefore can apply to how lawyers represent their clients, including which strategies they pursue and what evidence they present at trial. Strategies involve the attorneys’ judgments about the facts of the case as well as the client’s particular circumstances, and may be difficult to label as racially or ethnically discriminatory in an individual case. But, implicit bias in the application of certain strategies may violate the ABA rule against conduct that is “prejudicial to the administration of justice.”¹⁵⁵ For instance, implicit bias that takes the form of “Black male as violent” stereotyping can be prejudicial to the administration of justice, particularly when it enhances the perceived dangerousness of a person based on race; and thereby justifies lethal force against that person or uses ambiguous evidence to support a finding of dangerousness or violent conduct.¹⁵⁶

California’s Rules of Professional Conduct are arguably milder than the ABA model rule is for attorneys, requiring actual unlawfulness, or knowingly permitting such conduct when applied to the behavior of another attorney, or someone in the law office.¹⁵⁷ As Professor Girvan notes: “Legal doctrine, however stagnated. It only recognizes and targets overt, explicit bias with the accompanied understanding that

153. ABA Model Rule 8.4 states, in pertinent part, that it is “professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . . (d) engage in conduct that is prejudicial to the administration of justice; . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2009).

154. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 489 (2010).

155. MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2009).

156. Correll, *supra* note 15, at 1325.

157. *See, e.g.*, CAL. RULES OF PROF. CONDUCT r. 2-400 (B) (“In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of any client.”).

social desirability concerns might frequently prompt people to conceal it,¹⁵⁸ however, the Fourth Circuit case *Woods v. Greenboro* suggests some movement in this area.¹⁵⁹ While acting on bias can constitute actionable discrimination, implicit bias generally is not seen as actionable because there is no purpose or intent motivating it. In addition, the California rule is limited to accepting and terminating client representation (as well as employment conditions not applicable to this article), and therefore would not implicate strategic decisions in the conduct of representation.¹⁶⁰

Next, this article examines some of the situations in which implicit biases can impact the attorney-client relationship and be prejudicial to the fair administration of justice. Attorneys “reasonably should know” about these various opportunities for implicit bias to result in differential treatment based on race, gender, ethnicity, and other protected classifications.

B. *Implicit Bias in Communication*

Communication is often influenced by implicit bias. Clients may be hesitant to communicate based on their own culture, the lawyer’s culture, or either’s perceptions. “Cultural differences often cause us to attribute different meaning to the same set of facts,” as law professors found in a course on cultural competence.¹⁶¹ They explain:

[E]ven in situations in which trust is established, students may experience cultural differences that significantly interfere with Lawyers’ and clients’ capacities to understand one another’s goals, behaviors, and communications One important goal of cross-cultural training is to help students make isomorphic attributions, i.e., to attribute to behavior and communications that which is intended by the actor or speaker. Students were taught about the potential for misattribution [so they] can develop strategies for checking themselves and their interpretations.¹⁶²

For instance, consider when a lawyer asks a client to speak up if the client wants the lawyer to explain something she does not understand or if the lawyer is not being clear, cultural barriers may preclude the client from responding truthfully. This instruction, while seeming appropriate on its face, does not necessarily take into consideration that in some cultures, it would be considered rude to suggest the lawyer is not being clear, and in others, it would be considered embarrassing to admit one

158. Girvan, *supra* note 10, at 36. He continues, “the legal doctrine largely ignores contemporary theories of subtle, explicit, or implicit bias as a cause of discrimination.” *Id.* He then discusses Charles Lawrence’s unconscious racism argument and cultural meaning test analysis. Charles R. Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). He also cites Linda Hamilton Krieger’s analysis of Title VII case law noting the impact of such implicit bias in judicial decision making. Girvan, *supra* note 10, at 36 (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination in Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995)).

159. *Woods v. City of Greenboro*, 855 F.3d 639 (4th Cir. 2017).

160. Compare MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2009), with CAL. RULES OF PROF. CONDUCT r. 2-400 (B).

161. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 42 (2001).

162. *Id.* at 42–43.

does not understand.¹⁶³ If the client is from such a culture where it is disrespectful to imply that someone in a position of power is being unclear, she does not ask for an explanation; and when asked if she understands, she answers affirmatively. But she does not understand. Later, the lawyer may ask why the client is not going along with the strategy, not realizing that the client did not understand enough to participate in the strategy in the first place.

C. *Credibility Assessments that Rely on Implicit Biases*

On the issue of substantive credibility (whether we believe the story to be true), we are more likely to believe stories that make sense to us and less likely to believe those that do not make sense.¹⁶⁴ Consider a case where a defendant's photo identification card is found at the scene of a crime. For those of us who carry our identification cards with us every day, it does not make sense that the card would end up at a place and time that we are not (unless we assert that the identification card was stolen). For those who do not carry an identification card each day and instead keep it in a drawer somewhere, the card could end up someplace else or be left somewhere for days without the defendant noticing. Those who carry identification cards are less likely to find the second story credible, though it may very well be true.

Similarly, cultural differences can impact the process of evaluating credibility (whether we believe the storyteller to be credible). For instance, there are people who tell stories in nonlinear ways. Some cultures have different orientations about time and space and "[l]awyers and clients who have different time and space orientations may have difficulty understanding and believing each other."¹⁶⁵ What will seem to an attorney to be lying or uncooperative, may be the respectful or appropriate way to provide context and background for the story in the client's culture. It is important to be cognizant of the difference between having an individualistic culture where "people are socialized to have individual goals and are praised for achieving those goals,"¹⁶⁶ as opposed to a collective culture where:

[P]eople are socialized to think in terms of the group, to work for the betterment of the group, and to integrate individual and group goals. Collectivists use group membership to predict behavior. Because collectivists are accepted for who they are and accordingly feel less need to talk, silence plays a more important role in their communication style.¹⁶⁷

Those silences and apparent meanderings will be interpreted by some as meaning the storyteller is less credible. This interpretation likely applies to the attorney who is deciding how to represent the client, as well as to the judges and jurors who ultimately determine what testimony to believe.¹⁶⁸

163. *Id.* at 43.

164. The author notes "in examining the credibility of a story, lawyers and judges often ask whether the story makes 'sense' as if 'sense' were neutral." *Id.* at 43-44.

165. *Id.* at 44.

166. *Id.* at 45.

167. *Id.* at 46.

168. Other researchers have noted the importance of culture on experience. For instance, "influences of cultural factors on the IAT can also explain why people often display implicit attitudes that appear more concordant with their general cultural milieu than with the experiences of their individual

D. Representation Strategies Developed by Implicit Bias

Cultural competence has an impact on attorneys' strategies for representing their clients. A strategy that seems to be the best one from the attorney's perspective may be rejected by the client based on the cultural meaning of such an admission.¹⁶⁹ For instance, in a tort case involving the plaintiff's own potential negligence, an attorney may want to pursue a strategy that shows the plaintiff did not understand a written warning that was not verbally explained. In the plaintiff's culture, failure to understand could be a sign of lack of intelligence; and if intelligence and ability to read are highly prized in that culture, the client may be unwilling to advance that argument, even though doing so may be the most effective argument for the case. In fact, the argument might be particularly effective when jurors may apply the "unintelligent Black people" stereotype prevalent in the American media, even though the plaintiff's culture is Nigerian, where education is highly prized. "Availability bias" plays a role here, which operates when people base their assessment of how likely a particular fact is to be true on how quickly or clearly they can recall examples of that fact being true.¹⁷⁰ If the attorney knows a lot of educated Black people, that adjective-noun pairing makes sense and is more acceptable. If she does not know many educated Black women, then that pairing is unlikely in her mind.

Implicit bias studies show that people routinely discount the amount of pain they perceive another is feeling if that person has a darker complexion than they have. In personal injury cases, attorneys may therefore discount the amount of pain they attribute to Black clients seeking damages, while being more realistic, or even augmenting, the amount of pain they attribute to their white clients. Of course, the attorneys are not solely responsible for the valuation because they may have doctors or other expert witnesses provide an assessment of the pain levels. These experts may also be influenced by implicit bias, availability bias, confirmation bias, and others. Nevertheless, the valuation has an impact on case strategy and, for contingency fee cases, similar to the public defender triage situations described in part two above,¹⁷¹ on the amount of time and other resources to be devoted to the case.

When entering a contract, some people rely upon a handshake deal and others require a written agreement. In examining what is "reasonable reliance" or what constitutes an "offer and acceptance," different cultures may have different assessments. Attorneys who are not mindful of these differences might decline to accept what could be a winning case.

In employment discrimination and wrongful termination litigation, stereotypes about certain groups being uneducated, unintelligent or untrustworthy can impact the attorney's assessment of the strength of the claim or defense.

E. Promoting the Fair Administration of Justice

There are many contexts in which cultural understanding enhances the attorney-client relationship and promotes the fair administration of justice. Conversely, a lack of cultural understanding undermines the attorney-client

upbringing." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 959 (2006).

169. See Bryant, *supra* note 161, at 47-48.

170. I am indebted to my colleague Singh Sukhsimranjit for highlighting this point.

171. See Part II.B., *supra* note 161. See also the accompanying text.

relationship, as well as the fair administration of justice.

Given the depth of research, Continuing Legal Education (CLE) courses, and other resources on the existence and implications of implicit bias, attorneys “reasonably should know” they may be acting in ways “prejudicial to the fair administration of justice” due to implicit biases. Attorneys who are not mindful of its potential impact in their representation may be discriminating in their “conduct related to the practice of law.” Given the Fourth Circuit’s recent recognition that subtle stereotyping and implicit bias can give rise to legitimate discrimination claims,¹⁷² attorneys should abide by the ABA proposed Model Rule 8.4 and make special efforts to reduce the impact of implicit bias in the practice of law. The next section identifies specific strategies to implement this rule.

PART FOUR: REDUCING THE IMPACT OF IMPLICIT BIASES IN CIVIL CASES

There are three basic steps to reduce reliance on implicit biases. First, become more aware of one’s own thought processes. Second, develop a healthy concern for the consequences of implicit bias.¹⁷³ Third, learn to replace biased reactions with non-biased ones.¹⁷⁴ Ways to implement each of these steps in the civil context is discussed below.

A. Notice Race

If attorneys try to be colorblind, they will fail since most people do see color. Instead, attorneys should practice mindfulness, because simple awareness is not enough to reduce bias. Attorneys should focus on thoughts outside oneself, and use:

[E]mpathy-related techniques like perspective-taking, which prompts people to consider the experiences of individuals who are different from themselves. Colorblindness is not the answer; noticing race will help. Adopting an identity-conscious perspective (e.g., accepting and considering different identities) rather than an identity-blind mindset (ignoring or denying stigmatized attributes such as race and gender) can reduce bias. Finally, deliberately setting pro-diversity goals has been found to enhance diversity-related attitudes and behaviors.¹⁷⁵

Attorneys and judges alike should aim to make race salient in the courtroom when dealing with cases that raise concerns about racial bias.¹⁷⁶ Although parties may be hesitant to bring up race in a civil trial unless discrimination is at issue, for fear of

172. See *supra* note 159. See also the accompanying text discussing *Woods v. Greenboro*, 855 F.3d 639 (4th Cir. 2017).

173. *Casey*, *supra* note 49 at 15.

174. *Id.*

175. Eden King & Kristen Jones, *Why Subtle Bias is so often Worse than Blatant Discrimination*, HARV. BUS. REV. (July 13, 2016), <https://hbr.org/2016/07/why-subtle-bias-is-so-often-worse-than-blatant-discrimination>.

176. Chris Chambers Goodman, *The Color of our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 Law & Inequality 1, 50–54 (2007).

being “accused of playing the ‘race card,’ race,” however is often relevant.¹⁷⁷ U.S. Supreme Court Justice Sonia Sotomayor provides a powerful example of this continuing problem in criminal cases:

In February 2013, [Justice Sotomayor] made race painfully salient for one federal prosecutor by publicly criticizing his racially stigmatizing questioning of an African American defendant charged with participating in a drug conspiracy . . . Justice Sotomayor made race salient by highlighting the ways in which the prosecutor’s remarks relied on racial stereotypes and prejudice. Her remarks will likely encourage the prosecutor in this case and attorneys in future cases to think twice before making similar comments that draw generalizations about individuals based on their race.¹⁷⁸

The effects of implicit biases are likely largely unrecognized and unacknowledged particularly due to some viewing American society as “post-racial,”¹⁷⁹ and thus are even more likely to be ignored in civil cases.

Present methods of addressing bias may exacerbate implicit bias because they are directed primarily at explicit bias. Judges should be cautioned against dominating the jury selection process because jurors do not want to give biased answers or admit bias to a judge, but may be more likely to do so to lawyers. Therefore, Judge Bennett proposes that “the implicit bias of jurors can be better addressed by increased lawyer participation in voir dire, while the implicit bias of lawyers can then be curbed by eliminating peremptory strikes and only allowing strikes for cause.”¹⁸⁰ Both suggestions are provocative.

Asking a question like “Can you be fair and impartial in this case?” is unhelpful because the question “does not begin to address implicit bias, which by its nature is not consciously known to the prospective juror. Thus, a trial judge schooled in the basics of implicit bias would be delusional to assume that this question adequately solves implicit bias.”¹⁸¹ Judge Bennett understands that jurors are likely to give him the answer they think he wants (and he is rather surprised whenever jurors admits they cannot be fair). Moreover, sometimes the questions are posed in a way that educates the jurors about what would be an appropriate response and in these situations “the trial judge is probably the person in the courtroom least able to discover implicit bias by questioning jurors.”¹⁸²

B. Recognizing the Importance of Cross-Cultural Competency

To help attorneys and judges become more aware of the consequences of their implicit biases, some law schools offer a seminar in cross-cultural competence applying the “five habits for building cross-cultural competence” from an article by

177. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in A Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1564 (2013).

178. *Id.*

179. *Id.*

180. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 151 (2010).

181. *Id.* at 160.

182. *Id.*

Professors Susan Bryant and Jean Koh Peters.¹⁸³ These authors made a plea to enhance clinical education by increasing the cross-cultural competence of law students.¹⁸⁴ They recognize that “lawyers and clients who do not share the same culture face special challenges in developing a trusting relationship in which genuine and accurate communication can occur.”¹⁸⁵ In addition, they suggest that some version of the course curriculum¹⁸⁶ could be offered as a CLE course for attorneys already in practice.

For instance, the fourth habit is described as “pitfalls, red flags, and remedies,” and it “encourages conscious attention to the process of communication,” such as asking questions that “explore how others who were close to the client might view the problem and how they or she might resolve it.”¹⁸⁷ This habit has four focal points: “(1) scripts, especially those describing the legal process, (2) introductory rituals, (3) client’s understanding and (4) culturally specific information about the client’s problem.”¹⁸⁸ Using scripts to promote better communication would foster greater understanding on both sides, and highlighting culturally specific information would better equip the attorney to address and mitigate the impacts of implicit biases in representing clients.

The fifth habit is the “camel’s back,” which “proposes two ways to work with biases and stereotypes: (1) creating settings in which bias and stereotype are less likely to govern, and (2) promoting reflection and change with the goal of eliminating bias.”¹⁸⁹ One way to put this fifth habit into practice is to align oneself with counter-stereotypes. In the criminal context, one author suggests having people close their eyes and imagine they are being attacked by a white man and a Black man comes to their rescue.¹⁹⁰ Just that notion of switching the “violent-Black and savior-white” stereotype to “violent-white and savior-Black” can make a big difference in subsequent decisions and deliberations.¹⁹¹

Similarly, priming with counter-stereotypical words and phrases can impact decision making. For instance, thinking about words like “educated” and “intelligent” or “hard-working” and “responsible” before considering an employment discrimination claim can activate a different part of the brain that puts a minority former employee in a better light than doing nothing, which might leave the brain to fall back upon availability bias and unstated stereotypes like “chronically unemployed” and “entitlement-seeker.”

183. Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in a Multicultural World*, 62 UCLA L. REV. DISC. 140 (2014).

184. See Bryant, *supra* note 161.

185. *Id.* at 42.

186. The first habit is to identify the similarities and differences between themselves and their clients by analyzing degrees of separation and degrees of connection. The second habit involves the “Three Rings,” an exercise designed to analyze the differences and similarities between the client, the decision-maker, and the lawyer, each representing a ring. The third habit involves brainstorming other possible reasons for behavior by thinking of multiple interpretations or parallel universes. Patel, *supra* note 183, at 146–148.

187. Bryant, *supra* note 184, at 72–74.

188. *Id.* at 73.

189. Patel, *supra* note 183, at 149. “Like the proverbial straw that breaks the camel’s back, habit five recognizes innumerable factors that interact with bias and stereotype to negatively influence an attorney-client interaction. A lawyer who proactively addresses some of these factors may prevent a problematic interaction from reaching the breaking point.” Bryant, *supra* note 184, at 77. This habit includes taking a break, or offering refreshments, because when students engage in “self-analysis rather than self-judgment,” they are “more likely to respond to and respect the individual client.” *Id.* at 78.

190. Lee, *supra* note 177, at 1599–1600.

191. *Id.*

During trial, the court should talk about the concepts of implicit bias and the transparency theory with jurors, so they can be “trained” in this area, similarly to how police officers are “trained,” to try to combat implicit bias.¹⁹² For instance, to prepare jurors to be mindful of the consequences of their biases, Judge Bennett shows a video clip from a television show involving hidden cameras that captured bystanders’ reactions to various situations with varied race and gender actors to show how people respond differently.¹⁹³ In addition, he gives a specific jury instruction on implicit biases at the beginning of each case.¹⁹⁴

Judge Bennett also notes judges do not have the same resources to address implicit bias in prospective jurors and they do not have the same knowledge of the case to fully understand the impact of implicit bias in a particular situation.¹⁹⁵ He shows a PowerPoint presentation about implicit bias and believes providing information upfront “may mitigate the effect of the bias.”¹⁹⁶ In addition, he recommends the use of jury instructions, though he recognizes many of his colleagues are not receptive to the idea “fearing that implicit biases will only be exacerbated if we call attention to them.”¹⁹⁷ Judge Bennett uses the following jury instruction:

[A]s we discussed in jury selection, growing scientific research indicates each one of us has implicit biases, or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear and how we make important decisions. While it is difficult to control one’s subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you’re making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.¹⁹⁸

Some jurors will try to follow the rules and will decline to apply racial stereotypes and generalizations if specifically asked not to do so,¹⁹⁹ and other studies have confirmed that noticing race actually makes a difference in race-salient cases.²⁰⁰

192. Thompson, *supra* note 7, at 344. This author also states that combatting the bias that occurred in the Trayvon Martin trial should have been the responsibility of the prosecution. The author states that the prosecution should have rebutted the portrayal of Trayvon as an “uneducated, hostile, inarticulate, lazy thug who disliked Whites [sic].” *Id.* at 345. Although the defense did not offer explicit evidence of these traits, they still brought out evidence of Jeantel’s traits and linked those to Martin, thereby circumventing the Federal Rules of Evidence. *Id.* at 346. She suggests a rule that allows the prosecution to use rebuttal evidence when the jury is presented with evidence of an individual victim’s “stereotypical Blackness.” *Id.*

193. Kang, *supra* note 5, at 1182 n.250 (citing Judge Mark W. Bennett, *Jury Pledge Against Implicit Bias* (2012) (unpublished manuscript on file with Professor Kang)).

194. *Id.* at 1182.

195. Bennett, *supra* note 180, at 165.

196. *Id.* at 169.

197. *Id.*

198. *Id.* at 169 n.85.

199. See Goodman, *supra* note 176, 50–54.

200. See Lee, *supra* note 177. See also the accompanying text.

Still, few courts give jury instructions to counter-stereotypes and prejudice.²⁰¹

C. Moving Toward More Deliberative Decisions

As Professor Blasi and others have noted, implicit biases can be changed.²⁰² In order to make a conscious decision, the decision-maker has to have time to deliberate and not just react. Being overworked or rushed makes a difference in one's reliance upon the shortcut of stereotypes and unconscious bias. To combat this, courts can try to reduce time pressures. Since so few civil cases go to trial, there should be plenty of time for civil trial attorneys to assess, evaluate, and check for biases.

Professor Bassett proposes a standardized training program for all lawyers and clients, jurors and witnesses, as well as all court personnel, which integrates three approaches from prominent psychological studies: "diversity education, educating individuals about unconscious bias, and appealing to individuals' beliefs in equality and fairness."²⁰³ The education components increase awareness, and the appeals to fairness enhance concerns about the consequences of implicit biases. She notes Professor Gary Blasi's conclusion that "if our values include fairness and treating people as individuals, then anything that increases self-awareness should decrease our application of stereotypes."²⁰⁴

Exacerbating the problem, studies note that judges "tend[] to favor intuitive rather than deliberative faculties."²⁰⁵ Judges need to recognize that the decision they reach is not necessarily the right one. Others note:

Intuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system. Today, the overwhelming majority of judges in America explicitly reject the idea that these factors should influence litigants' treatment in court but even the most egalitarian among us may harbor invidious mental associations.²⁰⁶

201. Bennett, *supra* note 180, at 169.

202. Gary Blasi, *Advocacy against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276–77 (2002). For instance, "implicit gender stereotypes of feminine weakness were reduced by imagining examples of counter-stereotypic (i.e., strong) women, and implicit anti-Black race attitudes were reduced by having African American experimenters administer the research procedure." Greenwald & Krieger, *supra* note 167, at 963–64.

203. Bassett, *supra* note 152, at 1581. She explains:

The sheer number of individuals to whom this prerequisite would apply necessarily requires an approach that can easily be standardized, applied, and repeated. Accordingly, some of the more innovative and creative measures described in the psychological literature, despite their appeal, are unlikely to work effectively in this context. In particular, achieving diversity within the operating environment, mental imagery of counter-stereotypes, and exposure to actual admired exemplars who are counter-stereotypical likely require more time and more resources than are available to the courts in light of courts' limited budgets and time constraints. Instead, my proposal urges the adoption of a standardized program.

Id.

204. *Id.* at 1581–82 n.76 (citing Blasi, *supra* note 202, at 1276–77).

205. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 17 (2007).

206. *Id.* at 31

One way to reduce implicit bias is to go back and question how a decision was reached, why it was reached, and what else might have impacted it. Having conversations with others can bring implicit biases to the foreground and judges are often constrained from using this tool except in open court. Attorneys and judges should take the time to fill in informational gaps with actual information, rather than using stereotypes and implicit biases as shortcuts.

The authors of the *Blinking on the Bench* study explain that inducing deliberation and more deliberative thought processes to judges could result in less bias. The authors conclude that:

“[W]e believe that most judges attempt to ‘reach their decisions’ utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors.” Despite their best efforts, however, judges, like everyone else, have two cognitive systems for making judgments—the intuitive and the deliberative—and the intuitive system appears to have a powerful effect on judges’ decision making. The intuitive approach might work well in some cases, but it can lead to erroneous and unjust outcomes in others. The justice system should take what steps it can to increase the likelihood that judges will decide cases in a predominantly deliberative rather, rather than a predominantly intuitive, way.²⁰⁷

CONCLUSION

As the Fourth Circuit recently noted in *Woods*, “[i]nvidious discrimination steeped in racial stereotyping is no less corrosive of the achievement of equality than invidious discrimination rooted in other mental states.”²⁰⁸ While such discrimination can and does occur in the workplace, in business transactions, and in other facets of life, it is particularly pernicious when attorneys as officers of the court perpetuate this type of harm. This article analyzed the implications of attorneys’ own implicit biases and how those biases impact their clients, jurors, and the fair administration of justice.

Actionable discrimination is difficult to prove because of the intent standard that the courts apply. But, using a negligence standard for attorneys’ actions in and outside of the courtroom could reduce the impact of implicit bias. If attorneys comply with the ABA Model Rule of Professional Conduct that imposes a negligence standard on whether lawyers “reasonably should know” when they are discriminating on the grounds of “race, sex religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status,”²⁰⁹ the rights of litigants and the responsibilities of officers of the court would better serve the interests of justice.

207. *Id.* at 43.

208. *Woods v. City of Greensboro*, 855 F.3d 639, 651 (4th Cir. 2017).

209. MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2009).

CHAPTER IX-A

Part I

North Carolina Federal District Court Update: A Year in Review

Melissa A. Essary
Campbell University School of Law
Raleigh, NC

NORTH CAROLINA

BAR ASSOCIATION

seeking liberty + justice

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CHAPTER IX-A-PART I
North Carolina Federal District Court Update: A Year in Review

Melissa A. Essary - Raleigh

Introduction	IX-A-2
Case Dispositions	IX-A-3
Title VII	IX-A-9
Title VII and § 1981	IX-A-40
Title VII and the Age Discrimination in Employment Act (ADEA).....	IX-A-45
Title VII, ADEA, and ADA	IX-A-50
Title VII and NCEEPA.....	IX-A-54
Title VII and the First Amendment	IX-A-56
Title VII, Section 1981, First Amendment, and Title IX.....	IX-A-60
Title VII, ADA, and FMLA	IX-A-66
Title VII, Section 1981, ADEA	IX-A-70
Title VII, Section 1981, ADEA, and State Claims	IX-A-73
Title VII, Section 1981, and WDPP	IX-A-75
Title VII, Section 1981, ADA, and State Claims.....	IX-A-79
Title VII and IIED	IX-A-83
Title VII, Negligent Retention and Supervision, Assault, and Battery.....	IX-A-93
Section 1981	IX-A-95
Age Discrimination in Employment Act (ADEA)	IX-A-101
Americans with Disability Act (ADA)	IX-A-103
ADA, FMLA, and Rehabilitation Act.....	IX-A-120
ADA, FMLA, REDA, and NCEEPA	IX-A-122
ADA, FMLA, and State Claims	IX-A-124
ADA, REDA, and WDPP.....	IX-A-128
ADEA, Libel, Slander, WDP, IIED, and NEID.....	IX-A-130
Fair Labor Standards Act (FLSA)	IX-A-133
ERISA.....	IX-A-148
Wrongful Discharge in Violation of Public Policy (WDPP)	IX-A-151
The First Amendment and IIED	IX-A-153
North Carolina Wage and Hour Act, Breach of Contract, and Breach of Implied Covenant of Good Faith and Fair Dealing.....	IX-A-155
Equal Protection, Section 1983, and Tortious Interference with Contract	IX-A-157
Breach of Contract	IX-A-161

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The 34th Annual North Carolina/South Carolina Labor
and Employment Law Conference

Asheville, North Carolina

October 12–13, 2018

**North Carolina Federal District Court
Update: A Year in Review**

**Labor and Employment Law Cases:
September 1, 2017 through September 1, 2018**



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Introduction

This is my second year to review all North Carolina federal district cases issued by our three federal district courts. This year's review covers cases decided between September 1, 2017 and September 1, 2018. The courts decided more than 200 cases during that time. I deleted most of the *pro se* cases, as judges typically disposed of those on 12(b)(6) defense motions in sparsely written opinions. I also deleted cases that were decided on appeal to the Fourth Circuit and other cases that seemed to replicate others I retained. That left the 57 cases covered in this paper. If I've inadvertently left out an important case, please let the audience know during the Q and A session.

Title VII cases, which often contained other causes of action, make up the vast majority of the cases. They are followed, in a *very* distant second by American with Disabilities Act cases, with FLSA cases coming in third. The Table of Contents displays the assortment of employment law cases our district courts have decided over the past year.

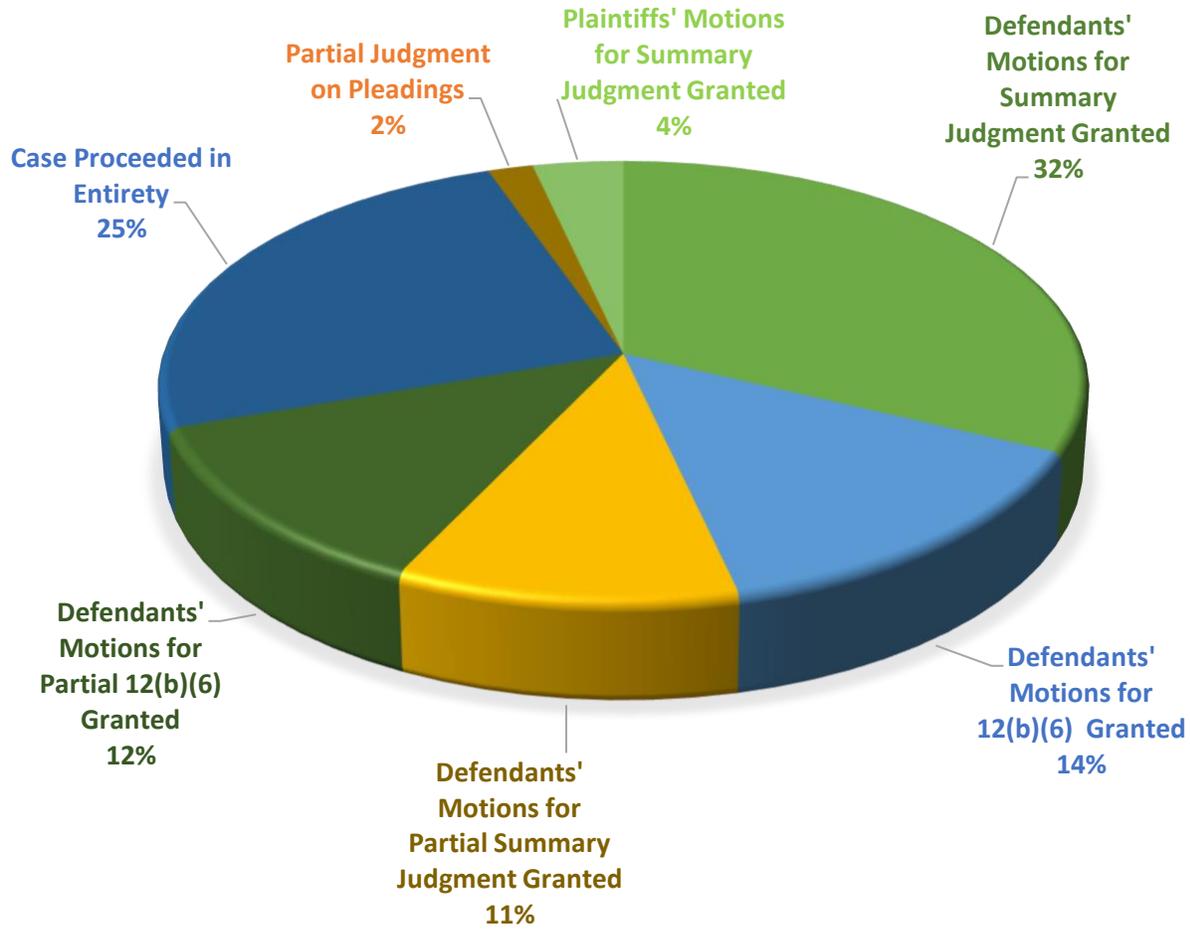
Last year, our courts disposed of 34% of cases in their entirety on the Defendant's 12(b)(6) motion, signaling, in my opinion, firm application of *Iqbal* and *Twombly*. This year, that number declined to 14%. Defendants won slightly more cases on summary judgment this year (32%) compared to last year (25%). Still, considerably more cases proceeded in their entirety this year versus last year (25% to last year's 10%). I've illustrated the percentages this year on the pie chart on the next page. I've also provided comparative data showing last year's vs. this year's case disposition percentages. Please keep in mind that a statistician might tell you that these numbers aren't statistically significant, so I offer no conclusion regarding the change in percentages.

My research assistant, Lindsey Martin, made this year's presentation possible. She started in February 2018 gathering and reading cases and summarizing them. At some point, I jumped in and read all the cases and revised her excellent summaries. Lindsey, here's a shout-out to you for all your very long hours and late nights on this project. It was a crazy amount of work, as you can see in the final paper, which is 162 pages long. I hope you find it a helpful resource.

Anything I have said in any part of this article or in person is attributable to me alone. I am solely responsible for any mistakes.

Cases marked with an asterisk* denote some of the more interesting cases, and I'll be discussing a few of these.

CASE DISPOSITIONS



Last Year's Data: Jan. 1, 2016–Sept. 1, 2017	This Year's Data: Sept. 1, 2017–Sept. 1, 2018
Defendants' Motions for 12(b)(6) Granted–34%	Defendants' Motions for 12(b)(6) Granted–14%
Defendants' Motions for Partial 12(b)(6) Granted–17%	Defendants' Motions for Partial 12(b)(6) Granted–12%
Defendants' Motions for Summary Judgment Granted–25%	Defendants' Motions for Summary Judgment Granted–32%
Defendants' Motions for Partial Summary Judgment Granted–14%	Defendants' Motions for Partial Summary Judgment Granted–11%
N/A	Plaintiffs' Motions for Summary Judgment Granted–4%
Case Proceeded in Entirety–10%	Case Proceeded in Entirety–25%

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA:

District Judges	Location
Chief Judge James C. Dever III	Raleigh, NC
Judge Terrence W. Boyle	Elizabeth City, NC
Judge Louise W. Flanagan	New Bern, NC
(Senior) Judge W. Earl Britt	Raleigh, NC
(Senior) Judge James C. Fox (retired on 3-31-2017)	Wilmington, NC
(Senior) Judge Malcolm J. Howard	Greenville, NC

Magistrate Judges	Location
Judge James E. Gates	Raleigh, NC
Judge Robert B. Jones, Jr.	Wilmington, NC
Judge Robert T. Numbers, II	Raleigh, NC
Judge Kimberly A. Swank	Greenville, NC

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA:

District Judges	Location
Chief Judge Thomas D. Schroader	Winston-Salem, NC
Judge William L. Osteen, Jr.	Greensboro, NC
Judge Catherine C. Eagles	Greensboro, NC
Judge Loretta C. Biggs	Winston-Salem, NC
(Senior) Judge N. Carlton Tilley, Jr.	Greensboro, NC

Magistrate Judges	Location
Judge L. Patrick Auld	Greensboro, NC
Judge Joi Elizabeth Peake	Winston-Salem, NC
Judge Joe L. Webster	Durham, NC

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA:

District Judges	Location
Chief Judge Frank D. Whitney	Charlotte, NC
Judge Robert J. Conrad	Charlotte, NC
Judge Max O Cogburn, Jr.	Asheville, NC
(Senior) Judge Graham C. Mullen	Charlotte, NC
Judge Martin Reidinger	Asheville, NC
(Senior) Judge Richard L. Voorhees	Charlotte, NC

Magistrate Judges	Location
Judge David S. Cayer	Charlotte, NC
Judge Dennis L. Howard	Asheville, NC
Judge David C. Kessler	Charlotte, NC

TABLE OF CONTENTS

Title VII.....	9
<i>Ballentine v. Three T Towing, LLC</i> , No. 5:17-CV-00056-RJC-DSC 2018 U.S. Dist. LEXIS 55977 (W.D.N.C. March 7, 2018).	9
<i>Barnes v. Shulkin</i> , No. 1:16cv940, 2018 U.S. Dist. LEXIS 9585 (M.D.N.C. Jan. 22, 2018).	11
<i>Boyd v. TIAA-CREF Individual & Inst. Servs., LLC</i> , No. 3:17-cv-00224-GCM, 2017 U.S. Dist. LEXIS 152560 (W.D.N.C. Sept. 20, 2017).	15
* <i>Fleming v. Norfolk Southern Corp.</i> , No. 1:17CV418, 2018 U.S. Dist. LEXIS 55186 (M.D.N.C., March 31, 2018).	19
* <i>Goad v. N.C. Farm Bureau Mut. Ins. Co.</i> , No. 1:16-CV-1332, 2017 U.S. Dist. LEXIS 198571 (M.D.N.C. Dec. 4, 2017).	21
<i>Judon v. City of Charlotte</i> , No. 3:15-CV-578-RJC-DSC, 2017 U.S. Dist. LEXIS 186000 (W.D.N.C. Nov. 9, 2017).	24
* <i>Netter v. Barnes</i> , No. 1:15-CV-843, 2017 U.S. Dist. LEXIS 220024 (M.D.N.C. Dec. 15, 2017).	27
* <i>Robbins v. Rowan Voc. Opportunities, Inc.</i> , 1:16CV310, 2018 U.S. Dist. LEXIS 88368 (M.D.N.C. May 23, 2018).	28
* <i>Rodriguez v. Elon Univ.</i> , No. 1:17CV165, 2018 U.S. Dist. LEXIS 76211 (M.D.N.C., April 27, 2018).	32
<i>Watson v. UPS</i> , No. 1:18cv119, 2018 U.S. Dist. LEXIS 112730 (M.D.N.C. July 5, 2018).	35
* <i>Young v. Onslow Water & Sewer Auth.</i> , No. 7:16-CV-259-D, 2018 U.S. Dist. LEXIS 5625 (E.D.N.C. Jan. 12, 2018).	38
TITLE VII and § 1981.....	40
<i>Chandler v. W.B. Moore Co. of Charlotte, Inc.</i> , No. 3:18-cv-149, 2018 U.S. Dist. LEXIS 68884 (W.D.N.C., April 23, 2018).	40
<i>Obimah v. Am. Red Cross</i> , 3:18-CV-00181, 2018 U.S. Dist. LEXIS 130856 (W.D.N.C. Aug. 3, 2018).	41
* <i>Velasquez v. Sonoco Display & Packaging, LLC</i> , No. 1:17CV865, 2018 U.S. Dist. LEXIS 61329 (M.D.N.C., April 11, 2018).	43
TITLE VII and the AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)	45
* <i>Francis v. Esper</i> , No. 7:16-CV-335-BO, 2018 U.S. Dist. LEXIS 82976 (E.D.N.C. May 17, 2018).	45
* <i>Lynch v. Private Diagnostic Clinic, PLLC</i> , No. 1:16CV526, 2018 U.S. Dist. LEXIS 43332 (M.D.N.C. March 16, 2018).	47
Title VII, ADEA, and ADA	50
<i>Hunter-Rainey v. N.C. State Univ.</i> , No. 5:17-CV-46-D, 2018 U.S. Dist. LEXIS 32480 (E.D.N.C., February 28, 2018).	50
<i>Pugh v. Shulkin</i> , No. 1:16-cv-1030, No. 1:16-cv-1030, 2018 U.S. Dist. LEXIS 58097 (M.D.N.C. April 5, 2018).	51
Title VII and NCEPA	54

<i>Miller v. AmCare Grp., LLC</i> , No. 1:17CV90, 2017 U.S. Dist. LEXIS 180380 (M.D.N.C. October 30, 2017).	54
TITLE VII and the FIRST AMENDMENT	56
* <i>Heggins v. City of High Point</i> , No. 1:16-CV-977 2017, 2017 U.S. Dist. LEXIS 209076 (M.D.N.C. Dec. 20, 2017).....	56
TITLE VII, SECTION 1981, FIRST AMENDMENT, and TITLE IX	60
* <i>White v. Gaston Cty. Bd. Of Educ.</i> , No. 3:16-cv-552, 2018 U.S. Dist. LEXIS 58229 (W.D.N.C. April 5, 2018).....	60
TITLE VII, ADA, and FMLA	66
<i>Clark v. Guilford Cty.</i> , No. 1:16CV1087, 2017 U.S. Dist. LEXIS 162024 (M.D.N.C. Sept. 30, 2017).....	66
TITLE VII, SECTION 1981, ADEA	70
<i>Evans v. TWC Admin. LLC</i> , No. 5:15-CV-675-FL, 2017 U.S. Dist. LEXIS 181444 (W.D.N.C. Nov. 2, 2017).	70
TITLE VII, SECTION 1981, ADEA, and STATE CLAIMS	73
* <i>Westmoreland v. TWC Admin. LLC</i> , No. 5:16-cv-00024-MOC-DSC, 2017 U.S. Dist. LEXIS 143059 (W.D.N.C. Sept. 5, 2017).....	73
TITLE VII, SECTION 1981, AND WDPP	75
<i>Ramos v. Carolina Motor Club, Inc.</i> , No. 3:17-cv-002120RJC-DSC, 2018 U.S. Dist. LEXIS 102381 (W.D.N.C. June 19, 2018).	75
TITLE VII, SECTION 1981, ADA, and STATE CLAIMS	79
<i>Pope v. ABF Freights Sys.</i> , No. 3:17-cv-564, 2018 Dist. LEXIS 123685 (W.D.N.C. July 24, 2018).	79
TITLE VII and IIED	83
<i>Barrow v. Branch Banking & Trust Co.</i> , No. 3:16-cv-00675-RJC-DCK, 2017 U.S. Dist. LEXIS 150999 (W.D.N.C. Sept. 18, 2017).....	83
<i>Ward v. AutoZoners, LLC</i> , No. 7:15-CV-164-FL, 2017 U.S. Dist. LEXIS 142652 (E.D.N.C. Sept. 5, 2017).	86
* <i>Saniri v. Christenbury Eye Ctr., P.A.</i> , No. 3:17-cv-000474-FDW-DSC 2017, U.S. Dist. LEXIS 199765 (W.D.N.C. Dec. 5, 2017).....	89
TITLE VII, NEGLIGENT RETENTION AND SUPERVISION, ASSAULT, AND BATTERY	93
<i>Watkins v. Bermuda Run CC, LLC</i> , No. 1:17CV512, 2018 U.S. Dist. LEXIS 6087 (M.D.N.C. Jan. 12, 2018).	93
SECTION 1981	95
* <i>Darden v. Wayne County Bd. Of Educ.</i> , No. 7:17-CV-84-BO, 2018 U.S. Dist. LEXIS 62527 (E.D.N.C., April 13, 2018).	95
<i>Gary v. Facebook, Inc.</i> , No. 1:17-cv-00123, 2018 U.S. Dist. LEXIS (W.D.N.C. July 25, 2018).....	97
AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)	101
<i>Tickles v. Johnson</i> , No. 1:17CV709, 2018 U.S. Dist. LEXIS 68788 (M.D.N.C. April 19, 2018).....	101

AMERICANS WITH DISABILITY ACT (ADA)	103
<i>Churchwell v. City of Concord</i> , No. 1:17-CV-299, 2018 U.S. Dist. LEXIS 98964 (M.D.N.C. June 11, 2018).	103
* <i>Dayton v. Charlotte-Mecklenburg Hosp. Auth.</i> , No. 3:17-CV-00392-RJC-DSC, 2017 U.S. Dist. LEXIS 218462 (W.D.N.C. Oct. 4, 2017).	105
* <i>EEOC v. Advanced Home Care, Inc.</i> , No. 1:17-cv-00646, 2018 U.S. Dist. LEXIS 60264 (M.D.N.C., April 10, 2018).....	107
* <i>Fulp v. Columbiana Hi Tech, LLC</i> , No. 1:16CV1169, 2018 U.S. Dist. LEXIS 27223 (M.D.N.C. Feb. 21, 2018).....	109
* <i>Gagnon v. McClatchy Newspaper, Inc.</i> , No. 3:17-cv-00382-FDW-DSC, 2018 U.S. Dist. LEXIS 40542 (W.D.N.C. March 13, 2018).	111
<i>Hazel v. Caldwell Cty. Sch.</i> , No. 3:17-CV-00518, 2018 U.S. Dist. LEXIS 112762 (W.D.N.C. July 6, 2018).	113
* <i>Moore v. Wal-Mart Stores East, LP</i> , No. 1:16-cv-362 2018, U.S. Dist. LEXIS 5882 (W.D.N.C. Jan. 12, 2018).....	115
ADA, FMLA, and REHABILITATION ACT	120
<i>Boone v. Bd. Of Governors of the Univ. of N.C.</i> , No. 1:17CV113, 2018 U.S. Dist. LEXIS 54310 (M.D.N.C., March 30, 2018)	120
ADA, FMLA, REDA, and NCEPA	122
<i>Egler v. Am. Airlines, Inc.</i> , No. 5:17-CV-73-FL, 2018 U.S. Dist. LEXIS 28210 (E.D.N.C. Feb. 21, 2018)...122	
ADA, FMLA, and STATE CLAIMS	124
<i>Stairwalt v. TIAA</i> , 3:17-cv-00220-MOC-DSC, 2018 U.S. Dist. LEXIS 132762 (W.D.N.C. Aug. 7, 2018)...124	
ADA, REDA, and WDPP	128
* <i>White v. Buckeye Fire Equip. Co.</i> , No. 3:17-cv-404-MOC-DSC, 2018 U.S. Dist. LEXIS 85761 (W.D.N.C. May 21, 2018).....	128
ADEA, LIBEL, SLANDER, WDP, IIED, AND NEID	130
<i>Hall v. Charter Communs., LLC</i> , No. 3:17-CV-00497-GCM 2018, U.S. Dist. LEXIS 15720 (W.D.N.C. Jan. 31, 2018).....	130
FAIR LABOR STANDARDS ACT (FLSA)	133
* <i>Acosta v. Del Sol Partnership 2</i> , No. 5:16-CV-231-BO, 2018 U.S. Dist. LEXIS 24627 (E.D.N.C. Feb. 15, 2018).....	133
* <i>Allen v. Express Courier Int’l</i> , No. 3:18-cv-00028-MOC-DSC, 2018 U.S. Dist. LEXIS 124581 (W.D.N.C. July 25, 2018).....	136
<i>Allen v. SSC Lexington Operating Co. LLC</i> , No. 1:16CV1080, 2017 U.S. Dist. LEXIS 162015 (M.D.N.C. Sept. 29, 2017).....	138
<i>Baclawski v. Fioretti</i> , No. 3:15-CV-417-DCK, 2018 U.S. Dist. LEXIS 3732 (W.D.N.C. Jan. 9, 2018).	141
<i>Chavez v. T&B Mgmt., LLC</i> , No. 1:16cv1019, 2017 U.S. Dist. LEXIS 209951 (M.D.N.C. Dec. 21, 2017).144	

Pappas v. Sol. Start, Corp., 3:17-cv-575-GCM, 2018 U.S. Dist. LEXIS 125361 (W.D.N.C. July 26, 2018).	146
ERISA	148
<i>Love v. Eaton Corp. Disability Plan for U.S. Empl.</i> , No. 5:16-CV-860-FL, 2017 U.S. Dist. LEXIS 204611 (E.D.N.C. Dec. 12, 2017).	148
WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY (WDPP)	151
* <i>Chandler v. W.B. Moore Co. of Charlotte, Inc.</i> , No. 3:18-cv-149, 2018 U.S. Dist. LEXIS 111079 (W.D.N.C. July 3, 2018).	151
THE FIRST AMENDMENT and IIED	153
<i>Lamb v. Lowe’s Cos.</i> , No. 5:17-cv-00028-RJC-DSC, 2018 U.S. Dist. LEXIS 37333 (W.D.N.C. March 7, 2018).....	153
NORTH CAROLINA WAGE AND HOUR ACT, BREACH OF CONTRACT, and BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING	155
<i>McKeown v. Tectran Mfg.</i> , No. 5:17CV109-GCM, 2018 U.S. Dist. LEXIS 47312 (W.D.N.C. March 22, 2018).....	155
EQUAL PROTECTION, SECTION 1983, and TORTIOUS INTERFERENCE WITH CONTRACT	157
* <i>Albright v. Charlotte-Mecklenburg Bd. of Educ.</i> , No. 3:17-cv-00461-FDW-DSC, 2017 U.S. Dist. LEXIS 199763 (W.D.N.C. Dec. 5, 2017).....	157
BREACH OF CONTRACT	161
<i>Broussard v. Local Book Publ’g, Inc. & Local 360 Media, Inc.</i> , No. 4:17-CV-64-BO, 2017 U.S. Dist. LEXIS 163445 (E.D.N.C. Oct. 3, 2017).....	161

Title VII

***Ballentine v. Three T Towing, LLC*, No. 5:17-CV-00056-RJC-DSC 2018 U.S. Dist. LEXIS 55977 (W.D.N.C. March 7, 2018).**

The United States District Court for the Western District of North Carolina recommended that Defendant's motion to dismiss for lack of subject matter jurisdiction on Plaintiff's claims under Title VII be dismissed.

Judge: David S. Cayer, United States Magistrate Judge

Defendant Three T Towing operated a vehicle towing service in Iredell County. Plaintiff was hired as a bookkeeper and accountant in December 2015. She was later promoted to Director of Operations. Plaintiff alleged that she was subjected to sex discrimination, sexual harassment, retaliation, and wrongful termination in violation of Title VII. Defendant filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Defendant did not qualify as an employer under Title VII because it employed fewer than fifteen people during the relevant time.

The Court denied Defendant's motion to dismiss for lack of subject matter jurisdiction, finding that the employee threshold is not jurisdictional. An entity may only be held liable in a Title VII action if it is an employer. "Employer" is defined as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b).

Defendant argued and attached an affidavit stating that it employed only two people including Plaintiff during the relevant time period. Defendant argued that all tow truck drivers were independent contractors and should not be considered employees. Defendant further argued that the fifteen-employee threshold limits the Court's subject matter jurisdiction. The Court found that the number of employees did not limit the Court's jurisdiction. The Court pointed to *Arbaugh v. Y & H Corp.*, where the Supreme Court held, settling a split among the circuits, "that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." 546 U.S. 500, 516 (2006). Acknowledging that federal courts are obliged to inquire into their own jurisdiction even when the parties do not challenge it, the Supreme Court reasoned that the "employee-numerosity" requirement was not jurisdictional because "[n]othing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met." *Id.* at 514. Therefore, whether Defendant was an "employer" under Title VII was not a matter affecting the Court's subject matter jurisdiction. Since the employee threshold is not jurisdiction, Rule 12(b)(6) is the proper vehicle for challenging the allegations in the complaint. The Court stated that "although Defendant may challenge Plaintiff's allegations at the summary judgment stage, the Court finds that Plaintiff has met her burden under Rule 8. Since this Court has subject matter jurisdiction and the Complaint states a claim for relief against Defendant pursuant to

Title VII, the undersigned respectfully recommends that Defendant's Motion to Dismiss be denied."

The Court denied Defendant's motion to dismiss, finding (1) that it had subject matter jurisdiction and (2) that Plaintiff's complaint adequately stated a claim for relief under Title VII.

***Barnes v. Shulkin*, No. 1:16cv940, 2018 U.S. Dist. LEXIS 9585 (M.D.N.C. Jan. 22, 2018).**

The United States District Court for the Middle District of North Carolina granted Defendant's motion for summary judgment on Plaintiff's claims under Title VII.

Judge: Thomas D. Schroeder, United States District Judge

In June of 2013, Barnes, an African American male, applied to work at the Fulton Veterans Affairs Medical Center ("Durham VA") in response to its vacancy announcement for a Temporary Registered Nurse in the Psychiatry Unit. The announcement stated that a successful applicant's starting level and salary would be determined by the NPSB (The NPSB is a group of thirty to forty nurses, all appointed by the Nurse Executive, and is responsible for making recommendations as to the grade, level, step, and salary for every nurse at the Durham VA). It further explained that to be hired as a Nurse II, a candidate would need a Bachelor of Science degree in Nursing and at least two years of nursing experience.

Barnes submitted his resume and application to the Durham VA on April 6, 2013. Barnes's resume stated that he had a Bachelor of Science in Nursing and five years of nursing experience, four of which as a charge nurse. Barnes did not specify his race on his application or resume, but he claimed that his application materials included a form on which he identified his race as African American. On June 4, Barnes received a call from Nurse Recruiter Kenneth Hodges, who told Barnes that he had been selected for the position but did not mention Barnes's starting level or salary.

