South Carolina Bar
Continuing Legal Education Division

39th Annual NC/SC Labor & Employment Law Video Replay

2024-003

Tuesday, January 30 & Wednesday, January 31, 2024

presented by
The South Carolina Bar
Continuing Legal Education Division