On June 5, Barnes claimed that he sent Hodges a letter of recommendation and a PowerPoint document, noting his professional accomplishments with reference to each of the dimensions of nursing and with the expectation that Hodges would forward the documents to the NPSB. On June 7, the NPSB reviewed Barnes's application materials and recommended that he start as a Nurse I, Level III, Step 9, and that his salary should be \$62,829. The NPSB found that Barnes's nursing experience benefitted only his own patients and that Barnes did not have sufficient demonstrated outcomes to start as a Nurse II.

On June 13, Hodges informed Barnes of the starting level and salary of the position he was being offered. Barnes told Hodges that there was a mistake and that he should have been hired as a Nurse II, based on his education and experience. That same day, Barnes sent Hodges an email repeating this belief and inquiring as to whether the NPSB would reconsider his starting grade and salary. On June 14, Hodges responded by email to confirm that Barnes had declined the offer and advised him that if he asked the NPSB to reconsider, it might choose to move forward with another candidate.

Barnes took the language in Hodge's email to mean that he had to accept the position immediately or it would be given to another candidate. As a result, Barnes accepted the Nurse I position against his will because he needed a job. When he accepted the position, he was still under the impression that the NPSB would reconsider his starting grade and salary.

Barnes began working at the Durham VA on July 14, 2013, and, around that time, attended an orientation for new employees. While giving a presentation at the orientation, Summey, a nurse educator at the Durham VA, mentioned that a Nurse II typically has two to three years of experience. Upon hearing this, Barnes told Summey that he felt he should have been hired as a Nurse II. In response Summey apologized and told Barnes that nurses are supposed to have a chance to negotiate their salaries.

During the orientation, Barnes claimed, he met other African American nurses who complained that their salary did not reflect their experience or education level. However, the only admissible evidence on this front is from nurse Regina McNeil, who confirmed that she complained unsuccessfully about her salary, and from Dr. Eagerton, who acknowledged that nurse manager Lisa Lowe did complain about her salary. During Barnes's first few weeks working at the Durham VA, he met with Susan Collin (Nurse Manager for the Psychiatric Unit), Kerri Wilhoite (Associate Chief of Nursing), McNeil, and Ossie Brigman to discuss nurses' salaries. At the meeting, Wilhoite told the three nurses in a very threatening manner that they should not rock the boat and complain about their salaries because the same group of people who made their initial salary recommendations could consider them when they were up for promotion or advancement every year. It was at this meeting that Barnes first suspected his non-promotion could be about race. The meeting concluded with Wilhoite stating that she would meet with Eagerton to discuss their situations and whether or not they would qualify for a promotion or raises.

On October 17, 2013, Barnes contacted an EEOC counselor at the Agency's Office of Resolution Management to discuss his concerns. Barnes filed a formal complaint with that office on January 19, 2014. A hearing for the case took place on November 17, 2015. On May 4, 2016, the Agency issued a Final Order finding that the Durham VA's actions were not the product of racial discrimination.

Retaliation Claim

Barnes argued that he was qualified for promotion to Nurse II in 2015, even more so than when he was hired and that he was not promoted in retaliation for having filed his December 3, 2015 EEOC complaint. He stressed Wilhoite's admonition to the group of complaining nurses, in the summer of 2013 that they shouldn't make complaints about their salaries and that they complained too much because it would upset the NSPB, who are the people that review their salaries every two years and decide whether they get promoted.

He claimed that Summey told him that if he complained about his salary that the nursing board members were there for a long time and that they would pretty much not promote him. Barnes further claimed that Kovalick was informed that she would have to testify at the November 17, 2015 hearing for Barnes's first EEOC complaint, and was thus reminded of it, just before she served on the NPSB that recommended against the promotion. Barnes argued that his non-promotion was another act of unlawful discrimination based on race. Defendant

responded that Barnes could not show a causal connection between his protected EEOC activity and his non-promotion and that his non-promotion was unrelated to his race.

The Court stated that in order to establish a claim of retaliation under Title VII, a plaintiff must show that (1) he engaged in a protected activity that was known to the decision-maker; (2) his employer took adverse action against him; and (3) a causal relationship existed between the protected activity and the adverse employment activity. However, merely complaining in general terms of discrimination or harassment, without indicating a connection to the protected class or providing facts sufficient to create that inference is not enough to survive summary judgment.

Barnes failed to state a prima facie case because he could not demonstrate that when the NPSB recommended his non-promotion, any member had any knowledge he had filed an EEOC complaint. His claim that Kovalick knew because she had been informed before the vote that she would be needed to provide testimony for the EEOC regarding his first complaint was unsupported by any admissible evidence.

Barnes relied on the EEOC's Report of Investigation from his second EEOC claim. However, the portion of the report he cited merely repeated his own contention that Kovalick and Summey were asked to provide testimony to an EEOC investigator sometime prior to the August 2015 Board decision and in an EEOC hearing in November 2015. There was no evidence to support this claim. Kovalick testified that she did not know anything about Barnes's first EEOC complaint until approximately two weeks before November 17, 2015. Barnes did not address the fact that the other four members of his five-member NPSB promotion board—at least two of whose votes he had to receive for a recommendation of promotion—had no knowledge of his prior EEOC complaint. Nor did he argue, or provide any evidence, that Eagerton—who was the ultimate decision maker—knew of Barnes's EEOC activity or approved of the non-promotion in any retaliatory fashion. The Court found that Barnes failed to state a claim for retaliation.

Discrimination Claim

The Court stated that in order for a plaintiff to state a prima facie claim of unlawful discrimination based in a failure to promote, he must show that he (1) is a member of a protected class, (2) applied for the position in question, (3) was qualified for the position in question, and (4) was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. Barnes's claim for non-promotion failed because he did not show that in 2015 he was qualified to be a Nurse II or that his non-promotion was under circumstances that gave rise to an inference of unlawful discrimination.

The NPSB that considered Barnes for promotion concluded he was not qualified for promotion to Nurse II under the applicable standards, which was a legitimate reason for his non-promotion. The NPSB panel found that he met none of the nine required elements. It rejected Barnes's contentions that his experience teaching and working as a preceptor demonstrated the kind of positive outcomes on the nursing unit to qualify him as a Nurse II.

In addition to Barnes's failure to meet the Nurse II standards, four of the five members of the NPSB testified that they were not aware of his race at the time they recommended he not be promoted. Barnes put forward no evidence that his non-promotion was related to his race.

The Court granted Defendant's motion for summary judgment, dismissing Plaintiff's claims with prejudice.

Boyd v. TIAA-CREF Individual & Inst. Servs., LLC, No. 3:17-cv-00224-GCM, 2017 U.S. Dist. LEXIS 152560 (W.D.N.C. Sept. 20, 2017).

The United States District Court for the Western District of North Carolina denied Defendant's Motion to Dismiss on Plaintiff's claims under Title VII and for breach of contract.

Judge: Graham C. Mullen, United States District Judge

Plaintiff Boyd, an African-American man, was licensed investment advisor with Series 7 and 66 qualifications. Boyd began working for TIAA in June 2005, and his employment was terminated on March 15, 2015. On March 24, 2015, TIAA submitted to FINRA a Uniform Termination Notice for Securities Industry Regulation (U-5). In the section on the U-5 form provided for Termination Explanation, TIAA stated that Plaintiff, "[d]id not meet internal performance expectations for position. No violation of industry rules, no customer harm, not securities related."

Boyd filed two charges of discrimination with the EEOC. He asserted that TIAA discriminated against him on the basis of race when it discharged him. On June 16, 2015, Boyd and TIAA participated in a mediation with the EEOC. As a result of that mediation, Boyd and TIAA entered into a separation agreement and release in full. Pursuant to that Agreement, TIAA submitted a revised U-5 on July 22, 2015, replacing the language in the Termination Explanation section with "Disagreement regarding internal policy requirements for position. No violation of industry rules, no customer harm, not securities related." In the Amendment Explanation box immediately below the termination explanation, TIAA stated, "[t]he failure to meet internal policy expectations precipitated a conversation with the employee as to what those expectations were and should be. Ultimately, it was the inability to reach an understanding as to what the job expectations were that resulted in the separation."

Boyd objected to the latter additional language in the amendment explanation, and TIAA again amended the U-5 on December 7, 2015. In the Amendment Explanation section, it stated "Amended to accurately reflect the intent of the previous amendment." Boyd alleged that he subsequently applied for numerous positions in the securities industry and was denied as a result of the inaccurate language provided in the U-5 form, as well as a result of negative references provided by TIAA.

On December 27, 2016, Boyd filed a Charge of Discrimination with the EEOC, asserting a retaliation claim under Title VII. On January 23, 2017, the EEOC issued Boyd a Right to Sue Letter. On April 26, 2017, Boyd filed his Complaint, alleging breach of contract and retaliation under Title VII.

Breach of Contract

Under North Carolina law, the elements of a claim for breach of contract are (1) existence of a valid contract, and (2) breach of the terms of that contract. TIAA conceded that the Separation Agreement constituted a valid contract. TIAA argued: (1) that Boyd's breach of contract claim

was barred by a release under the Separation Agreement, and (2) that even if Boyd did not release this claim, TIAA's actions—as alleged in Boyd's Complaint—did not establish a plausible claim for breach of contract.

Paragraph 3 of the Separation Agreement stated:

TIAA will file with the appropriate depository within the Financial Industry Regulatory Authority ("FINRA") the amended explanation of "discharged: disagreement regarding internal policy requirements for position. No violation of industry rules, no customer harm, not securities related" on your "Uniform Notice for Securities Industry Regulation" or "U-5." To be clear, you agree not to challenge in any way the accuracy and/or proprietary [sic] of the U-5 explanation above that TIAA will file with FINRA and to release TIAA pursuant to Paragraphs 11 and 12 below, from any claim related to the filing or content of that U-5 amendment.

Paragraph 11(b) stated, "This release of claims does not extend to your contractual right to enforce the terms of this Agreement or to any claims that may not be lawfully released."

The Court stated that a contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. On its face, Paragraph 3 unambiguously prevented Boyd from challenging the accuracy and/or proprietary of the agreed-upon language of the amended explanation filed in the U-5, thus it protected TIAA from future lawsuits challenging that specific language. Nowhere did it prevent Boyd from suing to compel TIAA to submit the U-5 with the agreed-upon language or from suing for damages based on TIAA's failure to submit the U-5 with agreed-upon language. Further, Paragraph 11 unambiguously preserved Boyd's right to file suit to enforce the terms of the Separation Agreement, including TIAA's promise in Paragraph 3 to amend the U-5 to reflect the agreed-upon language.

Boyd's ability to assert this claim was expressly retained in Paragraph 11. He did not run afoul of Paragraph 3 by challenging the agreed-upon termination language in the Separation Agreement. Rather, he sought relief for TIAA's alleged violation of Paragraph 3 when they inserted additional language into the U-5. The Court stated that his breach of contract claim was not barred by the release provisions of the Separation Agreement.

TIAA asserted that Boyd's complaint failed to allege facts that would plausibly amount to a breach of the terms of the separation agreement with respect to the filing of the U-5 form. TIAA further asserted that it did not breach the terms of the Agreement because the Agreement is silent as to the wording of the "Amendment Explanation" section of the amended U-5 and, regardless, that the given explanation comported with the agreed-upon language.

The Court stated that although the Agreement did not specifically mention the Amendment Explanation section, Boyd's Complaint alleged that a central aspect of the Agreement was changing the language from the original U-5's language of "did not meet internal performance expectations" to the agreed-upon language of "disagreement regarding internal policy

requirements." Boyd alleged that TIAA did amend the Termination Explanation to the agreed-upon language but also placed additional language in the Amendment Explanation section—immediately following the Termination Explanation—continuing to claim that there was a "failure to meet internal policy expectations." The Court held that this language arguably "substantially defeat[ed] the purpose of the agreement . . . or [could] be characterized as a substantial failure to perform."

The Court denied TIAA's motion to dismiss Boyd's breach of contract claim, finding that Boyd's Complaint raised a plausible claim for a breach of contract.

Retaliation Under Title VII

Boyd's second cause of action was for retaliation under Title VII. TIAA argued (1) that Boyd's retaliation claim was barred by a release under the Separation Agreement, and (2) that even if Boyd did not release this claim, TIAA's actions as alleged by Boyd's Complaint did not establish a plausible claim of retaliation under Title VII.

TIAA asserted that it is released from retaliation claims made by Boyd under the Separation Agreement. Paragraph 11(a) stated, "Except as otherwise set forth in this Agreement, the Separation Payment in Paragraph 2 represents full and complete settlement in satisfaction of any and all claims you may have against TIAA arising on or before the date you sign this Agreement." Additionally, the Agreement released and discharged TIAA "from any and all claims, in law or equity, which *you ever had or now have* regarding any matter arising on or before the date you sign this Agreement." (emphasis added).

Although Title VII retaliation claims fit within the category of claims waived in Separation Agreement, 11(a)(i), Boyd's claim did not arise *on or before* the date he signed the Agreement. Both parties agreed that the Separation Agreement was signed on June 26, 2015. Taking Boyd's factual allegations as true, TIAA retaliated against him on July 22, 2015, when it filed the amended U-5 form, and at various other points in time after the amended U-5 had been filed by providing negative references to other employers. Thus, the claims asserted by Boyd arose after the parties signed the Separation Agreement, and his claim for retaliation under Title VII was not barred by the release.

TIAA asserted that the allegations in Boyd's Complaint failed to raise a plausible claim for retaliation under Title VII. Title VII § 704 makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

The Court stated that at the motion to dismiss stage in a Title VII case, a plaintiff need only allege facts sufficient to state all the elements of a prima facie case for retaliation. In order to have done so, a plaintiff must have alleged facts supporting three elements: (1) that he was engaged in a protected activity; (2) that his employer took an adverse employment action against him; and (3) that there was a causal link between the two events.

Retaliation Claim

Protected Activity

The Court found that Boyd's Complaint sufficiently alleged that he was engaged in a protected activity. Title VII protects the activity of employees who pursue their federal rights by reporting or charging unlawful employment activity. By filing two Charges of Discrimination against TIAA with the EEOC asserting racial discrimination, Boyd certainly pursued his federal rights. Thus, his conduct was a protected activity.

Materially Adverse Action

The Court found that Boyd also sufficiently alleged that TIAA took an adverse employment action against him. The Court stated that to satisfy Title VII, an adverse employment action must have been material—one that might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Thus, it must have actually produced an injury or harm. Such action is prohibited whether taken against a current or former employee.

Boyd alleged that TIAA retaliated against him by interfering with his job search. Specifically, he alleged that TIAA falsely amended his U-5 form and provided negative referrals to prospective employers. As alleged, the combination of the Amendment Explanation and TIAA's negative referrals led potential employers to deny employment to Boyd. Employers generally rely on references, and employers in the securities industry rely on information in the U-5 form in making hiring decisions. As a result, he argued that a reasonable worker might be dissuaded from making a charge of discrimination if he knows that he will likely be seriously hindered in his search for employment elsewhere as a result of making his charge. Thus, providing negative referrals and false information in a U-5 form are sufficient to qualify as adverse employment actions.

Causation

Finally, Boyd sufficiently alleged that TIAA's adverse employment action was caused by his decision to engage in protected activity. The Court noted that alleging causation in a prima facie retaliation case is less onerous than meeting the but-for causation standard ultimately required to prove retaliation. Close temporal proximity between when the employer learns of the protected activity and the adverse employment action can be enough to make a prima facie claim for causation. Prima facie causation can also be found when the adverse employment action occurs upon the employer's first opportunity to carry out a harmful act to the employee.

It was clear that Boyd participated in an EEOC mediation with TIAA on June 16, 2015 and that TIAA submitted its revised U-5 form on July 22, 2015. The close temporal proximity was sufficient to show causation. And to the extent that TIAA knew about the EEOC charges months beforehand, the allegation that TIAA took the adverse employment action at its first opportunity—when it filed the amended U-5 form—established sufficient prima facie causation to survive a motion to dismiss. Boyd's Complaint sufficiently alleged all of the requisite elements of a prima facie claim for retaliation under Title VII, and thus the Court denied TIAA's motion to dismiss Boyd's claim for retaliation.

***Fleming v. Norfolk Southern Corp., No. 1:17CV418, 2018 U.S. Dist. LEXIS 55186 (M.D.N.C., March 31, 2018).**

The United States District Court for the Middle District of North Carolina granted Defendant's motion to dismiss the claims of Plaintiff Harris.

Judge: Loretta C. Biggs, United States District Judge

Plaintiff Fleming and Plaintiff Harris are both Caucasian and were employed by Defendant. In 2015, Plaintiff Fleming filed an EEOC Charge for race discrimination which included claims against Ben Fennell, an African-American Division Superintendent employed by Defendant.

On June 14, 2016 both Plaintiffs and RJ Johnson, an African-American employee of Defendant, were working on a train. Defendants claimed there was a possible violation of its operating safety rules. A formal investigation hearing was held, and all three individuals were terminated. Plaintiffs alleged that Fleming's EEOC Charge was referenced when they were terminated. In December 2016, Defendant's allowed RJ Johnson to return to work but did not allow Plaintiffs to do so.

Defendants moved to dismiss Harris' claims in their entirety. Harris claimed associational retaliation. The Court first articulated 12(b)(6) standards.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A complaint may fail to state a claim upon which relief can be granted in two ways: first, by failing to state a valid legal cause of action, *i.e.*, a cognizable claim, *see Holloway v. Pagan River Docks Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012); or second, by failing to allege sufficient facts to support a legal cause of action, *see Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). In evaluating whether a claim is stated, 'a court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff,' but does not consider 'legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments.' *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

Title VII

The Court held under 12(b)(6) that Plaintiff Harris failed to state a cognizable claim of associational retaliation under Title VII based on the protected activity of his co-worker Fleming, who filed an EEOC charge in 2015. The Court noted that the Supreme Court recognized that an employee may pursue a Title VII retaliation claim based on retaliation suffered in response to the protected activity of a third party. The Supreme Court in *Thompson*

v. N. Am. Stainless, LP, 562 U.S 170, 131 S. Ct. 863, 178 L. Ed. 2d 694 (2011) stated that “firing a close family member will almost always” give rise to a violation of Title VII’s anti-retaliation provision, while “reprisal on a mere acquaintance will almost never do so.” In that case, the plaintiff’s fiancée engaged in protected activity, and that relationship sufficed to place him in the “zone of interest” with his fiancée.

The Court stated that in this case, Plaintiff Harris only characterized the relationship between him and plaintiff Fleming as “closely affiliated” and “members of a small crew” in the responsive brief, and not the Complaint. There were no allegations in the Complaint to show that the relationship between the Plaintiffs were anything more than “mere co-workers.” Nothing in the complaint permitted the reasonable inference that the relationship between the Plaintiffs was such that Plaintiff Harris was terminated to hurt or punish Plaintiff Fleming.

Author’s Note: Many cases cannot survive a Defendants’ 12(b)(6) motion under the heightened pleading standards of Iqbal and Twombly. The indented quote is standard language which plaintiffs’ attorneys must take to heart. This means endeavoring to “nudge” your pleadings across the line – pre-discovery – to state not just a “possible,” but a “plausible” claim for relief. Judges vary in how stringently they apply Iqbal and Twombly.

***Goad v. N.C. Farm Bureau Mut. Ins. Co., No. 1:16-CV-1332, 2017 U.S. Dist. LEXIS 198571 (M.D.N.C. Dec. 4, 2017).**

The United States District Court for the Middle District of North Carolina denied defendant's motion for summary judgment on all claims.

Judge: Catherine C. Eagles, United States District Judge

Plaintiff, Mitzi Goad, asserted claims under Title VII for constructive discharge. Plaintiff argued that the defendant created a hostile work environment based on her gender and retaliated against her because of her complaints about sexual harassment.

In order to prevail on a Title VII hostile work environment claim, a plaintiff must show the underlying conduct was (1) unwelcome, (2) based on the plaintiff's protected class, (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive atmosphere, and (4) imputable to the employer. Ms. Goad contends that she was constructively discharged as a result of the hostile work environment.

Defendant did not contest elements one or two above. Defendant contended that Ms. Goad presented no evidence of the third and fourth elements necessary to establish the hostile work environment claim and moved for summary judgment.

Element 3

The Court held that Ms. Goad presented evidence from which a jury could conclude that the atmosphere was abusive. The Court stated that plaintiff's evidence was sufficient to raise a disputed question of material fact as to whether the environment was both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.

Ms. Goad testified that a co-worker repeatedly made unwanted sexual suggestions to her and that when she began complaining about the unwanted sexual invitations from her co-worker, her supervisor first downplayed the harassment and made a joke about it, and on another occasion he completely ignored the complaint. He also suggested to Ms. Goad that she should give in to the harassment and have sex with the co-worker and that she should make it work with the co-worker because of the co-worker's sales.

The supervisor did speak with the co-worker about Ms. Goad's complaints, and the co-worker eventually stopped making sexual comments, but thereafter the co-worker began making false accusations against Ms. Goad, complaining about her, staring at her, and on one occasion became physically threatening so that another employee had to step in. Ms. Goad continued to complain to her supervisor on an almost daily basis, and the supervisor always promised that the situation was being worked on. The supervisor also told Ms. Goad that she should not raise her concerns with higher-ups, as that would make it worse for her. The situation with the co-worker became so bad that Ms. Goad kept a loaded gun on her desk, and her other co-workers

would not leave her alone in the office with the harassing co-worker. In addition, her supervisor began making repeated sexual and overly personal comments to her, many in front of other co-workers.

Element 4

An employer is liable for a hostile work environment created by a co-worker if it knew or should have known about the harassment and failed to take effective action to stop it. Here, Ms. Goad presented evidence that she repeatedly complained to her supervisor about the erratic and retaliatory conduct of her co-worker, who repeatedly made false accusations and otherwise bullied Ms. Goad as a result of Ms. Goad's complaints of sexual harassment and of Ms. Goad's refusal to have sexual contact with the harasser. Beyond assuring her that he was working on it, the supervisor did not stop the continuing harassment from the co-worker. Instead, he began harassing Ms. Goad himself. The Court determined that from this evidence, a jury could conclude that the employer had notice and failed to respond with remedial action reasonably calculated to end the co-worker's harassment.

When a supervisor creates the hostile environment, the employer has an affirmative defense if it shows: 1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and 2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While the affirmative defense is not available when the supervisor's harassment culminates in a tangible employment action, such as discharge, the defense is available in constructive discharge cases such as this one. Thus, the affirmative defense could apply in a constructive discharge case.

Here, the parties agreed that Farm Bureau had a policy against workplace harassment which prohibited sexual harassment. The policy urged employees to report any such incidents to the employee's supervisor, human resources, or the general counsel. To the extent Farm Bureau raised this defense as to the conduct of the co-worker, it did not apply. The *Faragher* defense applies only when a supervisor creates the hostile work environment; the negligence test set forth in *Freeman, Vance*, and other cases cited applies when it is a co-worker who creates the hostile environment. In any event, evidence existed that Ms. Goad repeatedly reported the retaliatory harassment by the co-worker to her supervisor, who did little to nothing to stop the harassment. Thus, to the extent her hostile work environment claim is based on the conduct of her co-employee, Ms. Goad complied with the policy and the defense was not applicable.

To the extent the conduct of her supervisor contributed to the hostile work environment, Ms. Goad testified that she did not report the harassment by her supervisor to human resources or the general counsel because she had witnessed firsthand that another woman in the office had been blackballed after complaining. Her supervisor confirmed this view, telling her it would be "worse for her if she complained outside the office." This raised a question of fact as to whether Ms. Goad's failure to report the harassment by Mr. Robertson to human resources or the general counsel was reasonable. Moreover, her supervisor's initial reactions to the sexual harassment by the co-worker — making jokes, ignoring or downplaying the problem, and

suggesting Ms. Goad go along with the harasser — and his continuing failure to address the co-worker's retaliatory conduct raised a question of fact as to whether Farm Bureau's policy was effective.

Ms. Goad also raised material questions of disputed fact as to her retaliation claim. The elements of a prima facie claim for retaliation are: (1) engagement in a protected activity; (2) materially adverse action; and (3) a causal link between the protected activity and the employment action.

Here, Ms. Goad has presented evidence that she engaged in protected activity when she complained about sexual harassment by a co-worker to her supervisor, and that thereafter her supervisor did little to nothing to stop a continuing pattern of retaliatory conduct by the co-worker against Ms. Goad and in fact began harassing Ms. Goad himself, to such an extent that a hostile work environment was created by him. The retaliatory conduct by the co-worker and the supervisor began soon after Ms. Goad began complaining, and continued over several months, and was accompanied by the supervisor's statements that reporting the harassment outside the office would "make things worse" for her. A fact issue existed as to whether a reasonable employee would have been dissuaded from complaining about sexual harassment.

Finally, Farm Bureau contended that there is no evidence of harassment within the five day period before Ms. Goad quit on July 16, 2015, and as her EEOC charge was filed on January 7, 2016, any incidents before that date are time-barred. Ms. Goad brought a constructive discharge claim, and Farm Bureau's argument was thus inconsistent with the Supreme Court's decision in *Green v. Brennan*, 136 S. Ct. 1769, 1777, 195 L. Ed. 2d 44 (2016). In that case, the Supreme Court held that time limitations on a constructive discharge claim did not begin to run until the employee ended her employment. Moreover, Ms. Goad testified that the co-worker's retaliatory harassment continued on a daily basis.

Defendant's motion for summary judgment on all claims was denied.

Author's Note: This sexual harassment case contains an excellent overview of when liability may be imputed to an employer when co-worker and supervisor-created harassment occurs, the latter occurring without a tangible job action. Constructive discharge, the Court noted, is not a tangible job action, and the affirmative defense is available.

Judon v. City of Charlotte, No. 3:15-CV-578-RJC-DSC, 2017 U.S. Dist. LEXIS 186000 (W.D.N.C. Nov. 9, 2017).

The United States District Court for the Western District of North Carolina granted Defendants' Motion for Summary Judgment on Plaintiff's claims under Title VII.

Judge: Robert J. Conrad Jr., United States District Judge

Plaintiff was employed by Defendant as Assistant Aviation Director of Operations at Charlotte Douglas International Airport. As an Assistant Aviation Director, Plaintiff was one of four who answered to the Deputy Director who in turn answered to the Aviation Director. In July of 2013, the North Carolina General Assembly transferred control of Charlotte Douglas International Airport to another entity. Due to this uncertainty, Jerry Orr, the Aviation Director, abruptly left his position on July 13, 2013.

This left both the Aviation Director and Deputy Director positions above the four Assistant Directors vacant. Among the four Assistant Deputy Directors was Plaintiff, Mark Wiebke, John Christine, and Brent Cagle. Plaintiff was the only African American Assistant Director. Among these four Assistant Deputy Directors, Cagle had 1.5 years' experience at the airport as Assistant Director. Christine had 16 years' experience at the airport, two of which were as an Assistant Director. Wiebke had 25 years' experience at the airport, twelve of which were as an Assistant Direct. Plaintiff had sixteen years' worth of experience at the airport, with one year as an Assistant Director.

The City Manager appointed Assistant Director Cagle as Interim Aviation Director. The appointment of Cagle was consistent with the City Manager's power to fill interim positions in the event that a Department Director position opens. Cagle's appointment was a closed process in that the position was not advertised or opened for interviews. After his appointment, Cagle temporarily promoted Christine, one of the remaining Assistant Directors, to the vacant Deputy Director position. This interim appointment, like that of the interim Aviation Director position, was closed and neither Plaintiff nor Wiebke were offered the opportunity to interview for the position.

The closed hiring processes were not the norm. City hiring policy provided that all vacant positions shall be posted unless under unusual circumstances as approved by the Human Resources Director. However, Defendant defined the governance issues affected by the North Carolina legislation, as well as the sudden departure of Orr, as unusual circumstances that did not require following the norm or posting the positions.

In 2014, Cagle reorganized the Aviation Department's management structure by adding a second Deputy Director position between the Aviation Director and the four Assistant Director positions. Cagle made Christine's interim position permanent and allowed the newly created second Deputy Director position to remain open until a permanent Aviation Director was announced. Again, there was no interview process in filling the Deputy Director role

permanently. This closed process used to appoint Christine to Deputy Director left Plaintiff, an African American male, and Wiebke, a Caucasian male, in their old roles as Assistant Aviation Directors without a chance to apply for the permanent Deputy position.

Plaintiff had nineteen years of experience with the City working as Airport Operations Manager, Airport Facilities Manager, Airport Ground Transportation Manager, and Airport Operations Officer. Orr rated Plaintiff's 2012-2013 performance as Aviation Assistant as "completely satisfactory" and from 2013-2015, Plaintiff's performance evaluations were rated as "entirely satisfactory."

Title VII Failure to Promote Claim within Disparate Impact on Race

Plaintiff claimed that the closed hiring process used for both the interim and permanent placement of the vacant Deputy Director position resulted in a violation of Title VII due to a disparate impact on the basis of race. Specifically, Plaintiff alleged a failure-to-promote claim within the disparate impact theory.

That Court stated that to prove a prima facie case of failure to promote due to racial considerations, Plaintiff must show: (1) he was a member of a protected group, (2) he applied for the position in question, (3) he was qualified for that position, and (4) the defendants rejected his application under circumstances that gave rise to an inference of unlawful discrimination. After a plaintiff establishes a prima facie case, the defendant then has the burden to articulate some legitimate, nondiscriminatory reason for the decision not to promote. Plaintiff then has to show that defendant's legitimate reasons are actually just pretext for discriminatory intent.

The Court found that the legitimacy of Defendant's closed hiring process was a factual dispute entirely irrelevant to Plaintiff's claim. The deprivation of an opportunity to apply for a position may seem unjust, but it does not, without further showing, suggest that the deprivation was due to Plaintiff's race. The key issue that was before the Court was whether the Defendants rejected Plaintiff's application under circumstances that gave rise to an inference of unlawful discrimination.

Plaintiff argued that (1) as an African American, Plaintiff fell within the protection of Title VII; (2) Plaintiff qualified for the Deputy Director position given his past employment experience; and (3) Defendant denied Plaintiff the opportunity to compete due to his race "because he was considered not able to gain knowledge across areas of his everyday job performance" while "Christine, who was white, could by way of simple interest, learn all the aspects of airport management."

Defendant asserted that Plaintiff did not identify other African American employees adversely affected by the closed process. Even if the hiring process violated the City's policy, Defendant argued it adversely affected everyone regardless of their race. Defendant points to Plaintiff's admission that Wiebke, a Caucasian male, was also qualified for the position but found himself

similarly situated in that he was unable to apply for Deputy Director due to the closed process of appointing Christine.

The closest Plaintiff came to proving discriminatory intent behind the use of closed hiring processes was by looking to the communications between Interim Aviation Director Cagle and Christine. Plaintiff stated Cagle communicated with Christine about the latter's candidacy for the permanent Deputy Director position. Plaintiff argued these communications gave Christine a year to audition and train for the Deputy position without others receiving an opportunity to interview. Plaintiff made a general assertion that this exclusive opportunity was given due to Christine's race.

Even if Cagle preselected Christine for the Deputy Director position, the selection did not alone infer discrimination against others on the basis of race. Christine would have been preselected to the detriment of all other qualified applicants, regardless of race. Plaintiff failed to provide evidence that Christine was favored or that Plaintiff was disfavored due to race. Therefore, Plaintiff could not fulfill the fourth element for a failure-to-promote disparate impact claim.

Even if the Court were to find that Plaintiff proved a prima facie case of discrimination, Defendant nonetheless established a legitimate, nondiscriminatory reason for promoting Christine rather than Plaintiff. Cagle justified his decision and stated that on at least two occasions, airport stakeholders expressed concern regarding Plaintiff's ability to work with them. Cagle stated that his expectation for leadership would include the ability to manage and work with these stakeholders in an effective manner.

Plaintiff did not establish that Defendant's proffered explanation was unworthy of credence. Plaintiff, in an attempt to characterize Defendant's reasoning as pretext, pointed to his qualifications for the job. However, evidence showed that Plaintiff was as equally qualified as other candidates. In fact, Plaintiff admitted that Wiebke was *more* qualified for the position than Plaintiff. This admission defeated Plaintiff's use of qualifications as a measurement of Defendant's alleged discriminatory intent. The Court stated that Defendant, as an employer, had discretion to choose among equally qualified candidates, provided the decision was not based upon unlawful criteria. Plaintiff did not establish that Defendant used unlawful discriminatory criteria to pick one employee to promote among other, similarly qualified employees. The Court found that Defendant was entitled to judgment as a matter of law.

The Court granted Defendants' Motion for Summary Judgment on Plaintiff's claims under Title VII.

***Netter v. Barnes, No. 1:15-CV-843, 2017 U.S. Dist. LEXIS 220024 (M.D.N.C. Dec. 15, 2017).**

The United States District Court for the Middle District of North Carolina granted Defendant's motion for summary judgment.

Judge: Catherine C. Eagles, United States District Judge.

The plaintiff, Catherine Netter, sued defendant Sheriff B.J. Barnes for discriminating against her in violation of Title VII and her equal protection rights and for retaliating against her in response to her claim of discrimination. Ms. Netter alleged that Sheriff Barnes in his individual capacity was liable for discriminatory treatment because she was not allowed to take a test used to make promotion decisions while other persons similarly situated but of a different race and religion were allowed to take the test.

The Court stated that to establish a prima facie case of discrimination in the failure to promote context, Ms. Netter must show that (1) she is a member of a protected group, (2) there was a specific position for which she applied, (3) she was qualified for that position, and (4) the defendant rejected her application under circumstances that give rise to an inference of discrimination. *Williams v. Giant Food Inc.*, 370 F.3d 423, 430 (4th Cir. 2004).

The Court stated that plaintiff failed to identify any evidence in support of element four of the prima facie case for discrimination, that the defendant rejected her application under circumstances that give rise to an inference of discrimination. The evidence plaintiff set forth did not include evidence that an officer not of her race or religion was allowed to take the promotional test while on disciplinary status, as she was. The one individual she identified was a white detention officer who was promoted despite having a pending domestic violence charge. However, testimony by a Captain revealed that the officer was promoted while the criminal charge was pending, not while he was on disciplinary status. The Court further stated that all evidence available showed that the Sheriff consistently applied that rule that employees on disciplinary status were not considered for promotion.

With regard to her retaliation claim, the evidence showed that plaintiff copied personnel records and gave them to the EEOC, an outside investigator hired by the Sheriff's Department, and her attorney. The Court stated that plaintiff did not offer any circumstantial evidence that the reason for her termination was pretext. If she had only provided the documents to the investigator hired by the Sheriff's department, and then was fired, a reasonable jury could infer that this was a pretextual excuse to fire her. But because plaintiff also provided the records to the EEOC and her attorney, which clearly violated department policy, no reasonable jury would see that as pretextual.

Author's Note: Promoting a law enforcement officer while he's charged criminally with domestic violence might not be a sound policy employment practice. His pending criminal charges did not exclude him from being promoted, while the plaintiff's disciplinary status—which was applied consistently to all employees in the department—did.

***Robbins v. Rowan Voc. Opportunities, Inc., 1:16CV310, 2018 U.S. Dist. LEXIS 88368 (M.D.N.C. May 23, 2018).**

The United States District Court for the Middle District of North Carolina granted Defendant's motion for Summary Judgment on Plaintiff's claims under Title VII.

Judge: Loretta C. Biggs, United States District Judge

RVO is a non-profit rehabilitation facility that provides disabled individuals with work adjustment services and life skills, as well as vocational training and long-term or transitory employment. In September 2009, Plaintiff, an African-American female, was hired by RVO and later promoted to Innovations Program Manager. In May 2015, Plaintiff submitted her resume to RVO's Executive Director, Garrett Yelton for an available Qualified Professional ("QP") position within the facility. Yelton informed Plaintiff via email that he was unable to consider her for the position because, based on her resume, she did not have the DHHS-mandated work experience necessary for the position. The only two candidates who met the state-mandated qualifications were then-CAP/Innovations Technician Jermar Hoke (African-American) and an external candidate, Brandy Blackwell (Caucasian). Yelton selected Brandy Blackwell for the position.

On May 4, 2015, Plaintiff was absent from work, without providing advanced notice. Yelton met with Plaintiff and issued a written warning for having taken unapproved time off for illness. Plaintiff refused to sign the warning, and subsequently filed a grievance with RVO's Board against Yelton. The Board met with Plaintiff, and she ultimately agreed with the Board's assessment that her communication issues with Yelton needed to improve. On July 6, 2015, Yelton met with Plaintiff to discuss her performance evaluation. Plaintiff's evaluation reflected an overall "Below Standard" rating. Plaintiff sent an email to the Board attempting to lodge a retaliation/discrimination grievance against Yelton based on the result of her evaluation. The Board responded to Plaintiff's email and informed her that, per RVO's Staff Grievance Policy, complaints regarding performance appraisals were not subject to a grievance. Plaintiff filed an EEOC Charge, alleging discrimination based on race and retaliation. Seven months later Yelton suspended Plaintiff following a complaint about Plaintiff's harassing conduct toward the parent of a consumer. Plaintiff filed a second EEOC Charge, alleging retaliation by RVO for having filed the First EEOC Charge. Plaintiff was terminated on February 17, 2016 for conduct deemed to be "inappropriate, unprofessional and [which] demonstrate[d] a complete lack of judgment." The next day, Plaintiff filed a third EEOC Charge of Discrimination and alleged retaliation for having filed the First and Second EEOC Charges.

Title VII Race Discrimination

Failure-to-promote claim

The Court stated that to establish a prima facie case for failure to promote based on race, Plaintiff must show the following: (1) that she is a member of a protected group; (2) that she applied for the position in question; (3) that she was qualified for the position; and (4) that RVO rejected her for the position under circumstances giving rise to an inference of unlawful

discrimination. *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994). Under the applicable DHHS rules, in order to serve as a QP, one must have graduated from a college or university with a bachelor's degree in a human service field and must have two years of full-time, post-bachelor's degree accumulated experience with the population served. 10A N.C. Admin. Code 27G.0104(19)(c). Plaintiff argued that she was qualified for the QP position because her performance evaluations were positive, she performed adequately, she had obtained the college degree, and had been working with the consumers for several years. The Court found the arguments unavailing because Yelton posted the available QP position in May 2015. Plaintiff had earned a bachelor's degree only nine months earlier. As Plaintiff admitted in her deposition, at the time she applied for the position, she had not accumulated the required two years, full-time, post-bachelor's degree work experience. Plaintiff was, thus, ineligible to be considered as a candidate for the available QP position. Plaintiff also admitted that she was not more qualified than Blackwell, the candidate who was ultimately selected for the QP position. The Court concluded that because plaintiff did not show that she was qualified for the QP position, she failed to establish a prima facie case for failure to promote based on race.

Hostile Work Environment

The Court stated that to establish a hostile work environment claim under Title VII, Plaintiff must show that a reasonable jury could find that the alleged conduct was (1) unwelcome; (2) based on her race; (3) sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive work environment; and (4) imputable to her employer. *Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 495-96 (4th Cir. 2015). To establish race-based harassment, Plaintiff must show that but for her race, she would not have been the victim of the alleged discrimination. *See Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998).

Plaintiff alleged that she was subjected to the following harassing conduct: (i) Yelton's management style, including excessive scrutiny of her performance, and reduced communication with the management team; (ii) being tasked with training the candidate selected for the available QP position; (iii) receiving a below standard rating from Yelton on her July 2015 performance evaluation, (iv) receiving a written warning in May 2015 for violating RVO's attendance policy; (v) receiving an inadequate response from the Board to her grievances about Yelton; and (vi) being denied the QP position.

The Court found that, as to the alleged harassing conduct by the Board, the record was devoid of any credible evidence that but for Plaintiff's race, the Board would have handled Plaintiff's grievances in a different manner. The evidence showed that after her initial grievance the Board met with her, discussed her issues, and ultimately Plaintiff agreed she needed to improve her communication with Yelton. In response to her second e-mail about the below standard performance evaluation, Plaintiff was simply informed of RVO's policy that performance evaluations were not subject to grievance. The Court stated that this evidence did not support a finding that racial animus motivated the Board's actions toward Plaintiff. The Court also found that there was no evidence to show that Yelton's actions toward Plaintiff were motivated by race. Yelton never made racial comments to Plaintiff. The Court found that Plaintiff's allegations that Yelton increased scrutiny of her work, gave her a below standard performance

evaluation, and gave her a written warning are simply workplace disputes without evidence to prove that Yelton's conduct was motivated by race.

The Court noted that while race-based animosity can be established by evidence of RVO's differential treatment of similarly situated white employees, Plaintiff failed to make such a showing. The Court concluded that a reasonable jury could not find that the alleged incidents of harassment by Yelton and the Board were based on Plaintiff's race nor could a jury find that the incidents were sufficiently severe or pervasive. Thus, the Court found that Defendant was entitled to judgment as a matter of law on Plaintiff's hostile work environment claim.

Title VII Retaliation

The Court stated that to establish a prima facie case of retaliation under Title VII, a plaintiff must show: (i) that she engaged in protected activity, (ii) that her employer took adverse action against her, and (iii) that a causal relationship existed between the protected activity and the adverse employment activity. *Foster v. Univ. of Md. E. Shore*, 787 F.3d 243, 250 (4th Cir. 2015). Plaintiff alleged that she was retaliated against when: (i) she received a written warning; (ii) she received a poor performance evaluation; (iii) she was denied FMLA leave; (iv) she was suspended from her job; and (v) she was terminated.

Regarding the allegation that Plaintiff received a written warning, the Court found that Plaintiff did not engage in a protected activity under Title VII. Plaintiff testified in her deposition that those actions were taken against her in retaliation for: (i) participating in the DHHS and police investigation of RVO's former Executive Director, John Williams; and (ii) filing a grievance with the Board following Yelton's issuance of a written warning in May 2015. The investigation into the former director was wholly unrelated to any claims of employment discrimination based on race, color, religion, sex, or national origin, making it not a protected activity. Likewise, Plaintiff's grievance about Yelton's written warning made no mention of discrimination based on race, color, religion, sex, or national origin, making it not a protected activity. The Court noted that the Fourth Circuit has explained that "Title VII is not a general bad acts statute . . . and it does not prohibit private employers from retaliating against an employee based on her opposition to discriminatory practices that are *outside the scope of* Title VII." *Bonds v. Leavitt*, 629 F.3d 369, 384 (4th Cir. 2011).

Regarding the allegation that Plaintiff was denied FMLA leave for having filed an EEOC Charge, the Court stated that it is undisputed that filing an EEOC charge constitutes a protected activity. Plaintiff filed her First EEOC Charge on July 8, 2015. Plaintiff then alleges that "on or about early February, 2016, [she] requested and was denied Family and Medical Leave regarding a personal medical condition." The evidence before the Court failed to show that Plaintiff ever actually requested FMLA leave which was then denied by Defendant. The record indicated that Plaintiff never completed the FMLA paperwork after she requested it. The Court found that because there was no adverse employment action taken against Plaintiff by Defendant with respect to FMLA leave, Plaintiff failed to establish a prima facie case of retaliation based on a denial of FMLA leave.

Regarding Plaintiff's allegation of suspension and termination, the Court found that Plaintiff did not establish a causal link between the protected activity and these adverse employment actions. The Court stated that evidence of the employer's knowledge that a plaintiff engaged in a protected activity is absolutely necessary to establish the causation element of a retaliation claim because, by definition, an employer cannot take action because of a factor of which it is unaware. *Smyth-Riding v. Scis. & Eng'g Servs., LLC*, 699 F. App'x 146, 153 (4th Cir. 2017). Based on the evidence, the only protected activity Defendant knew about at the time of Plaintiff's suspension and termination was Plaintiff's filing of the First EEOC Charge. The Court noted that although the Fourth Circuit has not adopted a bright temporal line, the Court has held that a lapse of three or four months between the protected activities and discharge was too long to establish a causal connection by temporal proximity alone. *Perry v. Kappos*, 489 F. App'x 637, 643 (4th Cir. 2012) (quoting *Pascual v. Lowe's Home Ctrs., Inc.*, 193 F. App'x 229, 233 (4th Cir. 2006)). Here, there was approximately seven months between the first EEOC Charge and the suspension and termination. The Court found that without more, the evidence was insufficient to show that Plaintiff's suspension and termination was causally linked to the First EEOC Charge.

In instances where temporal proximity between the protected activity and alleged adverse employment action is absent, evidence of recurring retaliatory animus during the intervening period can be sufficient to satisfy the element of causation. *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). The Court found that Plaintiff offered no evidence of retaliatory animus by Defendant during the intervening seven months to demonstrate causation. The Court found that Plaintiff failed to satisfy her burden of establishing a prima facie case of retaliation based on her suspension and termination.

The Court granted Defendant's Motion for Summary Judgment.

Author's Note: The Court's discussion of temporal proximity in a retaliation case is instructive. First, a lapse of 3-4 months between the protected activity and the alleged retaliation is too long to establish causation by temporal proximity alone. Seven months, as here, was insufficient to show a causal link.

***Rodriguez v. Elon Univ., No. 1:17CV165, 2018 U.S. Dist. LEXIS 76211 (M.D.N.C., April 27, 2018).**

The United States District Court for the Middle District of North Carolina granted Defendant's motion for summary judgment.

Judge: Loretta C. Biggs, United States District Judge

Plaintiff is Hispanic and Puerto Rican and was an assistant professor at Elon. In 2014-2015, Plaintiff sought a promotion and tenure at Elon. Both a committee and a dean reviewed Plaintiff's portfolio and did not recommend Plaintiff for promotion or tenure. Therefore, the Provost did not recommend to the President of Elon that Plaintiff be granted either the promotion or tenure. Defendant then offered Plaintiff a one year terminal contract for the 2015-2016 academic year which Plaintiff declined and thereafter resigned. Plaintiff alleged that Elon's denial of his application for promotion and/or tenure was based on his national origin in violation of Title VII, and based on his race in violation of Section 1981.

Failure to Promote Claims

The Court reviewed Plaintiff's claim under the *McDonnell Douglas* burden shifting framework. The Court first noted that the Fourth Circuit has recognized that while Title VII is available to aggrieved professors, the Courts review professorial employment decisions with great trepidation and the Courts will not interfere with an academic institution's decision to deny tenure in order to impose their own judgment.

Because the Court found that Plaintiff failed to bring forth direct evidence of discrimination, Plaintiff was required to use the *McDonnell Douglas* burden-shifting framework to establish his claim. The framework requires that a Plaintiff establish a prima facie case of failure to promote based on national origin or race, by showing that: (1) he was a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position; and (4) Elon denied him the promotion and/or tenure under circumstances giving rise to an inference of unlawful discrimination. *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994).

Ultimately, the establishment of a prima facie case of employment discrimination requires proof by a preponderance of the evidence that the plaintiff was not promoted or dismissed under conditions which, more likely than not, were based upon impermissible racial [or other] considerations. *Gairola v. Commonwealth of Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1286 (4th Cir. 1985).

The Court first concluded that Plaintiff made a sufficient showing of element three, that Plaintiff was qualified for promotion or tenure based the declarations from a former dean, former student, a former member of the Board of Advisors of Elon, Plaintiff's former colleagues, and other evidence that suggested Plaintiff was qualified.

Next the Court concluded that Plaintiff did not provide sufficient evidence to satisfy element four, that Plaintiff was denied promotion and tenure under circumstances giving rise to an inference of unlawful discrimination. The Court noted that in an attempt to prove element four, the Plaintiff relied almost exclusively on his own declaration to support his claims of discrimination. The Court stated that “such self-serving declarations have little to no value when considering a motion for summary judgment.” In addition, the self-serving declarations, Plaintiff offered as evidence had no connection to the factors considered by the Committee and the dean with respect to their decision to deny Plaintiffs promotion and tenure.

The Court also found that Plaintiff did not meet the fourth element by presenting evidence that the position sought was filled by a non-minority because five other candidates for tenure were not recommended. Out of the five, four were white and one was American Indian. In addition, one of the four candidates for promotion also was Hispanic.

The Court also found that even if Plaintiff had established a prima facie case, Elon had articulated several legitimate, non-discriminatory reasons for declining to promote or tenure Plaintiff. The Committee and the Dean expressed concerns that Plaintiff favored certain students, that he was unresponsive and unavailable outside of class, that he mistreated students, and that he failed to meet teaching and advising expectations necessary for tenure and promotion (as well as many others). Plaintiff was unable to prove pretext because he did not cite to materials in the record to support his assertion that the evidence offered by Elon was pretext.

Defendant’s motion for summary judgment was granted as a matter of law on Plaintiff’s failure to promote claim.

Constructive Discharge

Plaintiff argued that he was constructively discharged when Elon offered him a one year terminal contract instead of a promotion or tenure. The Court concluded that no reasonable juror could conclude that Elon constructively discharged Plaintiff under these circumstances. Plaintiff failed to set forth evidence that Elon’s failure to approve his application for promotion and tenure was *deliberately* done for the purpose of Plaintiff resigning. The evidence showed the opposite of deliberateness, when Plaintiff first attempted to resign the dean refused his resignation. The Court noted that Plaintiff’s decision to leave his employment because of displeasure with Elon’s decision did not rise to the level necessary to establish an intolerable condition.

Author’s Note: Time and again, N.C. federal district court judges note that “because there is no direct evidence of discrimination,” the plaintiff must use the McDonnell Douglas model of proof. This conflicts with the U.S. Supreme Court’s ruling in Desert Palace v. Costa where the Court ruled that direct evidence is not needed in order to use the motivating factor, burden-shifting model of proof. 539 U.S. 90 (2003). Also, note the development of step four of the prima facie case under McDonnell Douglas as used in this case. I see more and more plaintiffs’ cases fail on 12(b)(6) motions because of their failure to plead facts sufficient to

state a plausible claim of relief. Step four in this case seems to usurp the last step of McDonnell Douglas, which is designed to determine the existence of discrimination. Also, the plaintiffs are losing based on the failure of their prima facie case on the “he was qualified” prong. The Supreme Court has noted that this means meets “minimal qualifications.” McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, defendants are winning on this step by showing plaintiff was not as qualified as the person selected, was not doing a good job, etc. These arguments certainly suffice as LNDs at step two. This case serves as a cautionary note to plaintiffs in formulating your prima facie case, the elements of which may be somewhat malleable, certainly dependent on the adverse action at issue.

Watson v. UPS, No. 1:18cv119, 2018 U.S. Dist. LEXIS 112730 (M.D.N.C. July 5, 2018).

The United States District Court for the Middle District of North Carolina granted Defendant's motion to dismiss on Plaintiff's claims under Title VII.

Judge: Thomas D. Schroeder, United States District Judge

Plaintiff Watson was a package delivery driver for UPS for twenty-eight years. In 2010, she was warned that she took too many restroom breaks and was fired on July 29, 2010, for dishonesty and theft of time. Plaintiff apparently returned to work thereafter, and the circumstances of her return are unclear. During a performance review Watson was allegedly treated like a "dog or a rug under her supervisor's feet." A co-worker who witnessed the event contacted management concerning Plaintiff's treatment.

Plaintiff filed a charge with the EEOC alleging that she was being harassed for taking restroom breaks outside of her allotted time to use the restroom or eat lunch. Plaintiff alleged that UPS retaliated against her for filing an EEOC charge by issuing her safety letters. On February 26, 2016, Watson was terminated for dishonesty and falsifying records. She "had already been warned of termination in February because of the complaints she'd filed against a female employee who had acted violently towards her." Watson was reinstated in April 2016. Later, Watson was asked to work in place of a male coworker who was suffering from a kidney stone. This violated UPS contract procedure which dictated that the least senior employee relieve injured coworkers. In June 2016, Watson requested to work an eight-hour day, which UPS drivers are allowed to do twice a month. The request appeared to have been granted, but Watson still had to work a nine-hour day because her truck was given to another driver, forcing her to wait an hour before beginning her route.

The Court first concluded that any claim based on any incident that occurred before April of 2016 was untimely because she did not file her EEOC charge until October 7, 2016. Title VII requires a claimant to file a charge with the EEOC within 180 days of the alleged unlawful employment practice in which case the charge must be filed with the EEOC within 300 days. 42 U.S.C. § 2000e-5. The Court next reviewed post-April 2016 claims.

Sex Discrimination

The Court found that Plaintiff failed to allege a prima facie case of sex discrimination. The Court stated that the elements of a prima facie case of Title VII discrimination are: (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside of the protected class. *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010). The Court noted that an employee need not allege specific facts to make out a prima facie case. However, a plaintiff must at least allege sufficient facts "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court stated that mere conclusory allegations that an employment action was taken because of sex are insufficient to survive a motion to dismiss.

The Court found that Plaintiff failed to allege an adverse employment action. Neither having to relieve a co-worker nor having to work a nine-hour day as opposed to an eight-hour day, meet the standard for an adverse employment action (element three of the prima facie case). The Court stated that the events that Watson complained of could best be described as nuisances, which the Fourth Circuit has determined are not subject to remedy under Title VII. *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (noting that Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment). Further, Plaintiff continued to serve in her same position without change to her compensation or her usual responsibilities.

The Court dismissed Plaintiff's claim under Title VII, finding that Plaintiff did not allege an adverse employee action.

Hostile Work Environment

The Court found that Plaintiff failed to allege a prima facie case of hostile work environment. Plaintiff alleged that Defendant's actions gave rise to a hostile work environment. The Court disagreed. The Court stated that a hostile environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To establish a claim of hostile work environment, a Plaintiff must show that she experienced harassment that was (1) unwelcome; (2) based on her protected status; (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) imputable to the employer. See *EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 327 (4th Cir. 2010). The Court stated that the determination of whether the environment is objectively hostile is made by examining the totality of the circumstances, which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23.

The Court found that Plaintiff did not meet the prima facie case. The Court noted that Plaintiff's allegation included no allegation of offensive touching or offensive language. Plaintiff did allege that she was harassed for taking too many bathroom breaks, but this occurred in 2010. A court may consider the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, but there still must be some act contributing to that hostile environment that takes place within the statutory period. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002). Although the Plaintiff alleged that the hostile environment was ongoing, the Court found that the allegation was a mere conclusion lacking any factual support. Additionally, the Court stated that Plaintiff failed to allege facts which plausibly support a claim that any harassment was based on her gender.

The Court dismissed Plaintiff's hostile work environment claim.

Retaliation

The Court stated that Title VII prohibits an employer from retaliating against an employee for complaining about prior discrimination. *Welton v. Durham Cty.*, No. 1:17-CV-258, 2017 U.S. Dist. LEXIS 137429, 2017 WL 3726991, at *4 (M.D.N.C. Aug. 28, 2017). To state a prima facie retaliation claim under Title VII, a plaintiff must establish that: (1) she engaged in a protected activity; (2) her employer took a materially adverse action against her; and (3) a causal connection exists between the protected activity and the adverse action. *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010). The Court found that Plaintiff alleged no facts that she was engaged in a protected activity since April 2016, or that there was a causal connection between her engagement in any activity and the complained of conduct of the employer. The Court went on to say that Plaintiff's allegation that she was continuously discriminated and retaliated against by Defendants since 2010, was wholly conclusory and failed to render any retaliation claim plausible.

The Court granted Defendant's motion to dismiss.

***Young v. Onslow Water & Sewer Auth., No. 7:16-CV-259-D, 2018 U.S. Dist. LEXIS 5625 (E.D.N.C. Jan. 12, 2018).**

The United States District Court for the Eastern District of North Carolina granted Defendant's motion for summary judgment.

Judge: James C. Dever III, Chief United States District Judge

Plaintiff is an African-American woman who worked for defendant Onslow Water & Sewer Authority as a customer service representative. In 2008, plaintiff applied for a promotion to customer account specialist. Defendant hired a white female for the position, and plaintiff filed a written grievance with defendant which alleged race discrimination. Plaintiff received a pay increase as settlement for the grievance. In 2014, a CAS position became available for the first time since 2008 and plaintiff applied. A panel of defendant's management conducted interviews (none that were involved in the 2008 grievance) and candidate's responses were graded. The position was offered to the highest ranked candidate, not plaintiff, who ranked fourth. Plaintiff filed an EEOC charge alleging race discrimination. Defendant again opened up a CAS position, but did not interview plaintiff because she had a recent disciplinary action and per policy, an employee was not eligible to apply for open positions for twelve months after being disciplined. An African-American male was selected for the position.

On September 15, 2015, Young filed an amended EEOC charge alleging retaliation. Young alleged that OWSA did not promote her in January 2015 in retaliation for filing her December 2014 EEOC charge. Young also alleged that OWSA retaliated against her in February 2015 by moving her to the front desk and a new cubicle.

Failure to Promote Based on Race

The Court assumed that plaintiff established a prima facie case and went straight to an analysis of defendant's legitimate, non-discriminatory reason for the adverse employment decision. The Court found that defendant had a legitimate, non-discriminatory reason for not promoting plaintiff, that she did not have the highest score during the interviews, and defendant hired the individual with the highest scores. The burden then shifted back to plaintiff to prove pretext. Plaintiff argued that she was more qualified than the individual hired. The Court stated "[i]f a plaintiff makes a strong showing that she was 'discernibly better qualified' than the candidate selected for a promotion, a plaintiff may have successfully raised a genuine issue of material fact as to whether the employer's proffered justification for promoting the successful applicant is pretextual. *See Heiko v. Colombo Sav. Bank*, F.S.B., 434 F.3d 249, 261-62 (4th Cir. 2006). But '[w]hen a plaintiff asserts job qualifications that are similar or only slightly superior to those of the person eventually selected, the promotion decision remains vested in the sound business judgment of the employer.'" *Id.* at 261.

The Court stated that plaintiff's evidence, which was her longevity with defendant and her favorable performance reviews, did not meet the burden of her being "discernibly better qualified than" the individual hired. Thus, she failed to create an issue of fact on pretext.

Retaliation Claim for Non-Promotion

The Court first stated that the retaliation claim for moving plaintiff from the front desk to a cubical was untimely. Even if it had been timely, the Court stated that the move to a cubical was not materially adverse. Plaintiff admitted that defendant rotated its CSRs and placement at the front desk was part of that rotation.

As to her non-promotion claim, the Court stated that plaintiff failed to raise a genuine issue of material fact concerning pretext. Defendant provided a legitimate non-discriminatory reason for not promoting her, in that defendant applied the company policy to not promote individuals with disciplinary actions into open positions. The Court also noted that several candidates who scored higher than plaintiff during interviews applied for the position and one was selected. Plaintiff ultimately failed to offer any evidence that the policy was pretextual.

Author's Note: The Court noted that a plaintiff may prove a Title VII violation in two ways. The first is through McDonnell Douglas. Interesting, Judge Dever wrote that the other means was through the use of "direct evidence."

[A] plaintiff may demonstrate through direct evidence that illegal discrimination motivated an employer's adverse employment action . . . Direct evidence is evidence from which no inference is required. To show race discrimination by direct evidence, a plaintiff typically must show discriminatory motivation on the part of the decisionmaker involved in the adverse employment action. Such direct evidence would include a decisionmaker's statement that he did not promote plaintiff due to her race. The decisionmaker must be either the employer's formal decisionmaker or a subordinate who was "principally responsible for," or "the actual decisionmaker behind," the allegedly discriminatory action. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151-52, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); Holley v. N.C. Dep't of Admin., 846 F. Supp. 2d 416, 427 (E.D.N.C. 2012).

The Court held that plaintiff lacked such direct evidence and thus had to use McDonnell Douglas. Contrast this principle of law with a dissimilar principle articulated in Francis v. Esper on page 45 of this article.

TITLE VII and § 1981

***Chandler v. W.B. Moore Co. of Charlotte, Inc.*, No. 3:18-cv-149, 2018 U.S. Dist. LEXIS 68884 (W.D.N.C., April 23, 2018).**

The United States District Court for the Western District of North Carolina denied Defendant's motion to dismiss Plaintiff's Title VII claim.

Judge: Max O. Cogburn Jr., United States District Judge

Plaintiff, a former employee of defendant, filed suit after the EEOC declined to pursue charges on her behalf. The EEOC notified plaintiff of their decision and of her right to sue in a letter dated November 13, 2017, received by Plaintiff's counsel on November 15, 2017. Plaintiff filed a request for an extension under NCRCP 3(a) on February 9, 2018.

The clerk issued a summons the same day, and plaintiff proceeded to file suit in Mecklenburg County Superior Court on February 20, 2018. The instant motion was limited solely to dismissal of the Title VII claim against Defendant, as Defendant argued that the claim was time-barred due because Plaintiff's failed to file suit within 90 days of receipt of her right-to-sue letter from the EEOC.

Plaintiff argued that she filed the request for an extension in Mecklenburg County Superior Court 86 days after receiving the letter from the EEOC, and thus satisfied the requirement to file suit within 90 days of receipt of the letter.

To meet the 90-day deadline based on November 15, 2017, plaintiff had to file suit by February 13, 2018. On February 9, 2018, plaintiff filed an Application and order Extending Time to File Complaint Pursuant to North Carolina Rule of Civil Procedure 3(a), and the clerk of court issued a summons the same day. Plaintiff then filed her complaint on February 20, 2018.

Defendant argued that the state procedural rule could not trump federal law, namely the 90-day deadline for filing a lawsuit after receipt of the right-to-sue notice. The Court disagreed with the argument and held that a claimant may initiate a Title VII claim in state court or federal court and that an action is commenced upon issuance of a summons. As a summons was issued in this matter within the 90-day deadline, plaintiff successfully commenced a Title VII claim in state court within 90 days of receipt of notice of her right to sue and her Title VII claim was thus not time-barred. Defendant's motion to dismiss was denied.

***Obimah v. Am. Red Cross*, 3:18-CV-00181, 2018 U.S. Dist. LEXIS 130856 (W.D.N.C. Aug. 3, 2018).**

The United States District Court for the Western District of North Carolina granted Defendant's Motion to Dismiss Plaintiff's claims under Title VII and Section 1981.

Judge: Graham C. Mullen, United States District Judge

Plaintiff, a Nigerian woman, worked for Defendant from 2000 to 2015. Plaintiff alleged that she endured harassment and ridiculed because of her national origin. Plaintiff alleged that she was often ridiculed because of her accent and about "Nigerian scams and Nigerian leaders being crooks." Plaintiff alleged that she was told "she had better go back to Africa and that Homeland Security should not have let her back into the country after she took a trip to Nigeria." Additionally, Plaintiff alleged that she was mocked regarding the similarity of her name to President Obama and told that she could not be promoted because "there was no telling how many Mercedes-Benz she would get." Plaintiff contacted HR regarding the alleged discriminatory conduct. Plaintiff alleged that her working conditions deteriorated after the reports to HR. Plaintiff was terminated in November 2015.

Title VII Claims

Plaintiff alleged retaliation and hostile work environment. The Court stated that a Plaintiff has ninety days from the date of receipt of the EEOC Right to Sue Letter to file an action. In this case, the Right to Sue Letter was mailed on January 4, 2018 but was erroneously dated January 4, 2017. The EEOC issued a corrected Dismissal and Notice of Rights to plaintiff dated January 10, 2018. Plaintiff filed her lawsuit on April 10, 2018, which was too late with respect to her receipt of the first EEOC letter. Plaintiff argued her claim should still be allowed because she filed within ninety days of receipt of the second letter. The Court found that the second letter did not restart the ninety-day requirement because it merely corrected a technical default. Since Plaintiff filed her complaint ninety-six days after the first Right to Sue letter, the Court granted Defendant's Motion to Dismiss on Plaintiff's Title VII claims.

Section 1981 Claims

Hostile Work Environment

The Court explained that to state a claim for hostile work environment, Plaintiff must show that: (1) the harassment was unwelcome; (2) the harassment was based on her protected status; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. *Causey v. Balog*, 162 F.3d 795, 801 (2005) (citing *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 772 (4th Cir. 1997)). The Court further explained that section 1981 prohibits discrimination on the basis of race, but does not provide protection for individuals based solely on their place or nation of origin. *Quraishi v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc.*, No. CIV. CCB-13-10, 2013 U.S. Dist. LEXIS 75683, 2013 WL 2370449, at *2 (D. Md. May 30, 2013). Although, the U.S. Supreme Court has construed the term race broadly, courts in the Fourth Circuit have held that a plaintiff must first demonstrate

that he actually faced intentional discrimination based on his ancestry or ethnic characteristics, rather than solely on his place of origin. Where a plaintiff's allegations reference only his place of origin and do not focus on specific ethnic characteristics associated with that place of origin, the broad construction of race under section 1981 does not apply.

The Court stated that here, Plaintiff's complaint explicitly alleges only national origin discrimination. The Court also stated that the Plaintiff did not allege that the harassment resulted from any type of racial animus. Further, Plaintiff explicitly labeled her claim "National Origin Discrimination." The Court went on to say that courts have consistently found that similar allegations (such as mocking a person's accent) has repeatedly been found to constitute nation origin discrimination. The Court noted that the closest Plaintiff came to alleging racial discrimination was her claim that she was told "she had better go back to Africa." The Court stated that discrimination based strictly off an origination in Africa only constitutes national origin discrimination. The Court went on to say that even if Plaintiff's complaint had alleged racial discrimination, Plaintiff failed to satisfy element three the "sufficiently severe or pervasive" element. The Court GRANTED Defendant's motion to dismiss on Plaintiff's hostile work environment claim.

Retaliation

The Court stated that in order to establish a prima facie case for retaliation, Plaintiff must show (1) that she engaged in protected activity; (2) that her employer took an adverse employment action against her; and (3) there is a causal nexus between the protected activity and the adverse action. *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 250 (4th Cir. 2015). The Court determined that Plaintiff failed to sufficiently allege a causal nexus between her protected activity and the adverse action. Plaintiff's termination occurred three months after she complained to HR. The Court noted that although Plaintiff asserted that her work was more strictly scrutinized, these were threadbare allegations that lacked the substance necessary to establish causation. The Court granted Defendant's motion to dismiss Plaintiff's retaliation claim.

The Court granted Defendant's Motion to Dismiss.

****Velasquez v. Sonoco Display & Packaging, LLC, No. 1:17CV865, 2018 U.S. Dist. LEXIS 61329 (M.D.N.C., April 11, 2018).***

The United States District Court for the Middle District of North Carolina denied Defendant's motion to dismiss pending the completion of discovery.

Judge: Joi Elizabeth Peake, United States Magistrate Judge

Plaintiff was a Hispanic male and he worked through Debbie's Staffing as forklift driver for Sonoco at Sonoco's locations. Debbie's staffing issued Plaintiff his paychecks, and both Debbie's Staffing and Sonoco employees supervised him and had a right to terminate him. A Sonoco supervisor made derogatory comments to Plaintiff based on his race and national origin. These incidents were reported to Sonoco's supervisors, managers and lead men (white males) who Plaintiff alleged took no action to stop the comments.

Plaintiff also made safety related complaints regarding forklifts, and working conditions in the warehouse, which Sonoco managers dismissed or ignored. Plaintiff complained to the Department of Labor via tweet, which his co-workers and supervisors were aware of. Plaintiff was later filled by a Sonoco lead man. When Debbie's Staffing inquired into the termination and the alleged discrimination and harassment, Sonoco stated that Plaintiff was terminated because he had interrupted a Sonoco Supervisor during a meeting. Debbie's Staffing upheld the termination decision.

Title VII and Section 1981 Discrimination Claims

The Court first addressed the liability of Debbie's Staffing as a joint employer of Plaintiff. The Court relied on the EEOC which published "The [staffing] firm is liable if it participates in the client's discrimination . . . The [staffing] firm is also liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control." The Court also relied on case law which stated that "a finding that two companies are an employee's 'joint employers' only affects each employer's liability to the employee for their *own* actions, not for each other's actions as [plaintiff] would have us hold." *Torres-Negron v. Merck & Co.*, 488 F.3d 34, 40 n. 6 (1st Cir. 2007).

The Court then reviewed Plaintiff's allegations to determine whether Debbie's Staffing knew or should have known about the client's discrimination and whether it failed to undertake prompt corrective measures within its control. The Court noted that Plaintiff alleged that Debbie's Staffing confirmed and implemented Plaintiff's termination from Sonoco, even after being informed of the racially discriminatory basis for Sonoco's request, and even though the Debbie's Staffing manager on-site disagreed with the purported reasons being given by Sonoco. Defendant Sonoco took the position that it did not employ Plaintiff and that Debbie's Staffing was responsible for the decision to terminate Plaintiff's assignment. The Court found that the details of the decision-making process and of the contractual arrangements between the parties appeared to involve a fact-intensive inquiry best undertaken after the opportunity for discovery on a more complete record. Therefore, the Court denied the motion to dismiss.

Title VII Retaliation

The Court concluded that these issues were best determined on a more factual record on summary judgment motions, rather than on the motion to dismiss. The Court concluded this because Plaintiff alleged that Debbie's Staffing adopted and confirmed the retaliatory decision of Sonoco, and that Debbie's Staffing was aware of his complaints of racial discrimination by October 21, 2016, and subsequently made the final decision to terminate him. On the other hand, Debbie's Staffing contested its involvement in any discriminatory or retaliatory decisions, which are determinations that require consideration of facts beyond the allegations of the complaint.

Retaliatory Employment Discrimination Act

Plaintiff alleged that Debbie's Staffing violated REDA by terminating him in retaliation for his complaints about multiple violations of the OSHANC. The Court again denied the motion to dismiss on this claim as well.

Author's Note: Any time joint employment is a potential issue, review the Fourth Circuit's companion decisions in two FLSA cases: Hall v. DIRECTTV, LLC, 846 F.3d 757 (4th Cir. 2017) and Salinas v. Commercial Interiors, Inc., 848 F.3d 125 (4th Cir. 2017). These pro-employee decisions broadened the circumstances under which entities may be held jointly liable under the FLSA. The Supreme Court denied certiorari on January 8, 2018.

TITLE VII and the AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

***Francis v. Esper, No. 7:16-CV-335-BO, 2018 U.S. Dist. LEXIS 82976 (E.D.N.C May 17, 2018).**

The United States District Court for the Eastern District of North Carolina granted Defendant's motion for summary judgment regarding plaintiff's hostile work environment claim. However, the Court denied defendant's motion for summary judgment as to plaintiff's race, gender, and age discrimination.

Judge: Terrence W. Boyle, United States District Judge

Plaintiff is an African American female born in 1958. Plaintiff worked as the only civilian Veterinarian at the Veterinary Treatment Facility at Camp Lejeune from 2005 to 2010. Throughout 2010, Captain Gerardo and Captain Bonfiglio counseled Plaintiff regarding medical record-keeping, the inadvertent breaking of a vial of narcotics, and the failure to implement the record-keeping procedures previously discussed. Plaintiff's father was hospitalized and then placed in a nursing home in December of 2010. He later passed away in January of 2011. On April 26, 2011, Captain Gerardo provided plaintiff a proposed letter of separation signed by Captain Bonfiglio and plaintiff was separated from her employment with the Army on June 9, 2011. Plaintiff alleged claims for race, sex, and age discrimination, as well as hostile work environment.

Plaintiff proceeded under the *McDonnell Douglas* framework. The Court stated "[t]o establish a prima facie case of employment discrimination, plaintiff must show (1) that she is a member of a protected class; (2) who suffered an adverse employment action; (3) that at the time of the adverse action she was performing at a level that met her employer's legitimate expectations; and (4) the position remained open or was filled by similarly qualified applicants outside plaintiff's protected class. *Hill*, 354 F.3d at 285. The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1973))."

The Court denied Defendant's motion for summary judgment because plaintiff submitted sufficient evidence to allow a jury to decide as to whether she was performing her job satisfactorily and whether her employer's proffered basis for her termination was mere pretext for discrimination. The evidence plaintiff submitted included testimony from the Staff Sergeant Torrisi from the vet clinic who stated that she reviewed all charts for charting errors and plaintiff appeared to have no more mistakes than any of the military veterinarians. She also testified that Captain Bonfiglio referred to civilian staff as "his minions" and that he requested to see patient-animals with attractive owners regularly. In addition, she testified that Captain

Bonfiglio made the same amount or more of record-keeping mistakes as plaintiff and was not counseled for them. The clinic receptionist testified that Captain Gerardo told people they wouldn't have to deal with plaintiff much longer and that Gerardo only requested plaintiff's records be checked for mistakes, no one else's. Testimony was also given that Bonfiglio attempted to fill plaintiff's position with his girlfriend but was told he was not allowed to do so.

The Court noted that while it is the perception of the decision-maker that is relevant to the determination of whether a plaintiff is performing her job satisfactorily, the evidence proffered by plaintiff created a genuine issue of material fact as to whether plaintiff was treated less favorably because of her race, gender, and/or age.

The Court granted defendant's motion for summary judgment relating to plaintiff's hostile work environment claim because plaintiff failed to present any substantive argument that her hostile work environment claim was encompassed by her age, race, and gender discrimination claims and on plaintiff's EEOC charge she only included age, race, and gender.

Author's Note: Judge Boyle stated that:

Under Title VII, there are two avenues through which a plaintiff may avoid summary judgment. First, a plaintiff may proceed under the mixed-motive framework by presenting direct or circumstantial evidence that discrimination motivated the employer's adverse employment decision. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (en banc) (abrogated on other grounds by *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013)). Under the mixed-motive theory, a plaintiff need only demonstrate "a stated purpose to discriminate and/or indirect evidence of sufficient probative force to reflect a genuine issue of material fact." *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999) (alteration and quotation omitted).

In this case, he noted that the plaintiff appeared to proceed under the pretext framework, which requires a plaintiff first to prove a prima facie case, then to prove that the employer's proffered permissible reason for taking an adverse action is actually a pretext for discrimination. Notice that Judge Boyle correctly states that a plaintiff in a Title VII case may use the mixed-motive model, "whether the plaintiff presents direct or circumstantial evidence."

***Lynch v. Private Diagnostic Clinic, PLLC, No. 1:16CV526, 2018 U.S. Dist. LEXIS 43332 (M.D.N.C. March 16, 2018).**

The United States District Court for the Middle District of North Carolina granted Defendant's motion for summary judgment.

Judge: Loretta C. Biggs, United States District Judge

Dr. Lynch, a white female, was a board-certified physician, licensed to practice in Illinois and North Carolina. Dr. Lynch had worked in the fields of emergency medicine, urgent care, and occupational health. She was the mother and primary caregiver of five children.

In September 2013, Defendant, through Dr. Vaughn and Suzanne Anderson, began looking to hire a full-time faculty physician for the Student Health Services Team. In October 2013, Plaintiff applied for the available Student Health Physician position at Duke. On November 5, 2013, Ms. Anderson informed Plaintiff that she had not been selected to interview for the position.

Later, in February 2014 and November 2014, two additional student health physician positions became available at Duke. Plaintiff re-applied in May 2014, and on September 20, 2014, she was informed by Dr. Vaughn that he had extended an offer to another candidate for the position, instead of Plaintiff.

In May 2014, Dr. Vaughn selected a white female physician to fill the first available position. Then, in September 2014, he selected a black female physician for the second available position, and on December 1, 2014, he selected Dr. Hunter Spotts, a white male physician, to fill the third available position.

Retaliation Claim

The Court focused its analysis on element three, whether a causal connection existed between the protected activity and the adverse action. Here, the alleged protected activity was an EEOC Charge of Discrimination the Plaintiff filed in 2002 against a former employer, and the adverse employment action was Defendant's failure to hire Plaintiff. The Court concluded that Plaintiff offered no evidence from which it could be reasonably inferred that Defendant knew of the prior EEOC Charge.

Sex Discrimination Claims

Defendant conceded by omission that Plaintiff established a prima facie case related to the third available position, which was filled by Dr. Spotts. Plaintiff conceded that Defendant articulated a legitimate non-discriminatory reason for its decision, that Dr. Spotts was more qualified than Plaintiff. The Court then focused on pretext, on which it decided Plaintiff did not raise a fact issue. Plaintiff alleged that she was treated differently than Dr. Spotts in the selection process regarding references, reasons for switching jobs, and malpractice issues. The Court stated that none of those facts offered by Plaintiff created an inference that the reason

Defendant hired Dr. Spotts was false. The Court took into consideration other evidence on the record such as that: (1) Duke had three available Student Health Physician positions, two of which Duke filled with members of the same protected class as Plaintiff; (2) of the ten candidates selected for in-person interviews, seven were women; and (3) throughout the hiring process, Dr. Vaughn had reservations about Dr. Lynch's ability to establish the empathetic doctor-patient relationship with students, which was essential to providing effective care in student health.

The Court also found that Plaintiff failed to establish a prima facie case of "sex plus" discrimination by showing that similarly situated men (who were the primary caregiver for their children) were treated differently than Plaintiff. The Court noted that the record was devoid of any evidence to suggest that Dr. Spotts, or any other male physician serving as a primary caregiver for their children, were treated differently than Plaintiff.

Importantly, the Court noted:

While the Fourth Circuit has not directly addressed the requirements necessary to prove a "sex plus" claim, it has explained generally that a comparator is required to establish a prima facie claim of gender discrimination. *See Gerner v. Cty. of Chesterfield*, 674 F.3d 264, 266 (4th Cir. 2012) (holding that, among other things, a prima facie claim requires a showing "that similarly-situated employees outside the protected class received more favorable treatment"). Similarly, other district courts in this circuit have held that a comparator is required in "sex plus" discrimination cases. *See e.g., Jordan v. Radiology Imaging Assocs.*, 577 F. Supp. 2d 771, 785 (D. Md. 2008) (holding that, to establish a prima facie case, a "sex plus" claim requires a comparator); *Samuels v. City of Baltimore*, No. RDB 09-458, 2009 U.S. Dist. LEXIS 96228, 2009 WL 3348134, at *6 (D. Md. Oct. 15, 2009) (unpublished), 2009 U.S. Dist. LEXIS 96228, 2009 WL 3348134, at *6 (stating that "to establish a *prima facie* case based on a 'sex plus' theory of employment discrimination, the plaintiff must show that similarly situated [women] were treated differently than [men]) (internal quotation marks omitted); *Hess-Watson v. Potter*, No. 703CV00389, 2004 U.S. Dist. LEXIS 53, 2004 WL 34833, at *2 (W.D. Va. Jan. 4, 2004) (explaining that a male comparator is necessary to establish a viable 'sex plus' discrimination claim).

Motion to Seal

The Court found that both the substantive and procedural requirements necessary to rebut the First Amendment presumption of public access to the document in question were met and that Duke satisfied its burden.

Author's Note: With regard to the indented material: First, a split in the Circuits exists as to whether the prima facie case "requires a showing that similarly-situated employees outside the protected class received more favorable treatment." See, e.g., Smith v. Lockheed-Martin Corp., 644 F.3d 1321 (11th Cir. 2011) (holding that such comparator evidence is not necessary

to establish a prima facie case of discrimination so as to survive defendant's motion for summary judgment). Even so, a Fourth Circuit decision recently affirmed the much earlier cited ruling in Hurst v. District of Columbia, 681 Fed. Appx. 186 (4th Cir. 2017) (holding that comparator evidence is required and upholding summary judgment of the lower court on that basis). Building on the legal principle that comparator evidence is required, the Court held that similarly, in "sex plus" cases, comparator evidence is required.

Title VII, ADEA, and ADA

***Hunter-Rainey v. N.C. State Univ.*, No. 5:17-CV-46-D, 2018 U.S. Dist. LEXIS 32480 (E.D.N.C., February 28, 2018).**

The United States District Court for the Eastern District of North Carolina denied Defendant's motion to dismiss; however, the court granted Defendant's motion for summary judgment.

Judge: James C. Dever III, Chief United States District Judge

Plaintiff is an African American female. When Plaintiff applied for the position at issue with NCSU, NCSU only reviewed application submitted through NCSU's online job portal. Plaintiff attempted but failed to submit her application through the online job portal. Instead of contacting technical support, Plaintiff emailed Dean Maureen Grasso and copied Justin Lang on June 13, 2016, and attached her resume and a cover letter. Dean Grasso and Justin Lang did not consider the email to be an application. Thereafter, Plaintiff alleged that NCSU did not hire her as Assistant Dean for Professional Development in the Graduate School due to her race.

Title VII

The Court used the *McDonnell Douglas* framework to determine that Plaintiff failed to establish a prima facie case of failure to hire based on race. The Court stated that NCSU only reviewed applications submitted through NCSU's online job portal. Plaintiff admitted that she attempted but failed to submit her application through the online job portal. Instead of contacting technical support, Plaintiff emailed Dean Maureen Grasso and copied Justin Lang on June 13, 2016, and attached her resume and a cover letter. Hunter-Rainey admits, however, that she never intended "the email" to be an application. Moreover, Dean Grasso and Justin Lang did not consider the email to be an application. Thus, because Hunter-Rainey did not apply for the Assistant Dean position, Hunter-Rainey failed to establish a prima facie case of race discrimination.

The Court noted that even if Plaintiff did establish a prima facie case, NCSU articulated a legitimate non-discriminatory reason for not selecting her, because she did not submit an application for the position. In addition, the Court stated that Plaintiff failed to raise a genuine issue of material fact concerning pretext. The Court reviewed Defendant's employment and interview documents, testimony, and affidavits and even viewing the evidence in the light most favorable to Plaintiff, nothing showed that the anyone involved in the hiring process knew Plaintiff's race. The Court granted NCSU's motion for summary judgment.

ADA & ADEA

The Court stated that these claims also failed because she did not apply for the position and Plaintiff failed to raise a genuine issue of material fact concerning pretext. The Court noted that all relevant personnel denied knowing that Plaintiff was a cancer survivor or her age.

***Pugh v. Shulkin*, No. 1:16-cv-1030, No. 1:16-cv-1030, 2018 U.S. Dist. LEXIS 58097 (M.D.N.C April 5, 2018).**

The United States District Court for the Middle District of North Carolina granted Defendant's motion for summary judgment as to all claims.

Judge: Thomas D. Schroeder, United States District Judge

Plaintiff is a blind African-American man in his sixties. He worked at the Durham VA as the Visual Impairment Services Team Coordinator (VIST) from 1996-2012. In 2011, concerns were raised about how Plaintiff was managing the Computer Assisted Training (CAT). Investigation led to a great deal of concern about vendor payments, the process for referring these payments, and whether a large number of training hours were clinically necessary.

Thereafter, Plaintiff was bitten by a tick, became seriously ill, and went on leave. During his leave, allegations of patient neglect/patient abuse surfaced regarding plaintiff. Due to these concerns and the CAT program concerns, an investigation began. Because of the investigation, Plaintiff was (although still on leave) temporarily detailed to work in the Durham VA's Logistics section, where his access to a computer and work files were restricted. The detail to Logistics meant that Plaintiff worked in a warehouse, but the detail did not cause Plaintiff's pay or grade to decrease. When Plaintiff reported to the warehouse, the VA became concerned that the path to the room Plaintiff was working posed potential obstacles for Plaintiff so the VA immediately moved him to a conference room and transferred him to the Education section.

The investigation ultimately turned up significant issues with the CAT program and significant concern for potential fraud such that the Durham VA management team was advised to immediately contact the Inspector General to do a criminal-based investigation. The report from the investigation recommended that the CAT program be placed under the review of another individual instead of Plaintiff. Plaintiff was permanently reassigned to the position of Blind Rehabilitation Specialist in the Durham VA's Education section, with no change in grade or pay. While Plaintiff's grade, GS-12, did not change, his position was later re-classified as GS-11. Thus, Plaintiff was paid at the GS-12 level and carried his service at the GS-12 level for the purpose of qualifying for higher grade positions, despite the fact that the title he held a GS-11 position.

Race and Age Discrimination (Title VII & ADEA)

Plaintiff claimed race discrimination under Title VII, age discrimination under ADEA, and failure to promote. The Court granted Defendant's motion to summary judgment as to these claims.

These claims failed as to element two of the prima facie case of race/age discrimination. The Court held that the actions in question (restricted access to the Surgical Service during the investigations, termination of Plaintiff's compressed tour of duty, loss of ability to schedule appointments, and being contacted about attempts to take leave) were not adverse

employment actions because they did not adversely affect the terms, conditions, or benefits of the Plaintiff's employment.

Specifically, Defendant's reassignment of Plaintiff from his GS-12 as VIST Coordinator to the GS-11 position of Special Emphasis Program Coordinator were not considered adverse employment actions because Plaintiff maintains his GS-12 status, and even though his new position was subsequently reclassified as a GS-11 position, Plaintiff is still paid as a GS-12 employee and remains eligible to apply for a GS-13 position from his current position. The Court noted that even if the Court assumes, that the reassignment represented a decrease in level of responsibility as well as a loss of opportunity to be promoted, Plaintiff did not demonstrate evidence that the VA took this action under circumstances that gave rise to an inference of discrimination of any type.

As to the failure to Promote the Court held that Plaintiff failed to provide evidence on element three, that he was qualified. Even if Plaintiff could establish the prima facie case, the Defendant had proffered a legitimate, nondiscriminatory reason for its decision not to return Plaintiff to the VIST position. The Court stated that evidence suggested that Defendant was not satisfied with his performance, mainly because Plaintiff's department was subject to a site visit and an Inspector General inquiry due to concerns about his management. The Court stated that the Defendant offered a legitimate, detailed, non-discriminatory reason for its action, that Defendant had simply lost faith in Plaintiff ability to perform his job. This conclusion was confirmed by two independent inquires.

Disability Discrimination

Failure to Accommodate

Plaintiff brought claims under the Rehabilitation Act of 1973 and argued that his initial placement in the warehouse did not make any accommodation for his disability and that the warehouse was a dangerous location for him to work and he never should have been sent there. The Court granted Defendant's motion for summary judgment on this claim. The Court further held that Plaintiff was only at the warehouse very briefly before Defendant assigned him to a position in the Education section. The Court noted that Defendant stated it was difficult finding a place for an employee who was detailed away from his usual position as a result of the investigation, the Court took this as well as the fact that Plaintiff was on leave at the time he was initially detailed into consideration when determining the failure to accommodate claim.

Disability Discrimination

This claim was analyzed under the McDonnell Douglas burden-shifting framework. The Court held that this claim failed under element three, that Plaintiff did not suffer an adverse action (as described above). The Court stated that even if there was an adverse action, Plaintiff's removal from his VIST Coordinator position was a result of his performance, not disability discrimination. The Court stated that there was no indication that the VA's actions were motivated by Plaintiff's disability and that the VA acted promptly to find a more suitable environment for Plaintiff once they realized the placement in the warehouse was ill-advised.

Retaliation

Plaintiff brought claims under Title VII for retaliation which failed mainly under element three, that a causal connection exists between the protected activity and the adverse action. The Court stated that many of the actions Plaintiff complained of took place before Plaintiff filed his first EEO complaint. Because of the timing, there could be no causal connection between those actions (the alleged denial of his sick leave, the limitation on his access to Surgical Services, termination of his compressed tour of duty, and his being detailed away from his position as VIST Coordinator) and Plaintiff's engagement in a protected activity. In addition, Defendant produced evidence that it removed Plaintiff from his position as VIST Coordinator and declined to reinstate him because of significant deficiencies in his performance which were identified by the VA Central Office Inquiry.

Hostile Work Environment

The Court held that Plaintiff failed to proffer evidence to make out a prima facie case because none of the allegations were sufficiently severe or pervasive to give rise to a hostile work environment claim. The Court stated that the Fourth Circuit recently noted that to prevail on a hostile work environment claim, a plaintiff must establish that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)).

Whistleblower Protection

The Court held that Plaintiff did not include a claim under the Whistleblower Protection Act in his complaint.

The United States District Court for the Middle District of North Carolina granted Defendant's motion for summary judgment as to all claims.

Title VII and NCEPA

Miller v. AmCare Grp., LLC, No. 1:17CV90, 2017 U.S. Dist. LEXIS 180380 (M.D.N.C. October 30, 2017).

The United States District Court for the Middle District of North Carolina granted Defendant's motion to dismiss as to plaintiff's claims under Title VII and NCEPA.

Judge: Joe L. Webster, United States Magistrate Judge

Plaintiff Stacy Miller was an employee at Defendant AmCare's business for several years in the role of executive assistant to Defendant Weeks, the Chief Operating Officer. Plaintiff alleged that shortly after taking the position, Defendant Weeks began to make inappropriate sexual comments and telephone calls to her, and harassed her on the job. Plaintiff alleged that she expressed her objections to this conduct directly to Defendant Weeks, but that the conduct did not cease until about April 2016.

After that point, Plaintiff alleged that Defendant Weeks began a course of work-related retaliation in the form of reduction of responsibilities, and the hiring of a new assistant that Plaintiff believed to be her upcoming replacement. Plaintiff was subsequently placed on administrative leave without notice, and her employment with Defendant AmCare was terminated on September 1, 2016.

Plaintiff conceded that Defendant AmCare did not employ the requisite number of employees, fifteen or more, to support jurisdiction under Title VII of the Civil Rights Act. The only claim that remained before the Court were Plaintiff's claims arising under North Carolina state law, specifically the NCEPA. Plaintiff therefore argued that remand was appropriate for the remaining claims since they were all state law claims. Defendant argued that the court should maintain its jurisdiction and find that plaintiff's state law claims were derivative of her Title VII claim and therefore warranted dismissal.

The Court stated that "when contemplating whether the exercise of supplemental jurisdiction under § 1367(c) is appropriate, courts are guided by considerations of convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy." The Court remanded the state law claims to the Superior Court.

Defendants moved for an order sanctioning plaintiff pursuant to Federal Rule of Civil Procedure 11(c) for advancing and continuing to pursue frivolous Title VII and NCEPA claims. Defendants argued that Plaintiff and her counsel exhibited a cavalier and irresponsible attitude by continuing to pursue Title VII and NCEPA claims after Defendants' counsel informed Plaintiff's counsel that Defendant did not have the requisite number of employees to meet the statutory definition of employer. Plaintiff relied upon Defendant's public representations such as its

LinkedIn profile which listed the company size as having “11-50 employees,” as well as a filing with the Georgia Secretary of State. Additionally, plaintiff noted the EEOC’s lack of dismissal of her claim on grounds that Defendant employed less than the statutory requirements. The Court found that plaintiff’s decision to continue pursuing the claims did not warrant Rule 11 sanctions. The Court did note in a footnote that the plaintiff, in admitting the defendant employed less than fifteen employees, appeared to have relinquished the NCEEPA state claims.

TITLE VII and the FIRST AMENDMENT

****Heggins v. City of High Point, No. 1:16-CV-977 2017, 2017 U.S. Dist. LEXIS 209076 (M.D.N.C. Dec. 20, 2017).***

The United States District Court for the Middle District of North Carolina granted defendants' motion for summary judgment.

Judge: Catherine C. Eagles, United States District Judge

Plaintiff, Ms. Alvena Heggins, sued her former employer and supervisors, the City of High Point, City Manager Greg Demko, and Deputy City Manager Randy McCaslin, alleging that they violated her First Amendment rights, discriminated against her on the basis of race, and retaliated against her for participating in civil rights activities.

Ms. Heggins was the Director of the Human Relations Department for the City of High Point until October 2015. Ms. Heggins is African-American. Mr. Demko, the City Manager, and Mr. McCaslin, the Deputy City Manager, are white. Before the events leading to her firing, Ms. Heggins' job performance was satisfactory. In late 2014 and early 2015, Ms. Heggins organized a series of forums designed to build trust between the black community and the City's police. She planned these events, denominated as "Black and Blue Forums," as part of her work for the City.

To promote the third Forum in March 2015, Ms. Heggins sent two emails, including a flyer, to a large listserv of recipients. The flyer described the event as: "Police Accountability & Citizen Oversight: A Framework for Dismantling White Supremacy and Establishing Real Justice in the 21st Century." Other local institutions also co-sponsored the event. Some City Council members and citizens interpreted the flyer as implying that the City's police force had a white supremacy problem and objected to the City's sponsorship of such an event.

The City's African-American Human Resources Director, Ms. Angela Kirkwood, explained to Ms. Heggins why the term white supremacy was offensive in context. Ms. Heggins also had a corrective interview with Mr. Demko, the City Manager. Mr. McCaslin gave Ms. Heggins a verbal warning for her role in the Forum. Shortly after this warning, Ms. Heggins filed an Equal Employment Opportunity Commission charge in May 2015, alleging race discrimination and retaliation.

While the EEOC charge was pending, Ms. Heggins sent an email to Mr. Demko, Mr. McCaslin, and others stating that she was "in fear for her very life and the life of her coworker, Mr. Lowe" because of her work. She mentioned no specific threat, the City investigated her fears and placed Ms. Heggins on paid administrative leave while the investigation was pending. Ms. Heggins refused to talk to the investigator without her attorney, the investigation was closed, and Ms. Heggins returned to work.

On July 27, 2015, Ms. Heggins wore a sign protesting discrimination and unfair treatment to a department head meeting and placed a similar sign in her department's office interior window. Mr. McCaslin directed Ms. Heggins to take down the window sign because it created a “tense and uncomfortable work environment” and made other employees uneasy, and verbally warned her about engaging in disruptive conduct.

In August 2015, a City Councilman complained that Ms. Heggins had accosted and harassed him when he came out of a Committee meeting, and a Major in the City's police force reported that Ms. Heggins had made public comments reasonably interpreted as accusing Mr. Demko of condoning displays of swastikas. Heggins contended that she did not accost a City Councilman, disparage Mr. Demko, or otherwise act inappropriately. After an investigation and because she had already been given two verbal warnings for similar behavior, Mr. McCaslin suspended Ms. Heggins for six days without pay in September 2015. Within 24 hours of returning to work from this suspension, Ms. Heggins argued with the Human Resources Director, Ms. Kirkwood, about her work plan. She also called Ms. Kirkwood a liar and questioned her work ethic.

In October 2015, Mr. McCaslin concluded that Ms. Heggins' pattern of inappropriate and discourteous behavior had not improved, and he fired her. The City hired an African-American female, Ms. Fonta Dorely, to replace Ms. Heggins. After being fired, Ms. Heggins filed another EEOC charge, asserting only retaliation.

The First Amendment Retaliation Claim

Ms. Heggins argued that the defendants retaliated against her for distributing the flyer, in violation of her First Amendment rights. Public employees who make statements “pursuant to their official duties” are not speaking as citizens for First Amendment purposes and their speech does not warrant constitutional protection. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). The Court held that the uncontradicted evidence shows that Ms. Heggins disseminated the flyer in her capacity as the Director of the Human Relations Department. Therefore, the Court held that she had no First Amendment cause of action based on her employer's reaction to the speech. The Court granted summary judgment on this claim.

Title VII and Section 1983 Claims for Race Discrimination

Ms. Heggins argued that the defendants discriminated against her on the basis of race, violating Title VII and her equal protection rights. Ms. Heggins identified two pieces of evidence supporting her claim that the City discriminated against her on the basis of race. First, Ms. Heggins pointed to Ms. Kirkwood's statement that the term “white supremacist” was equally offensive as the word “nigger.” The Court determined that it could not reasonably be interpreted to reflect a discriminatory attitude, as it was undisputed that Ms. Kirkwood used the term while explaining to Ms. Heggins why using it in the flyer was offensive to some readers.

Ms. Heggins also identified a remark by City Councilman Mr. Davis during the flyer controversy that she should be fired for “race-baiting” as evidence that she was fired based on her race.

The Court pointed out that Ms. Heggins did not claim that she heard the “race baiting” remark and pointed to no admissible evidence that it was made. The Court noted that even the phrase “race-baiting” was used, it did not equate to racial discrimination. Neither Ms. Kirkwood nor Mr. Davis was Ms. Heggins' employer or supervisor, and Ms. Heggins showed that the City acted on these remarks, both of which were allegedly made many months before she was terminated.

Nor did Ms. Heggins establish a prima facie case of discrimination under the *McDonnell Douglas* burden shifting framework. Ms. Heggins did not show that she was treated differently from similarly situated employees outside the protected class. She offered no evidence that another employee who engaged in similar conduct had avoided discipline or was disciplined less severely. Even if Ms. Heggins did put forth a prima facie case, the City offered a legitimate, non-discriminatory reason that Ms. Heggins did not rebut. The City showed with substantial evidence that Ms. Heggins engaged in a pattern of rude and inappropriate behavior triggered by her disagreement with the verbal warning given for distributing the flyer. She was suspended without pay in September 2015 after the City concluded that she continued to display disruptive behavior. Within hours of her return to work, she called the HR Director a liar, indicating to the City that her disruptive behavior would continue unless she was terminated.

To prove that the City's reasons for firing her were pretextual, Ms. Heggins offered only (1) her disagreement with the City's conclusions, and (2) several letters stating that she did not act inappropriately during the August 2015 Human Relations Commission meeting where she allegedly made derogatory comments about Mr. Demko. Both are insufficient to establish pretext. The issue is not whether the City's reasons for firing Ms. Heggins were correct. Instead, the issue is whether the City's reasons were not its true reasons, but were a pretext for discrimination.

Defendant's summary judgment on Plaintiff's discrimination claim was granted.

The Title VII Retaliation Claim

To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) she engaged in a protected activity, (2) that the City took adverse employment action against her, and (3) that "a causal connection existed between the protected activity and the adverse action.

Ms. Heggins offered evidence sufficient to meet all three elements of a prima facie case. It was undisputed that Ms. Heggins engaged in a protected activity when she filed the May 2015 EEOC complaint. Placing her on administrative leave in June 2015, warning her in July 2015, suspending her without pay in September 2015, and terminating her in October 2015, accompanied by a myriad of smaller indignities such as being left out of communications with other department heads and being required to submit outgoing correspondence for the public information officer's approval taken together, constituted adverse action.

She also offered evidence to show causation, as only five weeks elapsed between Ms. Heggins' May 2015 EEOC charge and the City's decision to place her on administrative leave in June, a warning followed soon thereafter in July, she was suspended without pay in September, and she was terminated in October. The closeness in time between the initial protected conduct and the beginning of a course of conduct leading to adverse action would arguably support a factfinder's inference of causation.

However, the Court determined that the City offered nondiscriminatory explanations for its actions that Ms. Heggins did not rebut. It was undisputed that Ms. Heggins was placed on administrative leave in July in response to her own expressions of fear for her life and the life of a co-worker while at work, for her safety, and so that these fears could be investigated. Her co-worker was treated the same. She returned to work with no loss of pay or benefits when the investigation was complete.

The City put forward a legitimate, non-discriminatory reason for the July 27 warning. Ms. Heggins did not dispute that her actions in wearing and posting her own signs about discrimination were disruptive to the work environment and that several co-workers expressed discomfort with her actions. The same was true for the suspension of Ms. Heggins in September 2015. It was undisputed that a city councilman complained that Ms. Heggins confronted or harassed him after a meeting, and that a police officer reported that Ms. Heggins made questionable comments about the City Manager and swastikas.

It was also undisputed that within a day of returning to work from the suspension, Ms. Heggins called the Director of Human Resources a liar and argued with her in front of other human resources staff. City's internal documentation supported its position that Ms. Heggins was terminated after she continued to engage in disruptive actions despite several warnings and a suspension.

Ms. Heggins did not show pretext in connection with her discrimination claim. She offered no evidence sufficient to prove that the City's explanations were not the real reasons for the various disciplinary actions taken, including termination. Defendant's motion for summary judgment was granted.

Author's Note: This is a case of inflamed passions. From the Plaintiff's perspective, she was the victim of race discrimination multiple times. From the employer's perspective, the Plaintiff created her own problems, including her disruption of the work environment in numerous instances, including wearing a sign to a meeting that protested discrimination and putting a similar sign in her office window.

TITLE VII, SECTION 1981, FIRST AMENDMENT, and TITLE IX

***White v. Gaston Cty. Bd. Of Educ., No. 3:16-cv-552, 2018 U.S. Dist. LEXIS 58229 (W.D.N.C. April 5, 2018).**

The United States District Court for the Western District of North Carolina granted Defendant's motion for summary judgment on Plaintiff's Section 1983 claims. The Court denied Defendant's motion for summary judgment on Plaintiff's Section 1981 claims, Title VI claims, and Title IX retaliation and retaliatory hostile work environment claims.

Judge: Max O. Cogburn, Jr., United States District Judge

Plaintiff, an African-American man, was employed by defendant as an assistant principal from August 2006 through July 2013. In October 2010, an African-American female fifth-grade student (referred to as "A.C.") wrote a note to the school's guidance counselor, Rachel Vanzant, about her white male teacher, indicating that he made her uncomfortable. Plaintiff told A.C. to write a note to the school counselor about it. According to plaintiff, Ms. Vanzant told Plaintiff that A.C. had accused her teacher of sexual assault and that Principal Hopper had asked the teacher to handle it. Plaintiff directed Ms. Vanzant to tell the director of guidance, but did not inform Principal Hopper of the student's accusation or question Principal Hopper's handling of the situation. Plaintiff reported the incident to Dr. Abernathy, the Assistant Superintendent of Elementary Schools, when Dr. Abernathy called him roughly three weeks after the allegations were made, though Plaintiff did not ask Dr. Abernathy to take any action or share the allegations with A.C.'s mother.

In February 2011, A.C.'s mother contacted Plaintiff to ask why nothing had been done about her daughter's accusation. Plaintiff told A.C.'s mother to call Dr. Abernathy. Dr. Abernathy in turn contacted Plaintiff and told him that she and Dr. Tutterow, the Assistant Superintendent of Human Resources, would investigate.

In March 2011, the Gastonia Police Department investigated the student's allegations and determined they were unfounded. Around the same time, plaintiff spoke with Mr. Williams, a former physical education teacher in GCS, and told him that a student may have been sexually assaulted. Plaintiff spoke to him because Mr. Williams was a minister and someone plaintiff respected and trusted. Plaintiff was unaware that Mr. Williams knew A.C.'s mother.

On May 18, 2011, Defendant approved Plaintiff's transfer to Forestview High School. However, near the end of May 2011, Plaintiff had lunch with A.C., Ms. Vanzant told Plaintiff he shouldn't eat with A.C. alone. On or around June 2, 2011, Plaintiff told A.C.'s mother that Ms. Vanzant had warned him not to have lunch alone with her daughter. Also around June 2, 2011, a representative of the NAACP met with Dr. Abernathy about A.C.'s allegations. Later that day,

Plaintiff was summoned to Dr. Abernathy's office. Dr. Abernathy subsequently gave plaintiff a written reprimand for his unprofessional communication with a parent about his coworkers.

Plaintiff was transferred to North Belmont Elementary School, where he worked under principal Chris Germain, a white male instead of Forestview High School, where Plaintiff had originally been approved to transfer to. Plaintiff was transferred to Catawba Heights Elementary School after Plaintiff's relationship with Mr. Germain deteriorated. While at Catawba Heights Plaintiff accumulated various reminders, warnings, and letters of reprimand from Ms. Whitworth (the principal). Ultimately, Ms. Whitworth asked Dr. Abernathy that plaintiff not be returned to Catawba Heights, or that she be moved instead. On April 25, 2013 Plaintiff was notified that the superintendent did not plan to recommend his contract to be renewed. At a hearing on the matter the Defendant explained that the recommendation was based on a pattern of responding inappropriately to supervisory contacts and displaying poor judgment in communications with other public education stakeholders.

First Amendment Retaliation Claim under § 1983

Plaintiff failed to offer any opposition to summary judgment on this claim, which suggested to the Court that plaintiff had conceded this claim. However, the Court still reviewed the claim.

In the public-school context, speech is protected by the First Amendment when (1) the teacher speaks as a citizen about matters of public concern and (2) the teacher's interest in exercising free speech is not outweighed by the countervailing interest of the state in providing the public service the teacher was hired to provide. *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 155-56 (4th Cir. 1992)

Plaintiff's speech at issue is: (1) his initial advice to A.C. to write a note to the guidance counselor; (2) his direction to Ms. Vanzant to contact her boss, the director of guidance; (3) his initial conversation with Dr. Abernathy shortly after the incident; (4) his assistance to A.C.'s mother in contacting Dr. Abernathy; (5) his conversation with Dr. Abernathy in February 2011; (6) assorted complaints into how the school handled the investigation into A.C.'s claims; and (7) his conversation with Mr. Williams where plaintiff told him that a student may have been sexually assaulted.

The Court stated that the first six of these instances were ordinarily within the scope of an employee's duties and were not protected under the First Amendment. Therefore, Plaintiff failed to meet element one "the teacher speaks as a citizen about matters of public concern." Instance number seven, where Plaintiff was having a conversation with Mr. Williams about the potential sexual assault of a student, might be outside his duties since Mr. Williams was a friend and Plaintiff was seeking personal advice. Regardless, the Court stated that it would be difficult to call this "speaking as a citizen about matters of public concern." It was likely that going to a friend for advice is the sort of self-interest speech that removed it from First Amendment protection.

The Court stated that even assuming that such speech did qualify as protected speech under the First Amendment, Plaintiff failed to offer any evidence to connect the decision not to renew his contract to his conversation with Mr. Williams. Because Plaintiff alleged no facts that Defendant was even aware of Plaintiff's conversation with Mr. Williams, or provided any evidence that said conversation was a motivating factor in Defendant's decision not to renew Plaintiff's contract, the Court granted summary judgment for defendant as to the First Amendment claim.

Racial Discrimination under § 1981 and Title VI Discriminatory Discharge

Plaintiff alleged that the non-renewal of his employment contract was an adverse employment action rooted in racial discrimination pursuant to Section 1983, Plaintiff also alleged racial discrimination under Title VI.

The Court stated that Title VI is generally not an appropriate avenue for employment discrimination claims. Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance. To survive a motion for summary judgment under Section 604 of Title VI, a litigant must provide facts to show that: (1) the employer received federal financial assistance for the primary purpose of providing employment, or (2) the employment discrimination was against a primary beneficiary of the federal financial assistance. *Fordyce v. Prince George's County*, 43 F.Supp.3d 537, 545 (D. Md. 2014). Because Defendant admitted that it received allocation of Federal Education Jobs Funds as part of the American Recovery and Reinvestment Act, satisfying element one, Plaintiff's Title VI claim was analyzed along with his Section 1981 claim.

The Court used the McDonnell Douglas burden-shifting framework. The court focused on element four, "the position remained open or was filled by a similarly qualified applicant outside the protected class." The Court noted that although there are exceptions to this requirement a plaintiff may not bypass this prong. Plaintiff failed this prong, Plaintiff did not allege any facts about his replacement being outside the protected class, that the position was left open, nor did he argue any appropriate exception applied.

Racially Hostile Work Environment & Retaliation under Title VI and Section 1981

Plaintiff alleged retaliation under Title VI and Section 1981. The Court noted that in relation to this claim, Plaintiff's only evidence was that he was African-American, A.C. was African-American, the teacher that allegedly sexually assaulted her was white, the NAACP launched its own investigation, and an email from one of his supervisors suggested that he thought plaintiff would work well with Ms. Whitworth, an African-American, given their shared status as a minority. The Court stated that this evidence made it difficult for the Court to find any unwelcome conduct that would be so severe or pervasive to affect plaintiff's work environment because his race or that the non-renewal of Plaintiff's contract was a pretext for racial discrimination.

In addition, the court noted that Plaintiff's superiors never made any comments relating to plaintiff's race at all. Plaintiff did not express any racial discrimination concerns before filing suit and Plaintiff conceded in his deposition that he never complained of racial discrimination to his superiors.

The Court stated that it even with the lack of evidence, it was hesitant to cut off Plaintiff's case on such fundamentally important claims at this stage, so the Court denied Defendant's motion for summary judgment on issues of racial discrimination.

Author's Note: This conclusion by the Court is inexplicable.

Retaliation under Title IX

The Court used the McDonnell Douglas framework and noted that the Fourth Circuit applies principles governing Title VII to provide standards for claims under Title IX. Title IX prohibits discrimination on the basis of sex in education programs and activities.

The Court first focused on element two, whether Plaintiff showed that his employer took materially adverse action against him. The Court noted that adverse actions like written reprimands added to Plaintiff's file and performance reviews are not typically considered materially adverse, unless they were essentially fabricated in support of a later adverse employment action.

Instead, the Court focused on (1) Defendant rescinding Plaintiff's transfer to Forestview High School in favor of reassignment to North Belmont Elementary school; and (2) Defendant declining to renew his employment contract. The Court stated that the Supreme Court in the *Burlington* case noted that while job reassignment is not automatically actionable, it can be an adverse employment action depending upon the circumstances of the particular case, and should be judged from a reasonable person's perspective in the plaintiff's position, considering all circumstances.

The Court determined that there was enough of a question of fact to preclude summary judgment on this issue. By rescinding the proposed transfer and sending Plaintiff to another school shortly after his outspoken conduct, the Court determined that a reasonable jury might conclude that defendant's action was intended to dissuade plaintiff from supporting any more charges of discriminatory conduct. The Court stated that whether plaintiff's rescinded transfer and reassignment constituted a materially adverse employment action was a question of fact for the jury to decide, not the Court. Defendant's refusal to renew Plaintiff's contract clearly constituted the sort of employment decision that can form the basis of a retaliation claim, even under the previous, stricter standard. Next the Court turned to element three, causation. Plaintiff needed to have demonstrated that a causal connection existed between the protected activity, speaking out about A.C.'s sexual assault allegations, and the asserted adverse action. This could be satisfied purely by temporal proximity.

The Court found that Plaintiff's evidence on causation was sufficient to raise a question of fact for the jury the Court noted two reasons. First, the email from a supervisor discussing ways to get rid of plaintiff without getting in trouble was strongly indicative of a causal relationship between protected activity and the reprimands and performance reviews. Second, just over two weeks after defendant became fully aware of plaintiff's informal opposition activity, defendant responded by taking adverse action against plaintiff in rescinding his transfer and reassigning him to another school. However, the non-renewal of Plaintiff's employment contract was less clear-cut because more than two years separated Plaintiff's informal opposition to the investigation of A.C.'s allegations and the non-renewal of his contract, which rendered temporal proximity inadequate by itself. Because temporal proximity was insufficient the Court stated that Plaintiff had to show other relevant evidence such as continuing retaliatory conduct or animus.

The Court found that there was sufficient evidence of continuing animus to create a question of material fact for the causation prong. The sufficient evidence included conduct by Plaintiff's superiors, an email from Mr. Germain that he wanted to know "what our game plan is going to be" about plaintiff, and that Mr. Germain doesn't want to "prevent us from dismissing him." The Court noted that such an email where a superior openly discusses a game plan to terminate plaintiff without trouble is a powerful testament to causation, in spite of the temporal gap; indeed, the Court found it to be the case's equivalent of a smoking gun. Also, plaintiff's testimony about job performance requirements and discipline under other supervisors tended to support causation.

The burden then switched to Defendant to show a legitimate, nondiscriminatory reason for the adverse action against Plaintiff. The Court found that Defendant met their burden by showing that Plaintiff was denied a transfer to Forestview High School because the Forestview's principal explained her discomfort with supervising a man who sent her unsolicited photos and poetry, as well as evidence of a policy of having principals be comfortable with their assistant principals. In addition, three separate principals found Plaintiff to be a problematic employee with an inability to carry out core job requirements like following instructions and communicating effectively.

The burden then switched back to Plaintiff to show by a preponderance of the evidence that the proffered reason was pretext for discrimination. The Court held that there was a clear issue of material fact as to whether defendant's proffered reasons were a pretext. At the time of the rescinded transfer and reassignment, defendant offered no explanation whatsoever for the decision. Only when this litigation arose and moved forward did defendant offer an explanation, through an affidavit from Forestview High School's principal explaining her personal discomfort with plaintiff. In addition, the short amount of time between learning of the alleged protected activity and taking adverse action could suggest to a jury that Plaintiff's rescinded transfer and reassignment constituted retaliation. As to the non-renewal of Plaintiff contract, the e-mail discussed above spoke strongly to both a desire to terminate Plaintiff and a hope to avoid legal consequences for doing so. This e-mail casted another light over the alleged disciplinary actions and reassignments Defendant subjected Plaintiff to over the two

years between his protected activity and the non-renewal of his contract, which creates a significant question of material fact of whether the reasons are mere pretext.

Retaliatory Hostile Work Environment Claim

The Court found a question of material fact existed for the jury pursuant to Title IX. The Court noted that the record was replete with examples of intimidation and altered employment conditions, from Ms. Whitworth threatening to fire plaintiff at the first sign of trouble, to ordering him to clean the bathrooms, to performance requirements and reprimands that strain credulity, and negative performance reviews that could impact future employment prospects. Taken together, the Court found there was sufficient evidence to create a question of fact for a jury to resolve on whether a materially adverse employment action occurred in the form of a hostile work environment. Defendant's motion for summary judgment was denied.

TITLE VII, ADA, and FMLA

Clark v. Guilford Cty., No. 1:16CV1087, 2017 U.S. Dist. LEXIS 162024 (M.D.N.C. Sept. 30, 2017).

The United States District Court for the Middle District of North Carolina granted in part and denied in part defendant's motion to dismiss. The motion was granted as to Plaintiff's action for discrimination on the basis of national origin and race under Title VII. The motion was also granted as to Plaintiff's action under the ADA. The motion was denied as to Plaintiff's action for retaliation under the FMLA.

Judge: Loretta C. Biggs, United States District Judge

Plaintiff, a Hispanic female, worked for Guilford County DSS from November 2009 to September 1, 2015. Plaintiff was the only Spanish interpreter and translator employed by DSS at that time. Plaintiff alleged that in February 2015, her manager told her that she could no longer have contact with Spanish speaking clients and that her job as an interpreter/translator was being terminated. Plaintiff filed a Charge of Discrimination against Defendant with the EEOC based on national origin.

Plaintiff claimed that until February 2015 she had always received the very highest evaluation scores and she had no warnings, write ups, or other disciplinary events in her career. However, in February 2015, Defendant reduced her evaluations to average and put in writing that Plaintiff was uncooperative, did not work well with others, refused training, and did not follow directions. Plaintiff alleged that these actions by her manager were in retaliation for her filing an EEOC Complaint.

Plaintiff further alleged that she was on medical leave from March 20 to June 1, 2015 for surgery and convalescence. Also, from about June 20, 2015 to September 1, 2015, Plaintiff was on medical leave due to an automobile accident. When Plaintiff returned to work on September 1, 2015 she was fired from her job.

Plaintiff's Complaint alleged that: (1) she was discriminated against based on her race and national origin; (2) she was discriminated against based on her disability; (3) she was subjected to retaliatory discrimination for filing an EEOC complaint; and (4) her rights under the FMLA were violated. Defendant filed a motion to dismiss for lack of subject matter jurisdiction based on a failure to exhaust administrative remedies, and for failure to state a claim on which relief can be granted.

The Court Dismissed Plaintiff's Title VII Claims Based on National Origin

Here, neither party disputed that an EEOC Charge was filed; however, the parties disputed the scope of that charge. After a review of the charge, the Court determined that Plaintiff failed to exhaust her administrative remedies as to her Title VII claims based on national origin. In her charge, she checked only boxes for "race" and "retaliation." In addition, Plaintiff failed to

outline any particulars in her discrimination charge that implicated discrimination based on national origin. The Court granted Defendant's motion to dismiss Plaintiff's Title VII claims for discrimination based on national origin.

Title VII Discrimination Based on Race:

Defendant argued that Plaintiff failed to plead sufficient factual allegations which would establish even a *prima facie* case of discrimination based on race that rose above the level of mere speculation to survive dismissal. The Court agreed with Defendant.

Under the *McDonnell Douglas* Framework, a plaintiff must establish a prima facie case of discrimination by alleging the following: (1) she belongs to a protected group; (2) suffered some adverse employment action; (3) performed at the employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicant outside the protected class, or different treatment from similarly situated employees outside of protected class. While a plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss, her factual allegations must be enough to raise a right to relief above the speculative level.

Here, Plaintiff's Complaint alleged the following: Plaintiff was Hispanic; Plaintiff's manager told her that she could no longer have contact with Spanish speaking clients and that her job as interpreter and translator between Spanish and English was being eliminated; non-Hispanic employees of Defendant were never treated in a way comparable to, or worse than, the manner in which Plaintiff was treated; and the adverse employment actions taken against Plaintiff, including elimination of her position, forbidding her to communicate with her Spanish-speaking clients all were pretextual and done with the purpose of concealing Defendant's discriminatory intent on the basis of Plaintiff's race and national origin.

The Court concluded that Plaintiff failed to sufficiently allege a claim of race discrimination under Title VII. In particular, as to the fourth element of Plaintiff's prima facie case, that she was treated differently than similarly situated employees outside of her protected class, Plaintiff alleged the conclusory assertion that non-Hispanic employees of Defendant were never treated in a way comparable to, or worse than, the manner in which Plaintiff was treated. She provided no *factual support* for this "conclusory assertion" that is merely a threadbare recital of one of the elements of the cause of action. Plaintiff provided no factual support for her conclusion that the alleged adverse employment actions were pretextual and done with the purpose of concealing defendant's discriminatory intent. This conclusory statement appeared to be Plaintiff's subjective beliefs rather than factual allegations that would allow the Court to make a reasonable inference that Plaintiff's employer treated her adversely because of her race. As a result, Plaintiff's Title VII race discrimination claim did not survive dismissal.

Failure to Accommodate Under the ADA:

To state a prima facie case for failure to accommodate under the ADA, Plaintiff must show: (1) that she was an individual who had a disability within the statute; (2) that the employer had notice of the disability; (3) that, with reasonable accommodation, she could perform the

essential functions of the position; and (4) that the employer refused to make such accommodations.

The Court found that Plaintiff failed to allege sufficient facts with respect to any of the elements of this claim. Plaintiff failed to allege a specific disability and whether any such disability fell within those prescribed in the ADA. Also, Plaintiff failed to allege sufficient facts to show that, with reasonable accommodation, she could meet the functions of her position or that her employer had notice of such disability. Finally, Plaintiff failed to allege that her employer refused to provide any accommodation. The Court granted Defendant's motion to dismiss Plaintiff's ADA claim.

Retaliatory Discrimination under Title VII:

In order to establish a prima facie case of retaliation under Title VII, Plaintiff must allege: (1) engagement in a protected activity; (2) adverse employment action; and (3) a causal link between the protected activity and the employment action.

Defendant argued in its brief that the absence of specific factual allegations supporting Plaintiff's claim of retaliatory discrimination prevents Plaintiff's claim from rising above the level of naked assertions. Plaintiff alleged that she was terminated on September 1, 2015 in retaliation for having filed charges of discrimination with the EEOC. Plaintiff failed to plausibly allege facts to support the third element of this cause of action—that there was a causal link between the filing of her EEOC Charge on February 14, 2015 and her termination over six months later, on September 1, 2015.

One way in which a plaintiff can allege a causal link is through temporal proximity, provided that an employer's knowledge of protected activity and the adverse employment action that follows are *very* closely related in time. *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). However, in cases where temporal proximity between protected activity and allegedly retaliatory conduct is missing, courts may look to the intervening period for other evidence of retaliatory animus. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000). The Court found that Plaintiff's Complaint failed to plausibly allege a causal link between her alleged protected activity and her termination. No temporal proximity existed between the filing of Plaintiff's EEOC Charge on February 14, 2015, and her termination which occurred over six months later. No causation would be inferred outside of a three to four-month period between the protected activity and the alleged retaliation. Second, Plaintiff made no allegations pointing to alleged continuing retaliatory conduct or animus directed at her by Defendant in the six and one-half month interval between the filing of her EEOC Charge and her termination. The Court dismissed Plaintiff's Title VII retaliation claim.

Retaliation Claim Under the FMLA:

To state a prima facie case of retaliation under the FMLA, Plaintiff must allege: (1) that she engaged in protected activity; (2) that Defendant took adverse action against her; and (3) that the adverse action was causally connected to Plaintiff's protected activity. Plaintiff alleged that she took FMLA leave from March to June 2015 for surgery, and from June to September 2015

due to injuries from an automobile accident. Plaintiff further alleged that she was terminated upon her return from FMLA leave on September 1, 2015.

The Fourth Circuit has held that taking FMLA leave is a protected activity and termination is an adverse employment action. Here, given the temporal proximity between Plaintiff's return from FMLA leave and her termination, on the same day, the Court could reasonably infer that the adverse employment action was causally linked to Plaintiff's use of her FMLA leave. The Court denied Defendant's motion to dismiss, holding that Plaintiff's allegations were sufficient to plausibly state an FMLA retaliation claim.

Defendant's motion to dismiss was granted in part and denied in part. The motion was granted as to Plaintiff's action for discrimination on the basis of national origin and race under Title VII. The motion was also granted as to Plaintiff's action under the ADA. The motion was denied as to Plaintiff's action for retaliation under the FMLA.

TITLE VII, SECTION 1981, ADEA

***Evans v. TWC Admin. LLC*, No. 5:15-CV-675-FL, 2017 U.S. Dist. LEXIS 181444 (W.D.N.C. Nov. 2, 2017).**

The United States District Court for the Western District of North Carolina denied Plaintiff's motion for partial summary judgment and granted Defendant's motion for summary judgment on Plaintiff's claims under Title VII, § 1981, and ADEA claims.

Judge: Louise W. Flanagan, United States District Judge

Plaintiff, Shirley Evans, was an African-American female over 40 years of age. She had been employed by Defendant TWC Administration LLC since 1988. Plaintiff was promoted to her position as lead construction coordinator in 2009. Clayton-Miller was Plaintiff's immediate supervisor. Plaintiff was one of 13 construction coordinators reporting to Clayton-Miller. Plaintiff performed her job satisfactorily and received performance ratings of "exceeds expectations" and "successfully meet expectations," with no negative reviews.

In 2014, Defendant posted a position announcement for a construction supervisor for Clayton-Miller's team. The announcement included among others the following requirements: computer proficiency and advanced skills in Access, Word, Excel, Visio, MS Project, MS PowerPoint and other required systems; knowledge of project management, project budgeting, and project feasibility and analysis required; strong analytical skills; and one to three years leadership experience. Out of 26 applicants, Clayton-Miller interviewed six individuals, including Plaintiff and two other construction coordinators, both of whom were white males, as well as external candidates. External candidate Holliday, is a white male who was younger than Plaintiff, was chosen for the position.

Disparate Treatment Claim for Failure to Promote

The Court stated that to prevail on a disparate treatment claim for failure to promote, Plaintiff must establish that she was treated less favorably because of her race, color, age, or gender. In order to establish a prima facie case based on race, color, age, or gender discrimination in promotions under Title VII, § 1981, and the ADEA, Plaintiff must have followed the burden-shifting framework outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Under the *McDonnell Douglas* framework, Plaintiff can establish a prima facie case by showing that 1) she was a member of a protected group; 2) she applied for the position in question; 3) she was qualified for that position; and 4) the defendants rejected her application under circumstances that gave rise to an inference of unlawful discrimination. The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the decision not to promote. After the employer states a reason for its decision, plaintiff has the opportunity to

show that the stated reason is a pretext for discrimination and the trier of fact must determine if the plaintiff has proved that the employer intentionally discriminated against her.

Defendant's legitimate, nondiscriminatory reason for failing to promote Plaintiff was that Clayton-Miller believed that Holliday was the most qualified candidate and selected him for the job. In making her decision to not promote Plaintiff and hire Holliday, Clayton-Miller ranked Plaintiff in the interview process as having a level 3 (solid) or level 4 (excellent) rating in all areas except decision making, giving plaintiff a level 2 (gap) rating, and an overall rating of level 3. Clayton-Miller ranked Holliday as having a level 4 or level 5 (outstanding) rating in all areas, with an overall rating of level 5.

Holliday had over 30 years experience in the telecommunication and cable business, worked for at least four of Defendant's competitors in various capacities, had advanced computer skills, and had managed an entire facility as plant manager. There was no dispute that Holliday had significantly more managerial experience than Plaintiff and that Plaintiff had only sufficient computer skills, particularly in Excel, and not the advanced computer skills required for the position.

The burden therefore shifted back to Plaintiff to show pretext, and the Court held that she failed to raise a genuine issue of material fact that Defendant's explanation was pretextual. The Court stated that a Plaintiff who alleges a failure to promote can prove pretext by showing that he was better qualified, or by amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reasons. Plaintiff did raise a fact issue as to whether she was better qualified than Holliday nor did Plaintiff produce evidence that undermined the credibility of Defendant's stated reasons. The many years Plaintiff worked for Defendant, the consistently positive reviews and awards she received, and various training courses she completed, did not show that she was better qualified than Holliday for the position in question, only that Plaintiff had performed extremely well in her current position, which no party disputed.

Plaintiff's main argument was that the skills and experience Defendant claimed were the basis of the hiring decision (advanced Excel skills), were not in fact necessary for the position. That was unsuccessful because the Court held that the Plaintiff could not establish her own criteria for judging her qualifications for promotion. The Plaintiff had to compete for the promotion based on the qualifications established by her employer. The Court noted that the "crucial issue in a Title VII action is an unlawfully discriminatory motive for a Defendant's conduct, not the wisdom or folly of its business judgment."

Plaintiff's evidence, without more than the fact that there was no person of color in a management position in the Morrisville Construction Department was insufficient to save either her failure to promote claim or any other potential discrimination claim.

The Fourth Circuit has held that although statistics can provide important proof of employment discrimination and may be used to establish an inference of discrimination as an element of

plaintiff's prima facie case or to demonstrate that an employer's stated nondiscriminatory reason for its action is in reality a pretext, the proper inquiry in a case of discrimination in hiring or promoting is a comparison between the percentage of minority employees and the percentage of potential minority applicants in the qualified labor pool. Plaintiff was referencing, at most, six management positions and offered no additional evidence about the racial composition of the qualified population in the relevant labor market that could have made this evidence potentially have probative value.

The Court granted Defendant's motion for summary judgment on Plaintiff's Title VII, § 1981, and ADEA claims, and denied Plaintiff's motion for partial summary judgment as to the same claims.

TITLE VII, SECTION 1981, ADEA, and STATE CLAIMS

***Westmoreland v. TWC Admin. LLC, No. 5:16-cv-00024-MOC-DSC, 2017 U.S. Dist. LEXIS 143059 (W.D.N.C. Sept. 5, 2017).**

The United States District Court for the Western District of North Carolina denied Defendant's motion for summary judgment.

Judge: Max O. Cogburn, Jr., United States District Judge

Plaintiff stated that she was in her 60s, had more than thirty years of relevant service in the cable industry, and was wrongfully terminated due to her age and race (and that her position was filled by a substantially younger individual). No other factual details are stated in the case.

The Court's language is instructive:

While defendant appears to contend in its reply that plaintiff's argument is comprised of "wishful thinking" and based on "contrived legal theories," and that her claim is founded on a "grandiose, yet entirely speculative theory," the court does not view the evidence in a light most favorable to the party seeking summary judgment. Plaintiff has come forward with evidence that (1) it was her age that motivated defendant to terminate her employment and (2) the allegation that she committed fraud in having her direct report correct a date to reflect the actual date that she believes the event occurred is mere pretext for age discrimination. Whether defendant believes this evidence is irrelevant; rather, it is whether a jury could believe it.

The Court stated that plaintiff came forward with evidence which, if believed, would support each element of an ADEA claim and would also be sufficient to rebut the legitimate, non-discriminatory reason given by defendant for firing plaintiff (that she asked her superior to improperly alter a document). Specifically, the Court stated that Plaintiff came forward with evidence that (1) it was her age that motivated defendant to terminate her employment and (2) the allegation that she committed fraud in having her direct report correct a date to reflect the actual date that she believes the event occurred is mere pretext for age discrimination. The Court determined that there remained genuine issues of material fact.

The Court denied defendant's motion for summary judgment as to plaintiff's Title VII and Section 1981 claims and stated it would revisit the issues at the close of plaintiff's evidence because plaintiff's substantive argument did not mention race except for the question presented and the "nature and matter before the Court."

Author's Note: This opinion was sparse and unfortunately did not detail the evidence which created a fact issue on Plaintiff's age discrimination claim.

TITLE VII, SECTION 1981, AND WDPP

Ramos v. Carolina Motor Club, Inc., No. 3:17-cv-002120RJC-DSC, 2018 U.S. Dist. LEXIS 102381 (W.D.N.C. June 19, 2018).

The United States District Court for the Western District of North Carolina granted in part, denied in part Defendant's Motion for Summary judgment. Summary Judgment was granted on Plaintiff's Title VII and Section 1981 discrimination claims; Plaintiff's Section 1981 hostile work environment claim; and Plaintiff's state-law wrongful termination claim. Summary judgment was denied on Plaintiff's Title VII hostile work environment claim and Plaintiff's Title VII and Section 1981 retaliation claims.

Judge: Robert J. Conrad, Jr., United States District Judge.

Plaintiff, a woman of Dominican descent, worked for Defendant from 2008 until her termination in 2017. Plaintiff began as a janitor and worked her way up to a management role. After her second promotion, Plaintiff alleged that she was subjected to discriminatory comments. Plaintiff alleged that Defendant's IT Operations Manager called her accent ugly and nasty and said that he couldn't understand her and that she sounded like Sofia Vergara. Plaintiff also claims she was discriminated against by a Project Manager, who would ask "can you do something about your accent" or "can you speak English." The Project Manager's actions escalated to screaming at Plaintiff in front of other employees. At one time, the Project Manager came within 12 inches of Plaintiff's face and wagged her finger at her. Plaintiff alleged that the Project Manager made derogatory remarks about minorities, including that Hispanic people made bad employees.

Plaintiff attempted to communicate to the IT Operations Manager and the Project Manger that their behavior toward her was disrespectful and discriminatory, but the behavior continued. Plaintiff reported the issues to both Harris in HR and the Manager of HR, Tatum. Plaintiff alleged that Defendant did not investigate the alleged discriminatory behavior, but instead investigated her. Plaintiff conveyed the alleged discriminatory behavior to the Vice President of Travel. In a meeting, the Vice President of Travel informed Plaintiff that she was no longer a manager because she could not get along with the Project Manager and that Plaintiff should interview for a position as a commissioned saleswoman (not a salaried position, required weekend shifts, and plaintiff was not guaranteed to get it).

On October 19, 2015, Plaintiff filed a charge of discrimination with the EEOC, which thereafter issued a right to sue letter on December 19, 2016. Plaintiff then brought an action, alleging that her termination was a result of discrimination and constituted an act of retaliation for registering her complaints against the Project Manager. Defendant filed a Motion for Summary Judgment.

Hostile Work Environment Claim

The Court stated that to succeed on a hostile work environment claim, a plaintiff must show: (1) she experienced unwelcome harassment; (2) the harassment was based on her race, color, religion, national origin, or age; (3) the harassment was sufficiently severe or pervasive to alter the conditions of [her] employment and to create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. *Baqir v. Principi*, 434 F.3d 733, 745-46 (4th Cir. 2006). Defendant attacked Plaintiff's ability to establish the third and fourth elements.

As to element three, the Court first noted that the Fourth Circuit interprets the severe/pervasive element as a high bar for plaintiffs to meet. Not just any offensive conduct will suffice since Title VII is not a "general civility code." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The Court went on to say that the severe or pervasive element of a hostile work environment claim has both subjective and objective components. *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (internal quotations and citations omitted). First, the plaintiff must show that she subjectively perceived the environment to be abusive. Next, the plaintiff must demonstrate that the conduct was such that a reasonable person in the plaintiff's position would have found the environment objectively hostile or abusive. When assessing the reasonable person standard, plaintiffs must identify instances where the environment was pervaded with discriminatory conduct aimed to humiliate, ridicule, or intimidate, thereby creating an abusive atmosphere. *Sunbelt Rentals, Inc.*, 521 F.3d at 316.

The Court determined that if believed, Plaintiff lived with verbal assaults in almost every interaction. The Court looked to Plaintiff's deposition testimony where Plaintiff testified that anytime she would have to deal with the Project Manager, she made a racist comment. Additionally, Plaintiff testified that every time Plaintiff and the Project Manager were by themselves, the Project Manager always mentioned Plaintiff's accent. Plaintiff also testified that the Project Manager yelled at her on two or three occasions, one of which the Project Manager came within inches of Plaintiff's face. The Court found that the offensive comments, when combined with conflicting testimony as to the pervasiveness of the offensive comments, resulted in a jury issue.

Regarding element four, the Court stated that if the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. *Vance v. Ball State Univ.*, 570 U.S. 421 (2013). Plaintiff alleged that the Vice President of Travel, without investigating, merely stated that the Project Manager was teasing Plaintiff and being difficult to work with. Defendant stated that the offensive conduct Plaintiff complained about ceased after meeting with the HR Manager. At this meeting, the HR Manager recommended Plaintiff raise her concerns about the Project Manager's general disrespect for her with the Vice President of Travel and also arranged for coaching of the Project Manager. The Court stated that this evidentiary conflict created a credibility question for the jury. Therefore, summary judgment was denied on Plaintiff's Title VII hostile work environment claim.

Discrimination Claim

The Court stated that to establish a prima facie discrimination claim, Plaintiff must show that: (1) she is a member of a protected class; (2) she suffered adverse employment action; (3) she was performing her job duties at a level that met [her] employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class. *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007).

The Court stated that Plaintiff did not meet the third element of her prima facie discrimination claim because the record was replete with exhibits showing plaintiff's inability to master the second managerial position. Although Plaintiff attempted to use her high performance scores as proof that she was meeting her employer's legitimate expectations, the Court stated that the scores showed that Plaintiff received her highest score seven months prior to her termination and it was the performance of the employee at the time of the termination that matters. The Court granted summary judgment on Plaintiff's Title VII and Section 1981 discrimination claim.

Retaliation Claim

The Court stated that to establish a prima facie case of retaliation under Title VII, Plaintiff must prove: (1) that she engaged in a protected activity; (2) that her employer took an adverse employment action against her; and (3) that there was a causal link between the two events. *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405-06 (4th Cir. 2005)). Here, the Court found that Plaintiff was able to meet her prima facie burden and had presented genuine issues of material fact as to her pretext argument. The Court determined that she met element one when she testified in her deposition that she met with the Vice President of Travel and the HR Manager to complain about discrimination. This testimony was corroborated by a calendar entry that stated, "met with Tatum to complain about Janet discrimination." Element two was satisfied when Plaintiff was terminated. The Court determined that Plaintiff met element three through the temporal proximity between Plaintiff's complaints and her termination (Plaintiff's termination occurred only two weeks after her complaints to the Vice President of Travel and within seven weeks of her initial complaints to the HR Manager).

After the Court determined that Plaintiff met her prima facie case, it determined that Defendant successfully established a legitimate, non-discriminatory reason for the termination—that Plaintiff was terminated due to her poor job performance and her behavioral issues in dealing with the Project Manager. Next the Court reviewed Plaintiff's pretext argument and determined that plaintiff was successful in establishing a genuine issue of material fact as to pretext. The facts that led to the genuine issue of fact were: (1) the short period of time between Plaintiff's termination and her engagement in a protected activity; (2) Defendant's reasoning for Plaintiff's termination was suspect when compared to other comparators (plaintiff was terminated more immediately than white employees with alleged behavioral issues); (3) Plaintiff's immediate termination was questionable considering her positive history with Defendant; (4) Defendant's statement that soon after the alleged August 19 counseling session, another employee told the Vice President of Travel that Plaintiff continued to create friction with her direct reports and the Project Manager compared to Plaintiff's declaration that

the other employee denied making that statement. The Court denied Defendant's Motion for Summary Judgment on Plaintiff's Title VII and Section 1981 retaliation claims.

Wrongful Discharge in Violation of Public Policy

The Court stated that "[a]n employer wrongfully discharges an at-will employee if the termination is done for 'an unlawful reason or purpose that contravenes public policy.'" *Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 10, 745 S.E.2d 316, 323 (2013) (quoting *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 571, 515 S.E.2d 438, 441 (1999)). The Court noted that no exhaustive list of acceptable public policies exists to support a wrongful termination claim. However, at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992). Plaintiff cited two N.C. statutes to support her claim of wrongful termination based on discrimination and retaliation. First, Plaintiff cited NCEEPA. The Court stated that the NCEEPA "expresses the policy of North Carolina with respect to employment discrimination on account of race, religion, color, national origin, age, sex or handicap. It does not express a public policy concerning harassment, failure to promote or retaliation." *Chung v. BNR, Inc.*, 16 F. Supp. 2d 632, 634 (1997). Courts have held that the NCEEPA provides a basis for wrongful termination due to employment discrimination, but not based on retaliation or hostile work environment. The Court determined that Plaintiff could pursue a wrongful termination claim based on the public policy of the NCEEPA in relation to her discrimination claim only. The Court ultimately found that the wrongful termination claim for discrimination failed because her Title VII claim failed.

Second, Plaintiff claimed that Defendant violated the public policy set forth in North Carolina's Occupational Safety and Health Act of N.C. Defendant argued that OSHANC applied to formal EEOC complaints, not general complaints to a manager or supervisor. The Court determined that a plaintiff claiming a violation of public policy under OSHANC must do more than merely complain to a supervisor or manager (as Plaintiff did here). *Green-Hayes v. Handcrafted Homes, LLC*, 241 N.C. App. 655, 775 S.E.2d 695 (2015) (complaining to a plant manager and a consultant were not protected and were insufficient to serve as a basis for a claim of retaliatory discharge). Here, Plaintiff did not file an EEOC complaint until after her termination, thus limiting her claim to her complaints submitted within the workplace. Since complaints alone are insufficient, Plaintiff's claim were unsuccessful.

The Court granted Defendant's Motion for Summary Judgment on Plaintiff's state-law wrongful termination claim.

The Court granted in part, denied in part Defendant's Motion for Summary Judgment.

TITLE VII, SECTION 1981, ADA, and STATE CLAIMS

Pope v. ABF Freights Sys., No. 3:17-cv-564, 2018 Dist. LEXIS 123685 (W.D.N.C. July 24, 2018).

The United States District Court for the Western District of North Carolina granted in part, denied in part Defendant's Motion to Dismiss. The Court dismissed Plaintiff's claims for: (1) race discrimination in violation of Section 1981 and Title VII; (2) retaliation in violation of Section 1981 and Title VII; (3) disability discrimination in violation of the ADA; and (4) breach of contract.

Judge: Graham C. Mullen, United States District Judge

Plaintiff, an African-American male, was employed by Defendant ABF. Defendant is a major transportation company that operates in North America to provide short-term and long-term truck hauls. In June 2016, Plaintiff became a full-time employee with Defendant. Plaintiff enrolled in Local Union membership and executed a card authorizing the Local Union to represent him. Plaintiff asked a dispatcher about his route options now that he was a full-time driver. The dispatcher allegedly became highly agitated at the question, cursed at Pope, and barked at Pope that he had no options. Pope claimed that thereafter he became a target for management.

Defendant called the Local Union for assistance. A Union steward informed both the dispatcher and an Operations Supervisor that Defendant was a Union member and was planning to become a line-haul driver once he reached his 30-days as a full-time driver. On July 1, 2016, the Operations Supervisor told Pope that he was doing a "great job," and informed Defendant that he had reprimanded the dispatcher for how he had treated Pope.

On July 6, 2016, Defendant injured his back while lifting heavy items during a delivery. Defendant claims that he had to continue working in spite of the injury, but that he immediately reported the injury to the other employee and to the dispatcher. Upon returning to the terminal, Pope informed the Operations Supervisor of the injury. The Operations Supervisor then typed up the paperwork that Plaintiff needed to go to the doctor. The doctor concluded that Defendant had to be placed on light duty due to his disability. Around July 6, 2016, the Operations Supervisor received the doctor's conclusions, and allegedly said "Well, they're not really back doctors anyway," and immediately terminated Defendant's employment. When Defendant requested a Union steward be present, the Operations Supervisor became belligerent and hostile.

Local Union #391, was the sole and exclusive representative of ABF's employees who are members of the Local Union. ABF and the Local Union entered into an Agreement, allegedly stating that all ABF employees become Union members "on and after the thirty-first (31st)

calendar day following the beginning of their employment." The Agreement further stated that employees in their probationary period "may be terminated without further recourse; provided, however, that the Employer may not terminate the employee for the purpose of 'evading' the Agreement or discriminating against Union members." The Agreement was in effect throughout the relevant time period.

Title VII & Section 1981 Retaliation Claims

The Court dismissed Plaintiff's Title VII and Section 1981 retaliation claims, finding that none of Plaintiff's allegations rose to the level of protected activity under Title VII or Section 1981. The Court stated that Title VII prohibits discrimination against an employee because, in relevant part, he "has opposed any practice made an unlawful employment practice by this subchapter, or because he made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3. The Court further stated that a prima facie case of retaliation under Title VII and Section 1981 requires a showing: (1) that he engaged in a protected activity, (2) that his employer took an adverse employment action against him, and (3) that there was a causal link between the two events. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015).

Plaintiff argued that he engaged in protected activity on three occasions: (1) when he asked for route options and was barked at by a dispatcher; (2) when he called the Local Union for assistance after this occurred; and (3) when he was discouraged by the Operations Supervisor from turning to the Union when he encountered problems. The Court found that none of the occurrences rose to the level of a protected activity under Title VII or Section 1981. The Court reasoned that Plaintiff did not allege that these actions in any way opposed discriminatory conduct that violated Title VII or Section 1981, nor did he allege that the actions charged discriminatory conduct or in any way amount to participation in an investigation into discriminatory conduct. The Court dismissed Plaintiff's Title VII and Section 1981 retaliation claims.

ADA Claims

The Court dismissed Plaintiff's claim for discrimination in violation of the ADA, but found that Plaintiff alleged a plausible claim of retaliation in violation of the ADA. Plaintiff alleged that Defendant violated the ADA by failing to accommodate his disability. The Court stated that to establish a prima facie case for failure to accommodate under the ADA a plaintiff must show: (1) that he was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position; and (4) that the employer refused to make such accommodations." *Rhoads v. FDIC*, 257 F.3d 373, 387 n.11 (4th Cir. 2000). An individual alleging that he has a disability must show that he has substantial limitations in one or more major life activities, such as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). Short-term impairments only qualify as disabilities if they are sufficiently severe. *Summers v. Altarum Institute, Corp.*, 740 F.3d 325, 330 (4th Cir. 2014).

The Court found that Plaintiff did not allege any specific facts about the nature of his injury, the expected duration of his impairment, or how the injury limited his major life activities. Instead, Plaintiff simply stated that he was in substantial pain one day after the incident and that a doctor concluded he needed to be placed on light duty. Based on this, the Court determined that Plaintiff did not allege sufficient facts to show that his injury created an “actual disability” or a “record of” a disability under the ADA. The Court dismissed Plaintiff’s failure to accommodate claim.

Plaintiff also alleged that Defendant retaliated against him in violation of the ADA. The Court stated that a prima facie case for retaliation requires a plaintiff to prove: (1) that he engaged in a protected activity; (2) that his employer took an adverse employment action against him; (3) that there was a causal link between the two events. *Reynolds v. Am. Nat. Red Cross*, 701 F.3d 143, 154 (4th Cir. 2011). The Court noted that this basis of recovery does not require that the claimant be disabled. *Rhoads v. FDIC*, 257 F.3d 373, 391 (4th Cir. 2001).

The Court found that Plaintiff alleged a plausible claim of retaliation in violation of the ADA. Both Plaintiff and Defendant agreed that element two was satisfied because Defendant fired Plaintiff. The Court stated that element one was satisfied because Plaintiff made a request for a reasonable accommodation. Plaintiff alleged that he gave Defendant a letter from his doctor that stated he needed to be placed on light duty and that after Defendant saw the letter, Defendant immediately terminated Plaintiff. Defendant argued this was not an actual request for a reasonable accommodation. The Court disagreed with Defendant, citing *Sillah v. Burwell*, where the plaintiff informed her supervisor of her doctor’s instructions and limitations and the supervisor treated the limitation with derision and terminated plaintiff. 244 F. Supp. 3d 499 (D. Md. 2017). In that case, the Court found that plaintiff had adequately alleged an ADA retaliation claim. Likewise, here the Court determined that Plaintiff satisfied element one. The Court also found that Plaintiff satisfied element three. The Court noted that factual support for causation can be shown through temporal proximity between the protected activity and the adverse employment action. Here, Plaintiff alleged that he was immediately terminated after receiving the doctor's conclusions. Thus, the Court determined that Plaintiff sufficiently alleged an extremely close temporal proximity that could support a finding of causation.

The Court dismissed Plaintiff’s claim for discrimination in violation of the ADA, but found that Plaintiff alleged a plausible claim of retaliation in violation of the ADA.

Breach of Contract

Plaintiff alleged that the collective-bargaining agreement allows employees to be terminated without further recourse during their probationary period, but that Defendant may not terminate an employee in order to evade the Agreement or to discriminate against Union Members. Plaintiff stated that he had already completed one probationary period and was required to complete a second probationary period before being entitled to cross over and become a line-haul driver. Plaintiff was terminated during the second probationary period.

The Court stated that under Section 301, a state-law claim is preempted if the resolution of the state-law claim depends upon the meaning of a collective-bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988). The parties agree that the Agreement is a collective-bargaining agreement within the meaning of Section 301.

The Court ultimately determined that Plaintiff's state-law breach of contract claim was substantially dependent upon an analysis of the Agreement and therefore was preempted by Section 301 of the Labor Management Relations Act.

The Court granted in part, denied in part Defendant's Motion to Dismiss.

TITLE VII and IIED

***Barrow v. Branch Banking & Trust Co.*, No. 3:16-cv-00675-RJC-DCK, 2017 U.S. Dist. LEXIS 150999 (W.D.N.C. Sept. 18, 2017).**

The United States District Court for the Western District of North Carolina granted in part and denied in part Defendant's motion for summary judgment. The Court granted summary judgment as to Plaintiff's claims of IIED, NIED, and negligent retention and supervision under Title VII. The Court denied summary judgment as to Plaintiffs claim of civil conspiracy.

Judge: Robert J. Conrad, Jr., United States District Judge

Plaintiff's First Amended Complaint alleged claims against Defendant for: (1) violation of Title VII; (2) intentional infliction of emotional distress ("IIED"); (3) negligent infliction of emotional distress ("NIED"); (4) negligent retention and supervision; and (5) civil conspiracy. Defendant filed a partial motion to dismiss under 12(b)(6), seeking to dismiss Plaintiff's claims for IIED, NIED, negligent retention and supervision, and civil conspiracy.

Hostile Work Environment & IIED

The Court stated that in order to succeed on a claim for IIED, a plaintiff must prove: (1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another. The issue before the Court was what behavior constituted extreme and outrageous conduct. Under North Carolina law, extreme and outrageous conduct "exceeds all bounds usually tolerated by decent society." Successful claims typically involve sexual advances, obscene language, and inappropriate touching. Plaintiff argued that Defendant's discriminatory and hostile work environment amounted to extreme and outrageous conduct. Defendant pointed to case law describing the high bar "outrageous conduct" must clear when alleged in the employment context.

In *Hogan v. Forsyth County Club Co.*, Defendant's acts constituted extreme and outrageous conduct when he: made sexually suggestive remarks to the waitress while she was working; coaxed her to have sex with him; told her that he wanted to take her; brushed up against her; rubbed his penis against her buttocks and touched her buttocks with his hands. 79 N.C. App. 483, 340 S.E.2d 116, 123 (1986). When she refused his advances, he screamed profane names at her, threatened her with bodily injury, and on one occasion, advanced toward her with a knife and slammed it down on a table in front of her. In comparison, IIED was not found with a second waitress when the same chef's actions included screaming, shouting, and throwing menus. The Court differentiated the situations by stating that liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

The acts Plaintiff alleged resemble the latter waitress's unsuccessful claims in Hogan. Plaintiff alleged she was falsely accused of soliciting sporting tickets, set up to take the blame for her superior's mishandling of a closing, set up as a potential scapegoat for a possible fraud investigation, and ostracized by her co-workers after raising complaints regarding her superior. These events failed to clear the level North Carolina law mandates for extreme and outrageous conduct. The Court granted Defendant's motion to dismiss Plaintiff's IIED claim.

NIED

The Court stated that to properly state a claim for NIED, Plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress and (3) the conduct did in fact cause the plaintiff severe emotional distress. The Court noted that plaintiffs cannot merely import the alleged intentional conduct of an IIED claim into a NIED claim.

Plaintiff was correct that Fed. R. Civ. P. 8(d)(2) allows claimants to plead in the alternative. Nonetheless, Plaintiff's complaint and alleged facts must support that alternative claim. Because the facts of Plaintiff's complaint centered on allegations of discrimination, the Court focused on the inherent intentional character of discrimination claims generally.

The Court noted that case law shows that discrimination is inherently intentional. *Gauthier v. Shaw Grp., Inc.*, No. 3:12-CV-00274-GCM, 2012 U.S. Dist. LEXIS 172551 (W.D.N.C. Dec. 4, 2012). Plaintiff's alleged discrimination was inherently intentional both in its execution and its outcome. Plaintiff's complaint relied upon facts based on discrimination as the underlying conduct of Defendant. Plaintiff summarized the facts as follows, "Plaintiff contends she was subjected to disparate treatment and alternatively disparate impact due to her race, in terms of the work conditions, failure to promote, privileges, benefits and work environment. Plaintiff also alleges that Defendant BB&T knew or should have known that its employees were treating Plaintiff differently than other non-African American employees." Because Plaintiff built her Complaint off of alleged discrimination, she did not properly plead a NIED claim. While Plaintiff could plead in the alternative, her material factual allegations charged nothing but intentional acts. The Court dismissed Plaintiff's NIED claim.

Negligent Retention and Supervision

The Court stated that to support a claim of negligent retention and supervision against an employer, the plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to the plaintiff, and that prior to the act, the employer knew or had reason to know of the employee's incompetency. All parties agreed that the controlling issue before the Court was whether Plaintiff's complaint featured a common law tort to support her negligent retention and supervision claim.

Absent her IIED and NIED claims, Plaintiff relied on a Title VII violation, which North Carolina does not recognize as a common law tort. Because this Court dismissed Plaintiff's IIED and NIED claims, her negligent retention and supervision claim relied upon her surviving Title VII claim. The 4th Circuit's case, *McLean v. Patten Communities, Inc.*, 332 F.3d 714, 719 (4th Cir.

2003), held that a Title VII violation does not constitute a common law tort in North Carolina. As a Fourth Circuit ruling, *McLean* was binding upon this Court. Accordingly, the Court dismissed Plaintiff's negligent retention and supervision claim.

Civil Conspiracy

No parties objected to the recommendation allowing the civil conspiracy claim to survive. The Court agreed with the recommendation that Defendant's motion to dismiss be denied as applied to the civil conspiracy claim.

The Court granted in part and denied in part Defendant's motion to dismiss.

Ward v. AutoZoners, LLC, No. 7:15-CV-164-FL, 2017 U.S. Dist. LEXIS 142652 (E.D.N.C. Sept. 5, 2017).

The United States District Court for the Eastern District of North Carolina granted defendant's motion for summary judgment as to the constructive discharge claim. The Court denied the motion for summary judgment as to the retaliation, IIED, and hostile working environment.

Judge: Louise W. Flanagan, United States District Judge

In September 2012, defendant AutoZoners, a national retailer and distributor of automotive parts, hired plaintiff as a part-time (to accommodate his other job) commercial driver in its Whiteville, North Carolina store. At that time, Tarkington was general manager of that store and was in charge of everything in that store, including disciplining employees. Plaintiff reported to Smith, who in turn reported to Tarkington.

In March 2013, defendant hired Atkinson as a sales clerk. A few days after Atkinson started working for defendant, she began sexually harassing plaintiff. Atkinson frequently told off-color jokes, made sexually explicit comments, and made inappropriate advances toward plaintiff. Shortly after Atkinson began harassing him, plaintiff complained to Smith about Atkinson's actions, including her grabbing and twisting his nipple. According to plaintiff, Smith said nothing in response to plaintiff's complaints. The week following plaintiff's initial complaint to Smith, Atkinson touched plaintiff's genitals. Approximately six to eight weeks after his first complaint to Smith, plaintiff told Tarkington about Atkinson's behavior. According to plaintiff, Tarkington never spoke to Atkinson about the alleged harassment.

In or around May 2013, a full-time driving position became available, and Plaintiff told Smith that he would love the full-time job. In response, Smith allegedly said to plaintiff, no, you complain too much. Plaintiff did not ask Tarkington to be considered for the position. Atkinson, the alleged harasser, was promoted to the full-time driver position.

In July 2013, plaintiff again complained to Tarkington about Atkinson's sexual harassment. At that time, Tarkington informed District Manager Geer of plaintiff's complaints. In response, Geer told Tarkington that he would handle it. Sometime afterward, plaintiff took a three-week vacation. After plaintiff returned to work, Atkinson again grabbed and twisted plaintiff's nipple. Almost immediately after the assault, plaintiff told McCall, the new store manager, that he wanted to speak with him and plaintiff's immediate supervisor Smith.

The next day plaintiff spoke with Geer, AutoZoner's district manager. At that time, plaintiff agreed to meet with Geer on August 19, 2013. Plaintiff gave Smith a resignation letter on August 16, 2013. When plaintiff met with Geer three days after turning his resignation, Geer asked plaintiff if he would come back to work until the company could investigate his claims. Geer said he could move Atkinson to another store, and told McCall to move Atkinson to the company's Shallotte, North Carolina store pending investigation of plaintiff's complaints.

Title VII Retaliation

The Court stated that to state a claim for retaliation under Title VII, a plaintiff must demonstrate that: (1) he engaged in a protected activity; (2) his employer took an adverse action against him; and (3) & that a causal link between the two events existed. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015).

Plaintiff alleged that defendant failed to promote him in retaliation for reporting Atkinson's sexual harassment. The Court stated that there was no dispute that plaintiff engaged in a protected activity when he reported the sexual harassment. The Court stated that there was a genuine issue of material fact as to whether relevant decision makers were aware of plaintiff's protected activity. Plaintiff alleged that at the time he was denied the promotion, Smith and Tarkington both knew of plaintiff's allegations of harassment and when Plaintiff told Smith he wanted to be considered for the promotion, Smith said plaintiff complained too much. Plaintiff also alleged that Smith had authority to promote employees. The Court stated that from this evidence, a reasonable juror could infer that Smith was a relevant decision maker with respect to the promotion decision. The Court stated that it was undisputed that Tarkington had authority to recommend promotions to Geer who allegedly made the promotion decision. A reasonable juror could infer that Tarkington made a recommendation regarding the promotion in this instance, thus a genuine issue of material fact existed regarding whether relevant decision makers were aware of plaintiff's protected activity prior to the time he was denied the promotion.

Constructive Discharge

To establish a claim for constructive discharge, a plaintiff must provide sufficient evidence that his employer deliberately made his working conditions intolerable in an effort to induce him to quit. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 186-87 (4th Cir. 2004). Whether working conditions are intolerable is determined from the objective perspective of a reasonable person. *Heiko v. Colombo Sav. Bank, F.S.B.*, 434 F.3d 249, 262 (4th Cir. 2006) (internal citations omitted).

Regarding the constructive discharge claim, the Court determined that evidence on the record did not establish that defendant intended plaintiff to quit. The evidence indicated that plaintiff voluntarily resigned and neither Smith, McCall, nor Geer intended him to quit. Greer told plaintiff he would move Atkinson to a different store, Plaintiff testified that Smith treated employees with respect and dignity, and Tarkington believed he adequately addressed plaintiff's concerns after informing Geer of the problem. Plaintiff's argument that defendant's inaction following the initial complaints was insufficient to create a genuine issue of material fact.

IIED

The Court stated that under North Carolina law, to allege prima facie case for IIED a plaintiff must set forth sufficient evidence to establish: 1) extreme and outrageous conduct by the defendant; 2) which is intended to and does in fact cause; 3) severe emotional distress. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22 (1992). The law interferes only where the distress

inflicted is so severe that no reasonable man could be expected to endure it. *Waddle*, 331 N.C. at 84. Severe emotional distress means any emotional or mental disorder, including neurosis, psychosis, chronic depression or phobia, that may be generally recognized and diagnosed by trained professionals. *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 354-55, 452 S.E.2d 233 (1994).

Where a plaintiff's IIED claim is based upon acts of harassment committed by an employee of the defendant employer, there must be some basis for imputing the employee's actions to the employer. One means by which to do so is to prove that the harassment was ratified by the employer. *Phelps v. Vassey*, 113 N.C. App. 132, 135, 437 S.E.2d 692 (1993). To show that an employer ratified acts of its employee, the plaintiff must establish that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, showed an intention to ratify the act. *Brown v. Burlington Indus., Inc.*, 93 N.C. App. 431, 437, 378 S.E.2d 232 (1989). An employer may ratify the acts of an employee by failing to act. *Id.* Furthermore, a claim for IIED may exist "where [the] defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E. 2d 325 (1981). A supervisor's failure to prevent further sexual harassment may establish ratification. See *Hogan v. Forsyth County Club Co.*, 79 N.C. App. 483, 492, 340 S.E.2d 116 (1986).

With regard to the IIED claim, the Court stated that plaintiff set forth sufficient evidence that defendant ratified Atkinson's harassment. The Court stated that evidence of record showed that through Smith and Tarkington, defendant had knowledge of the alleged harassment. Pursuant to company policy, both Smith and Tarkington were obligated to report plaintiff's complaints. Plaintiff reported the harassment to Smith in March 2013. Smith did not report the alleged harassment to any of her supervisors. Plaintiff also reported the harassment to Tarkington. Tarkington did not report the harassment to any of his supervisors until after plaintiff complained to Tarkington in July 2013. The failure of Smith and Tarkington to report and/or to correct the alleged harassment was sufficient to create a genuine issue of material fact regarding whether defendant ratified Atkinson's harassing behavior. In addition, the Court found that Atkinson's repeated conduct (pinching nipples, touching groin, and making sexually charged remarks) created a fact issue as to whether the conduct was extreme and outrageous.

***Saniri v. Christenbury Eye Ctr., P.A., No. 3:17-cv-000474-FDW-DSC 2017, U.S. Dist. LEXIS 199765 (W.D.N.C. Dec. 5, 2017).**

The United States District Court for the Western District of North Carolina denied defendants' partial motion to dismiss.

Judge: Frank D. Whitney, Chief United States District Judge

Plaintiff, Niloufar Saniri, was a former employee of Defendant, Christenbury Eye Center. Defendant, Jonathan Christenbury, M.D., was the majority shareholder of CEC, and Defendant, Ellie Pena-Benarroch, was its Chief Operating Officer.

Plaintiff asserted the following eight causes of action: (1) violations of Title VII based on sex, quid pro quo sexual harassment, hostile work environment based on sex, retaliation, and wrongful termination against CEC and Dr. Christenbury; (2) wrongful discharge in violation of public policy based on sex against CEC and Dr. Christenbury; (3) assault against CEC and Dr. Christenbury; (4) battery against Dr. Christenbury and CEC; (5) IIED against CEC and Dr. Christenbury; (6) IIED against Pena-Benarroch; (7) North Carolina Wage and Hour violations against all Defendants; and (8) breach of contract against CEC and Dr. Christenbury. Plaintiff filed two charges of discrimination with the EEOC and received notices of right to sue on or about March 31, 2017.

Plaintiff did not fail to exhaust her administrative remedies as to Dr. Christenbury.

Defendants argued that Plaintiff's Title VII claims against Dr. Christenbury should be dismissed pursuant to Rule 12(b)(1) because Plaintiff failed to exhaust her administrative remedies as to him. While Plaintiff did file two Charges of Discrimination with the EEOC, Defendants argued that because Plaintiff did not name Dr. Christenbury as a party in either of the two charges, the Title VII claims against him should be dismissed.

An EEOC charge must sufficiently describe the alleged discriminatory acts and identify the accused parties so as to (1) notify the EEOC and the employer of the scope of the allegations and (2) provide an opportunity for voluntary compliance. Title VII does not require procedural exactness, however, and because EEOC charges are often filed by non-lawyer complainants, Courts often construe the naming requirement liberally. This exception allows unnamed respondents in the EEOC charge to be held liable in civil actions where they have been given adequate notice by the administrative charge.

Factors for determining substantial-identity include: (1) Whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; (2) whether, under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purposes of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of

the unnamed party; (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

The Court viewed the first and third factors as most significant to this case. Even though Dr. Christenbury's name was not written in the "Name" box of the EEOC charges, his name appears numerous times throughout the documents. And not only was his name referenced numerous times, a brief reading of the charge revealed that his alleged conduct was the impetus for and central focus of Plaintiff's charges. Furthermore, Dr. Christenbury purportedly did receive actual notice of both charges and was even interviewed during the EEOC investigation.

The Court held that Plaintiff did not fail to exhaust her administrative remedies as to Dr. Christenbury.

Dr. Christenbury could be held individually liable for a violation of Title VII under a theory of piercing the corporate veil.

Defendants argued that Dr. Christenbury could not be individually liable for a violation of Title VII because liability under Title VII extends only to employers. Plaintiff contended that Dr. Christenbury may be found individually liable under a theory of piercing the corporate veil. In general, a supervisor may not be held liable in their individual capacity for Title VII violations. *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177, 180 (4th Cir. 1998). Given certain circumstances, however, an individual can be held liable for Title VII violations under a corporate veil piercing theory. *Burnette v. Austin Med., Inc.*, No. 1:11CV52, 2011 U.S. Dist. LEXIS 43027 at *4 (W.D.N.C. Apr. 14, 2011). A Title VII violation alone, however, is insufficient to pierce the corporate veil; the party seeking to pierce must demonstrate that the defendant has abused the corporate form and that piercing the corporate veil is necessary to prevent injustice or fundamental unfairness. *DeWitt Truck Brokers, Inc. v. Ray Flemming Fruit Co.*, 540 F.2d 681, 687 (4th Cir. 1976).

The question here was whether Plaintiff alleged facts sufficient to support a veil piercing theory. A Court may disregard the corporate form and impose liability under the alter-ego theory when: (1) the shareholder dominates and controls the organization and (2) imposing such liability is needed to avoid injustice. Courts have stated that fraud; gross undercapitalization; failure to observe corporate formalities; siphoning of the corporation's funds; non-functioning of officers and directors; absence of corporate records; and the fact that the corporation is merely a facade, all are relevant factors to be considered. While the plaintiff carries a heavy burden when attempting to pierce the corporate veil, North Carolina Courts recognize the equitable nature of alter ego theory, and as a result they do not focus on the presence or absence of a particular factor, but instead apply the doctrine flexibly to avoid injustice.

Plaintiff alleged, among other things, that Dr. Christenbury owed, operated, and controlled CEC; referred to himself as a "God" of LASIK during CEC staff meetings; had been fraudulently transferring and hiding CEC's assets in anticipation of litigation; and had a pattern of using CEC to shield himself from personal liability in order to commit unlawful acts.

These allegations assert facts sufficient to support a plausible argument for piercing the corporate veil and holding Dr. Christenbury personally liable for his alleged Title VII violations. If after discovery, however, the evidence indicated that piercing the corporate veil is not appropriate, then Plaintiff's Title VII claim against Dr. Christenbury would be subject to dismissal at that time.

Plaintiff properly stated a claim for wrongful discharge in violation of public policy as set forth in NCEEPA.

Defendants argued that Plaintiff's wrongful discharge in violation of public policy claim should be dismissed because North Carolina Courts have repeatedly rejected attempts by plaintiffs to bring wrongful discharge claims under the North Carolina Equal Employment Practices Act based on allegations of retaliation.

While the Fourth Circuit has held that there is no private right of action under the NCEEPA for sexual harassment, it has determined that there is a private right of action under North Carolina common law for violation of public policy, specifically the NCEEPA, when an employee is discharged for refusing the sexual advances of her supervisor. In other words, the Fourth Circuit allowed those claims that allege wrongful discharge because of the plaintiff's refusal of sexual advances from her supervisor but disallows claims that merely allege sexual harassment and not wrongful discharge. Consequently, a claim of wrongful discharge under the NCEEPA was actionable, but any additional state claims, separate from the claim of wrongful discharge, asserted under the NCEEPA would be dismissed.

Here, Plaintiff asserted a claim for wrongful discharge in violation of public policy set forth in NCEEPA based on sex against CEC and Dr. Christenbury. This Court found that such a claim was consistent with claims allowed by the Fourth Circuit in *McLean* and this Court in *Chambers v. Ashley Furniture Indus., Inc.*, No. 3:10CV362-RJC-DSC, 2010 U.S. Dist. LEXIS 126969, 2010 WL 4977102 at *5 (W.D.N.C. Nov. 9, 2010).

Plaintiff's claim for wrongful discharge in violation of public policy based on sex survived.

Dr. Christenbury can be held individually liable for a claim of wrongful discharge in violation of public policy.

Defendants argued that Plaintiff's wrongful discharge claim failed because it could not be brought against Dr. Christenbury as an individual. While the NCEEPA does permit a claim of wrongful discharge, such claims must be brought against employers, not supervisors or employees.

Plaintiff argued, however, that Dr. Christenbury was individually liable for this claim through a theory of piercing the corporate veil. Because the Court determined above that Plaintiff pled sufficient facts to support piercing the corporate veil, Plaintiff's claim for wrongful discharge in violation of public policy against Dr. Christenbury survived.

Defendants' partial Motion to Dismiss was denied.

Author's Note: The "piercing of the corporate veil" or "alter ego" theory discussed in this case led the Court not to dismiss the claims against the owner of the company individually. Among other facts, he referred to himself as the "God" of the company.

TITLE VII, NEGLIGENT RETENTION AND SUPERVISION, ASSAULT, AND BATTERY

***Watkins v. Bermuda Run CC, LLC*, No. 1:17CV512, 2018 U.S. Dist. LEXIS 6087 (M.D.N.C. Jan. 12, 2018).**

The United States District Court for the Middle District of North Carolina granted Defendant Christmas' motion to dismiss as to the Title VII claim; the Court denied Defendant Christmas' motion to dismiss as to battery; and the Court granted Defendant BRCC's motion to dismiss as to assault and negligent retention and supervision.

Judge: N. Carlton Tilley, Jr., Senior United States District Judge.

Watkins was an employee of BRCC in Bermuda Run, North Carolina. Plaintiff alleged that while employed by BRCC as a server in the dining area, he was continually sexually harassed by Christmas, the head chef. Watkins alleged that Christmas began making sexual, lewd, and unwanted comments towards him beginning in or about July 2015. Plaintiff stated that after the initial incident, Watkins confronted Christmas telling him that the comments were unwanted and inappropriate.

Plaintiff alleged that in August 2015, Christmas approached Plaintiff during work hours on the BRCC facility grounds. Plaintiff was plugging in an electrical cord and Christmas approached Plaintiff and said "while you're down there, why don't you plug this into your mouth?" Christmas was pointing to his penis when the comment was made. After this, Watkins again told Christmas to stop his behavior.

On December 3, 2015, Christmas approached Watkins from behind, put his hand on Watkins' shoulders, forced his knee between Plaintiff's buttocks, and made lewd comments about Watkins' anus in front of another coworker. Plaintiff told BRCC management of what had transpired. The Manager agreed to allow Watkins to transfer, so he did not have to work in close proximity with Christmas. Ultimately, BRCC was unable to transfer Watkins to another property, but they did give him two paid days off to recover from the trauma. Christmas continued his supervisory role at BRCC despite the allegations of sexual harassment.

BRCC filed a motion to dismiss the claim of assault and negligent retention and supervision against it, and Plaintiff conceded that these claims should be dismissed as to BRCC. (The case does not state why plaintiff conceded these claims.) Defendant Christmas filed a motion to dismiss the Title VII claim against him, and plaintiff conceded that the Title VII claim against him was not actionable.

Regarding the assault/battery against Christmas, the Court stated that plaintiff pled sufficient facts to state a claim for battery. The facts that were sufficient included defendant Christmas

placing his knee in plaintiff's buttocks and grabbing his buttocks without consent and after being told not to. The Court also stated that even though plaintiff incorrectly labeled his claim "assault" instead of "battery" it would be inappropriate to dismiss it just because it was labeled incorrectly.

SECTION 1981

****Darden v. Wayne County Bd. Of Educ., No. 7:17-CV-84-BO, 2018 U.S. Dist. LEXIS 62527 (E.D.N.C., April 13, 2018).***

The United States District Court for the Eastern District of North Carolina denied Defendant's motion to dismiss and granted Plaintiff's motion to amend his complaint.

Judge: Terrence W. Boyle, United States District Judge

Plaintiff is an African-American male and was employed by Defendant from 2002-2014 at Eastern Wayne High School as an instructional assistant and basketball coach. In March 2013, a minor female student accused Plaintiff of grabbing her and attempting to kiss her. Plaintiff turned himself in to law enforcement after a warrant was issued for his arrest but he maintained his innocence. On December 13, 2013, defendant's Assistant Superintendent for Human Resources, Dr. Marvin McCoy, sent a letter to plaintiff indicating that in light of the charges, Plaintiff had been placed on suspension with pay. The letter stated that plaintiff could return to work should all matters be cleared.

On January 14, 2014, Dr. McCoy sent another letter to plaintiff stating that plaintiff had been placed on suspension without pay and that he would be contacted about the next step within thirty days. On September 30, 2014, in the first communication with plaintiff since the January 2014 letter, defendant terminated plaintiff's employment. The State of North Carolina dismissed all charges against plaintiff on February 9, 2015. On February 10, 2015, Dr. McCoy called plaintiff and informed him that he was not welcome on campus and would not be permitted to return to work. Plaintiff further alleged that two white male teachers were accused of making inappropriate sexual comments about female students. Both of these teachers admitted to making the inappropriate remarks and were allowed to retain their teaching positions with defendant and to retire.

Wrongful Termination under Section 1981 and 1983

Plaintiff alleged sufficient facts of each of the elements of a prima facie case of discrimination in the termination of employment under section 1981. The Court stated that Plaintiff alleged that he is a member of a protected class, that he was qualified for his position, and that prior to the events which led to his termination he was performing his job satisfactorily. Plaintiff has alleged that he was fired, and that other employees not members of the protected class, namely two white male teachers, were allowed to remain in their positions under apparently similar circumstances.

The Court found that at the 12(b)(6) stage of the proceeding Plaintiff alleged sufficiently similar comparators to nudge his claim across the line from conceivable to plausible. Defendant's motion to dismiss was denied and Plaintiff's motion to amend his complaint to add additional factual support was granted.

Author's Note: Keep in mind that this was a 12(b)(6) case and not a summary judgment case. Once discovery occurs, the two "comparators" argument might or might not work.

Gary v. Facebook, Inc., No. 1:17-cv-00123, 2018 U.S. Dist. LEXIS (W.D.N.C. July 25, 2018).

The United States District Court for the Western District of North Carolina granted Defendant's Motion for Summary Judgment on Plaintiff's claims under 1981.

Judge: Martin Reidinger, United States District Judge

Plaintiff, an African-American male, began working for Facebook as a CFE at the Forest City data facility in November of 2012. Plaintiff received good marks for his performance and was awarded bonuses because of the good performance. Plaintiff was initially on a list of individuals up for promotion but was taken off the list after Facebook's headquarters decided there were too many people on the list and required the Forest City managers to reevaluate the listed employees. The review of Plaintiff's performance was led by Defendant Hawkins, a white male, who was formerly the facilities manager at the Forest City data center that Facebook operates. Hamrick was Plaintiff's supervisor during this time and he offered some feedback and a peer summary review during the decision-making process. The group agreed that Plaintiff was trending toward promotion, but the group decided not to promote Plaintiff at that time. Another employee, Randall was promoted instead of Plaintiff.

After Plaintiff received the review, Plaintiff met with Hamrick to discuss why he received lower than expected compensation increases. Plaintiff wasn't satisfied with Hamrick's explanation and had a second meeting with him. Plaintiff still wasn't satisfied and requested to meet with Faccone, Plaintiff's global facilities manager. During the meeting with Faccone, Plaintiff stated that he thought his pay and promotion differences were due to race. Plaintiff continued to meet with various individuals regarding his pay and promotion. Ultimately plaintiff submitted a written complaint to Facebook's Human Resources department, who conducted an investigation and concluded that the management's decision to promote Randall and not the Plaintiff was due to Randall's superior work performance and initiative.

In August 2014, Plaintiff was promoted as scheduled. In July 2015, Plaintiff read a statement from a fellow employee Brian Gill regarding various racially charged comments Hawkins had made including the use of the N word. Plaintiff's pay was only lower than Randall's pay for six months, then in December 2015 Facebook paid Plaintiff a lump sum equivalent to the difference between Plaintiff's pay and Randall's pay. In 2016, both Plaintiff and Randall were promoted again and received the same pay rate.

The Court stated that generally, a section 1981 claim is treated the same as a Title VII claim. Thus, a plaintiff asserting a section 1981 claim can survive summary judgment in one of two ways. First, the plaintiff can establish the claim by demonstrating through direct or circumstantial evidence that his race was a motivating factor in the employer's adverse employment action. Alternatively, the plaintiff can establish a claim by first establishing a prima facie case of discrimination, using the McDonnell Douglas framework and then demonstrating that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination. Under the *McDonnell*

Douglas framework, a plaintiff shows a prima facie case of race discrimination in the context of a failure to promote claim by demonstrating that (1) he is a member of a protected class; (2) he applied for a position; (3) he was qualified for that position; and (4) he was rejected for that position "under circumstances giving rise to an inference of unlawful discrimination." *Bryant v. Aiken Reg'l Med. Centers Inc.*, 333 F.3d 536, 544-45 (4th Cir. 2003) (quoting *Brown v. McLean*, 159 F.3d 898, 902 (4th Cir.1998)). Once the plaintiff makes out this prima facie case, the burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 216 (4th Cir. 2016). Once the defendant shows such a reason, the burden then shifts back to the plaintiff to show that the stated reason is pretextual.

The Court found that the Plaintiff presented evidence to establish that he is a member of a protected class and that he sought a promotion for which he was qualified. To satisfy the fourth element of the prima facie case (that he was denied the promotion under circumstances giving rise to an inference of unlawful discrimination), the Plaintiff relied on evidence that he was denied a promotion at the same time that a similarly situated white employee, Randall, received a promotion and that a participant in the making of that decision had made racially inappropriate remarks in other contexts regarding the Plaintiff and other African-American employees.

The Court stated that a plaintiff is not required to point to a similarly situated comparator in order to succeed on a discrimination claim. *Haywood v. Locke*, 387 F. App'x 355, 359 (4th Cir. 2010). However, where a plaintiff chooses to base his discrimination claim on the more favorable treatment of similarly situated employees from a non-protected class, the plaintiff is required to show that he is similar to his comparator "in all relevant respects." *Id.* The Court noted that this means that a comparator "must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

The Court stated that the evidence showed that Plaintiff's situation was similar to Randall's in some relevant respects, but not in all respects. At the time of the 2014 promotions, Randall was already exhibiting many of the skills necessary for the promotion. According to Matt Hamrick, who managed both Randall and Gary at the time, Randall demonstrated initiative and significant hands-on experience in the same job. According to Hamrick, Randall's strength was verbal communication, holding vendors accountable, making sure things were passed on, and making sure the facility remained running at a very busy time. Randall's high level of engagement, initiative, and demonstrated leadership, in combination with his hands-on experience, made him a strong candidate for promotion. By contrast, Hamrick viewed the Plaintiff as lacking Randall's demonstrated initiative and strong interpersonal skills. Plaintiff had failed to show initiative, even though Hamrick had explained to the Plaintiff the importance of going above and beyond what was required of his basic job responsibilities. For example, when Plaintiff agreed to take on a special project of creating a numbering system, he struggled to stay

on task, failed to provide complete information when requested, and did not stay motivated. The Court found that in light of the differences between Plaintiff and Randall's initiative and communication skills, Plaintiff failed to show that he and Randall were similarly situated at the time of the promotion decisions.

Plaintiff then attempted to rely on a new potential comparator, Kevin Walker, in an effort to meet his prima facie case. The Court determined that Walker was not similarly situated to the Plaintiff for several reasons. Walker was hired in June 2013, following the completion of a three-month internship with Facebook. This internship allowed Facebook managers to observe Walker's work ethic even prior to being formally hired. After Walker was hired as a full-time Facebook employee, Walker and the Plaintiff worked in different buildings and had different supervisors. Finally, Walker, unlike the Plaintiff, had been consistently rated as an exceptional employee, exhibiting outstanding work performance and earning Exceeds Expectations or Greatly Exceeds Expectations on every performance review since Q3 2014. Because of his outstanding performance, Walker received a series of rapid promotions that outpaced all other CFEs at the Forest City facility. While a comparator is not required to be an exact match, there still must be enough common features between the individuals to allow for a meaningful comparison. *Haywood*, 387 F. App'x at 359-60. The Court found that Plaintiff did not establish a prima facie case of discrimination with respect to Facebook's decision not to promote him.

Even if Plaintiff could make out a prima facie case, Facebook presented evidence that during the 2014 evaluation period, management believed that the Plaintiff was not ready for the promotion due to his lack of initiative and communication issues. The Court noted that job performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996).

After the burdens shifted back to Plaintiff, he could not demonstrate that Facebook's articulated reasons for not promoting him were pretextual. Plaintiff pointed to Hawkins' involvement in the decision not to promote him and the claim that Hawkins had animus towards African-Americans based on his alleged statements. The Court stated that there was no indication in the record when this alleged statement was made or, more importantly, that this alleged statement was made near the time of the promotion decision in Q1 2014. Even if it could be inferred that such statement was made at or near the time of the Q1 2014 promotion decision, however, Hawkins did not have the authority to control Facebook's promotion decisions. Rather, a selection committee made the decision to remove the Plaintiff (and others) from the promotion list for Q1 2014. Other managers on this panel, particularly Hamrick, had input in the decision not to promote the Plaintiff and all were in agreement on the reasons for not promoting the Plaintiff at that time. Thus, Hawkins' involvement in the selection panel does not demonstrate that the reasons given for Facebook's decision not to promote the Plaintiff in Q1 2014 were pretextual.

Plaintiff attempted to show pretext by arguing that Facebook offered conflicting explanations for his non-promotion. The Court stated that a plaintiff may attempt to establish pretext by

showing that the employer's proffered explanation is unworthy of credence. The undisputed forecast of evidence, however, shows that the explanations offered by Facebook management have been entirely consistent. The Plaintiff testified that Hawkins told him Randall exhibited more initiative, and Hamrick told him he needed to improve his communication. The Plaintiff's Q1 2014 written evaluation states "in order to achieve the next level Robert will need to be more of a self starter and find projects on his own to improve the way in which things are done." Hamrick and Hawkins both testified that Plaintiff's lack of initiative and communication skills kept him from receiving a promotion.

The Court granted Defendants' Motion for Summary Judgment.

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

Tickles v. Johnson, No. 1:17CV709, 2018 U.S. Dist. LEXIS 68788 (M.D.N.C. April 19, 2018).

The United States District Court for the Middle District of North Carolina granted Defendant's 12(b)(6) motion.

Judge: N. Carlton Tilley, Jr., Senior United States District Judge

Plaintiff was hired by Defendant as a detention officer in the Alamance County Detention Center. Defendant used a hierarchical system for hiring and promoting employees. This system included a provision that before an employee could be promoted to a higher rank, he must have met minimum standards or guidelines set by Defendant. Plaintiff was hired as a Detention Officer 1 and received several promotions which made him Corporal in the shortest amount of time possible. Plaintiff thereafter applied for a promotion to Sergeant. Under Defendant's guidelines, a corporal could not be considered for a Sergeant position until he served as a Corporal for 18 months. Plaintiff met these qualifications and had never received a write-up.

Plaintiff alleged that the Defendant promoted two younger, less qualified deputies who failed to meet the guidelines for promotion to sergeant instead of Plaintiff. Two months later, Plaintiff was reprimanded for making a comment about a foremen maintenance employee's intolerance for people of other races and ethnicities. Then shortly after the write-up, Plaintiff was terminated.

ADEA Failure to Promote and Termination

The Court held that Plaintiff failed to state a plausible claim for relief under 12(b)(6). He did not sufficiently allege that Defendant failed or refused to hire him because of his age and that Defendant discharged him because of his age.

The Court held that it was not reasonable to infer age discrimination from the allegation that Defendant promoted others before the guidelines would normally allow promotion. The factual allegations left to speculation the reason why Defendant did not promote Plaintiff. The extent of Plaintiff's allegations in support of his discharge claim was that he was terminated two weeks after he was not promoted and a few weeks later, another deputy over forty, with an exemplary record, was also terminated. This evidence was insufficient to state a claim, as the other employee's termination was not a factor because there were no allegations as to why the other older worker was terminated. The Court stated that the fact of being over forty is not alone sufficient to support a reasonable inference that he was terminated because of his age. Plaintiff's pleadings were simply speculative as to the reason for his termination.

In addition, although the allegations include that Defendant had guidelines that were supposed to be met before Defendant promoted employees, these allegations did not require Defendant to abide by the guidelines in Defendant's promotion decisions, and Plaintiff did not allege that these guidelines were legal requirements, normally followed, purely advisory, or in the nature of a threshold requirement rather than a qualification. The Court stated that from the scant allegations, it was not reasonable to infer that Plaintiff was terminated because of his age. The Court granted Defendant's motion to dismiss the complaint.

AMERICANS WITH DISABILITY ACT (ADA)

***Churchwell v. City of Concord*, No. 1:17-CV-299, 2018 U.S. Dist. LEXIS 98964 (M.D.N.C. June 11, 2018).**

The United States District Court for the Middle District of North Carolina denied Defendant's motion for summary judgment.

Judge: Catherine C. Eagles, United States District Judge

Ms. Churchwell worked as a project engineer for the City of Concord from 2001 - July 2015. Ms. Churchwell was diagnosed with chronic autoimmune urticaria in 2001. By 2007, she was unable to work for short periods of time because of her symptoms; she was also diagnosed with irritable bowel syndrome and chronic migraine headaches.

In May 2015, Ms. Churchwell was intermittently out of work due to migraines and IBS symptoms. From June through her termination, she was out of work nearly continuously. She used a combination of sick days, vacation days, and FMLA leave to cover her work absences. On June 5, a Benefits Specialist with the HR Department sent Ms. Churchwell a letter advising her that she would soon exhaust her FMLA leave and enclosed a copy of the City's ADA reasonable accommodation request form. The Benefits Specialist also told Ms. Churchwell the City would assume she had resigned her position if she did not return the form by June 20.

Ms. Churchwell exhausted her FMLA leave on Friday, June 12. Doc. She was absent from work on unauthorized leave for the remainder of June through her termination. On June 16, Ms. Churchwell submitted a reasonable accommodation request to the City's HR Department. As accommodations, she requested: "(1) If in the office and come down with symptoms, may need to leave; (2) If at home and have symptoms or medication side effects, may need to stay home and away from office; (3) I may need to leave office for doctors appointments or treatment therapies, or for medication at pharmacy; (4) I may need to avoid being in extreme temperatures for extended lengths of time."

The next day, Ms. Churchwell also sent an email to Ms. Hyde asking for thirty days of unpaid leave, from June 17 to July 16. Ms. Hyde denied the request. Ms. Hyde said she denied the request because the Engineering Department had 3.5 full time engineers, 48 active projects, and losing one full-time engineer staff person would put the Engineering Department's projects even further behind schedule.

In late June, the City granted Ms. Churchwell's June 16 accommodations request and instructed her to return to work on June 26. She did not return to work on June 26 or at any point in June because, according to Ms. Churchwell, her condition "worsened," rendering her "completely unable to work for a period of a few weeks. On July 1, Ms. Hyde notified Ms. Churchwell she

had violated the City's absence without leave policy and that she was considering the full range of disciplinary action. She was terminated on July 6.

Failure to Accommodate

The Court stated that to establish a prima facie case of failure to accommodate under the ADA, Ms. Churchwell must show that: (1) she was an individual who had a disability under the meaning of the statute; (2) the City had notice of her disability; (3) with reasonable accommodation she could perform the essential functions of the position; and (4) the City refused to make such accommodations. *See Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013).

The Court stated that plaintiff offered evidence sufficient to meet all four elements of a prima facie case. The city argued that the accommodation would have produced an undue hardship on the engineering department because the loss of a single engineer in such a small department would cause other staff to take on more work and slow project delivery time. Plaintiff put forth evidence this was pretextual through evidence that the city did not post a job advertisement for her position until August 2015, past the time plaintiff would have returned to work with her requested accommodation. Her replacement didn't begin work until 2017. Importantly, the city produced no evidence that it engaged with plaintiff in the interactive process of determining a reasonable accommodation. The Court denied defendant's motion for summary judgment.

Disability Discrimination

The Court stated that to establish a claim for disability discrimination under the ADA, a plaintiff must prove (1) that she has a disability, (2) that she is a qualified individual, and (3) that her employer discharged her (or took other adverse employment action) because of her disability. *Reynolds v. Am. Nat. Red Cross*, 701 F.3d 143, 150 (4th Cir. 2012).

The Court stated that a reasonable jury could find that plaintiff established a prima facie claim and that she proved pretext as well. It is undisputed that Ms. Churchwell established element one, that she had a disability. Ms. Churchwell established element two, that she was a qualified individual, by producing evidence that she could have performed the essential functions of her job had she been granted unpaid leave as a reasonable accommodation (it is well-established that unpaid leave can be a form of reasonable accommodation). Furthermore, the Court stated that Ms. Churchwell produced evidence from which a reasonable jury could conclude she was terminated because of her disability (element three). The evidence was the undisputed testimony that both Ms. Hyde and Ms. Edwards were aware of her disability and the City's refusal to approve leave without pay caused her absences to be coded as unexcused, leading to her termination. The Court stated that Ms. Churchwell put forth sufficient evidence of pretext to defeat summary judgment. The Court pointed back to its discussion of the evidence she put forth in general.

***Dayton v. Charlotte-Mecklenburg Hosp. Auth., No. 3:17-CV-00392-RJC-DSC, 2017 U.S. Dist. LEXIS 218462 (W.D.N.C. Oct. 4, 2017).**

The United States District Court for the Western District recommended that Defendant's motion for Partial Judgment on the Pleadings be granted and Plaintiff's claims for retaliation and failure to accommodate under the ADA be dismissed.

Judge: David S. Cayer, United States Magistrate Judge

Plaintiff was employed by Defendant Carolinas Healthcare System ("CHS") as an RN from 2011 until her termination in January 2017. Plaintiff was a victim of physical and sexual abuse as a child and suffers from PTSD. Certain noises, smells, emotions, experiences, and situations trigger Plaintiff, leaving her unable to calm down and at times unable to continue working. Plaintiff requested certain accommodations from CHS, including excusing her from assisting in juvenile rectal surgery and not penalizing her for involuntary stress reactions. CHS initially agreed to provide these accommodations. During Plaintiff's employment, she had numerous issues with physicians and co-workers necessitating coaching and counseling with her supervisors. On January 24, 2017, CHS terminated Plaintiff's employment after she engaged in an argument with Defendant Dr. Bryan May. Plaintiff became upset when she heard Dr. May whistling in the operating room. CHS informed Plaintiff that she was being terminated because of her pattern of behavior and the severity of the incident with Dr. May.

Plaintiff filed a Charge of Discrimination based on disability with the EEOC. She alleged that the discrimination occurred as early as January 24, 2017, and as late as January 24, 2017. The EEOC issued Plaintiff a right to sue letter. Plaintiff then filed a complaint alleging that CHS discriminated against her in violation of her rights under the ADA by (1) failing to make reasonable accommodations; (2) terminating her employment because of her disability; and (3) retaliating against her for asserting her rights under the ADA.

Defendant CHS argued that Plaintiff's claims for retaliation and failure to accommodate under the ADA should be dismissed pursuant to Fed. R. Civ. Pro. 12(c) and 12(b)(1) for failure to exhaust her administrative remedies. Regarding the retaliation claim, plaintiff conceded that she did not check the box for retaliation and that the narrative portion of her charge did not allege facts sufficient to support a retaliation claim. Therefore, the Court dismissed Plaintiff's retaliation claim for lack of subject matter jurisdiction.

Regarding the failure to accommodate claim, Plaintiff argued that she satisfied the requirement to exhaust administrative remedies because this claim was reasonably related to the factual statements in her EEOC charge and could have been expected to follow from a reasonable investigation into the charge. The Court held that Plaintiff failed to exhaust her administrative remedies, stating, "[i]t is clear from the face of Plaintiff's EEOC charge that her allegations are confined to the date on which 'an incident related to her disability [occurred] in the workplace' and the date she was discharged. The only date that Plaintiff alleged any discrimination took place is January 24, 2017, the date of her discharge. The Court stated that "the charge is devoid

of any allegations that Plaintiff requested or was refused reasonable accommodations. Plaintiff's EEOC charge did not describe her medical conditions or mention that she required, requested, or was refused accommodations . . . Rather, the EEOC charge focuses solely on her termination, which was not reasonably related to the failure to accommodate claim asserted here. As a result, a reasonable investigation of [Plaintiff]'s EEOC charge would not likely reveal this claim or provide [CHS] with ample notice of the allegations against it."

The Court recommended that Defendant's Motion for Partial Judgment on the Pleadings be granted and Plaintiff's claim for retaliation and failure to accommodate be dismissed for lack of subject matter jurisdiction. The only claim that survived was the alleged wrongful termination on January 24, 2017.

Author's Note: This case is a reminder of the importance of the allegations contained in the EEOC charge. In a subsequent lawsuit under Title VII (the ADA or ADEA), a federal Court may consider only those allegations included in the charge. The Court recited this familiar language, "Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII [ADA or ADEA] lawsuit."

***EEOC v. Advanced Home Care, Inc., No. 1:17-cv-00646, 2018 U.S. Dist. LEXIS 60264 (M.D.N.C., April 10, 2018).**

The United States District Court for the Middle District of North Carolina denied Defendant's motion to dismiss.

Judge: Thomas D. Schroeder, United States District Judge

On February 3, 2014, Advanced hired Pennell to serve as a Patient Accounts Representative at its High Point location. The main function of Pennell's job was to manage cases for patients who required at home health care services.

During the spring of 2015, Pennell began to experience frequent asthma attacks and flare ups of bronchitis. She was diagnosed with chronic bronchitis and COPD. As a result of these conditions, Pennell had difficulty talking continuously for extended periods of time. Her conditions were aggravated by scents and odors of the sort that she was regularly exposed to when working in a cubicle at Advanced along with hundreds of other employees.

Following her diagnosis, Pennell was out of work under the FMLA. When she returned to work, Pennell asked her supervisor if she could telework either part-time or full-time as an accommodation for her disability. She requested this accommodation because it would prevent her from being exposed to irritants in her work environment and because she would not have to take inbound calls while teleworking, meaning she would have to spend less time continuously talking. The supervisor informed Pennell that she would get back to her, but never did. Pennell requested the accommodation of telework on at least three separate occasions, but never received a response.

In November of 2015, Pennell was again hospitalized with COPD-related symptoms. In December, while still on leave, she received a performance review from her supervisor that stated she had met Defendant's performance expectations. Pennell's direct supervisor told her on more than one occasion, however, that if she could not return to work without restrictions on January 7, 2016, when her FMLA leave ended, she would be terminated. Pennell exhausted all twelve weeks of her leave but could not return to work, and she was fired on January 8, 2016.

Failure to Accommodate

Defendant argued in its motion to dismiss that the EEOC failed to allege sufficient facts to support the claim that Pennell was a qualified individual and that the complaint failed to allege facts to demonstrate the essential function of Pennell's position or that Pennell could have performed it with a reasonable accommodation.

The Court stated that while the duties of Pennell's position were not described in depth (the complaint only stated that she was a case manager and that she spends part of her time on the phone) those duties were sufficiently alleged, particularly as to the need for accommodation.

The Court also stated that the EEOC alleged sufficient detail about the requested accommodation and how Pennell could have performed the essential functions of her position. The EEOC's complaint made clear that Pennell requested the accommodation of telework (part-time or full-time), that some of her work required her to be on the telephone, and that she could perform the essential function of her position with the requested accommodation. This was sufficient factual detail for the Court to draw the reasonable inference that Pennell could have performed the essential function of her position with the requested accommodation. The Court noted that whether the accommodation was reasonable is a fact question, and the employer bears the burden of proof to establish an undue hardship defense. The EEOC need not plead facts to avoid an affirmative defense.

Wrongful Termination

Defendant argued that Pennell was not fulfilling its legitimate expectations because she was not working at the time of her discharge. It also argued that nothing in the complaint suggested that Defendant discharged Pennell because of a disability.

The Court stated that the complaint did allege facts that directly linked Defendant's failure to accommodate Pennell to her discharge. Specifically, Pennell's supervisor's statements that if she could not return to work without restrictions after FMLA leave, she would be terminated. The Court further stated that the EEOC stated a wrongful discharge claim sufficient to survive the motion to dismiss because it alleged that Pennell had received a satisfactory performance review, was discharged, had requested accommodations on several occasions before her discharge but received no meaningful response, and was discharged upon the expiration of her FMLA leave under circumstances giving rise to a reasonable inference it was because of her disability.

Defendant's motion to dismiss was denied.

Author's Note: Remember, too, that the ADA may provide temporary leave as a "reasonable accommodation" under that statute even after the FMLA leave expires (assuming the person has a "disability" under the ADA).

***Fulp v. Columbiana Hi Tech, LLC, No. 1:16CV1169, 2018 U.S. Dist. LEXIS 27223 (M.D.N.C. Feb. 21, 2018).**

The United States District Court for the Middle District of North Carolina granted Defendant's motion for summary judgment.

Judge: N. Carlton Tilley, Jr., Senior United States District Judge

Plaintiff was diagnosed with an eye disorder in both eyes. He had two surgeries to correct the disorder prior to employment with defendant. After the surgeries, and when plaintiff applied for the welding position with defendant, plaintiff's vision was 20/20 in both eyes. When plaintiff began his job training, he told his supervisor he had vision problems, that he had just recently had cataracts removed which had been replaced with the wrong implants. He was in the process of having them redone. Plaintiff requested "cheater" lenses which are commonly used by welders. Plaintiff alleged that his supervisor constantly complained about plaintiff, micromanaged plaintiff, and said that things were wrong with plaintiff's welds when there wasn't anything wrong with them.

On plaintiff's last day of employment with defendant, he was working on a weld when his supervisor pointed out that there was "undercut." The supervisor had previously noticed undercuts in plaintiff's welds. To fix the undercut the welder hesitated and allowed the gap to fill. To avoid undercut on the next part, plaintiff hesitated, but, as a result, the supervisor criticized him for the resulting knots in the weld. Plaintiff acknowledged hesitating to fill the undercut, but disagreed that it caused excessive buildup.

The supervisor told plaintiff that he was not to hesitate in the bottom of welds anymore. When plaintiff moved to the next part, he tried something different, borrowed a stool, and crawled on top of it to have a better welding position (explaining that if he were taller, he would not have needed the stool). After Plaintiff completed several vertical welds, his supervisor saw that plaintiff had stopped in the corner of the weld again. According to Plaintiff, his supervisor told him to pack up his belongings and leave because "it's apparent you're going to do things the way you want to do them instead of the way I told you to do them."

The Court stated "[t]o establish a prima facie case of disability discrimination, an employee must show that (1) he was a qualified individual with a disability, (2) he was discharged, (3) he was fulfilling his employer's legitimate expectations at the time of discharge, and (4) the circumstances of his discharge raise a reasonable inference of unlawful discrimination. *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 150 (4th Cir. 2012). Once the employee meets this burden, the employer must produce evidence of a legitimate, nondiscriminatory reason for the termination. *Jacobs v. N.C. Admin. Office of the Cts.*, 780 F.3d 562, 575 (4th Cir. 2015). If the employer does so, the employee must then prove that the asserted justification is pretextual. *Id.* at 575-76.

The Court determined that a reasonable jury could not find plaintiff disabled (therefore not satisfying element one of the prima facie case) because plaintiff lived an independent life unrestricted by his vision. Plaintiff's vision was 20/20 in June and July which changed to 20/25 – 20/30 in August. Plaintiff's doctor described his post-operative course as excellent. Plaintiff read and drove without restriction and plaintiff stated that he could see well enough to weld when he applied for the position. As a result, he did not have an actual disability that substantially limited him in seeing or working. Additionally, plaintiff complained of other problems in his inability to weld a particular part, such as being too short or the length of his arms (not his vision). On plaintiff's last day of employment, his difficulties with welding did not arise from a vision problem, but arose from his repeated failure to follow directions from a superior. The Court stated that although plaintiff may have had a vision impairment, he was not legally disabled under the ADA.

The Court stated that even if plaintiff could show he was disabled, the evidence showed that he was not meeting defendant's legitimate expectations at the time he was terminated (failing to satisfy element three of the prima facie case as well).

Author's Note: The plaintiff did not assert that the defendant regarded him as disabled because of his vision impairment. Instead, plaintiff made this assertion as to his diabetes, which plaintiff did not mention in his EEOC charge. The charge contained no assertion that diabetes was reasonably related to the vision problems. As such, the plaintiff failed to timely comply with EEOC charge filing requirements.

***Gagnon v. McClatchy Newspaper, Inc., No. 3:17-cv-00382-FDW-DSC, 2018 U.S. Dist. LEXIS 40542 (W.D.N.C. March 13, 2018).**

The United States District Court for the Western District of North Carolina denied both defendant's motions for summary judgment.

Judge: Frank D. Whitney, Chief United States District Judge

Plaintiff alleged wrongful discharge, disparate treatment, and retaliation under the ADA against Defendant McClatchy Newspapers. Plaintiff was employed with defendant and suffered from vertigo issues. Defendant Jordan emailed human resources concerned with plaintiff's performance including her difficulty traveling because of her vertigo. Days later a performance improvement plan (PIP) was initiated, and it indicated that Plaintiff could be terminated after a 90-day period if plaintiff failed to improve her performance. The PIP required plaintiff to stop working from home and begin working from the Charlotte Observer office. After receiving the PIP, plaintiff contacted human resources to formally apply for an accommodation to work from home due to her disability. The 90-day PIP period ended on August 1, 2015 without any further discipline or termination.

On August 28, 2015, human resources granted plaintiff's accommodation to work from home. A few weeks later Defendant Jordan indicated he still wanted to terminate Plaintiff. Shortly after, defendant Jordan issued a letter acknowledged that the PIP ended and that Plaintiff had made improvement and that the PIP would extend four weeks and that plaintiff would be terminated if there was no significant improvement. After the four weeks, plaintiff was terminated. The letter terminating Plaintiff stated that she had made progress in some areas but the decline of the paper's "dealsaver" program and her below standard leadership were the grounds for her termination.

Defendant McClatchy moved for summary judgment on all claims and argued that Plaintiff's claims for wrongful discharge and disparate treatment under the ADA failed because Plaintiff failed to show satisfactory performance and a causal connection as required for a prima facie case. The Court did not lay out a rule statement for the prima facie cases. The Court noted, however, that the dealsaver program continued to decline after plaintiff was fired and the employees with responsibility for the program were not terminated.

The Court concluded that there was a dispute of material fact as to each of plaintiff's claims and therefore denied both summary judgment motions. Specifically, the Court stated that there were material questions of fact as to whether plaintiff was performing her job at a level that met her employer's legitimate expectations, whether Defendant McClatchy's justification for plaintiff's termination was pretextual, and whether a causal connection existed between plaintiff's termination and her request for a reasonable accommodation.

Author's Note: In an off-handed way, this decision discussed the plaintiff's state law claim for tortious interference with contract against defendant Jordan, plaintiff's supervisor.

Presumably, plaintiff claimed that by recommending her termination, Jordan “interfered” with her “contract” of employment. Though no indication exists that plaintiff was anything other than an at-will employee, Jordan argued that plaintiff failed to show that Jordan, a “non-outsider” to the contract, acted with legal malice. Because a question of fact existed as to whether plaintiff was performing her job satisfactorily, Jordan may have done a “wrongful act or exceed[ed] his legal right or authority,” thus raising an issue of fact on whether he acted with legal malice. This is a great case for plaintiffs’ attorneys that arguably supports an assertion of a tortious interference with contract claim against an individual supervisor.

***Hazel v. Caldwell Cty. Sch.*, No. 3:17-CV-00518, 2018 U.S. Dist. LEXIS 112762 (W.D.N.C. July 6, 2018).**

The United States District Court for the Western District of North Carolina granted in part, denied in part Defendants' Motion to Dismiss Plaintiff's claims under the ADA.

Judge: Graham C. Mullen, United States District Judge

Plaintiff was employed by Defendant Caldwell County Schools as an Exceptional Children's Teacher. As an EC Teacher, Plaintiff instructed studies with disabilities, maintained IEPs, and provided guidance and education to her students. Plaintiff suffers from hearing loss and regularly wears a hearing aid in each ear. Despite the hearing aids, Plaintiff suffers from significant hearing loss when substantial background noise is present and in larger and open areas. This hearing loss impacts her ability to hear and understand speakers. Plaintiff alleged that her hearing disability can be reasonably accommodated with the aid of devices. Specifically, Plaintiff claimed to have successfully managed the disability in the past with devices such as an FM Listening System and a Sound Neckloop.

Plaintiff alleged that she provided information concerning her disability and the accommodations when she was hired. She followed up approximately one month later, sending reports of her hearing loss and prior recommendations for accommodations to the appropriate parties including the principal, the director for students with disabilities, and the audiologist for Caldwell County Schools. Shortly after her request in September, Defendant arranged for an audiologist to observe Plaintiff in the classroom. Despite that observation, no one ever followed up with Plaintiff concerning her disability. In late January, the audiologist again observed Plaintiff in the classroom. On February 22, 2016, at the direction of her doctor, Plaintiff took one week's leave from work. Plaintiff alleged that this leave was due to symptoms stemming from the stress caused by months of teaching without the aids she requested, and from her supervisor's unwillingness to assist her or otherwise engage in the interactive process. On February 29, 2016, Plaintiff met with a representative with human resources. During that meeting, an HR representative allegedly told Plaintiff that her only option was retirement. Plaintiff subsequently retired. Plaintiff filed suit against Defendants alleging that Defendants failed to accommodate her disability and forced her into an involuntary retirement.

ADA

The Court stated that the ADA prohibits covered employers from discriminating against an otherwise qualified employee because of a disability. 42 U.S.C. § 12112(a). Qualified Individual is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). To establish a prima facie case for failure to accommodate under the ADA, a plaintiff must show: "(1) that he was an individual who had a disability within the meaning of the statute; (2) that the [employer] had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position; and (4) that the [employer] refused to make such accommodations." *Rhoads v. FDIC*, 257 F.3d 373, 387

n.11 (4th Cir. 2000) (citing *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999)).

The Court stated that elements one through three were clearly alleged and that the case hinged on element four. Defendants argued that Plaintiff did not allege that she requested specific accommodations. The Court disagreed with Defendants, pointing to Plaintiff's amended complaint which stated that "Plaintiff had successfully managed the disability for many years prior to working for [D]efendant, with reasonable and available devices such as an FM Listening System, and a Sound Neckloop On or around August 18, 2015, Plaintiff began working for [D]efendant. At the time of her hire, she provided information concerning her disability and the accommodations she required." The Court found that this statement properly alleged both the specific accommodations she required, and that Defendant had notice of the specific accommodations. The Court denied Defendants' Motion to Dismiss regarding Plaintiff's Disability Discrimination claim.

Retaliation in Violation of the ADA

The Court stated that the prima facie case for retaliation requires a plaintiff to prove: "(1) that she engaged in a protected activity; (2) that her employer took an adverse employment action against her; (3) that there was a causal link between the two events." See *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 271 (4th Cir. 2015) (citing *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405-06 (4th Cir. 2005)). The Court noted that constructive discharge can constitute an adverse employment action "when the record discloses that it was in retaliation for the employee's exercise of rights protected by the Act." *Munday v. Waste Mgmt. of N. Am.*, 126 F.3d 239, 243 (4th Cir. 1997) (quoting *Holsey v. Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984)). To allege constructive discharge, a plaintiff must show "both intolerable working conditions and a deliberate effort by the employer to force the employee to quit." *Johnson v. Shalala*, 991 F.2d 126, 131 (4th Cir. 1993) (quoting *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985)). The Court stated that although "the Fourth Circuit has cautioned against finding a constructive discharge upon the premise that the employer failed to afford the plaintiff reasonable accommodation," it is proper when an employee "present[s] evidence that the employer intentionally sought to drive him from his position." *Phillips v. Donahoe*, No. 1:11CV279, 2013 U.S. Dist. LEXIS 23623, 2013 WL 646816 at *12 (M.D.N.C. Feb. 21, 2013).

The Court found that Plaintiff sufficiently alleged that her working conditions were intolerable. The Court specifically noted Plaintiff's statement that "[when] substantial background noise is present . . . her hearing loss substantially impacts her ability to hear and understand speakers and constitutes a substantial limitation on her major life activity of hearing." The Court also pointed to Plaintiff's doctor's recommendation to take a leave of absence. Based on those reasons, the Court denied Defendants' motion to dismiss regarding Plaintiff's retaliation claim.

The Court granted in part, denied in part Defendants' Motion to Dismiss, dismissing Caldwell County Schools from the suit.

***Moore v. Wal-Mart Stores East, LP, No. 1:16-cv-362 2018, U.S. Dist. LEXIS 5882 (W.D.N.C. Jan. 12, 2018).**

The United States District Court for the Western District of North Carolina granted defendant's motion for summary judgment.

Judge: Max O. Cogburn, Jr., United States District Judge

Plaintiff worked for defendant Wal-Mart beginning in October 2007 as a trailer truck mechanic in defendant's Transportation Office in Shelby, North Carolina. In 2009, plaintiff was promoted to parts clerk. In his new role, plaintiff was responsible for safely and correctly organizing, storing, and managing parts. In doing so, plaintiff was sometimes required to lift and shelve products that could exceed fifty pounds in weight.

In June 2014, plaintiff suffered a stroke and was given a 90-day medical leave of absence. The stroke primarily impacted the left side of his body, including movement in his left arm and leg, facial drooping, slurred speech, and the loss of peripheral vision in his left eye. Plaintiff returned to work on September 2, 2014 after 82 days of medical leave and extensive physical and occupational therapy. Plaintiff's healthcare provider released him to return to his prior job of parts clerk without restrictions.

At the time of his return, plaintiff continued his rehabilitation and expected to continue improving, and his supervisors indicated they would do their best to accommodate him as long as he could reasonably perform most of his job functions. While plaintiff was still fully capable of performing much of his past work, certain issues arose. Supervisors observed plaintiff leaving tasks undone and not safely and properly stocking and shelving parts; however, they declined to reprimand plaintiff or otherwise discuss these issues with him, in light of his full release from his healthcare provider and belief that plaintiff would continue to improve.

In December 2015, plaintiff attended a meeting with his supervisors and a human resources manager. One of plaintiff's supervisors had noticed plaintiff fall backwards when attempting to enter a forklift, due to plaintiff's inability to properly grasp the forklift with his left hand and balance himself. Other observations similarly suggested that plaintiff's condition had not improved since returning, and reflected a possible impairment that would require accommodation. After plaintiff filed the necessary paperwork requesting an accommodation, defendant denied the request, saying that he was no longer able to perform the essential functions of his position. Instead, defendant offered plaintiff a job transfer. Two weeks later, an opening for the position of Driver Coordinator became available, which plaintiff was qualified to perform within his restrictions. However, plaintiff experienced difficulties adjusting to the new position and carrying out its functions, leading to various errors and ending in his termination in April 2016. As a result of these experiences, plaintiff filed suit against defendant and claims discrimination under the ADA.

Plaintiff alleged: (1) that he was denied a reasonable accommodation for his disability; and (2) he was wrongfully terminated due to his disability.

Whether plaintiff was denied a reasonable accommodation?

To support a prima facie claim for a failure to accommodate under the ADA, plaintiff must present evidence that could establish: (1) that he had a disability within the meaning of the statute; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position; and (4) that the employer refused to make such accommodations. If plaintiff successfully establishes these four elements, defendant may still avoid liability by showing “that the proposed accommodation will cause undue hardship in the particular circumstances.”

First, the Court considered whether plaintiff had a disability within the meaning of the statute. Under the ADA, a disability may take any of the following forms: (1) a physical or mental impairment that substantially limits one or more major life activities (the actual-disability prong); (2) a record of such an impairment (the record-of prong); or (3) being regarded as having such an impairment (the regarded-as prong). The list of major life activities was enlarged to include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”

Here, plaintiff suffered a stroke, and the resulting symptoms significantly impacted the left side of his body, including the use of his left arm, loss of peripheral vision in his left eye, and a need for a leg brace and cane. For the Court, there was no dispute of material fact that plaintiff was actually disabled within the meaning of the ADA and the ADAAA, as major life activities of performing manual tasks, seeing, walking, lifting, and working have all been substantially limited by plaintiff's stroke. The Court held that plaintiff was actually disabled within the meaning of the Act due to the impairments from the stroke he suffered and their well-established presence in the record.

Next, the Court considered whether defendant had notice of plaintiff's disability. Here, defendant was aware plaintiff had a stroke and of the accompanying limitations, as evidenced by measures defendant took to ease plaintiff's transition back to work and observations by plaintiff's supervisors. Thus, there was no question that defendant had notice.

The third step was to determine whether plaintiff could perform the essential functions of his position with a reasonable accommodation. To overcome a motion for summary judgment, plaintiff must present evidence from which a jury could infer that the proposed accommodation was reasonable on its face. This required an inquiry into the essential functions of the relevant position. Essential functions include only those functions “that bear more than a marginal relationship to the job at issue. At this step, plaintiff bore the burden of demonstrating that [the complainant] could perform the essential functions of his job.

The ADA specifically identifies two factors that inform whether a particular function is essential to a position. First, an employer's judgment of essential functions must be considered. Second, if a written job description was prepared ahead of advertising or interviewing candidates for the job, that description shall be considered evidence of the essential functions of the job. Regulations also provide guidance, identifying seven factors as evidence of an essential function: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) amount of time spent on the job performing the function; (4) consequences of not requiring the incumbent to perform the function; (5) terms of a collective bargaining agreement; (6) work experience of past incumbents in the job; and (7) current work experience of incumbents in similar jobs. None of these seven factors is dispositive, and not all will necessarily be relevant in a given matter. The list is also not exhaustive.

As for whether an accommodation is reasonable, reasonable accommodation means modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability to perform the essential functions of that position.

Plaintiff argued that, upon returning to his job after sufficiently recovering from his stroke, he performed his job for fifteen months before his supervisors expressed any kind of displeasure with his performance. Plaintiff argued that this demonstrates that defendant had accommodated him, and there was no reason they could not continue to do so. Further, plaintiff contended that he never had the opportunity to find potential reasonable accommodations, as defendant failed to engage him in an interactive process in order to find an accommodation for him.

The Court held that plaintiff did not meet his burden to survive summary judgment on this issue, as plaintiff failed to present any evidence that would let a jury find a reasonable or plausible accommodation existed that would allow him to carry out his job's essential functions.

Defendant contended that essential functions of plaintiff's job included the ability to lift up to 50 pounds and safely climb ladders to reach items on higher shelves, and that plaintiff is incapable of performing that job with or without reasonable accommodation. The Court agreed. The record included a job description that lists various responsibilities associated with the position, including that lifting up to 50 pounds is required. Plaintiff's supervisor affirmed that plaintiff's job regularly required lifting over 20 pounds without assistance and safely climbing using a "three-point contact" protocol. Plaintiff's testimony did nothing to contest this, and indeed acknowledges these functions. The Court thus found that these were essential functions, as the employer judges them to be so, a job description includes them, and multiple employees agreed that they were part and parcel of the position.

As for whether plaintiff could perform these essential functions, plaintiff's healthcare provider stated that, as a result of his stroke, plaintiff could no longer lift more than 20 pounds and that

he could not carry out the three-point safety protocol used while on a ladder when safely retrieving items from higher shelves, due to weakness along the left side of his body. The Court was not persuaded by plaintiff's argument that defendant had accommodated plaintiff for fifteen months, and that they must continue to do so. Uncontested evidence indicates that defendant allowed plaintiff to resume working while only performing certain functions of his job, with the understanding that plaintiff would return to full duty as his condition improved.

Plaintiff did not meet his burden of providing evidence that a reasonable accommodation would have allowed him to perform his job's essential functions, and he accepted an alternative accommodation that defendant was not necessarily required to offer. There was no dispute of material fact for a jury to resolve. The Court granted summary judgment on this issue in defendant's favor.

Whether plaintiff was terminated for his disability?

Next, the Court considered plaintiff's allegation that defendant discriminated against him by terminating him for his disability. The ADA provides that "no covered entity 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."

First, plaintiff must establish a prima facie case that his termination violated the ADA. To do so, plaintiff must prove: "(1) he was a qualified individual with a disability; (2) he was discharged; (3) he was fulfilling his employer's legitimate expectations at the time of discharge; and (4) the circumstances of his discharge raise a reasonable inference of unlawful discrimination. Whether plaintiff was fulfilling defendant's legitimate expectations at the time he was discharged is a matter that was not addressed in the previous analysis.

To show that he was meeting defendant's legitimate expectations, plaintiff must submit probative proof. Probative proof is evidence that demonstrates that plaintiff was qualified in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative. In determining whether plaintiff was performing his job satisfactorily, it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff.

Here, plaintiff did not demonstrate that he was doing his job well enough to meet defendant's legitimate expectations. Plaintiff did not contest defendant's evidence of his repeated mistakes as Driver Coordinator, or that defendant showed leniency throughout the process by providing him additional training and counseling, and by counting groups of mistakes together instead of individually in order to give plaintiff even more time to adjust to the position. Indeed, plaintiff admitted in his deposition to the errors and mistakes identified by defendant, and that his termination was the result of poor performance.

Plaintiff also did not contest that defendant's expectations for plaintiff as Driver Coordinator were patently legitimate. The undisputed evidence presented shows that defendant has terminated only two other Driver Coordinators in the past three years, and that one such person terminated was terminated for the same type of errors as plaintiff. Ultimately, plaintiff offered no evidence to create a dispute of material fact.

Even if plaintiff did establish a prima facie case of discrimination, defendant clearly satisfied its burden by presenting evidence that plaintiff was reassigned and terminated for nondiscriminatory reasons. To rebut this showing, plaintiff had to come forward with specific evidence that "the employer's proffered explanation is unworthy of credence. Alternately, plaintiff could show that other employees who were similarly situated, who did not suffer from a disability, were treated more favorably. Plaintiff did neither.

By admitting that he could not lift more than 20 pounds, he admitted that he could not perform an essential function of the Parts Associate job, which unequivocally justified the reassignment. Plaintiff also admitted his repeated mistakes in the position of Driver Coordinator, which further supported defendant's proffered explanation. Finally, defendant's records indicated they terminated two other people from the position of Driver Coordinator over the past three years; neither were disabled or requested an accommodation and one was terminated for similar reasons to plaintiff, further indicating plaintiff's inability to create a dispute of material fact as to whether pretext existed. Once again, despite claiming pretext exists, plaintiff's only evidence is that defendant ceased providing plaintiff with lighter duty after fifteen months. As established, this did not constitute discrimination on the part of defendant.

Defendant's motion for summary judgment was granted and the action was dismissed with prejudice.

Author's Note: As we see more ADA reasonable accommodation cases emerge, this case provides a good review of the law.

ADA, FMLA, and REHABILITATION ACT

***Boone v. Bd. Of Governors of the Univ. of N.C.*, No. 1:17CV113, 2018 U.S. Dist. LEXIS 54310 (M.D.N.C., March 30, 2018)**

The United States District Court for the Middle District of North Carolina granted Defendant's motion to dismiss as to Plaintiff's failure-to-accommodate claim under Title II of the ADA and Plaintiff's FMLA interference claim. Defendant's motion to dismiss was denied as to Plaintiff's failure-to-accommodate claim under the Rehabilitation Act and Plaintiff's FMLA retaliation claim.

Judge: Loretta C. Biggs, United States District Judge

Plaintiff was employed as a campus police officer for Defendant UNC. Plaintiff was raped by a supposed friend whom she was visiting in South Carolina. As a result, plaintiff was diagnosed with post-traumatic stress response, anxiety, and depression. Plaintiff told a co-worker that her head wasn't in the game which was reported up the chain of command. Plaintiff's superiors called her in for a meeting and suggested to Plaintiff that she take FMLA. A week later Plaintiff was placed on investigatory status and had to undergo a Fitness for Duty examination. After the exam, she was notified that she was no longer under investigation and could submit her FMLA paperwork which was subsequently approved. Plaintiff was on leave from September 28, 2015 to December 18, 2015.

On December 17, 2015, Plaintiff called her chief regarding returning to work and he told her that she could return after the new year. On January 4 2016, she notified Defendant that she was cleared by her doctor to return to work and provided a doctor's note certifying her fitness for duty. UNC required her to undergo another Fitness for Duty examination and she was later notified that she was unfit to return to work. Plaintiff alleged that she asked Defendant for leave or light duty and submitted paperwork to Defendant certifying that she had a disability related to mental health brought on by personal trauma. Defendant demanded that Plaintiff provide documents from her doctor, Plaintiff's doctor claimed she was fit to return to work and would not certify that she was disabled. Plaintiff was subsequently terminated.

Failure to Accommodate under Title II of the ADA

The Court stated that because the 4th Circuit has explicitly held that Title II of the ADA does not apply to public employment discrimination (*Reyazuddin v. Montgomery Cty.*, 789 F.3d 407 (4th Cir. 2015), Plaintiff failed to state a claim.

Failure to Accommodate under the Rehabilitation Act

The Court found that Plaintiff plausibly alleged facts for each element of failure to accommodate. With regard to the first element, that Plaintiff was an individual who had a disability, plaintiff offered evidence that she was diagnosed with posttraumatic stress response, anxiety, and depression which significantly impaired her ability to participate in major life

activities like working. For the second element, that the employer had notice of Plaintiff's disabilities, Plaintiff alleged that she submitted paperwork to UNC certifying that she had a disability related to mental health brought on by a personal trauma. As to the third and fourth elements, that with reasonable accommodation Plaintiff could perform the essential functions of the position and that the employer refused to make such accommodations, Plaintiff stated eight different allegations in relation to these elements. Specifically, that Plaintiff requested light duty, that UNC had enough officer to cover Plaintiff's duties without significant burden, and that UNC didn't engage in any sort of process to determine if the accommodation was feasible.

Retaliation under the FMLA

The Court found that Plaintiff alleged sufficient facts to plausibly state a retaliation claim under FMLA. The Court focused on the third element of Plaintiff's case, that the adverse action was causally connected to Plaintiff's protected activity. Plaintiff's complaint alleged that her FMLA ended December 18, 2015 and that she was terminated upon her attempted return to work on or around January 22, 2016. The Court inferred that Plaintiff was terminated approximately two months or less following the end of her FMLA leave, and the Court determined that that was sufficiently close in temporal proximity to satisfy element three.

Interference under the FMLA

The Court held that Defendant did not violate the FMLA when it chose to not reinstate Plaintiff following the results of her mental health evaluation showing that she was unfit to return to work because an employee who remains unable to perform an essential function of the position because of a physical or mental condition is not entitled to job restoration at the end of her FMLA. In addition, the Court noted that Plaintiff's right to job restoration under the FMLA expired at the end of her FMLA leave period. Even though Plaintiff was granted additional leave beyond the FMLA period, her job restoration rights under the FMLA did not extend.

ADA, FMLA, REDA, and NCEEPA

Egler v. Am. Airlines, Inc., No. 5:17-CV-73-FL, 2018 U.S. Dist. LEXIS 28210 (E.D.N.C. Feb. 21, 2018).

The United States District Court for the Eastern District of North Carolina granted Defendant's motion to dismiss as to Plaintiff's ADA claim, FMLA claim, REDA claim, and NCEEPA claim.

Judge: Louise W. Flanagan, United States District Judge

Plaintiff is female and worked for defendant for 25 years prior to her termination. Plaintiff was absent from work for the following four time periods: November 2-5, 2014; November 17-22, 2014; December 17-24, 2014; and January 16-21, 2015. Plaintiff submitted FMLA Leave of Absence Certification forms, executed by her treating physician, to the appropriate medical department of defendant for these leaves of absence. Defendant approved these leave forms. Plaintiff's alleged that her medical conditions caused substantial limitation upon her major life activities. While on leave, defendant asked plaintiff for additional documentation, and plaintiff secured proper documentation of her disability from her treating physician. Plaintiff further notified defendant that she intended to seek further medical treatment. According to the complaint, defendant falsely alleged that plaintiff had engaged in misrepresentation and dishonesty in her submissions of FMLA documents, which plaintiff denied. Defendant subsequently terminated plaintiff.

ADA Claim

Plaintiff's claim failed because she did not allege sufficient facts permitting an inference that she had a disability. Plaintiff did not allege what medical conditions she had, what limitations were caused by the medical conditions, or what life activities are substantially limited by the medical conditions. The Court noted that Plaintiff merely parroted the language of the statute which was insufficient to meet the pleading requirement under Iqbal.

Plaintiff's claim also failed because she did not allege sufficient facts permitting an inference that Defendant discharged Plaintiff due to her disability. Plaintiff stated in the complaint only that Defendant discharged Plaintiff by falsely accusing her of improperly submitting FMLA document. In addition, by not alleging the nature of Plaintiff's disability the Court was left to speculate on any causal connection between the disability and the termination. The Court again noted that merely parroting statute language is insufficient.

REDA

Plaintiff's claim under REDA was dismissed because: (1) Plaintiff failed to allege any facts permitting an inference that she engaged in conduct protected by REDA; (2) Plaintiff failed to identify any statutory rights exercised under REDA; (3) Plaintiff did not allege she was issued a right-to-sue by the state Commissioner of Labor.

NCEEPA

Plaintiff's NCEEPA claim was dismissed for the same reasons stated above regarding Plaintiff's federal ADA claim, that plaintiff failed to allege facts giving rise to a plausible inference that defendant discriminated against Plaintiff due to disability.

ADA, FMLA, and STATE CLAIMS

***Stairwalt v. TIAA*, 3:17-cv-00220-MOC-DSC, 2018 U.S. Dist. LEXIS 132762 (W.D.N.C. Aug. 7, 2018).**

The United States District Court for the Western District of North Carolina granted Defendants' Motion for Summary Judgment on Plaintiff's FMLA, ADA, IIED, and NIED claims.

Judge: Max O. Cogburn Jr., United States District Judge

In 2012, Plaintiff began working at Teachers Insurance and Annuity Association of America ("TIAA"). In 2015, Plaintiff was hospitalized and diagnosed with diverticulitis. He remained hospitalized for ten days then returned to work. In September, Plaintiff underwent scheduled colon surgery. A few days before his surgery, Plaintiff met with Director, Mr. Swartout. Plaintiff complained that, during that meeting, Mr. Swartout told Plaintiff that "he had been hitting the ball out of the park and he wasn't really sure what to do with [him]" because he was such a high performer. While out on approved FMLA leave, Mr. Swartout called Plaintiff and offered him the position of interim manager of the unit. Plaintiff accepted the position. In December, Plaintiff collapsed at work and took paid time off for several days. He returned to work without restriction.

In February 2016, Mr. Swartout emailed Plaintiff asking if he had any idea what his schedule would be over the next few weeks or months. Plaintiff then berated his manager by email, forwarding it to the entire team. Days later, Plaintiff again emailed Mr. Swartout and the entire team, berating Mr. Swartout relating to questions about Plaintiff's work schedule. Plaintiff was not disciplined for this conduct. In January or February 2016, Plaintiff received a performance evaluation which resulted in him receiving a \$6,000 pay increase and a \$24,000 bonus. Plaintiff continued to work, taking intermittent leave as needed, until Plaintiff went out on continuous FMLA leave and again received short-term disability. Plaintiff's continuous leave continued until doctors released him to return to work. During this time, he was never disciplined for any absences and never lost pay. Upon Plaintiff's return to work in June 2016, he worked part-time for three weeks before returning to full-time work, as recommended by one of his physicians. In mid-August 2016, Plaintiff received an employment offer and gave TIAA his two-week notice. Plaintiff filed a claim alleging: 1) interference with or discrimination under the FMLA, (2) failure to accommodate and retaliation in violation of the ADA, (3) IIED, (4) NIED, and (5) punitive damages.

Interference with or discrimination under the FMLA

To establish an interference claim under the FMLA, the plaintiff bears the burden proving that: (1) he is entitled to an FMLA benefit; (2) his employer interfered with the provision of that benefit; and (3) that interference caused harm. *Adams v. Anne Arundel Cty. Pub. Sch.*, 789 F.3d 422, 427 (4th Cir. 2015). The Court noted that such a claim offers no relief "unless the employee has been prejudiced by the violation." *Ragsdale v. Wolverine World Wide, Inc.*, 535

U.S. 81, 89 (2002). The Court found that Plaintiff was entitled to an FMLA benefit, which he received, but Plaintiff failed to meet his burden on the second and third prongs.

First, the Court determined that TIAA did not interfere with Plaintiff's FMLA rights. For an interference claim to be viable, the plaintiff must show that FMLA benefits were actually withheld. *Ross v. Gilhuly*, 755 F.3d 185, 192 (3d Cir. 2014). Here, all of Plaintiff's FMLA leave requests were approved by TIAA. The Court noted that Plaintiff's admission that none of his FMLA leave requests were denied is sufficient alone to defeat his claim for interference of his FMLA rights. Plaintiff was allowed intermittent and continuous leave, as instructed by his doctors until his voluntary resignation. During that time, TIAA approved every absence that Plaintiff had under the FMLA relating to his serious health condition and medical appointments. In response to Plaintiff's complaints of constant pressure due to the workload imposed on him despite his health condition, the Court stated that Plaintiff was never disciplined for failing to complete his work and he suffered no pay loss. Additionally, TIAA offered Plaintiff the interim manager position and a raise. Therefore, the Court found that TIAA did not interfere with Plaintiff's FMLA rights.

Second, the Court determined that Plaintiff did not suffer any harm as a result of any alleged interference with his FMLA rights. The Court pointed out that TIAA approved every absence that Plaintiff requested, Plaintiff did not lose any compensation or benefits, and he was compensated for all the days he took off. The Court addressed Plaintiff's complaint that TIAA forced him to use vacation days before his short-term disability began paying him by stating that under the FMLA "an employee may be required to exhaust accrued sick, personal, and vacation time as part of the twelve-week leave." *Cleary v. Nationwide Mut. Ins. Co.*, 9 F. App'x 1, 4 n.4 (4th Cir. 2001) (per curiam) (citing 29 U.S.C. § 2612(d)(2)(A)). The Court also noted that employers are permitted to verify the claimed medical condition, to assess how long the employee might be out of work, and to fashion the best environment for the employee upon return to the workplace. Based on this analysis, the Court found that Plaintiff's complaint that his director questioned or sought additional information about some of his leave requests was misplaced. The Court determined that TIAA did not interfere with Plaintiff's FMLA rights.

Failure to accommodate and retaliation in violation of the ADA

To establish a claim for disability discrimination, a plaintiff must establish a prima facie case of discrimination by showing: (1) he is within the ADA's protected class; (2) he suffered an adverse employment action; (3) at the time of the adverse employment action, he was performing his job at a level that met his employer's legitimate expectations; and (4) the adverse employment action occurred under circumstances giving rise to a reasonable inference of unlawful discrimination. See *Williams v. Brunswick Cty. Bd. of Educ.*, 725 F. Supp. 2d 538, 543 (E.D.N.C. 2010), *aff'd*, 440 F. App'x 169 (4th Cir. 2011) (per curiam) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Plaintiff argued that he requested an accommodation which was not granted. Specifically, Plaintiff stated he lost his vacation days when he took days off work due to his health problems, which was against company policy, and that his director had too much control in deciding when Plaintiff's doctors' appointments would be.

In response to Plaintiff's claims, the Court stated that Plaintiff never explained what adverse employment action he allegedly suffered and that the record was devoid of such an action. He was provided with leave (continuous and intermittent) on multiple occasions, and later voluntarily quit. Plaintiff did not even receive disciplinary actions when he berated his director in group emails to the team. Instead, he received a significant merit pay increase and bonus totaling \$30,000, well after TIAA was aware of Plaintiff's medical issues and leave requests. Additionally, Plaintiff did not identify a single instance in which he requested time off and was denied. The Court further addressed Plaintiff's complaint that work reassignments would have helped him by stating that assigning Plaintiff's work to another employee is not a reasonable accommodation within the ADA. The Court granted Summary judgment on Plaintiff's ADA claim.

IIED

The Court stated that the essential elements of an IIED claim are: (1) extreme and outrageous conduct by the defendant (2) which is intended to and does in fact cause (3) severe emotional distress. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22 (1992). The Court noted that a claim for IIED exists when a defendant's conduct exceeds all bounds usually tolerated by decent society. *Watson v. Dixon*, 130 N.C. App. 47, 52-53, 502 S.E.2d 15 (1998). Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308 (1985). The behavior must be more than mere insults, indignities, threats, and plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 354, 595 S.E.2d 778 (2004).

The Court found that Plaintiff did not present evidence showing extreme and outrageous conduct by Defendant. Plaintiff merely presented evidence of workplace disagreements, discussions, and directions with and from his supervisor, things that occur in every job and in every workplace. The Court found that nothing in the record reflected that Defendant engaged in intentional, extreme, and outrageous behavior that would support a claim for IIED. The Court pointed out that "what is unusual here is the quantum of evidence showing that plaintiff was *not* mistreated by defendants, but was treated incredibly well. The evidence before the Court shows that: plaintiff's director complimented plaintiff for being a high performer; plaintiff was offered the interim manager position while he was on leave; defendants approved plaintiff's requests for intermittent and continuous leave; defendants gave plaintiff a favorable performance evaluation rating; and plaintiff received a bonus and merit increase totaling \$30,000." The Court found none of those actions rose to the level of extreme and outrageous conduct. The Court granted Summary Judgment on Plaintiff's IIED claim.

NIED

The Court stated that to maintain a cause of action for NIED, a plaintiff must show that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress and (3) the conduct did in fact cause the

plaintiff severe emotional distress. *McAllister v. Ha*, 347 N.C. 638, 645, 496 S.E.2d 577 (1998). Without evidence of negligence, a Plaintiff cannot maintain a claim for NIED. Plaintiff argued that TIAA was negligent in not providing information to Plaintiff's director about legal requirements under the ADA and FMLA, and that Plaintiff's director was negligent in not speaking with the Human Resources about the statutes. The Court found that Plaintiff's claim for NIED failed because he asserted intentional rather than negligent conduct. Further, Plaintiff did not show that TIAA breached any legal duty owed to him. The Court granted Summary Judgment on Plaintiff's NIED claim.

The Court granted Defendants' Motion for Summary Judgment on Plaintiff's NIED claim.

The Court granted Defendant's Motion for Summary Judgment in its entirety as to all claims.

ADA, REDA, and WDPP

***White v. Buckeye Fire Equip. Co., No. 3:17-cv-404-MOC-DSC, 2018 U.S. Dist. LEXIS 85761 (W.D.N.C. May 21, 2018).**

The United States District Court for the Western District of North Carolina granted Defendant's motion for summary judgment.

Judge: Max O. Cogburn, Jr., United States District Judge

Plaintiff is a former employee of defendant, where she was a welder. In September 2015, plaintiff partially amputated her finger on a disc grinder. When she returned to work, she had lifting restrictions, and she asked if any accommodations were available. Defendant placed plaintiff in a different department to accommodate her restrictions. Plaintiff had many disciplinary problems, and was given six disciplinary actions in the first year of employment. Later, plaintiff required surgery on her finger and after the surgery was again on a weight restriction, but this time couldn't lift more than five pounds. There were no positions that fit this restriction, so placed plaintiff on workers' compensation, and she received full benefits. After plaintiff returned to work, additional behavior issues arose, and she was terminated.

Failure to Accommodate under the ADA

The Court stated that to succeed on such a claim, plaintiff must show that she was disabled within the meaning of the ADA, that defendant had notice of the disability, that with a reasonable accommodation she could perform her position's essential functions, and that defendant refused to make such accommodations. *See Wilson v. Dollar General Corp.*, 717 F.3d 337, 345 (4th Cir. 2017)

Plaintiff argued that defendant failed to accommodate her during the period where she was limited to lift five to seven pounds. The Court held that plaintiff failed to identify any possible reasonable accommodation. Plaintiff had three main arguments (1) that other employees could have provided lifting assistance to plaintiff so she could do another job; (2) that she could have filled other positions; and (3) that defendant neglected to properly cooperate engage with plaintiff throughout the process and that both parties are supposed to work together to find a reasonable accommodation. The Court struck down each assertion.

Regarding argument one, the Court stated that the ADA does not require an employer to make an accommodation that would impact other employees in their ability to perform their job duties, such as creating more work. *Rudolph v. Buncombe Cty. Gov't*, 846 F. Supp. 2d 461, 474 (W.D.N.C. 2012). Regarding the second argument, the Court stated that plaintiff bore the burden of demonstrating the existence of a vacant position for which she was qualified and plaintiff did not meet this burden because in plaintiff's deposition, she admitted that she did not know what positions were available at the time of her restrictions. Regarding argument three, the Court declined to engage in any analysis of how interactive or cooperative defendant

was with plaintiff, as an employer who fails to engage in the interactive process will not be held liable if the employee cannot identify a reasonable accommodation that would have been possible. See *Wilson v. Dollar General Corp.*, 717 F.3d 337, 345 (4th Cir. 2017). Here, the plaintiff failed to do so.

Retaliation

Plaintiff relied solely on defendant's alleged failure to accommodate her as an adverse employment action. The Court stated that plaintiff's failure to accommodate claim failed as a matter of law because there was no reasonable accommodation available, and plaintiff was provided workers' compensation benefits for the duration of her time away. The Court stated that "other colleagues of this Court have found that retaliation claims are improper when they rely on an alleged failure to accommodate as an adverse employment action, as they leave plaintiffs able to double dip by asserting both ADA failure-to-accommodate and retaliation claims." *McClain v. Tenax Corp.*, 2018 U.S. Dist. LEXIS 6691, at *18-20 (S.D. Ala. 2018). Therefore, the retaliation claim failed.

REDA

The Court found that plaintiff failed to sufficiently exhaust her administrative remedies. Plaintiff's first NCDOL charge was filed in March of 2016, and while the alleged workers' compensation and termination claims did not arise until April and May of 2017, NCDOL did not issue a right-to-sue letter on any charges until May 23, 2017. The April workers' compensation claim and May termination claim appeared to be based on entirely different sets of facts and occurrences than the alleged misconduct that formed the basis of the initial NCDOL charge.

The Court further stated that even if plaintiff's REDA claim was sufficiently similar to consider her administrative remedies exhausted, plaintiff's own testimony demonstrated that her termination was not in retaliation for her NCDOL filings. Plaintiff explicitly stated that she believed defendant terminated her because she knew improper things about other employees, and not because of any causal connection to her NCDOL charges.

Wrongful Discharge in Violation of Public Policy

Plaintiff abandoned her NCWHA, NCPDPA, NCEEPA, and PSHA claims. The Court stated that the only claim left was plaintiff's REDA claim which the Court already ruled would not survive summary judgment.

Author's Note: Given the rise in failure to accommodate cases, the Court's view in this case is instructive. As noted above, a failure to reasonably accommodate a plaintiff cannot be the adverse action in a retaliation claim, as this would allow a plaintiff to "double dip."

ADEA, LIBEL, SLANDER, WDP, IIED, AND NEID

Hall v. Charter Communs., LLC, No. 3:17-CV-00497-GCM 2018, U.S. Dist. LEXIS 15720 (W.D.N.C. Jan. 31, 2018).

The United States District Court for the Western District of North Carolina granted defendant's motion for partial dismissal of plaintiff's complaint and dismissed plaintiff's first, third, fourth, and fifth causes of action.

Judge: Graham C. Mullen, United States District Judge

Plaintiff was employed by Defendant Charter Communications, LLC. At the time of his termination from employment, Plaintiff was a Fleet Market Manager. Plaintiff alleged that unnamed agents/employees of Charter informed an unidentified co-worker of Plaintiff's that Plaintiff was being investigated for accepting kick-backs and converting company assets. Plaintiff alleged that these two agents/employees of Defendant made false statements and used such statements to subsequently wrongfully terminate Plaintiff's employment on the basis of his age.

Plaintiff alleged: (1) wrongful harassment and termination in violation of public policy based on his age; (2) wrongful harassment and termination in violation of the ADEA; (3) slander and libel; (4) intentional infliction of emotional distress; and (5) negligent infliction of emotional distress. Defendant filed a motion to dismiss Plaintiff's First, Third, Fourth and Fifth Causes of Action for failure to state a claim as a matter of law.

Plaintiff's first cause of action alleged harassment in violation of North Carolina public policy. Plaintiff alleged that in harassing and ultimately terminating Plaintiff in whole or in part because of his age, Defendant violated the public policies of the State of North Carolina. Such a claim failed as a matter of law because both North Carolina state and federal Courts have repeatedly found that there is no separate cause of action for harassment under the North Carolina Equal Employment Practices Act. Only discharges are actionable under that law.

Plaintiff's third cause of action was for defamation. To raise an actionable claim of defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person.

The Court held that the plaintiff made the following vague and conclusory allegations in support of his defamation claims: (1) Plaintiff asserted that these unnamed agents or employees used slanderous innuendo and false statements about the Plaintiff when interviewing Plaintiff and his coworkers in order to cast Plaintiff in a false light; (2) Plaintiff referenced alleged statements made by unnamed agents or employees of Defendant to Plaintiff's co-worker regarding Defendant's investigation into Plaintiff's acceptance of kick-backs and conversion of company assets; (3) Plaintiff alleged that Charter falsely alleged to Plaintiff that he had violated Company

Policies and Company Standards for Conducting Business; (4) Plaintiff alleged Charter committed libel in a written statement with the North Carolina Unemployment Commission.

To the extent Plaintiff's defamation claim was based upon communications made in the course of the ESC proceeding, the claim is barred by an absolute privilege and was dismissed as a matter of law. North Carolina Courts have long held that unemployment proceedings constitute judicial proceedings and, therefore, statements made in the course of such proceedings are absolutely privileged and cannot support a defamation claim as a matter of law.

With regard to Plaintiff's remaining allegations, in order to allege a defamation claim, the Plaintiff must show: (1) that the defendant made false, defamatory statements; (2) of or concerning the plaintiff; (3) which were published to a third person; and (4) which caused injury to the plaintiff's reputation. Plaintiff failed to sufficiently allege the first and third elements of his defamation claim.

The Court found that he failed to identify with any specificity the purported statements he contends are defamatory, warranting dismissal of his defamation claim as a matter of law. While Plaintiff made vague and conclusory references to alleged slanderous innuendo and false statements made during interviews with Plaintiff and his co-workers, Plaintiff provided no notice to Defendant (or this Court) of what specific statements Plaintiff actually contended were defamatory or the circumstances surrounding their publication.

Plaintiff failed to assert facts showing publication of any allegedly false statements. The only statements Plaintiff set out with any indicia of particularity concerned Defendant's explanation to Plaintiff for the termination of his employment. To the extent Plaintiff purported to allege that Defendant's explanation to Plaintiff for the termination of his employment constituted false statements, absent from the Complaint was any indication that such statements were published to a third party outside of the employment relationship.

Assuming Plaintiff's assertion that Charter agents/employees informed the Plaintiff's coworker they were investigating whether Plaintiff accepted kick-backs and converted company assets. Plaintiff failed to allege the falsity of this statement. The Complaint was devoid of any facts showing that Plaintiff was not being investigated for the same, or that the information allegedly shared with the coworker was false. As a matter of law, Plaintiff could base a claim of defamation on true statements.

Plaintiff's fourth cause of action alleged IIED. In order to state a claim for IIED, a plaintiff must allege that (1) the defendant's conduct was extreme and outrageous, and (2) the conduct was intended to and does in fact cause severe emotional distress. With respect to the first element, the initial determination of whether the alleged conduct was intentional, extreme and outrageous enough to support an IIED claim is a question of law. To be considered extreme and outrageous the conduct alleged must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. North Carolina Courts have set a high threshold for a

finding that conduct meets this standard. This threshold excludes a great deal of conduct that is undoubtedly very bad and is properly considered reprehensible. Mere insults, indignities, and threats are not enough to rise to the level of extreme and outrageous conduct. Allegations of discriminatory treatment, without more, generally do not constitute extreme and outrageous conduct necessary for an IIED claim as a matter of law.

The Court held that as a matter of law that Plaintiff's allegations did not meet the high threshold of extreme and outrageous conduct and dismissed the claim.

Plaintiff's fifth cause of action was for NIED. Plaintiff must establish the following: (1) Defendant negligently engaged in conduct; (2) it was reasonably foreseeable that such conduct would cause Plaintiff severe emotional distress; and (3) the conduct did in fact cause Plaintiff severe emotional distress. Implicit within these elements is a requirement that the defendant was negligent with respect to a legal duty owed to the plaintiff. Courts consistently dismiss NIED claims where they are based solely on intentional conduct such as claims of discrimination and retaliation, as opposed to negligent conduct. When the plaintiff's complaint alleged acts of discrimination that are intentional in nature, and simply concludes that the acts were committed negligently, it was insufficient to state a claim for negligent infliction of emotional distress.

Plaintiff did nothing more than allege in conclusory fashion that Defendant negligently engaged in conduct that was reasonably foreseeable to cause him emotional distress. The remainder of Plaintiff's Complaint addressed intentional acts on the part of Defendant. This was insufficient to meet the pleading standards for a claim of negligent infliction of emotional distress.

Defendant's Motion for Partial Dismissal of Plaintiff's Complaint was granted and Plaintiff's First, Third, Fourth and Fifth Causes of Action were dismissed with prejudice.

FAIR LABOR STANDARDS ACT (FLSA)

***Acosta v. Del Sol Partnership 2, No. 5:16-CV-231-BO, 2018 U.S. Dist. LEXIS 24627 (E.D.N.C. Feb. 15, 2018).**

The United States District Court for the Eastern District of North Carolina granted Plaintiff's motion for Summary Judgment on Plaintiff's claims under the Fair Labor Standards Act.

Judge: Terrence W. Boyle, United States District Judge

Defendant Del Sol is a corporation based in N.C. and owned by Defendant Pablo Salgado. Salgado owns two Del Sol Mexican restaurants through the Del Sol corporation. The Wage and Hour Division of the Department of Labor began an investigation of Defendants' pay practices. Based on the investigation, it was determined that fifteen employees were owed back wages. The Secretary of Labor filed suit on May 5, 2016, alleging violations of multiple provisions of the FLSA.

On February 15, 2017, Defendants' counsel filed a motion to withdraw from representation, which was granted. Defendant Del Sol was directed to retain new counsel. On September 22, 2017, Plaintiff moved for summary judgment. Plaintiff's summary judgment was unopposed as Defendants did not appear and did not answer Plaintiff's request for admissions (The Court, citing *Custer v. Pan American Life Insurance Company*, stated that a district Court bears the responsibility of carefully reviewing an unopposed motion, to ensure that summary judgment is in fact warranted as a matter of law despite the opposing party's failure to respond. 12 F.3d 410, 416 (4th Cir. 1993)).

The Court granted Plaintiff's motion for summary judgment, finding that Defendants violated the overtime, minimum wage, and recordkeeping provisions of the FLSA. The Court stated that the Fair Labor Standards Act provides certain wage-related guarantees for covered employees. Covered employees must be paid above a certain minimum wage and compensated for overtime hours at one and a half times the normal hourly rate. 29 U.S.C. §§ 206-207. Further, covered employers are required to keep complete and accurate payroll and timekeeping records. 29 U.S.C. §§ 211(c) and 215(a)(5). When employers violate these provisions, they can be liable for back wages and liquidated damages, as well as be enjoined from continued violations. 29 U.S.C. § 216(c) and 217. Affected employees can bring suit under the FLSA, or an action can be brought by the Secretary of the Department of Labor, as was done here. See 29 U.S.C. §216(b)-(c). The Court stated that for summary judgment to be appropriate, there must be no genuine issue of material fact: (1) that Defendants Salgado and Del Sol are a covered employer under the Act; (2) that the employees in question are covered employees under the Act; (3) that violations occurred; and (4) that relief is warranted.

Covered Employers

First, the Court found that Defendants were “employers.” The Court defined employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). The Court noted that the FLSA is expansive and one who has “substantial control of the terms and conditions” of the work is an employer. *Falk v. Brennan*, 414 U.S. 190, 195, 94 S. Ct. 427, 38 L. Ed. 2d 406 (1973). To determine whether Defendant Pablo Salgado was an employer, the Court looked at his level of control over the operations, including whether he had ultimate hiring and firing authority and how involved he was in the daily operations of the business. Since he had ultimate hiring and firing authority and was deeply involved in the daily operations, the Court determined that he was an employer. Next, the Court determined that Del Sol was an employer. The Court noted that it is not always the case that a corporation is an employer under the FLSA merely because an officer of that corporation is one. *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1162 (11th Cir. 2008). Here however, Del Sol was indistinguishable from Pablo Salgado. Salgado owned 99% of Del Sol and had plenary authority to make decisions related to wages and hours. The Court found that this level of control made Del Sol an employer as well.

Covered Employees

Next, the Court determined that the employees were covered under the FLSA. The Court stated that there are two lanes of coverage: individual and enterprise. Individual coverage applies to individual employees who themselves directly affect interstate commerce. *McLeod v. Threlkeld*, 319 U.S. 491, 494, 63 S. Ct. 1248, 87 L. Ed. 1538 (1943). Enterprise coverage applies to employees who work for an enterprise “engaged in commerce or in the production of goods for commerce” among the several states or between a state and another place. 29 U.S.C. §§ 207(a)(1), 203(b). The Court noted that regular interstate credit card transactions constitute interstate commerce for purposes of the Act. See Opinion Letter, Fair Labor Standards Act (FLSA), 1999 WL 1002373 (Mar. 5, 1999). The Court determined that the restaurants are an enterprise that affects interstate commerce, as the restaurants accepted major credit cards. The employees, who worked as cooks, kitchen helpers, dishwashers, servers and managers, were directly involved in the functioning of the enterprise as required by law. See *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429, 75 S. Ct. 860, 99 L. Ed. 1196 (1955). Therefore, the restaurant employees were covered under the FLSA.

Violations of the FLSA

Next, the Court found that Defendants violated the overtime, minimum wage, and recordkeeping provisions of the FLSA. First, the Court stated that Defendants paid employees the same wage no matter how many hours they worked (instead of paying time and a half for more than forty hours of work). Second, the Court determined that Defendants’ “tipped” employees only worked for tips, which violates the FLSA. The FLSA has specific rules regarding compensation for employees who receive tips. 29 U.S.C. § 203(m). Employers must pay employees at least \$2.13 an hour in cash, but the difference between that and the required minimum wage must be made up by tips. *Trejo v. Ryman Hospitality Properties, Inc.*, 795 F.3d 442, 447 (4th Cir. 2015). Third, the Court found that Defendants violated the FLSA by failing to keep records of the tips its servers earned or use a payroll system. The lack of records violated

the FLSA because employers are required to keep accurate and complete payroll and timekeeping records.

Relief

The Court awarded the Plaintiffs \$72,442.60 in back pay. The Court stated that when employer records do not exist, the plaintiff must show by just and reasonable inference that the wages paid did not meet the standards of the FLSA. *See Martin v. Deiriggi*, 985 F.2d 129, 132 (4th Cir. 1992). The Court used the Wage and Hour Investigator's calculations of the overtime and minimum wages owed to the employees based on employee interviews. The Defendants never responded to the calculations. The Court found that the tipped employees were owed \$7.25 an hour for every hour worked during the recovery period. Because Defendants did not pay any cash wage to their tipped employees or inform them that their tips would be used to offset its' minimum wage obligations, no tip credit could be applied against those employees' back wages.

The two-year statute of limitations under the FLSA yields to a three-year statute of limitations upon a finding of "willfulness." This occurs when an employer "either knew or showed reckless disregard of whether its conduct was prohibited by the FLSA." The Court found that Pablo Salgado deliberately tried to conceal his failure to follow the FLSA. He instructed his employees not to cooperate with the investigation and underreported the number of his employees. Because his conduct was willful, the three-year statute of limitations applied and allowed back pay to be calculated accordingly.

The Court awarded the Plaintiffs \$72,442.60 in liquidated damages, finding that the Defendants did not make a showing of good faith such that liquidated damages could be avoided. The Court noted that when liquidated damages are awarded, they are awarded in an amount equal to the calculated back wages. 29 U.S.C. § 216(b). A Court may only decline to award the damages if an employer shows that the FLSA violations were done in good faith or on the basis of reasonable grounds. 29 U.S.C. § 260; *McFeeley v. Jackson Street Entertainment, LLC.*, 825 F.3d 235, 245 (4th Cir. 2016).

The Court granted Plaintiff's motion for Summary Judgment.

Author's Note: *This case reads like an FLSA primer. Judge Boyle's summary of the FLSA is a worthy read.*

***Allen v. Express Courier Int'l, No. 3:18-cv-00028-MOC-DSC, 2018 U.S. Dist. LEXIS 124581 (W.D.N.C. July 25, 2018).**

The United States District Court for the Western District denied Defendants' Motion to Dismiss Plaintiff's claims under the FLSA.

Judge: Max O. Cogburn Jr., United States District Judge

LSO is a third-party logistics company providing various supply-chain management services to help businesses reduce transportation costs, increase efficiency in product movement, and allow the customer to focus on their core business. Plaintiffs entered into federally regulated Owner Operator Agreements with LSO. Plaintiffs filed a complaint alleging overtime, minimum wage, and misclassification violations under the FLSA. Defendants filed a Motion to Dismiss for Failure to State a Claim.

Wage Violations

The Court explained that “to state ‘a plausible overtime claim, a plaintiff must provide sufficient factual allegations to support a reasonable inference that he or she worked more than forty hours in at least one workweek and that his or her employer failed to pay the requisite overtime premium for those overtime hours.’” *Hall v. DIRECTV, LLC*, 846 F.3d 757, 777 (4th Cir. 2017). The Court further stated that “this standard ‘does not require plaintiffs to identify a particular week in which they worked uncompensated overtime hours. Rather, this standard is intended to require plaintiffs to provide some factual context that will nudge their claim from conceivable to plausible.’” *Id.*

Here, Plaintiffs alleged that they worked more than forty hours per week, that Defendants knew of the overtime hours but failed to pay overtime wages, and that Plaintiffs' vehicle expenses caused their pay to drop below minimum wage. The Court denied Defendants' motion to dismiss, stating that Plaintiffs' facts “nudged” their claims from conceivable to plausible, meeting the Iqbal/Twombly standard.

Misclassifications

The Court stated that to help define and distinguish between employees and independent contractors, Courts have adopted the economic realities test. *See, e.g., Tony & Susan Alamo Found. V. Sec'y of Labor*, 471 U.S. 290, 301 (1985). “The purpose of the economic realities test is to determine ‘whether the worker is economically dependent on the business to which he renders service or is, as a matter of economic reality, in business for himself.’” *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 150 (4th Cir.2017). To assist applying the economic realities test, the Fourth Circuit also considers the following six factors: (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business. *Id.* The

Court noted that no single factor is dispositive, and the totality of the circumstances must be considered. *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 305 (4th Cir. 2006).

The Court pointed out that Defendants' argument that there were more factors weighing in their favor, was an incorrect analysis. In *Hall v. DIRECTV, LLC*, the Court held that one factor alone from a list of nonexclusive factors can give rise to a reasonable inference that plaintiffs will be able to develop enough evidence establishing their claim regarding the employer status. 846 F.3d 757, 777 (4th Cir. 2017) The Court stated that Plaintiffs have alleged facts that would support at least one of the six factors of the economic realities test. The Court noted that Plaintiffs included in their complaint that Defendants, not Plaintiffs, set the prices charged to the customer; Defendants maintained operations, compliance, accounting marketing, information-technology, and insurance departments; Defendants' Director of Operations assisted the branch offices in maximizing profits; Defendants' branch managers were in charge of drivers, assigned the routes to drivers, and had authority to terminate drivers; Defendants dictated to Plaintiffs the identification badge used, the uniform worn, the method of tracking packages, the insurance required, and the type of communication equipment used; etc. The Court found that these alleged facts supported at least one factor of the economic realities test.

The Court DENIED Defendants' Motion to Dismiss, finding that Plaintiffs alleged sufficient facts to state claims for wage violations and misclassification as independent agents under the FLSA.

Author's Note: This case illustrates the stunning effect of Hall v. DIRECTTV, a 2017 Fourth Circuit case potentially greatly expanding the definition of "employee." One factor alone from a list of nonexclusive factors can give rise to a reasonable inference that plaintiffs were employees so as to allow them to defeat the 12(b)(6) motion and develop evidence through discovery.

Allen v. SSC Lexington Operating Co. LLC, No. 1:16CV1080, 2017 U.S. Dist. LEXIS 162015 (M.D.N.C. Sept. 29, 2017).

The United States District Court for the Middle District of North Carolina granted Defendant's Motion to Compel Individual Arbitration and Stay Proceedings.

Judge: William L. Osteen Jr., United States District Judge

Plaintiff filed a putative class and collective action against Defendant SSC and alleged claims under the FLSA that included failure to pay minimum wages, failure to pay overtime wages, and failure to keep records. Plaintiff also alleged similar violations under certain provisions of the North Carolina Wage and Hour Act and the North Carolina Administrative Code.

SSC was a North Carolina LLC that provided short-term and long-term health care services. Plaintiff worked as an hourly employee for SSC from February 2014 until September 2015 as an LPN. As part of her employment, Allen was given certain documents including an Employment Dispute Resolution Book which detailed an Employment Dispute Resolution Program. The last page of the EDR Booklet contained an EDR Program acknowledgment form, which Allen signed on February 10, 2014. The form acknowledged that she was bound to use the EDR Program to resolve her employment related disputes as described within the booklet.

The EDR Booklet provided:

Your decision to accept employment or to continue employment with the Company constitutes your agreement to be bound by the EDR Program. Likewise, the Company agrees to be bound by the EDR Program. This mutual agreement to arbitrate claims means that both you and the Company are bound to use the EDR Program as the only means of resolving employment related disputes and to forego any right either may have to a jury trial on issues covered by the EDR Program. However, no remedies that otherwise would be available to you or the company in a Court of law will be forfeited by virtue of the agreement to use and be bound by the EDR Program. This Program covers only claims by individuals and does not cover class or collective actions. The EDR Booklet states that disputes covered under the EDR Program pertain to claims such as discipline, discrimination, fair treatment, harassment, termination and other legally protected rights. Under the EDR Program, covered disputes proceed in four steps, with the last step being binding arbitration. The EDR Booklet also acknowledges that the application, interpretation and enforcement of the EDR Program is covered by the Federal Arbitration Act.

Analysis

Defendant filed a motion to compel arbitration of Plaintiff's individual claims. SSC argued that Allen agreed, as part of the EDR Program, to arbitrate her individual claims as a condition of her employment. In SSC's view, the sentence, "this Program covers only claims by individuals and does not cover class or collective actions," is an "express collective action and class action

waiver.” The purported waiver, according to SSC, “expressly prohibits class and collective arbitration.” Therefore, SSC argued that Allen's individual claims should be compelled to arbitration.

Allen disputed this interpretation. She interpreted “this Program covers only claims by individuals and does not cover class or collective actions” to mean that only individual claims fell within the scope of the EDR Program. Allen argued that because she brought a collective and class action lawsuit, the EDR Program and the arbitration agreement were inapplicable.

Under the FAA, a written arbitration agreement shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. A Court must compel arbitration if (i) the parties have entered into a valid agreement to arbitrate, and (ii) the dispute in question falls within the scope of the arbitration agreement.

Here, the parties did not dispute that the arbitration agreement was valid. The parties' only disagreement centered on whether the dispute fell within the scope of the EDR Program. Specifically, whether the EDR Program precluded collective and class arbitration, or whether it simply did not apply to collective and class proceedings in any forum.

The Court stated that it had to apply ordinary state law principles that governed the formation of contracts, which included principles concerning the validity, revocability, or enforceability of contracts generally. Due regard must be given to the federal policy favoring arbitration. Any doubts regarding the scope of arbitrable issues agreed to by the parties must be resolved in favor of arbitration.

Here, the EDR Program that Allen signed and acknowledged includes the sentence, “this Program covers only claims by individuals and does not cover class or collective actions.” “Cover” was not defined in the EDR Booklet, and the Court was not convinced that the EDR Program constituted an express waiver of collection and class arbitration. The Court suggested that one interpretation of “cover” could mean to have sufficient scope to include. That interpretation suggested, as Allen urged, that class or collective actions were simply outside the scope of the EDR Program.

When the agreement was read as a whole, the EDR Program introduction also provided, in the same paragraph, that the employee was “bound to use the EDR Program as the only means of resolving employment related disputes . . . on issues covered. If a party could circumvent the EDR Program by bringing a class or collective action outside of arbitration, then the EDR Program would be one of two means to resolve employment related disputes, and the provision that bound the employee to use the EDR Program as the only means of resolving employment related disputes would be rendered ineffectual.

Plaintiff relied primarily on the premise that the plain language of the sentence, covered only claims by individuals and did not cover class or collective actions so the parties did not agree to arbitrate Plaintiffs' putative class and/or collective action claims. Neither party disputed that

the FLSA and state law claims, brought individually, were covered disputes subject to arbitration.

The Court stated that the plain language of the agreement raised doubts as to whether the parties intended their agreement to include a waiver of class or collective actions, and was susceptible to either of the constructions asserted by the parties. The Court resolved all doubts in favor of arbitration, and held that Plaintiff's claims had to be referred individually to arbitration. The Court granted Defendant's motion to compel individual arbitration and stay proceeding.

***Baclawski v. Fioretti*, No. 3:15-CV-417-DCK, 2018 U.S. Dist. LEXIS 3732 (W.D.N.C. Jan. 9, 2018).**

The United States District Court for the Western District of North Carolina GRANTED Defendants' motion for summary judgment on Plaintiff's retaliation claims under the FLSA.

Judge: David C. Keesler, United States Magistrate Judge

Plaintiff Baclawski sought redress for overtime violations and unlawful retaliation pursuant to FLSA and the North Carolina Wage and Hour Act. Plaintiff was employed by Defendants between October 2013 and June 2015. Plaintiff's primary duties and responsibilities were running errands for, serving as a housekeeper and nanny for, and taking care of the personal residences of Mr. Peter Fioretti.

Plaintiff alleged that she worked a substantial number of overtime hours, but instead of paying her appropriately for those hours, Defendant Fioretti, Mountain's chief executive officer, misclassified her as a 1099 independent contractor and an exempt, salaried employee in order to evade overtime pay requirements. Plaintiff repeatedly complained to Fioretti about the fact that she was not being compensated for the substantial number of overtime hours that she was working. In June 2015, Plaintiff resigned her employment.

Plaintiff alleged that Defendants retaliated against her when she sought compensation for her overtime hours by demanding repayment of \$25,000.

FLSA

The only evidence of retaliation that was before the Court was a single email by Kevin Mast to Plaintiff on June 12, 2015. The email stated:

Anne, per the attached detail from our expense reimbursement system, it appears you have received reimbursement for \$27,024.79 for expenses incurred. However, it appears that we were not provided receipts or appropriate documentation relating to \$22,051.16 of these items. Without proper documentation, we are going to need to collect these undocumented expenses back from you. **Please either submit the required documentation, or provide us with a check in the amount of \$22,051.16 by no later than the end of the week next week.**

Plaintiff responded to the above e-mail and explained some of her expenses, made clear that she believed she had followed proper procedures, asserted that she had complete records, and emphasized that she would not be making any payment to Defendants.

No evidence of additional requests, or any other demands, threats, or communication at all between the parties regarding this issue were presented to the Court. Defendants asserted that they realized soon after Plaintiff's email response that they had the information they needed and would not be seeking further documentation or payment from Plaintiff. The evidence indicated that Defendants never notified Plaintiff that she did not have to pay them back.

It was undisputed that Defendants' one-week deadline for the check passed without comment from Defendants. Then three months passed without any further request, demand, or threat from Defendants regarding her expenses, documentation, or reimbursement before Plaintiff's original complaint asserting three (3) retaliation claims was filed.

The undisputed evidence showed that Plaintiff sent written complaints alleging FLSA violations to Defendants two days prior to Mr. Mast's email, and that she later filed a Complaint asserting retaliation claims under the FLSA and state law. Plaintiff's response to Mr. Mast's email was a forceful rebuttal of Defendants' demands, and effectively ended Defendants' inquiry for any records or returned payments from Plaintiff.

After Plaintiff's response e-mail, Mr. Mast determined that Plaintiff had submitted sufficient support for her expense reimbursements to Heather Rooker in Defendants' accounting department, and ceased all efforts to collect additional documentation or expense refunds from Plaintiff.

Defendants argued that Plaintiff could not establish the second or third elements of a FLSA retaliation claim. Defendants argued that to establish a retaliation claim under the FLSA, Plaintiff must prove: (1) she engaged in an activity protected by the FLSA; (2) she suffered adverse action by the employer subsequent to or contemporaneous with such protected activity; and (3) a causal connection exists between the employee's activity and the employer's adverse action.

Defendants argued that the second element could not be satisfied because Mr. Mast's email did not constitute conduct that was materially adverse to Plaintiff. Defendants noted that petty slights, minor annoyances, and simple lack of good manners, which are not uncommonly found in the workplace, do not qualify as materially adverse employment actions. Defendants contended that they simply asked Plaintiff to submit additional documentation, or return her reimbursements, and that they then immediately ceased all conduct related to the expenses. Defendants further argued that no reasonable employee would be dissuaded from pursuing her rights based on Mr. Mast's emails, and that in fact, Plaintiff was not dissuaded from pursuing her rights.

Last, Defendants contended that there was no causal connection between the Mast email and Plaintiff's complaint about alleged entitlement to overtime wages. Defendants acknowledged that Mr. Mast's email was temporally close to Plaintiff's complaint regarding overtime wages, but asserted that the email was not in response to, or caused by, the complaint. Defendants argued that they had a legitimate, non-retaliatory reason for Mr. Mast's email—to ensure all reimbursement payments were properly documented and accounted for.

Defendants argued that even if Plaintiff could make a prima facie case for retaliation, they stated a legitimate non-discriminatory explanation for Mr. Mast's email, which rebutted a prima facie case and shifted the burden back to Plaintiff to show pretext. Defendants contended that

Mr. Mast looked into various issues following Plaintiff's resignation to make sure everything was in order. Defendants concluded that Plaintiff has failed to come forward with sufficient evidence to establish that their articulated reason for the email is merely a pretext for retaliation, and argue that temporal proximity is not enough.

In response, Plaintiff argued that the Fourth Circuit has expressly held that the FLSA's anti-retaliation provisions broadly extend to any conduct that could well dissuade a reasonable worker from making or supporting a charge of discrimination, including former employees. Plaintiff then asserted that Defendants' communication of a false demand for \$22,000 of Plaintiff's lawfully earned money was retaliation. Plaintiff suggested the conduct was both undertaken for a retaliatory motive and lacked a reasonable basis in fact or law.

The Court explained that the crux of the allegation for retaliation is Kevin Mast's email dated June 12, 2015. The Court held that a reasonable employee (or jury) would not construe Mr. Mast's request as an adverse employment action. The Court noted that the key inquiry in a post-employment retaliation claim is whether the defendant's actions were "materially adverse and could well dissuade a reasonable worker from making or supporting a charge that their employer is violating, or has violated, the statute's substantive provisions." The evidence showed that Plaintiff promptly responded with a statement that showed she was confident in her position on the matter and would not provide anything to Defendants. The Court granted summary judgment in favor of Defendants on all Plaintiff's retaliation claims.

***Chavez v. T&B Mgmt., LLC*, No. 1:16cv1019, 2017 U.S. Dist. LEXIS 209951 (M.D.N.C. Dec. 21, 2017).**

The United States District Court for the Middle District of North Carolina denied Defendants' motion to dismiss Plaintiffs' claim under the FLSA.

Judge: Thomas D. Schroeder, United States District Judge

This was a putative collective action by current and former servers and bartenders of Defendants T&B Management, LLC (known as Hickory Tavern) who operate various restaurants. Plaintiffs alleged that Defendants violated the tip-credit provisions of the FLSA by requiring these employees to spend a substantial amount of their workweek engaged in pre-and post-shift non-tippable activities.

Plaintiffs alleged that Hickory Tavern required its tipped servers and bartender employees to perform general preparation, maintenance, cleaning, food preparatory work, stocking, washing dishes, rolling silverware, and other non-tip-generating duties and tasks during discrete times before and after their work shifts serving customers. Plaintiffs alleged that these duties took a substantial amount of time to complete and were not related to the service of customers and were compensated at only \$2.13 an hour. Such duties were alleged to have typically took one hour at the beginning of a lunch shift, 30 minutes at the end of the lunch shift, 15 minutes at the beginning of a dinner shift, and one to one and one-half hours at the end of a dinner shift. Plaintiffs alleged that such duties constituted well over 30% of their workweek.

FLSA

Defendants argued two main points. First, they contended that any non-tippable work that was nevertheless related to the employees' jobs could not be considered another occupation for purposes of the dual occupation regulations. Second, Defendants contended that as long as the employees nevertheless earned more than minimum wage for a 40-hour workweek, they had no claim under the FLSA.

The Court noted that employers may be liable for paying minimum wage to dual occupation employees whose duties are non-tippable, related to the tippable occupation, and take place before or after tippable duties for a substantial amount of time. The Court further noted that the extent of qualifying activities and their duration are questions of fact, ill-suited to dismissal at this pleading stage. Here, Defendants relied principally on classifications of job duties from the Occupational Information Network which was extrinsic evidence, outside the pleadings. The Court concluded that, at this preliminary stage, it could not say that the allegations of the second amended complaint failed to state a plausible claim.

Defendants argued, secondly, that Plaintiffs failed to state a cognizable claim because no Plaintiff alleged he or she was paid less than minimum wage over the course of a 40-hour workweek. Hickory Tavern argued that Plaintiffs failed to state a minimum wage claim because they failed to allege that they were paid less than minimum wage for any workweek. This

argument was not sufficiently advanced in these briefs to permit the Court to resolve it on such thin consideration.

Defendants did not address recent authority as to this argument such as *Romero v. Top-Tier Colorado LLC*, 849 F.3d 1281, 1286 (10th Cir. 2017), which rejected the defendants' argument that if a tipped employee makes enough in tips to meet the minimum wage, then the employer has necessarily complied with 29 U.S.C. § 206a. Defendants also did not address *McLamb v. High 5 Hosp.*, 197 F. Supp. 3d 656, 661 (D. Del. 2016), which rejected a workweek argument in a dual job claim; or *Osman v. Grube, Inc.*, No. 16-CV-802, 2017 U.S. Dist. LEXIS 105276, 2017 WL 2908864, at *2 (N.D. Ohio July 7, 2017), which stated that Plaintiff's failure to state that she made less than minimum wage on any particular workweek alone is not grounds for dismissal.

The Court found that Defendants failed to address the possibility that if Plaintiffs succeeded on the dual jobs claim, they would need to be paid full minimum wage for each hour spent working as a non-tipped employee regardless of their total pay for the week. Because the Court found that workweek argument was not adequately developed, the Court deferred any consideration of it. Thus, the Court denied Defendants' motion to dismiss Plaintiffs' second amended complaint.

Pappas v. Sol. Start, Corp., 3:17-cv-575-GCM, 2018 U.S. Dist. LEXIS 125361 (W.D.N.C. July 26, 2018).

The United States District Court for the Western District of North Carolina granted Defendant's Motion for Partial Summary Judgment on Plaintiff's claims under the FLSA.

Judge: Graham C. Mullen, United States District Judge

Defendant is a business providing technology solutions, managed services, and customer support to its customers, most of whom are dental practices. Plaintiff was employed by Defendant as a technician. Defendant paid all employees as salaried employees, and each employee received the same flat amount each pay period regardless of how many hours the employee worked. Defendant used Paychex, a third-party service provider, to process payroll and consult on HR matters. Paychex assisted in the creation of the company's employee handbook and benefit plans.

In the summer of 2016, Plaintiff asserted that he was misclassified by Defendant as an exempt employee under the FLSA and that he should be earning overtime. Around the same time, Defendant was contacted by Paychex in connection with some upcoming changes in the law that might require Defendant to reclassify certain employees as non-exempt. Defendant consulted with Paychex and sought legal advice on the new wage laws and Plaintiff's question about his own classification. Defendant reclassified Plaintiff and one other employee as non-exempt. The re-classification was implemented the week of July 9-16, 2016 and Plaintiff was paid in accordance with the law from this date forward.

Plaintiff asked to be paid for the overtime he had worked prior to his reclassification. Plaintiff was given a payroll check in the gross amount of \$10,350.17 and a Memorandum of Understanding explaining the payment and how it had been calculated. Plaintiff took the check with him, but never deposited it. Plaintiff allegedly believed that the payment was "unfair" because it did not cover the entire length of his employment. Plaintiff voluntarily resigned effective June 16, 2017 and filed suit against Defendant on August 4, 2017.

The Court stated that there is a two-year statute of limitations on actions under the FLSA; however, a cause of action arising out of a willful violation can be commenced within three years after the cause of action accrued. 29 U.S.C. § 255(a). An action under the FLSA is considered commenced when the complaint is filed. The Plaintiff has the burden of proving that an FLSA violation is willful. "Only those employers who 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]' have willfully violated the statute." *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 358 (4th Cir. 2011) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

Here, the Court stated that Plaintiff did not produce sufficient evidence of willfulness. The evidence Plaintiff produced showed that Defendant genuinely believed its employees were bona fide exempt computer professionals under 23 U.S.C. § 213(a)(1). The evidence showed

that even after conducting a review, Defendant only needed to reclassify two employees out of twenty-five.

Additionally, Defendant relied on Paychex to manage Defendant's payroll. The Court relied on *Prusin v. Canton's Pearls, LLC*, a similar case where the District of Maryland refused to find a reckless or willful violation of the FLSA due to a similar reliance on a third-party processor. See *Prusin v. Canton's Pearls, LLC*, No. JKB-16-00605, 2017 U.S. Dist. LEXIS 160810, at *7 (D. Md. Sept. 29, 2017). The Court determined that the evidence was insufficient to create a genuine issue of fact regarding Defendant's willfulness. Therefore, the Court found that Plaintiff's recovery of unpaid overtime under the FLSA was limited to two years preceding the filing of the suit.

The Court went on to determine the appropriate method for calculating Plaintiff's unpaid overtime. The Court stated that the damages had to be calculated according to the "fluctuating workweek" method found in 29 C.F.R. § 778.114(a). The Court noted that the Fourth Circuit endorsed this method of calculating damages in *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 358 (4th Cir. 2011). The Fourth Circuit found the fluctuating workweek method appropriate in mistaken exemption classification cases, so long as the employer and employee had a mutual understanding that the fixed weekly salary was compensation for all hours worked each workweek and the salary provided compensation at a rate not less than the minimum wage for every hour worked. The Court found that any unpaid overtime should be paid in accordance with the fluctuating workweek method.

The Court granted Defendant's Motion for Partial Summary Judgment.

ERISA

***Love v. Eaton Corp. Disability Plan for U.S. Empl.*, No. 5:16-CV-860-FL, 2017 U.S. Dist. LEXIS 204611 (E.D.N.C. Dec. 12, 2017).**

The United States District Court for the Eastern District of North Carolina granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment.

Judge: Louise W. Flanagan, United States District Judge

Plaintiff started working for Eaton Corp. on November 8, 1999. On October 25, 2014, plaintiff stopped working at the direction of her physician and was determined by the plan to be qualified as of that day to receive short-term disability benefits through January 15, 2015. On January 19, 2015, due to the nature of plaintiff's disability, the plan extended short-term disability benefits until January 31, 2015, but informed plaintiff she would need to submit additional medical evidence to support additional short-term disability benefits. On February 16, 2015, the plan informed plaintiff that because she failed to submit additional medical evidence concerning her ongoing disability, she no longer qualified for short-term disability benefits effective February 1, 2015.

On February 28, 2015, plaintiff appealed the denial of her continued short-term disability benefits to the plan's first level of administrative review, submitting medical documentation at that time. Plaintiff submitted additional medical evidence after receiving an extension of time to do so. On April 3, 2015, the plan upheld the suspension of short-term disability benefits, finding plaintiff did not qualify for ongoing short-term disability benefits. On April 17, 2015, plaintiff appealed the denial of continued short-term disability to the plan's second level review, submitting additional medical evidence after receiving an extension of time to do so. The plan again upheld the denial of continued short-term disability benefits on July 15, 2015.

On December 17, 2015, plaintiff submitted a long-term disability benefits claim. The plan denied plaintiff's request on December 21, 2015, stating that because plaintiff had not qualified for and received six months of short-term disability benefits, she could not qualify for long-term disability benefits. Plaintiff appealed her denial through the plan's first level review. On February 12, 2016, in upholding the denial, the plan's first level review stated that "this is an administrative decision," "it is not based on a determination of whether or not plaintiff has met the definition of disability," and therefore "additional medical documentation is not relevant to the appeals decision." Plaintiff appealed her denial of long-term disability benefits through the plan's second level review. On June 9, 2016, in upholding the denial, the plan's second level review held "the Committee interprets the Plan as specifically requiring an individual to fully exhaust the six months of disability coverage as provided under the short-term disability plan," which plaintiff did not do.

ERISA Analysis

The Court determined *de novo* whether the ERISA plan at issue conferred discretionary authority on the administrator, and, if it did, whether the administrator acted within that discretion. The plan at issue here conferred discretionary authority upon defendant to make benefit decisions according to the terms of the plan. Under the abuse-of-discretion standard, a Court will not disturb a plan administrator's decision if the decision is reasonable, even if the Court would have come to a contrary conclusion independently.

Here, the plan contained two separate sections for short-term disability benefits and long-term disability benefits.

First, the plan provided that:

The Short Term Disability Plan provided you with continuing income for up to 26 weeks if a covered disability prevents you from working. If you are disabled longer than 26 weeks, additional benefits may be available under the Eaton long term disability plan.

Under short-term disability benefits, the plan provided in part that a person may be eligible for short-term disability benefits if that person is covered by the plan and has a covered disability, defined as “an occupational or non-occupational illness or injury prevents you from performing the essential duties of your regular position with the Company or the duties of any suitable alternative position with the Company.”

Second, the plan provided that:

The Long Term Disability Plan provides a continued source of income if you are sick or injured and cannot work for an extended period of time. During the first 26 weeks of a covered disability, you may be covered by an Eaton Short Term Disability Plan. If you remain disabled after that time, you may receive a benefit from the Long Term Disability Plan.

The plan provided in part that a person may be eligible for long-term disability benefits if that person is covered by the plan and has a covered disability, defined as “unable to work as the result of an occupational or non-occupational illness or injury.” The plan additionally provided that the “work you are unable to do is defined differently over the course of a disability,” and that a person will be considered disabled if:

Defendant argued the plan required a claimant, like plaintiff, to qualify for and receive six months of short-term disability benefits before she could qualify for long-term disability benefits. Here, because plaintiff only received short-term disability benefits from October 25, 2014, though February 1, 2015, defendant argued that plaintiff was correctly denied eligibility for long-term disability benefits.

The Court determined that pursuant to the plain language of the plan, there was no basis to interpret the terms of the plan to require plaintiff to first exhaust short-term disability benefits before becoming eligible for long-term benefits. Nowhere in the plan was such a requirement written, and a claimant in plaintiff's position would have no indication that such was required based on the terms of the plan. Every provision offered by defendant to support its interpretation supports only the position that a claimant must have been disabled for six months prior to receiving long-term disability benefits, not that a claimant also must have applied for and received short-term disability benefits.

To support its position, defendant emphasized the following language from the plan, that "the waiting period for the start of long-term disability benefits begins on the day you become disabled and continues for six months." The Court determined that these words in no way indicated that a person seeking long-term disability benefits must qualify for and receive six months of short-term disability benefits in order to be able to apply for long-term disability benefits. Instead, these words stated that a person must be disabled for six months and only then can that person begin to receive long-term disability benefits. Nothing indicated that a person must be considered disabled for six months and additionally apply for and receive short-term disability benefits under the plan's short-term disability benefit system.

Another section of the plan supported this interpretation. Under the directions provided to apply for long-term disability benefits, the plan states that "if you are receiving disability benefits from the Short Term Disability Plan, the Claims Administrator will mail the Long Term Disability Plan forms to you at the end of your fourth month of disability." The reverse scenario offered by this provision is that a person may not be receiving disability benefits from the short-term disability plan when applying for long-term disability benefits.

Plaintiff's motion for summary judgment was granted, defendant's motion for summary judgment was denied, and the case was remanded for further administrative proceedings consistent with the order.

WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY (WDPP)

****Chandler v. W.B. Moore Co. of Charlotte, Inc., No. 3:18-cv-149, 2018 U.S. Dist. LEXIS 111079 (W.D.N.C. July 3, 2018).***

The United States District Court for the Western District of North Carolina granted Defendant's Motion to Dismiss Plaintiff's claim for wrongful discharge in violation of public policy under North Carolina law.

Judge: Max O. Cogburn Jr., United States District Judge

Plaintiff filed suit against Defendant alleging claims under Title VII and Section 1981, along with a wrongful discharge in violation of public policy claim under the Occupational Safety and Health Act of North Carolina ("OSHANC"). Defendants filed a motion to dismiss solely as to the North Carolina public policy claim, arguing that the claim was completely unrelated to the facts at issue in the matter. Defendants argued that Plaintiff's claims of racial discrimination and retaliation were unrelated to the occupational injuries and illnesses that OSHANC covers.

The Court stated that OSHANC's express legislative purpose is ensuring "safe and healthful working conditions" and "to preserve our human resources" through various means, including encouraging businesses and employees to reduce safety and health hazards, providing safety standards and training, and enforcing safer practices. N.C. Gen. Stat. § 95-126. The Court stated that "it is clear that OSHANC's purpose is to protect employee safety and health. . . . OSHANC also includes an antidiscrimination provision that opposes discrimination by reason of 'sex, race, ethnic origin, or by reason of religious affiliation.' However, OSHANC states that such discrimination is limited to employers, employees, or others who are 'related to the administration of this Article' as opposed to a more general statement."

The Court agreed that Plaintiff failed to properly state a claim in support of the claim against Defendant because OSHANC covers workplace injury and illness claims and not retaliation or discrimination claims. The Court stated that Plaintiff essentially reiterated her allegations from her two previous causes of action, violations of Title VII and of §1981. The Court further explained that Plaintiff failed to plead facts with any specificity, and instead simply alleged that Defendant violated North Carolina public policy "by terminating plaintiff because she reported and opposed race and ethnic origin discrimination" in violation of OSHANC.

The Court noted that the North Carolina Court of Appeals specifically stated that retaliatory discrimination is prohibited as against public policy to ensure that employees are not discouraged from reporting violations of OSHANC. Here, Plaintiff failed to offer any connection to OSHANC. Plaintiff's pleadings did not represent any sort of violation of OSHANC and its explicit purpose of protecting employee health and safety. The Court found that the lack of any

connection to workplace health and safety removed the claim from OSHANC's antidiscrimination provision.

The Court GRANTED Defendant's Motion to Dismiss the third cause of action for wrongful discharge against public policy under North Carolina law.

Author's Note: The case lacks any information as to whether plaintiff grounded a wrongful discharge claim predicated on the NCEPA.

THE FIRST AMENDMENT and IIED

***Lamb v. Lowe's Cos.*, No. 5:17-cv-00028-RJC-DSC, 2018 U.S. Dist. LEXIS 37333 (W.D.N.C. March 7, 2018).**

The United States District Court for the Western District of North Carolina granted Defendant's motion to dismiss plaintiff's right of association and IIED claims.

Judge: Robert J. Conrad Jr., United States District Judge

Plaintiff was a fifty-one year old Caucasian male who worked for defendant Lowe's Inc. from 1999-2015. When he was fired, he held the position of Chief Marketing Officer for Lowe's. In 2012, defendant hired Mike Jones, an African-American male to whom plaintiff reported. While supervising Plaintiff, Jones regularly made comments to Plaintiff that were antagonistic to Plaintiff's age, race, and religion. With respect to age, Jones told Plaintiff that he was "the old guard" and disconnected. Jones also told Plaintiff to hire younger employees to better appeal to younger customers and instructed Plaintiff to encourage an employee in her fifties to retire. With respect to race, Jones told Plaintiff that Defendant needed to appeal to Hispanics and African Americans, that Jones's family and friends thought of Defendant as "country and redneck," and that Defendant overly focused on people like Plaintiff. With respect to religion, Jones said Plaintiff and others deferred too much to the "religious Christian right" and made hostile comments about Plaintiff's association with the American Family Association. On several occasions, Plaintiff requested a meeting with Defendant's Chairman and CEO but was repeatedly thwarted by Jones.

Plaintiff commenced a law suit alleging IIED and violation of the right of association (and four other causes of action not at issue in this motion to dismiss). Defendant filed a motion to dismiss both claims. Plaintiff also sued Lowe's for age, race, and religious discrimination. Those claims were not the subject of this Motion to Dismiss. With respect to plaintiff's First Amendment claims, the Court held that plaintiff did not properly allege a violation of his First Amendment right of association because the US Constitution does not secure rights to individuals against other private parties, such as Lowe's. No state action existed.

The Court stated that to state a claim for IIED in North Carolina, a plaintiff must show (1) extreme and outrageous conduct (2) intended to cause severe emotional distress (3) that did indeed cause severe emotional distress. *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 452 S.E.2d 233, 240 (N.C. 1994). Whether conduct is sufficiently extreme and outrageous is a question of law. *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 528 S.E.2d 368, 372 (N.C. App. 2000). Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 595 S.E.2d 778, 782 (N.C. App. 2004). The complained-of conduct must be more than mere insults, indignities, or threats. *Wagoner v. Elkin City Sch.' Bd.*

of Educ., 440 S.E.2d 119, 123, 113 N.C. App. 579 (N.C. App. 1994) (internal quotation marks and citation omitted). The term severe emotional distress means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so. *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22, 27 (N.C. 1992) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 395 S.E.2d 85, 97 (N.C. 1990)).

The Court held that plaintiff failed to sufficiently allege an IIED claim. The Court stated that the comments from Jones did not rise to the level of “extreme and outrageous” conduct necessary to support an IIED claim. The Court noted that NC Courts will rarely find that conduct rises to the level of extremeness and outrageousness necessary to support an IIED claim. Additionally, plaintiff failed to identify any specific emotional or mental disorder.

NORTH CAROLINA WAGE AND HOUR ACT, BREACH OF CONTRACT, and BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

McKeown v. Tectran Mfg., No. 5:17CV109-GCM, 2018 U.S. Dist. LEXIS 47312 (W.D.N.C. March 22, 2018).

The United States District Court for the Western District of North Carolina denied Defendant's motion to dismiss under 12(b)(6), except as to plaintiff's request for punitive damages.

Judge: Graham C. Mullen, United States District Judge

Plaintiff worked in North Carolina for Tectran, a Delaware company, from 2009-2017. In 2009, Tectran president contacted Plaintiff and offered an ownership stake in Tectran. Plaintiff agreed to join defendant to develop Tectran's original equipment manufacturer business as an employee and shareholder. Plaintiff alleged that throughout his employment, Tectran repeatedly failed to transfer stock to Plaintiff according to the parties' agreement. Plaintiff became concerned about Tectran's disregard for safety, falsified reports, misrepresentation of company financials, and accounting, and as a result, Plaintiff resigned. Plaintiff alleged that Tectran failed to pay employment-related compensation and wrongly attempted to repurchase plaintiff's 600 shares of stock by claiming that it could repurchase the stock at the original price plaintiff paid for it, which was significantly less than the market value.

Defendant moved to dismiss the North Carolina wage and hour act claim to the extent plaintiff alleged that Tectran wrongfully withheld shares as unpaid wages. The Court decided to allow the claim to remain.

Defendant moved to dismiss plaintiff's breach of contract claim arguing that it was time-barred under both Delaware and North Carolina law. The Court decided to allow the claim to remain because plaintiff alleged that "throughout the employment relationship, Tectran repeatedly failed to transfer Tectran stock to Plaintiff, in accord with the parties' agreement." Although defendant argument is that the breach was isolated to 2009, the Court found that the complaint properly alleged a breach of contract claim and that discovery could reveal more factual details.

Additionally, the Court found that plaintiff adequately stated a breach of the implied covenant of good faith and fair dealing under Delaware law because plaintiff alleged a scheme whereby defendant offered plaintiff compensation at the beginning of employment, then repeatedly withheld the compensation. This withstood the motion to dismiss because under Delaware

law, parties breach the implied covenant when their conduct frustrates the ultimate purpose of the contract by taking advantage of their position to control implementation of the contract's terms.

Plaintiff's request for punitive damages failed as a matter of law because none of the causes of action stated by plaintiff, even if successful, would entitle plaintiff to an award of punitive damages. The Court noted that N.C. Gen. Stat. §1D-15(d) provides that punitive damages shall not be awarded solely for breach of contract.

With regard to the stock repurchase agreement claim, the Court found that at a minimum plaintiff stated a plausible claim that the repurchase provisions of Section 8 were not activated because of the phrases "termination of employment" "by the company" where plaintiff resigned his employment.

EQUAL PROTECTION, SECTION 1983, and TORTIOUS INTERFERENCE WITH CONTRACT

****Albright v. Charlotte-Mecklenburg Bd. of Educ.*, No. 3:17-cv-00461-FDW-DSC, 2017 U.S. Dist. LEXIS 199763 (W.D.N.C. Dec. 5, 2017).**

The United States District Court for the Western District of North Carolina denied Defendant's motion for summary judgment on Plaintiff's claims under § 1983 and for tortious interference with contract.

Judge: Frank D. Whitney, Chief United States District Judge

In December 2014, Plaintiff accepted a position with Charlotte-Mecklenburg Schools ("CMS") as a Behavior Modification Technician ("BMT") at Harding High School. BMTs assist the school staff with discipline issues. Harding High School was known for having significant student discipline problems. Plaintiff was the only female BMT at Harding High School, and she openly criticized her fellow male security officers' response to fights that occurred on the campus during the 2014-2015 school year. At the end of the school year, the principal of Harding High School informed Plaintiff that he would not renew her contract for the 2015-2016 school year.

However, the principal was replaced by Defendant Ward, and Ward hired Plaintiff as a BMT for the 2015-2016 school year. In the 2015-2016 school year, Plaintiff continued to voice concerns about security on campus. In March 2016, Ward discussed a reduction of the number of BMT positions at Harding High School for the next school year, including Plaintiff's position.

On June 1, 2016, Plaintiff responded to a call that a large number of students had congregated outside the cafeteria and had not gone to class. The other BMTs then funneled the students into the G building—the building Plaintiff with a co-worker was assigned to oversee. Plaintiff asked her co-worker to come to her aid, but he chose not to respond. While urging the students to return to their classrooms, one student began physically attacking Plaintiff. Three other students joined in and they continued to attack her until the school resource officer arrived and intervened. News of the attack spread and created negative publicity for CMS. The Mecklenburg County District Attorney's office cleared Plaintiff of any wrongdoing, and eventually, the students involved were charged, and the main perpetrator convicted of assault.

On June 16, 2016, Defendant Johnson, who worked in employee relations for CMS, terminated Plaintiff and informed Plaintiff that she would not be employed as a BMT in the next school year and stated that CMS was blaming her for the incident. Johnson acted on the recommendation of Ward and Mitchell, the head of human resources. At that time, Plaintiff believed her position had previously been eliminated, as informed by Ward. Plaintiff, then, reverted back to her classification as a member of the permanent substitute teacher pool. When Plaintiff told Johnson of her classification, Johnson informed her that she was barred

from all future employment with CMS because of the June 1, 2016 incident. Subsequently, Plaintiff's classification as a member of the permanent substitute teacher pool was removed.

Plaintiff asked for a hearing before the Board, but counsel for the Board informed Plaintiff that she had no hearing rights because she was not terminated. Then, Plaintiff asked the Board for an investigation of the incident and her termination but received no response. Despite repeated requests for a writing, Johnson and Mitchell stalled. Eventually, in April 2017, Mitchell responded in writing that Defendant Johnson had decided that Plaintiff had violated CMS policy and was responsible for the assault, but that Plaintiff had not been disciplined in any manner and had not been terminated. Rather, her BMT contract had ended and was not renewed.

Plaintiff requested a hearing with the Board, explaining that by firing her and barring her from employment as a result of the incident on June 1, 2016, a gender double-standard had been applied. Male BMTs had fought or beaten students and were cleared for their acts; however, she had been attacked and beaten and fired for violating CMS policy. The Board denied Plaintiff's request for a hearing. Counsel for the Board informed Plaintiff that she had not been fired and being barred from future employment was not appealable.

Section 1983 Individual Defendants

The individual Defendants contended that they were entitled to qualified immunity. The Court explained that qualified immunity is a doctrine that protects government officials from civil liability, as long as their conduct does not violate clearly established statutory or constitutional rights within the knowledge of a reasonable person. To assert a claim under Section 1983 for a violation of the Equal Protection Clause, Plaintiff must plead sufficient facts to demonstrate that she has been treated differently from others with whom she is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Under this framework, a plaintiff establishes a prima facie case by showing (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class.

The Individual Defendants argued that they were entitled to qualified immunity because their acts were reasonable and there were no allegations that they knowingly violated the law. The Court stated that qualified immunity does not turn on the reasonableness or knowledge of the public official, but instead turns on whether a reasonable person in the official's position would have known that his conduct would violate that right. Plaintiff pled that the individual Defendants engaged in gender-double standard firing. The Court stated that these allegations, when viewed in the light most favorable to Plaintiff, pled disparate treatment or different treatment of Plaintiff by the individual Defendants when compared to treatment by the individual Defendants of BMTs of the opposite sex: Plaintiff was fired for using force, but her male colleagues were not fired when they used force. The Court found that it could not conclude as a matter of law that the individual Defendants were entitled to qualified immunity.

§ 1983-The Board

The Court stated that to hold a municipality liable for a constitutional violation under § 1983, the plaintiff must show that the execution of a policy or custom of the municipality caused the violation. To hold a municipality liable for a single decision, the decision maker must possess final authority to establish municipal policy with respect to the action ordered. The Board is only liable for acts that it has officially sanctioned or ordered.

Plaintiff sued the Board under § 1983 for ratifying the acts of its agents. Defendants argued that the Board did not have final review authority over the individual Defendants' acts because Plaintiff failed to timely appeal to the Board. The Court denied Defendants' motion to dismiss Plaintiff's claims under § 1983 without prejudice, finding that Defendants did not show that the complaint failed to state a cause of action.

Tortious Interference with Contract

The individual Defendants argued they were entitled to qualified immunity as non-outsiders for Plaintiff's claim of tortious interference with contract. The Court stated that the elements of a claim for tortious interference with contract are: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff. It further stated that under North Carolina law, there is a distinction between claims of tortious interference with contract against outsiders and non-outsiders. A non-outsider, who, though not a party to the terminated contract, had a legitimate business interest of his own in the subject matter, enjoys immunity from liability for inducing his corporation or other entity to breach its contract with an employee unless exercised for motives other than reasonable, good faith attempts to protect the non-outsider's interests in the contract interfered with.

The Court stated that a non-outsider has a qualified right to bring about the termination of another's terminable contract of employment when, in good faith, he believed this to be necessary to protect his own legitimate business interest or to perform his own fiduciary duty to the employer. In order to hold a non-outsider liable for tortious interference with contract, a plaintiff has to have established that the defendant acted with legal malice. Legal malice occurs when the non-outsider does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties. The Court noted that this question is often one of fact that cannot be resolved on a motion to dismiss; therefore, allegations of facts demonstrating that Defendants' actions were not prompted by "legitimate business purposes" are sufficient at the pleading stage.

Plaintiff alleged the individual Defendants interfered with her employment contract with CMS on account of her sex and in order to blame her for the incident on June 1, 2016 to avoid scrutiny and bad publicity for the school and CMS. Plaintiff alleged that Johnson terminated Plaintiff's employment upon recommendation of Ward and the approval of Mitchell. Plaintiff further alleged that the June 1, 2016 incident was picked up by the news, a video of the

incident went viral on social media, and that Plaintiff suffered a concussion and other injuries requiring medical attention. Further, Plaintiff was not charged for her role in the incident on June 1, 2016, whereas the students involved were charged, with the main perpetrator being convicted of assault. Also, Plaintiff alleged that male BMTs were not terminated when they had beaten and controlled the students. Plaintiff also alleges Ward acted to avoid scrutiny of his leadership of the school.

Thus, said the Court, the Plaintiff alleged facts that supported that the individual Defendants' acted with legal malice. The Court denied Defendant's motion to dismiss the claim of tortious interference with contract against the individual Defendants.

The Court Denied Defendants' Motion to Dismiss without prejudice to Defendants to reassert their arguments at a later stage in the proceeding.

Author's Note: The Court applied North Carolina law to the Plaintiff's tortious interference with contract claim against the "outsiders" to the contract. These "outsider" Defendants included Ward, Johnson, and Mitchell. North Carolina law is fairly unique in its articulation of the law in this area and as this case illustrates, plaintiff friendly.

BREACH OF CONTRACT

***Broussard v. Local Book Publ'g, Inc. & Local 360 Media, Inc.*, No. 4:17-CV-64-BO, 2017 U.S. Dist. LEXIS 163445 (E.D.N.C. Oct. 3, 2017).**

The United States District Court for the Eastern District of North Carolina granted Defendants' motion for summary judgment on Plaintiff's claim.

Judge: Robert J. Conrad Jr., United States District Judge

Plaintiff was recruited and hired by Defendants as a sales manager for the North Carolina region in March of 2016. Plaintiff received an offer letter from the vice president of sales at Local 360 Media that purported to list her benefits should she accept a job, including an automobile allowance, mileage reimbursement, bonuses, health and dental insurance, moving expenses and up to six months of housing assistance.

Plaintiff accepted the position, moved from Louisiana to North Carolina, began the job, and was terminated 16 days later. Plaintiff filed suit, alleging violations of Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act and North Carolina's Equal Employment Practice Act, as well as wrongful discharge in violation of public policy and breach of contract. Only Plaintiff's breach of contract was before the Court, following Defendants' motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Breach of Contract Discussion

The Court stated that North Carolina has long recognized the doctrine of employment at will, where either party can terminate the employment relationship at any time. However, parties can opt to remove that presumption by contracting for different terms. One way to do so is to contract for a specific length of employment. Neither the North Carolina Supreme Court nor the Court of Appeals have ever held that the *only* contractual relationship sufficient to take a particular employment relationship out of the employment at will category is a contract for a definite term of employment.

At issue in this case is whether there was an agreement between Plaintiff and Defendant such that plaintiff was not an at-will employee. The North Carolina Supreme Court previously ruled squarely on the issue of whether moving in order to take a job was enough to remove the at-will presumption: it is not. *Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 493 S.E.2d 420, 423 (1997). But concrete assurances from an employer or additional consideration for taking a job can remove the at-will presumption. *Franco v. Liposcience Inc.*, 197 N.C. App. 59, 676 S.E.2d 500, 501 (2009); *Kristufek v. Saxonburg Ceramics, Inc.*, 901 F. Supp. 1018, 1023 (W.D.N.C. 1994). If all Plaintiff alleged was that she relocated for the new job, she has no claim. If she has successfully pled additional facts that show she provided additional consideration and was made specific promises, she has stated a claim.

Merely agreeing to a rate of pay over a specified amount of time does not guarantee a term of service for that time period. *Freeman v. Hardee's Food Systems*, 3 N.C. App. 435, 165 S.E.2d 39, 41-41 (1969). Likewise, merely agreeing to a bonus structure for a specified amount of performance does not guarantee the right to fully perform that amount. *Wilkerson v. Carriage Park Dev. Corp.*, 130 N.C. App. 475, 503, S.E.2d 138, 140 (1998). But several different provisions, when stacked, can operate to remove the at-will presumption. See *Stewart v. U.S. Corr. Corp.*, No. 1:98cv173-C, 1999 U.S. Dist. LEXIS 22834 (W.D.N.C. Mar. 17, 1999); *Station Assocs., Inc. v. Dare County*, 130 N.C. App. 56, 501 S.E.2d 705 (1998).

Plaintiff alleged enough facts to make it inappropriate to dismiss her claim. Plaintiff argued that the offers of an annual salary, six months' housing assistance, health and dental insurance, an automobile allowance, mileage reimbursement, and sales bonuses, taken together, constituted definite provisions that operated to remove the at-will presumption. In reliance on those promises, Plaintiff took steps that she would not have taken otherwise, including selling her home, turning down a different job offer and leaving her job in Louisiana.

The Court found that Plaintiff stated a claim upon which relief could be granted, and thus denied Defendant's motion to dismiss. Plaintiff acknowledged she alleged no facts to sustain a claim against Defendant Local Book Publishing. The motion to dismiss as to that Defendant was granted.

CHAPTER IX-A

Part II

North Carolina State Law Update

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NORTH CAROLINA

BAR ASSOCIATION

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CHAPTER IX-A-PART II
NC Update – State Appellate Court

Laura J. Wetsch - Raleigh

INDEX

Abuse of Process.....	IX-A-2
Attorneys.....	IX-A-3
Attorneys’ Fees.....	IX-A-3
Civil Conspiracy.....	IX-A-4
Civil Procedure.....	IX-A-4
Constitutional Claims.....	IX-A-5
Fraud.....	IX-A-6
Governmental Immunity.....	IX-A-7
Malicious Prosecution.....	IX-A-8
Misappropriation of Trade Secrets.....	IX-A-8
Negligent Infliction of Emotional Distress (NIED).....	IX-A-10
Noncompetes.....	IX-A-10
Public Employees.....	IX-A-11
Public Employees – Benefits.....	IX-A-17
Statute of Limitations.....	IX-A-18
Title VII.....	IX-A-18
Tortious Interference.....	IX-A-18
Unfair and Deceptive Trade Practices.....	IX-A-19
Whistleblowers.....	IX-A-20
Workers Comp Exclusivity.....	IX-A-20

Abuse of Process

Seguro-Suarez v. Key Risk Ins. Co., No. COA17-697, 2018 N.C.App.LEXIS 888, 2018 WL 4200879 (N.C.App. Sep. 4, 2018) (Inman, Stroud, Dillon) – in 2003 plaintiff was injured on the job when he fell 18 feet onto concrete, striking his head and sustaining a permanent traumatic brain injury. Although the plaintiff required 24-hour care upon release from the hospital, the Workers Comp carrier, Key Risk Ins., arranged for plaintiff’s 18-year old daughter (who had recently immigrated to the U.S.) to assume all home care for the plaintiff, without pay, and later refused plaintiff’s physicians’ requests for evaluation by occupational home therapy evaluation and a neurologist. At some point, Key Risk obtained 9 hours of surveillance footage over a six month period, which it edited down to 45 minutes; it used that footage to persuade plaintiff’s neuropsychologist in 2007 that the plaintiff was willfully exaggerating his symptoms and needed no further treatment. In 2008 a NCIC deputy commissioner ordered Key Risk to authorize further treatment; in 2010, a deputy commissioner ordered Key Risk to pay continued compensation. In 2011 the full Industrial Commission entered its own opinion in the plaintiff’s favor, awarding him continued benefits and concluding as a matter of law that Key Risk had brought and defended the claim without reasonable grounds, and that its position was not based on reason. The Commission further ordered Key Risk to pay the plaintiff’s daughter and a family friend for their caregiving services, finding its refusal to do so “unreasonable and constitut[ing] stubborn, unfounded litigiousness.” Key Risk’s untimely appeal of this Order was rejected. Key Risk then obtained additional surveillance of the plaintiff, along with an independent exam which concluded that the plaintiff was not malingering, and did not suffer from dementia, traumatic brain injury, chronic dizziness and chronic headaches as a result of his workplace injury, and convinced the Lincolnton Police Department to bring criminal charges against the plaintiff under the theory that he was obtaining his Workers Comp benefits by false pretenses (faking his symptoms). As a result, the plaintiff was arrested, jailed, and indicted on 25 counts of obtaining property by false pretenses, and one count of insurance fraud. While in pretrial detention, he was ordered to undergo a psychological exam to determine his competency; the examining psychologist concluded that he exhibited cognitive deficits consistent with his history, and was mentally incapable of proceeding. The State ultimately dismissed all charges after a hearing in which the trial court asked the State if it “really want[ed] to assist in the establishment of a malicious prosecution claim[,] and expressed “real concerns when a man is drawing a check pursuant to an order, in effect, pursuant to a court order, and one side doesn’t like the court order and decides to take out criminal charges because they disagree with what the ruling was.” After he was released, the plaintiff filed suit, alleging malicious prosecution, abuse of process, UDTP, bad faith, and civil conspiracy. Defendants moved for dismiss under Rule 12(b)(1) and (6), arguing the Workers Comp exclusivity provision, and the trial court denied that motion. The court of appeals allowed the Defendants’ interlocutory appeal, and affirmed the trial court. After disposing of the Workers Comp exclusivity defense, the court found that the plaintiff’s claim for abuse of process was sufficient where he alleged that the defendants caused criminal proceedings to be continued against the plaintiff after his arrest, and then used that criminal process to attempt to recoup the funds it had paid for Workers Comp benefits.

Attorneys

Ke v. Zhou, No. COA16-1297, 808 S.E.2d 458, 2017 N.C.App.LEXIS 973 (N.C.App. Nov. 21, 2017) (Dillon, Zachary, Berger) – in this contractual dispute between a restaurant owner and his (unlicensed) “contractor,” the Court of Appeals reiterated the rule that a corporation cannot appear in court except through a licensed attorney, so the clerk of court did not err in entering default against the corporate defendant when the corporation’s owner purported to file an answer on behalf of himself, individually, and the corporation:

The precising holding in *Lexis-Nexis [Div., of Reed Elsevier, Inc. v. Travishan Corp.]*, 155 N.C.App. 205, 208, 573 S.E.2d 547 549 (2002)] was that a corporation may *not* represent the corporation in a lawsuit, except in small claims court. ... The [dicta relied upon by counsel] did not stand for the proposition that a corporate officer could *file an answer* in a lawsuit pending in superior court in order to avoid default. ... [E]ven if Defendant Zhou in fact *intended* to file his answer on behalf of both himself and his corporation, the answer was not a valid response for his corporation because he was not a licensed attorney. ...

Attorneys’ Fees

Winkler v. N.C. State Bd of Plumbing, Heating & Fire Sprinkler Contractors, No. COA17-873, 2018 N.C.App.PLEX 805, 2018 W.L. 3977853 (N.C.App. Aug. 21, 2018) (Inman, Elmore, Berger) – Winkler was subjected to disciplinary proceedings after he installed a replacement HVAC system and examined a hotel’s pool heater (for which he was not licensed), turned on the gas to the heater, and failed to check for carbon monoxide, so that three hotel guests died. He appealed the Board’s discipline, and the court of appeals reversed, concluding that the Board did not have jurisdiction to discipline Winkler for the pool heater inspection, remanding solely for consideration of the HVAC matter. The Board ultimately issued a revised order placing Winkler on probation for 12 months, among other things. Winkler then moved in superior court for his attorneys’ fees and costs incurred in his successful defense of allegations that the Board knew or should have known was outside its statutory authority, citing N.C.Gen.Stat. §§ 6-19.1 and 6-20. The superior court awarded \$29,347.47, the Board appealed, and the court of appeals reversed, ruling that N.C.Gen.Stat. § 6-19.1 excluded claims incurred in disciplinary proceedings.¹

¹ The language at issue provided:

- (a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing Board, brought by the State or brought by a party who is contesting State action pursuant to [N.C.G.S.] § 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorneys’ fees, including attorney’s fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as costs against the appropriate agency....

N.C.G.S. § 6-19(a)(2017). The Board argued that “or a disciplinary action by a licensing Board” was part of the phrase beginning with “other than,” while Winkler contended that “or a disciplinary action by a licensing Board” was in addition to “any civil action.”

Civil Conspiracy

Krawiec v. Manly, No. 252A16, 370 N.C. 602, 811 S.E.2d 542, 2018 N.C.LEXIS 222 (Apr. 6, 2018) – plaintiffs entered into contracts with Defendants Bogosavac and Difljak, whereby the defendants agreed to exclusively work for the defendants as dance instructors and performers, and plaintiffs would procure an O1-B visa for each defendant. These contracts included a one-year noncompete. However, almost immediately Bogosavac and Difljak began working as dance instructors for defendant Metropolitan Ballroom, allegedly sharing plaintiff’s confidential ideas and concepts for dance productions, marketing strategies, and customer lists. Among other things, plaintiffs sued the defendants for civil conspiracy, alleging that the defendants reached an agreement whereby Bogosavac and Difljak would unlawfully go to work for Metropolitan Ballroom, unlawfully solicit plaintiff’s customers, and unlawfully disclose plaintiff’s trade secrets, all of which damaged plaintiff’s business and reputation. The supreme court affirmed the business court’s 12(b)(6) dismissal, finding that the plaintiff’s allegations lacked sufficient detail regarding which laws were allegedly violated and how the defendants violated them, and plaintiff’s other claims (tortious interference and misappropriation of trade secrets) failed to state claims for relief so could not form a basis for civil conspiracy.

Seguro-Suarez v. Key Risk Ins. Co., No. COA17-697, 2018 N.C.App.LEXIS 888, 2018 WL 4200879 (N.C.App. Sep. 4, 2018) (Inman, Stroud, Dillon) – see “Abuse of Process” for factual background - - After his release from pretrial detention, the plaintiff filed suit, alleging malicious prosecution, abuse of process, UDTP, bad faith, and civil conspiracy. The court of appeals agreed that the plaintiff’s civil conspiracy claim should be dismissed based on the intra-corporate immunity rule: a corporation can’t conspire with itself, and plaintiff’s allegations failed to allege any conduct outside of employment or agency relationships. The court declined to consider whether liability attached due to the independent motive of employees/agents, or their conspiratorial acts outside the scope of their employment or agency, since facts supporting those arguments were not alleged.

Civil Procedure

Market America, Inc. v. Lee, No. COA17-342, 809 S.E.2d 32, 2017 N.C.App.LEXIS 1078 (N.C.App. Dec. 19, 2017)(Davis, Bryant, Inman)– Market America discovered that its independent distributor (Lee) was working with a third party, so it fired her, and then sued her and the third party. The superior court granted the defendants’ 12(b)(6) motion from the bench, but before defense counsel could deliver a written order to the court, the plaintiff filed a voluntary dismissal under Rule 41(a)(1). Defendants moved to vacate the voluntary dismissal for lack of good faith, and the superior court granted that motion. The Plaintiff appealed, and the court of appeals elected to treat the (interlocutory) appeal as a petition for certiorari, citing judicial economy. The court of appeals then affirmed, observing that a voluntary dismissal based on concerns for a future adverse ruling by the court was permissible, but dismissing an action after the court had announced its ruling was in bad faith and ineffective:

“Once the trial court has informed the parties of its ruling against the plaintiff on the defendant’s dispositive motion, Rule 41 does not permit the proceeding to devolve into a footrace between counsel to see whether a notice of voluntary dismissal can be filed before the court’s ruling is memorialized in a written order and filed with the clerk of court. To hold otherwise would ‘make a mockery’ of the court’s ruling.”

Constitutional Claims

Tully v. City of Wilmington, 370 N.C. 527, 810 S.E.2d 208 (Mar. 2, 2018) – Tully was a police officer who took the City’s required written exam for promotion, but did not receive a passing score. After receiving a copy of the official exam answers, Tully realized that the exam was based on outdated law and many of the “correct” answers were actually incorrect. Tully filed a grievance through the City’s internal grievance policy but was informed that “the test answers were not a grievable item,” despite the City’s policy which expressly permitted appeal of any portion of the City’s selection process, and provided remedies if an error in the process was substantiated, including re-testing, re-scoring and/or re-evaluation of candidates. Tully ultimately sued, alleging constitutional (due process property) claims under the North Carolina Constitution, Art. 1, § 1 (denial of fruits of his labor) and § 19 (no person shall be deprived of life, liberty or property but by the law of the land) based on the Town’s failure to allow him to “grieve denial of promotion based on his answers to the Sergeant’s test.” The superior court granted judgment against Tully on the pleadings pursuant to Rule 12(c). Tully appealed and in August 2016 the Court of Appeals reversed in a 2-1 decision,² observing that Tully was not asserting a right to a promotion, he was asserting a right to a non-arbitrary and non-capricious promotional process, in accordance with the City’s policies, and concluding, “[I]t is inherently arbitrary for a government entity to establish and promulgate policies and procedures and then not only utterly fail to follow them, but further to claim that an employee subject to those policies and procedures is not entitled to challenge that failure.”

The supreme court found that Tully had successfully alleged a claim under Article 1, § 1, citing *Corum v. UNC*, 330 N.C. 761 (1992), *State v. Balance*, 229 N.C. 764 (1949), *Presnell v. Pell*, 298 N.C. 715 (1979), and *King v. Town of Chapel Hill*, 367 N.C. 400 (2014), and ruling:

...Article I, Section 1 ... applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place. ... Here, Tully has adequately stated a claim under the portion of Article I, Section 1 safeguarding the fruits of his labor because, taking all the facts in his complaint as true, he alleges that the City arbitrarily and capriciously denied him the ability to appeal an aspect of the promotional process despite the Policy Manual’s plan statement that “[c]andidates may appeal any portion of the selection process.” Tully’s allegations

² Judge Linda Stephens wrote the opinion in which Judge Douglas McCullough concurred. Judge Wanda Bryant dissented, asserting the City’s power as an employer to manage its own internal operations.

state that by summarily denying his grievance petition without any reason or rationale other than that the examination answers “were not a grievable item” despite their being a “portion of the selection process,” the City ignored its own established rule. Tully then alleges that in so doing, “the City arbitrarily and irrationally deprived [him] of enjoyment of the fruits of his own labor.” Accordingly, we conclude that the City’s actions here implicate Tully’s right under Article I, Section 1 to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process.

Nevertheless, a public employee asserting this claim must show that no other state law remedy is available and must plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest, (2) the employer violated that policy, and (3) the plaintiff was injured as a result of that violation. Tully alleged each of these, and his complaint was sufficient as to his § 1 claim. However, the court ruled that there was no property interest in a promotion, so dismissal of his § 19 claim was appropriate.

Fraud

Bickley v. Fordin, No. COA17-185, 811 S.E.2d 671, 2018 N.C.App.LEXIS 170 (Aug. 24, 2017)(Dillon, Hunter, Arrowood) – in 2003 defendant formed an LLC whose primary asset was a software program. In 2006 plaintiff purchased a 10% interest in the LLC for \$50,000, but shortly thereafter was sentenced to 2 years imprisonment after pleading guilty to drug charges. In October 2008 defendant persuaded plaintiff to agree to sell back his 10% interest for \$50,000 in the form of a promissory note, telling plaintiff that the shares were worth nothing, the plaintiff’s conviction adversely affected the LLC’s prospects, and it would bankrupt the LLC if he didn’t agree to sell. A year later, the defendant formed a second company and had the second company “purchase” the software program from the first company; every member of the first company was given a minority stake in the second company. Six months after that, a third party invested in the second company and in 2014, the company sold the software program for \$14M. In December 2015, plaintiff sued for breach of contract (defendant never paid the \$50K), fraud, constructive fraud, breach of fiduciary duty and UDTPA. The court of appeals affirmed the fraud verdict, based on the defendant’s testimony that he had no intent to put the company in bankruptcy when he made that representation to the plaintiff, the investor (who defendant claimed wouldn’t invest if plaintiff was a member) didn’t buy into the company until 18 months after the plaintiff left the company, and the defendant never disclosed that the plaintiff was a member, even to the LLC’s CPA.

Governmental Immunity

Lambert v. Town of Sylva, No. COA17-84, 2018 N.C.App.LEXIS 439 (N.C.App. May 1, 2018)(Stroud, Elmore, Tyson) – plaintiff was hassled by chief of police when plaintiff decided to

run for sheriff as a Republican, and then was called in by town manager and fired based on “complaints” the Town had received. Plaintiff was told he could not appeal from this decision. When plaintiff applied for unemployment benefits, the Town claimed he was fired for excessive absenteeism. Meanwhile, his personnel file included no complaints, reprimands or counseling notifications other than an unsigned memo relating to a traffic checkpoint a year earlier, nor did it include any reprimands for absenteeism and his only absences were for Town-approved leave for illness and the birth of his child. Plaintiff sued under 42 U.S.C. § 1983 (free speech and association), and WDPP in violation of NCGS § 160A-169 (fired for political activity/beliefs), arguing that the town manager was rubber-stamping a decision made by the police chief, and alleging that the Town had waived sovereign immunity to the extent of its coverage under a liability insurance policy. The Town answered, asserting at-will employment and wholly failing to assert any affirmative defense, including any defense of governmental immunity. The Town filed no motion to dismiss or for summary judgment, the case was tried to a jury, and at the close of plaintiff’s case superior court Judge Mark Powell (Jackson County) granted a directed verdict for the town, referencing Rules 12(b)(6), 12(b)(7), and 50, and explaining to the jurors:

[For] the Town of Sylva commissioners – to be responsible for what their employees do that the plaintiff alleges was wrong, the commissioners either had to have a customer or policy that allowed it or directed it, they had to know it was happening – these are the alternatives – or they had to know it was happening and did nothing about it, maybe a reckless indifference type standard, or perhaps they failed to adequately train their employees and that’s why it was happening, but just because a municipal employee allegedly violated someone’s rights under that federal statute does not make the town liable, and I think you understand what I’m saying. I’ve heard – perhaps there’s been some testimony about some communication from a commissioner, but I didn’t hear any evidence that the commissioners were the moving force behind any of this. Now maybe employees, if you believe the plaintiff’s evidence, were, but not the commissioners themselves, and that’s why I dismissed the federal claims.

Similarly, on the WDPP claim, the judge explained:

Well, North Carolina law makes it clear you can’t fire someone because of political things they do when they’re not at work; that’s wrong. But you’ve also heard of sovereign immunity. You’ve heard of the cases where a – for example, a state employee was driving a truck during his business and he hit somebody and hurts them. So that person says, “I’m going to sue the state.” And perhaps you’ve heard about those cases where that lawsuit was thrown out because the judge says, “You cannot sue the state without their permission.” I remember I read some of those cases and I thought, well, that’s kind of unfair. Well, it depends on who hits you, who runs over you, whether you get money back or not for your damages. And there’s an exception for that. If the state or municipality has purchased liability insurance, then those lawsuits can proceed. But there’s been no evidence about liability insurance in this case. So the doctrine goes back to the common

law and the law concerning the King of England. You couldn't sue the king without his permission. And there's all kinds of exceptions. I know you want me to go into them, but I won't.

The Plaintiff appealed and the court of appeals reversed, pointing out that only Rule 50 was applicable, and finding that the plaintiff had presented more than a scintilla of evidence to support his claims. The Defendant did not assert governmental immunity in its pleadings or at trial, so the defense was waived, it was improper for the trial court to raise it for the Defendant, and ultimately the defense would be ineffective on Plaintiff's constitutional claims unless the Defendant showed that an adequate state remedy existed (which it didn't). Additionally, the plaintiff was not required to show an unlawful custom or policy because he alleged that the official with final policy-making authority made the unconstitutional decision and the Town Manager concurred (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)). Moreover, by leaving the decision to these decisionmakers, without any right of review by the Town, the Town did not insulate itself from liability; instead, it made itself directly liable for those decisions.

Malicious Prosecution

Seguro-Suarez v. Key Risk Ins. Co., No. COA17-697, 2018 N.C.App.LEXIS 888, 2018 WL 4200879 (N.C.App. Sep. 4, 2018) (Inman, Stroud, Dillon) – facts set out in “Abuse of Process”, above -- After he was released from pretrial detention, the plaintiff filed suit, alleging malicious prosecution, abuse of process, UDTP, bad faith, and civil conspiracy. Defendants moved for dismissal under Rule 12(b)(1) and (6), arguing the Workers Comp exclusivity provision, and the trial court denied that motion. The court of appeals allowed Defendants' interlocutory appeal and affirmed the trial court, disposing of the Workers' Comp exclusivity argument (see below), and rejecting Key Risk's argument that it could not be liable for malicious prosecution under *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross*, 366 N.C. 505, 512 (2013) because they only provided information to law enforcement and the prosecutors later decided to initiate proceedings based on that information: *Farm Bureau* concluded that a defendant could not be liable for its innocent transmittal of false or misleading information; here, the plaintiff alleged knowing, intentional, and malicious delivery of false, misleading and incomplete information which caused criminal proceedings to be initiated against him. Those allegations were sufficient to state a claim against the defendants.

Misappropriation of Trade Secrets

Krawiec v. Manly, No. 252A16, 370 N.C. 602, 811 S.E.2d 542, 2018 N.C.LEXIS 222 (Apr. 6, 2018) – plaintiffs entered into contracts with Defendants Bogosavac and Difljak, whereby the defendants agreed to exclusively work for the defendants as dance instructors and performers, and plaintiffs would procure an O1-B visa for each defendant. These contracts included a one-year noncompete. However, almost immediately Bogosavac and Difljak began working as dance instructors for defendant Metropolitan Ballroom, allegedly sharing plaintiff's confidential ideas and concepts for dance productions, marketing strategies, and customer lists. The North Carolina Supreme Court affirmed the business court's 12(b)(6) dismissal, finding that the

plaintiff's failed to sufficiently allege the trade secret they claimed was misappropriated. In doing so, the Supreme Court adopted the test formulated by the Court of Appeals in *Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C.App. 315, 326, 660 S.E.2d 577, 585 (2008) and *VisionAIR, Inc. v. James*, 167 N.C.App. 504, 510, 511, 606 S.E.2d 358, 364 (2004), *discret. review denied*, 363 N.C. 139, 674 S.E.2d 422 (2009): "To plead misappropriation of trade secrets, a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur."

Specifically, the supreme court ruled that, while customer lists and other compilations of customer data could be "trade secrets" under the statute, information that was available through public sources was not. In this case, the plaintiffs' description of their trade secrets as "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information" was insufficient to put the defendants on notice of the precise information at issue, failed to identify any information that was not publicly available, and was too general for the Court to determine whether the information was a "formula, pattern, program, device, compilation of information, method, technique, or process" that "derive[s] independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering," as required by N.C.Gen.Stat. § 66-152(3)(a). Additionally, the plaintiffs failed to identify any efforts to maintain the confidentiality of the information beyond an "expectation" that defendants Bogosavac and Difljak would keep the information "in confidence".

However, Justice Beasley dissented, pointing out the "problematic and muddled standards for North Carolina plaintiffs seeking to properly plead a claim for misappropriation of trade secrets," as well as North Carolina's liberal pleading standards, which required only a "*short and plain* statement... sufficiently particular to give the court and the parties *notice*" of the transactions and occurrences at issue. There was no heightened pleading standard for misappropriation of trade secrets, and the court improperly relied upon cases addressing motions for preliminary injunction and summary judgment in assessing 12(b)(6) sufficiency. Further, Justice Beasley objected to the majority's requirement that plaintiff provide evidence showing the steps it took to keep its trade secrets confidential, which was never previously required in North Carolina. Justice Beasley also objected to the majority's failure to consider whether marketing strategies and "original ideas and concepts for dance productions" were trade secrets, especially as there were no allegations that the productions had already occurred. Justice Beasley found the pleadings sufficient, and concluded:

With this case this Court had an opportunity to correct the faulty logic that for over a decade has resulted in the substitution of a preliminary injunction standard for our general pleading standard governing this particular claim. Instead, the majority has validated a heightened pleading standard for a misappropriation of trade secrets claim with no discussion as to why it believes it is necessary to do so. ... Because I believe we should not reject plaintiffs' misappropriation of trade

secrets claim at this early stage in the proceeding given our notice pleading standard, I respectfully dissent.³

Negligent Infliction of Emotional Distress (NIED)

Jones v. Wells Fargo Co., No, COA18-96, 2018 N.C.App.LEXIS 736, 2018 W.L. 3733877 (N.C.App. Aug. 7, 2018) – see Workers Comp (below)

Noncompetes

Market America, Inc. v. Lee, 809 S.E.2d 32, 2017 N.C.App.LEXIS 1078 (N.C.App. Dec. 19, 2017)(Davis, Bryant, Inman) - While Lee was employed as an independent distributor/certified trainer of Market America, she started working with a third party, ARIIX. When Market America learned of this, it fired Lee and then sued her for breach of noncompete and nonsolicitation provisions that included time restrictions of one year and geographic restrictions of 100 miles from the distributor's residence or any other distributor's residence, or any residence of any independent distributor in the distributor's downline who had achieved the level of Executive Coordinator or above. The superior court granted 12(b)(6) dismissal, ruling that the territorial restrictions were unreasonable and overbroad as a matter of law. After some procedural shenanigans (see above), Market America appealed, and the court of appeals reversed, finding that it was improper to dismiss at the pleading stage where evidence was needed to show the reasonableness of the restrictions:

“In this case, it is impossible to determine based solely on the four corners of the complaint whether the territorial restrictions in the Certified Trainer Agreement are appropriately tailored to protect Market America's legitimate business interests. Indeed, because of the way the provisions are worded, we presently have no way of knowing the actual effect of the geographic restrictions on Lee. The complaint does not specify the number of independent distributors Lee personally sponsored or the locations of the residences of the independent distributors in Lee's “downline” who achieved the level of executive coordinator or above during the time period specified in the agreement. Without this and other additional relevant information the potential overbreadth of the Certified Trainer Agreement's restrictions on Lee cannot be meaningfully assessed.

³ Justice Beasley also pointed out that the court could have found the complaint sufficient under rule 12(b)(6), and then required that the plaintiff identify the trade secret with more specificity prior to discovery.

Public Employees

City of Asheville v. Frost, 370 N.C. 590, 811 S.E.2d 560, 2018 N.C.LEXIS 217 (N.C. Apr. 6, 2018) – police officer suspended during investigation of excessive force claim, then terminated by Chief on unanimous panel of supervisors in officer’s chain of command. The officer appealed to the City’s Civil Service Board, which conducted a 3-day hearing and concluded that the City failed to prove the officer used excessive force, and also failed to provide the officer with adequate due process protections, so that his termination was not justified and his employment had to be reinstated with back pay and benefits. The City appealed to the superior court for de novo trial, and the officer filed a timely response, requesting a jury trial. The City moved to strike, arguing that there was no right to a jury trial from an administrative hearing, and the superior court denied the motion, finding that City’s Civil Service Law⁴ incorporated N.C.R.Civ.P. 38, so that the officer had a right to request a jury trial following that Rule’s procedures. The Court of Appeals reversed in a split decision (Bryant, Dietz; Hunter, dissenting), ruling that only the City (“petitioner”) could request a jury trial. The Supreme Court reversed the Court of Appeals, finding that the Civil Service Act’s direction that “if the petitioner desires a trial by jury, the petition shall so state” only provided direction on when/how to request a jury trial, and did not limit the respondent’s ability to request a jury trial, particularly when the Civil Service provision was read together with Rule 38.

Tully v. City of Wilmington, 370 N.C. 527, 810 S.E.2d 208 (Mar. 2, 2018) – see “Constitutional Claims”

Watlington v. Dept. of Soc. Servs. Rockingham Cty, No. COA17-1176, 2018 N.C.App.LEXIS 971 (N.C.App. Oct. 2, 2018) (Inman, Elmore, Murphy) – Watlington was a county social worker who was suspended after she told co-workers that she had accepted a gift at the conclusion of a case visit. During the course of the investigation, DSS discovered two additional instances of gift-giving of which it was unaware, and as a result of the cumulative information, determined that the social worker had violated policy and engaged in unacceptable personal conduct. Watlington challenged her termination, which was upheld in OAH. On a first appeal in 2017, the court of

⁴ The applicable section of Asheville’s Civil Service Act provided:

Within ten days of the receipt of notice of the decision of the Board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact upon which the petition relies for relief. If the petitioner desires a trial by jury, the petition shall so state. Upon the filing of the petition, the Clerk of the Superior Court shall issue a civil summons as in a regular civil action, and the sheriff of Buncombe County shall serve the summons and petition on all parties who did not join in the petition for trial. It shall be sufficient service upon the City for the sheriff to serve the petition and summons upon the clerk of the City. Therefore, the matter shall proceed to trial as any other civil action.

City of Asheville v. Frost, Record on Appeal at p 61.

appeals found that the ALJ failed to make appropriate findings of fact or conclusions of law, and remanded for those findings, and to determine whether DSS violated procedures and, if so, order a remedy appropriate with the NC Admin. Code. The ALJ reviewed and rendered another decision, affirming termination and finding DSS had not violated any procedural requirements. The social worker appealed again, arguing that all but one of the alleged acts of unacceptable personal conduct occurred in the past, so were not “current” incidents upon which DSS could rely for her termination. The court of appeals disagreed, finding that only one “current” incident of unacceptable personal conduct was required, and it was reasonable for DSS to also consider prior acts that it learned about during its investigation: “This five-day period – from management’s discovery of these acts of unacceptable personal conduct to Ms. Watlington’s dismissal – constitutes a “reasonable time under the circumstances,” ... and her acts were therefore “current” within the meaning of 25 N.C.Admin. Code 11.2304(a).” In doing so, the panel made a policy choice that a contrary decision would allow a “clever employee” to escape dismissal by concealing a prior bad act for a lengthy period of time. Moreover, her unacceptable personal conduct would erode the public’s faith in DSS, even though not malicious or correct, and provided requisite cause to justify dismissal.

Smith v. N.C. DPI, No. COA17-1361, 2018 N.C.App.LEXIS 923, 2018 W.L. 4440337 (N.C.App. Sep. 18, 2018) (Davis, Dillon, Inman) – Daniel Smith was a section chief for Student Certification and Credentialing at DPI. In 2013 Smith wrote a number of snotty and threatening emails to DPI partner organizations (the Ass’n for Career and Tech. Educ.’n, the Nat’l Inst. for Automotive Serv. Excellence). In July 2014 he showed up in a tank top and shorts at a social event during a professional conference, and after he was approached about it, complained that DPI’s dress code was discriminatory because women were permitted to wear open-toed shoes but men were not. In September 2014 he left his own morning presentation at a DPI conference because attendees were late in appearing, and then failed to show up for his afternoon presentation. In October 2014 he gave a misleading reference to DOL for a former DPI employee he did not supervise, and was given a written warning for misconduct; he responded by filing an EEOC Charge asserting retaliation for objecting to the “discriminatory dress code.” Shortly after filing that Charge, DPI issued a new dress code which Smith printed on colorful paper and posted throughout his division, retrieving from the trash can and reposting those that were taken down. In December 2015 he argued loudly with a female colleague about an “Ugly Sweater Contest” that was scheduled to take place during DPI’s holiday party, again asserting sex discrimination; the female colleague complained to HR, asserting intimidating behavior and a hostile work environment. From January to April 2016, DPI investigated Smith’s behavior; during Smith’s interview he repeatedly responded to questions with, “I do not wish to discuss [it] with you at this time,” and “I don’t care to share.” In February 2016 DPI learned that Smith had told a job candidate that he did not get along with his supervisor because she discriminated against men, he might be suing DPI for discrimination, and that she might want to withdraw herself from consideration because “the first candidate hit it out of the ballpark.” In March 2016, DPI learned that Smith had “liked” two postings in his LinkedIn account, the first by an author of “erotic and paranormal romance” who included a photo of a woman’s breasts in a bra and the caption, “Let’s Talk Sex;” and the second a picture of multiple scantily clad women. In May 2016 DPI concluded its investigation and the Review Team recommended “appropriate action” in response to his intimidating

behavior toward women in the workplace. A week later, Smith received his pre-disciplinary conference notification, and was given an opportunity to respond. A week after that, he was fired; his 4-page single-spaced termination letter listed specific grounds for his dismissal (disrespect that harmed the cohesiveness of the organization or hindered it in carrying out effectively its tasks, goals and mission; and conduct unbecoming a State Employee) with examples of each. Smith filed an internal grievance (he lost) and then a petition for contested case with OAH (he lost, again). He appealed to the court of appeals, arguing that the termination letter was impermissibly vague because it failed to include the names of the persons he talked to or the dates of those conversations. The court of appeals rejected this argument, observing that Smith had not argued that the lack of names/dates prevented him from contesting the grounds for his dismissal and that other detail was more than sufficient to put him on notice. Ultimately, he did not contest committing the acts of which he was accused, and those acts were more than sufficient to support OAH's finding of just cause for the termination based upon unacceptable personal conduct.

Weaver v. N.C. DHHS, No. COA17-828, 2018 N.C.App.LEXIS 878, 2018 W.L. 4200881 (N.C.App. Sep. 4, 2018) (Stroud, Davis, Arrowood) – petitioner was a career employee who had worked as a Lab Specialist in the Microbiology Unit of the State Lab for 11 years when she applied for a supervisory position; she was also the spouse of a disabled veteran, and believed she should have preference for the position both because of veteran's preference and her career status. However, hiring officials determined that petitioner was very experienced with lab operations but had no supervisory or management experience, so they selected a male candidate who was not a state employee, but had the requisite education, work and supervisory requirements for the job, including supervising a public health lab in Maryland with 6-12 employees. Petitioner challenged the selection, and after a hearing in OAH, the ALJ pointed out that she admitted to no supervisory experience, and had thus failed to establish that she was significantly better qualified for the position than the selected candidate. Moreover, because she did not meet the minimum requirements for the position, she was not qualified for the veteran's preference or priority consideration as a career State employee. The court of appeals agreed, concluding that the ALJ's findings were supported by the evidence, and information contained in the successful candidate's application and interview notes were properly authenticated and admitted under the "business records" exception to the hearsay rule.

Hardy v. N.C. Central Univ., No. COA17-664, 2018 N.C.App.LEXIS 794, 2018 W.L. 3733622 (Aug. 7, 2018) (Murphy, McGee, Elmore) – Tisha Hardy had risen to the rank of lieutenant with the NCCU Police Department, but was demoted to patrol officer due to her subordinates' complaints, from which NCCU concluded she had engaged in "unacceptable personal conduct" and "unsatisfactory job performance," based on her "autocratic, divisive, bullying management" of her patrol team. She challenged her demotion, and OAH agreed that NCCU had not shown sufficient proof that Hardy bullied, threatened or intimidated her subordinates, or created a violent workplace for her subordinates, citing to her "good" and "very good" annual performance ratings for leadership, and a recent "very good" rating for employee supervision, and finding insufficient her subordinates' testimony that Hardy assigned unnecessary work, failed to assist her subordinates on calls (directing traffic at an accident scene, etc.), used a harsh tone, or

distracted officers by calling them during their shifts.⁵ The court of appeals affirmed, applying the “*Warren test*”,⁶ and agreeing that Hardy’s conduct could be categorized as poor management and supervision, but was not “autocratic, divisive, or bullying,” and did not fall into any of the statutory definitions of “unacceptable personal conduct:” it was not conduct for which no reasonable person should expect to receive a prior warning (cf. *Poarch v. NC Dept. of Crime Control*, 223N.C.App. 125, 741 S.E.2d 315 (2012)(trooper having sexual relations in his patrol car and unlawfully stopping his lover), or job-related conduct that violated state or federal law, or a willful violation of known or written work rules, or conduct unbecoming a state employee that was detrimental to state service.

Johnson v. East Carolina Univ., COA17-1159, 816 S.E.2d 539, 2018 N.C.App. LEXIS 704, 2018 W.L. 3431816 (N.C.App. July 17, 2018)(Davis, Dillon, Inman) – Johnson was an Analyst in ECU’s IT Department, working on the Banner Team. In 2014 she sought promotion to a “Specialist” position within the Banner Team, pointing out that she had been a project leader, and had served as the backup to the person previously holding the Specialist position. The hiring team determined that none of the applicants – including Johnson – were qualified, and re-advertised the position four more times. Johnson reapplied each time, never got an interview, and ultimately a probationary state employee was selected for the position, although he had no experience on the Banner Team. Johnson filed an internal grievance, alleging age, sex, race and color discrimination and alleging that ECU erred in failing to give her priority consideration as a career State employee under N.C.G.S. § 126-7.1(e), (g). Her grievance was unsuccessful, and she filed a petition for a contested case in OAH. After hearing, the ALJ (Elkins) concluded that Johnson failed to meet her burden of showing discrimination or that her qualifications were substantially equal to the successful candidate, so she was not entitled to priority consideration. She appealed the determination that she was not entitled to priority consideration, and the Court of Appeals affirmed the ALJ, ruling that the findings of fact supported the ALJ’s determination: the posting specified a high preference for “expertise in PL/SQL, SQL, Oracle Forms, Banner Finance, or AppWorx”, and while the successful candidate demonstrated that expertise in his application and interview, Johnson did not. Accordingly, Johnson failed to establish that she was “substantially equal” to the successful candidate, and therefore was not entitled to priority consideration.⁷

Hunt v. N.C. Dept. of Pub. Safety, COA17-1244, 817 S.E.2d 257, 2018 N.C.App. LEXIS, 2018 W.L. 3029028 (N.C.App. June 19, 2018)(Davis, Dillon, Inman) – Hunt was a career status employee who worked for DPS as a correctional officer at Scotland Correctional Institution. In Summer 2017 he

⁵ On appeal, NCCU also argued Hardy’s alleged failure to immediately report a larceny, but this argument was rejected because (a) it was not raised until appeal, and (b) because it was not mentioned in her letter of demotion, it failed to provide the sufficient particulars required by N.C.Gen.Stat. § 126-35.

⁶ *Warren v. N.C. Dept. of Crime Control*, 221 N.C.App. 376, 383, 726 S.E.2d 920, 926 (2012)(review of public employer’s discipline of employee requires the court to consider whether (1) employee engaged in the conduct the employer alleges, (2) the employee’s conduct falls within one of the categories of unacceptable personal conduct provided by the N.C. Administrative Code, and (3) the misconduct amounted to just cause for the disciplinary action taken).

⁷ The panel assumed for the sake of the appeal that the successful candidate’s probationary status would have triggered the N.C.Gen.Stat. § 126-7.1 preference, if Johnson’s qualifications had been “substantially equal.”

received two warnings for tardiness and absenteeism, and on November 2, 2016 he was instructed to meet with his unit manager, Gerald, where he was told that she was investigating a prior absence from work, and asked him to sign paperwork regarding his absence. Hunt refused, saying he could not recall the absence, became upset and left the prison without swiping out. Gerald later testified that she heard Hunt say, “I quit” or “I’m quitting;” another individual testified hearing Hunt say, “I’m tired of this s***”; Hunt denied making these statements. Gerald told the officer-in-charge that Hunt had resigned, so when Hunt tried to re-enter the prison to begin working his shift a few minutes later, he was denied entry. On November 4, Hunt tried to speak to the prison Superintendent, Poole, but she was on vacation. On November 7, Superintendent Poole returned from vacation, and an assistant superintendent informed her that Hunt had resigned to Gerald. On November 9, Poole spoke to Hunt, and Hunt asked if he could return to work. Poole asked him if he was rescinding his resignation, and Hunt said, “yes,” but Poole refused to allow him to rescind based on the pending investigation and prior disciplinary issues, and later that day Hunt received a letter confirming his resignation. A few weeks later Hunt sent a letter saying he never resigned, and on January 20, 2017 filed a Step 1 Grievance to DPS. DPS then refused the grievance because he had resigned. Hunt filed a petition for contested case, and DPS moved to dismiss, arguing that Hunt failed to exhaust the internal agency grievance process, and failed to file his grievance within 15 days of “the event.” The ALJ (Lassiter) denied DPS’s motion, and after a hearing issued a Final Decision that Hunt never submitted a verbal statement of resignation to any DPS employee authorized to accept it, and that DPS accordingly had unlawfully terminated Hunt’s employment without cause. The ALJ ordered Hunt reinstated, and his attorneys’ fees and costs totalling \$11,740 paid, and DPS appealed, arguing that OAH had no jurisdiction because Hunt resigned, and he failed to timely follow the mandatory grievance procedures. In turn, Hunt argued that (1) he was effectively discharged, (2) because he was never provided with a statement of his appeal rights, the deadline for his Step 1 Grievance was never triggered, and (3) his OAH petition was timely because it was filed within 30 days of DPS’s letter refusing to consider his grievance. The court of appeals agreed with the ALJ that there was no evidence that Hunt resigned to any DPS “appointing authority,” that is, the person or persons who were authorized to make personnel decisions at the Scotland Correctional Institution, as required by 25 N.C.Admin.Code § 1C.1002: Gerald did not have the authority to hire/fire and was not given authority to accept Hunt’s resignation, and there was no evidence that Hunt ever told Poole that he wanted to resign. Additionally, the court agreed that because DPS never provided the required statement of appeal rights (even after it was aware that Hunt disputed his “resignation”), Hunt’s deadline was not triggered. Moreover, because DPS refused to allow Hunt to grieve his discharge, he had no duty to take any further steps pursuant to that grievance process, and was justified in filing an OAH petition instead. Moreover, the court did not need to consider just cause because DPS never argued that it had just cause to terminate. Finally, DPS’s argument that the ALJ erred in awarding attorneys’ fees/costs because it did not allow DPS 10 days to respond was rejected where DPS failed to show prejudice, and failed to argue that the amount awarded was unreasonable or the fees were not recoverable as a matter of law.

Antico v. N.C. Dept. of Pub. Safety, No. COA17-1085, 812 S.E.2d 203, 2018 N.C.App.LEXIS 316 (N.C.App. Apr. 3, 2018)(unpub.)(Arrowood, Stroud, Davis) – Antico was a prison guard at Polk Correctional Institution. He was fired of unacceptable personal conduct, namely leaving the

premises of the prison before he was released from his shift. He grieved his termination, and then filed a petition for a contested case with OAH. The ALJ (Elkins) found that Antico had three active written warnings (unauthorized use of force against inmate (2x) and failure to remain alert in his assignment to observe a self-injurious behavior inmate), and that on the night in question he might not have heard the instruction to remain, but refused his superior's command to return when he was stopped at the gate. Accordingly, the ALJ found just cause to terminate based on unacceptable personal conduct (defying a reasonable and proper instruction), Antico appealed, and the Court of Appeals affirmed the ALJ's decision: (1) substantial evidence demonstrated that an order to remain onsite to help look for missing equipment at the end of the shift was expected and required, and the ALJ was in the best position to determine the credibility of Antico's assertion that his superior yelled at him, (2) Antico's refusal to return violated a known and written workplace rule, which constituted unacceptable personal conduct (insubordination), and (3) just cause existed for the dismissal, considering "the need for order in a prison setting to maintain safety and security," and that Antico's conduct "would cause [DPS] to lose confidence in [his] ability to work with an incarcerated population," and "discipline had previously been imposed for [Antico's] unacceptable workplace behavior."

Peterson v. Caswell Dev. Ctr., DHHS, No. COA17-1139, 814 S.E.2d 590, 2018 N.C.App.LEXIS 306, 2018 W.L. 1597714 (N.C.App. Apr. 3, 2018)(Tyson, Bryant, Dillon) – Peterson was a career state employee with 8 years of experience, assigned to work a morning shift (6:00am-2:30pm) at "Magnolia Cottage," a residential care center for individuals with disabilities, behavioral challenges and medical conditions that required 24-hour care and supervision. On June 2, 2016, Peterson overslept and did not arrive at work until around 7:00am. She was given a written warning for an unexcused absence which she refused to sign. On August 27, Peterson overslept again, and again arrived at work at 7:00am. On September 5 she was instructed to attend a pre-disciplinary conference the next day, and was informed of the possibility of suspension without pay due to unacceptable personal conduct. She attended the pre-disciplinary conference, provided a written statement admitting she had overslept, and was suspended for five days without pay. However, the facility's policies specified that disciplinary action (including written warnings) only began after five unscheduled absences or five instances of tardiness in a 12-month period. Peterson filed a petition for a contested case in OAH, and the ALJ reversed DHHS's decision, finding that just cause did not exist for an unpaid suspension. DHHS appealed, but the Court of Appeals agreed with the ALJ: (1) the record showed Peterson had 8 years of positive employment history, (2) other employees were able to cover for the hour that she was late so there was no negative impact to the facility or residents, and (3) DHHS wrongly applied its absenteeism policy Peterson's tardiness. Substantial evidence supported the ALJ's determination that DHHS did not have just cause to suspend Peterson for five days without pay.

Whitehurst v. E. Carolina Univ., 811 S.E.2d 626, 2018 N.C.App. LEXIS 128 (N.C.App. Feb. 6, 2018) (Zachary, Stroud, Arrowood) – Whitehurst was a permanent state employee employed by ECU as a Public Safety Supervisor. On March 17, 2016, a non-ECU student, Myrick, struck a female in downtown Greenville, and then fled to ECU campus, pursued by a group of individuals, who attacked him. Whitehurst was called to the scene by an ECU telecommunicator who saw it on surveillance cameras; by the time he arrived the assault had ended, individuals were detaining

Myrick by sitting on him, and told Whitehurst that Myrick had assaulted a girl downtown by punching her in the face. Myrick confirmed he had “been in a fight downtown.” Whitehurst put handcuffs on Myrick but didn’t attempt to prevent the remaining individuals from leaving the scene, or ask them to stay so he could get their statements. By the time other officers arrived, almost all perpetrators and witnesses had left. Although another officer learned that Myrick was the victim of the assault, she did not tell Whitehurst. Whitehurst transported Myrick to the hospital and released him. At 3:30am Whitehurst notified his Chief and other command officers that he had responded to an assault on campus. He did not file a report with respect to the assault. The next day, the Chief initiated an Internal Affairs investigation, but Whitehurst was not shown the surveillance footage for another three days. Whitehurst was placed on paid suspension, and then fired for violating three rules: (1) failing to obtain information from witnesses and suspects, (2) failing to file an appropriate report documenting the incident, and (3) failing to file a report when a private citizen detains someone. Whitehurst grieved his dismissal, and the Grievance Hearing Panel recommended a demotion rather than dismissal, but the ECU Chancellor dismissed him anyway. Whitehurst filed a petition for a contested case hearing, and the ALJ (Don Overby) determined that ECU met its burden of showing unacceptable personal conduct and just cause for discipline, but reversed Whitehurst’s dismissal, finding that a demotion of one pay grade was more appropriate.

Public Employees – Benefits

Trejo v. N.C. Dept. of State Treasurer, Retirement Sys. Div., No. COA16-1182, 808 S.E.2d 163, 2017 N.C.App.LEXIS 938, 2017 W.L. 5146274 (Nov. 7, 2017)(Dietz, Elmore, Arrowood) – In 2002, Stephanie Trejo was injured while working as a public school teacher. In 2006 (after expiration of the State’s 4-year waiting period) she applied for State disability benefits, and also applied for Social Security disability benefits; the State granted benefits retroactive to 2004, but required that she complete additional paperwork before beginning payments. Meanwhile, the SSA denied benefits, determining that she was not disabled under that agency’s standards. In 2009 Trejo completed her State paperwork and began receiving LTD benefits, including a lump sum payment for accrued benefits from 2004-2009. Four years later, she received a notice of overpayment from the State, who explained that it had failed to offset the amount that the SSA would have given her if her claim had been approved, which offset was statutorily required to commence four years after she began receiving disability benefits from the State. The State reduced her benefits in order to recoup the alleged overpayment, and Trejo filed an administrative challenge in OAH. The ALJ rejected Trejo’s arguments, but the superior court reversed. The State appealed, and the court of appeals reversed the superior court, ruling (1) the applicable statute at the time that her disability benefits vested (2004) required that the State apply an offset for any Social Security disability benefits Trejo hypothetically could have received, even if she was denied those benefits, (2) it did not matter that Trejo was later ineligible for SSA benefits since she was eligible when State benefits accrued, (3) Trejo could not successfully assert estoppel or laches because the State never said they would not apply the offset, and Trejo did not show that she had changed her position because she believed it would not apply the offset (in fact, Trejo signed a form in 20016 acknowledging the State’s right of offset, and her agreement to reimburse any overpayment), and (4) the 3-year statute of limitations did not bar the State’s recoupment effort

because (a) reducing future benefits was not an “action” within the meaning of N.C.Gen.Stat. § 135-5(n) (“no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made.”), (b) N.C.Gen.Stat. § 135-5(n) specifically exempted the Retirement System’s recoupment of overpaid benefits, and (c) N.C.Gen.Stat. § 135-9 authorized the State to recoup any overpayment through reduction of other state benefits “[n]otwithstanding any provisions to the contrary”.

Statute of Limitations

Unifund CCR, LLC v. Francois, COA18- 1811, 2018 N.C.App.LEXIS 710, 2018 W.L. 3431314 (N.C.App. July 17, 2018) (Dietz, Tyson, Berger) – trial court may not raise statute of limitations defense on behalf of defaulting litigant who fails to appear, and had no authority to dismiss a complaint based on a perceived violation of a debt collection statute that created a civil enforcement mechanism for the debtor and the Attorney General.

Title VII

Norman v. N.C. Dept. of Admin., No. COA17-328, 811 S.E.2d 177, 2018 N.C.App. LEXIS 123 (N.C.App. Feb. 6, 2018)(Elmore, Stroud, Tyson) - Rashia Norman began working as a probationary parking booth attendant with the NCDOA State Parking Division on February 23, 2010. From June-July 2010 her supervisor (who was newly returned from FMLA leave) made inappropriate comments and touched Norman without her consent. After a month of this, she complained to a co-worker, who told the supervisor, who angrily confronted Norman but ultimately apologized. Thereafter, Norman was counselled for various performance issues (failing to properly log off, altering a RTW form signed by her healthcare provider), and then on September 20, 2010 was notified of a pre-counseling meeting, at which she finally reported Moore’s harassment. She was terminated the next day, and DOA investigated but found no evidence of unlawful harassment. Norman filed an EEOC Charge alleging Title VII discrimination (harassment) and retaliation, and after receiving a notice of right to sue, filed a complaint in superior court. DOA moved for summary judgment, which was granted, based upon Norman’s failure to timely report the harassment and her admission that the performance issues occurred. The court of appeals affirmed, citing *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.2d. 261 (4th Cir. 2001) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) to rule that Norman’s failure to report the harassment – consistent with DOA’s policy of which she was aware --barred her harassment claim, and no reasonable jury could believe that her failure to report was due to a fear of retaliation where there was no evidence Moore threatened to retaliate. The panel likewise rejected Norman’s retaliation claim, since the undisputed evidence was that DOA had decided to terminate Norman’s employment before she engaged in any protected activity.

Tortious Interference

Krawiec v. Manly, 370 N.C. 602, 811 S.E.2d 542 (N.C. Apr. 6, 2018) – plaintiffs entered into contracts with Defendants Bogosavac and Difljak, whereby the defendants agreed to exclusively

work for the defendants as dance instructors and performers, and plaintiffs would procure an O1-B visa for each defendant. These contracts included a one-year noncompete. However, almost immediately Bogosavac and Difljak began working as dance instructors for defendant Metropolitan Ballroom, allegedly sharing plaintiff's confidential ideas and concepts for dance productions, marketing strategies, and customer lists. Plaintiffs sued for tortious interference, among other things, but their claim failed because they failed to allege that the defendant knew of the exclusivity provisions of these contracts. Accordingly, the business court's order granting 12(b)(6) dismissal of this claim was affirmed.

Unfair and Deceptive Trade Practices

Krawiec v. Manly, 370 N.C. 602, 811 S.E.2d 542 (Apr. 6, 2018) – plaintiffs entered into contracts with Defendants Bogosavac and Difljak, whereby the defendants agreed to exclusively work for the defendants as dance instructors and performers, and plaintiffs would procure an O1-B visa for each defendant. These contracts included a one-year noncompete. However, almost immediately Bogosavac and Difljak began working as dance instructors for defendant Metropolitan Ballroom, allegedly sharing plaintiff's confidential ideas and concepts for dance productions, marketing strategies, and customer lists. The plaintiffs sued Metropolitan Ballroom for unfair and deceptive trade practices, relying upon their allegations of tortious interference and misappropriation of trade secrets for their “unfair or deceptive acts. However, where those tort claims failed, the UDTPA claim failed as well.

Seguro-Suarez v. Key Risk Ins. Co., No. COA17-697, 2018 N.C.App.LEXIS 888, 2018 WL 4200879 (N.C.App. Sep. 4, 2018) (Inman, Stroud, Dillon) – facts set out above under ‘Abuse of Process’ -- After he was released, the plaintiff filed suit, alleging malicious prosecution, abuse of process, UDTP, bad faith, and civil conspiracy. After disposing of defendants' Workers Comp exclusivity defense, the court rejected Key Risk's argued that the plaintiff's UDTPA claim was barred for lack of privity:⁸ because Key Risk was already directly obligated to pay the plaintiff his Workers Comp benefits at the time of its tortious conduct, and because “statutory privity” existed as a result of the Workers Comp Act, *Wilson* did not bar the plaintiff's claim.

Bickley v. Fordin, No. COA17-185, 811 S.E.2d 671, 2018 N.C.App.LEXIS 170 (Aug. 24, 2017)(Dillon, Hunter, Arrowood) – facts set out above under “Fraud” --Plaintiff sued for breach of contract (defendant never paid the \$50K promissory note), fraud, constructive fraud, breach of fiduciary duty and UDTPA. The trial court granted a directed verdict on the UDTPA claim, awarded \$50,000 on the breach of contract claim, and submitted the remaining torts to the jury, who found in favor of the plaintiff and awarded \$505,000. The court of appeals affirmed the directed verdict on the UDTPA claim, ruling: (1) repurchase of an interest in a closely held company from a shareholder does not fall within the scope of the UDTPA, because it was an internal transaction between owners of a business, and was akin to a securities transaction.

⁸ Defendants cited *Wilson v. Wilson*, 121 N.C.App. 662, 468 S.E.2d 495 (1996)(3rd party claimants cannot bring a UDTPA action against the insurance company of an adverse party).

Whistleblowers

Brown v. N.C. Dept. of Public Safety, No. COA16-1298, 808 S.E.2d 322, 201 N.C.App.LEXIS 977 (N.C.App. Nov. 21, 2017)(Calabria, Bryant, Stroud) – Lenton Brown was a correctional officer at Maury Correctional Institution in Greene County, N.C., who filed a superior court complaint alleging that he was denied a promotion in retaliation for reporting other officers' use of excessive force against an inmate, in violation of North Carolina's Whistleblower Act, N.C.Gen.Stat. § 126-84. Roughly 18 months later, he took a voluntary dismissal, and a year after that filed a petition for a contested case with OAH, alleging nearly identical claims. The State moved to dismiss, citing sovereign immunity, and Brown's failure to timely file his claim with OAH, which divested OAH of subject matter jurisdiction. Although he was directed to do so, Brown failed to respond to the State's motion, and the ALJ dismissed with prejudice, for lack of subject matter jurisdiction. Brown appealed, and the court of appeals affirmed the ALJ's decision: under N.C.Gen.Stat. § 126.34.02(a), Brown (a career State employee) had 30 days from receipt of the final agency decision to file a petition for a contested case, or assert a whistleblower claim under N.C.Gen.Stat. § 126-84; at the time of the alleged retaliation he could pursue a Whistleblower Claim in superior court or pursue a contested case in OAH, but not both, but by the time of his superior court complaint the statute had been amended and his only recourse was to file a contested case petition, which he failed to timely do.

Workers Comp Exclusivity

Seguro-Suarez v. Key Risk Ins. Co., No. COA17-697, 2018 N.C.App.LEXIS 888, 2018 WL 4200879 (N.C.App. Sep. 4, 2018) (Inman, Stroud, Dillon) – in 2003 plaintiff was injured on the job when he fell 18 feet onto concrete, striking his head and sustaining a permanent traumatic brain injury. Although the plaintiff required 24-hour care, the Workers Comp carrier, Key Risk Ins., arranged for plaintiff's 18-year old daughter (who had immigrated to the U.S. two months prior) to assume all home care for the plaintiff; it did not pay her for this service. Although plaintiff's physicians requested occupational home therapy evaluation and evaluation by a neurologist, these requests were refused. At some point, Key Risk obtained 9 hours of surveillance footage over a six month period, which it edited down to 45 minutes; it used that footage to persuade plaintiff's neuropsychologist in 2007 that the plaintiff was willfully exaggerating his symptoms and needed no further treatment. In 2008 a deputy commissioner ordered Key Risk to authorize further treatment; in 2010, a deputy commissioner ordered Key Risk to pay continued compensation. In 2011 the full Commission entered its own opinion and award in the plaintiff's favor, awarding him continued benefits and concluding as a matter of law that Key Risk had brought and defended the claim without reasonable grounds, and that its position was not based on reason, awarding the plaintiff his attorneys' fees and requiring that Key Risk continue to pay the plaintiff \$345.35 per week until further Order of the Commission. The commission further ordered that Key Risk pay the plaintiff's daughter and a family friend for their caregiving services, finding its refusal to do so "unreasonable and constitut[ing] stubborn, unfounded litigiousness." Its untimely appeal of this Order was rejected. Key Risk then obtained additional surveillance of the plaintiff, along with an independent exam which concluded that the plaintiff was not malingering, and suffered from dementia, traumatic brain injury, chronic dizziness and chronic headaches as a result of his

workplace injury. Undeterred, Key Risk convinced the Lincoln Police Department to bring criminal charges against the plaintiff under the theory that he was obtaining his Workers Comp benefits by false pretenses (faking his symptoms), providing the PD with an extensively edited videotape. As a result, the plaintiff was arrested, jailed, and indicted on 25 counts of obtaining property by false pretenses, and one count of insurance fraud. While in pretrial detention, he was ordered to undergo a psychological exam to determine his competency; the examining psychologist concluded that he exhibited cognitive deficits consistent with his history, and was mentally incapable of proceeding. The State ultimately dismissed all charges after a hearing in which the trial court asked the State if it “really want[ed] to assist in the establishment of a malicious prosecution claim[,] and expressed “real concerns when a man is drawing a check pursuant to an order, in effect, pursuant to a court order, and one side doesn’t like the court order and decides to take out criminal charges because they disagree with what the ruling was.” After he was released, the plaintiff filed suit, alleging malicious prosecution, abuse of process, UDTP, bad faith, and civil conspiracy. Defendants moved for dismissal under Rule 12(b)(1) and (6), arguing the Workers Comp exclusivity provision, and the trial court denied that motion. The Defendants filed an interlocutory appeal, the court of appeals allowed the interlocutory appeal and affirmed the trial court, distinguishing prior cases ruling that insurer misconduct had to be addressed by the Industrial Commission, since those cases of misconduct all related to the processing and handling of his claim. Here, plaintiff’s claims concerned the initiation and continued pursuit of a criminal prosecution, not a Workers Comp claim. Criminal prosecutions had to be handled in a court of general jurisdiction (which the NCIC was not), and the malicious use and abuse of the court’s officers and processes thus did not arise within the exclusive jurisdiction of the Industrial Commission. Additionally, Key Risk’s actions were intentional torts which fell outside the scope of the Workers Comp act, per *Woodson/Bowdon*; its motives in committing these acts (avoiding ongoing Workers Comp liability) was irrelevant.

Burgess v. Smith, No. COA17-1352 (N.C.App. Aug. 7, 2018)(Elmore, Tyson, Zachary) – plaintiff’s decedent was a traveling saleswoman who was a passenger (along with co-workers) in a vehicle that hydroplaned and crashed, resulting in her death at the scene in June 2013. In May 2015 her mother brought a wrongful death action against several individuals, including Marshall (who had previously denied he was the employer). Default was entered in July 2015, and default judgment was entered in July 2016. Five months later, in December 2016, Marshall moved the court for relief from judgment and to dismiss for lack of subject matter jurisdiction, asserting for the first time that he was the decedent’s employer and that the Workers Comp exclusivity provision (N.C.Gen.Stat. § 97-10.1) required that any proceeding be brought before the Industrial Commission. The superior court ruled that equitable estoppel and laches barred Marshall from challenging the court’s subject matter jurisdiction, and Marshall appealed. The court of appeals vacated, observing that subject matter jurisdiction could be raised at any time, including after entry of default judgment, and was a legal matter independent of the parties’ conduct so could not be barred by equitable estoppel or laches. The court remanded for further consideration, pointing out that (a) if the superior court determined it had jurisdiction, then its default judgment may be sustained; (b) if it determined that jurisdiction lay within the Industrial Commission then the prior judgments had to be vacated and plaintiff’s claims dismissed for lack of subject matter jurisdiction, (c) if the plaintiff was required to refile in the NCIC, the plaintiff could raise equitable

estoppel against any timeliness argument raised by Marshall, and (d) if plaintiff was required to file her claim in the South Carolina Industrial Commission, that Commission was encouraged to consider as waived Marshall's timeliness arguments.

Jones v. Wells Fargo Co., No, COA18-96, 2018 N.C.App.LEXIS 736 (N.C.App. Aug. 7, 2018)(unpub.) (Berger, Tyson, Dietz) – Plaintiff received SSA benefits for disability (mental illness) but wanted to go back to work, and informed employer of her disability before she was hired in June 2012. She worked for approximately a year, when she had a relapse and went back on full SSA disability. She returned to work about three months later (October 2013) on a reduced work schedule, but was required to produce the same results as before her relapse. When she asked for a transfer to a different supervisor, her request was denied. Her condition deteriorated and in December 2013 she was diagnosed with bipolar disorder and taken out of work by her doctor. In August 2015 she sued her employer, alleging NIED. The trial court granted Rule R12(b)(6) dismissal based on Workers Comp exclusivity, and the court of appeals agreed, ruling that workplace injuries caused by negligence were barred by the exclusivity provision unless the injury was caused by intentional misconduct substantially certain to cause serious injury or death, citing *Jordan v. Cent. Piedmont Comty. Coll.*, 124 N.C.App. 112, 119, 476 S.E.2d 410, 414 (1996), *discret. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997) and *Woodson*. According to the panel, the plaintiff's allegations that the employer engaged in harsh criticisms and evaluations, and that the employer knew of her disabling condition when it did so, was insufficient to meet this standard.

CHAPTER IX-B

South Carolina State Law and Federal District Court Update

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NORTH CAROLINA

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CHAPTER IX-B
South Carolina Legal Update

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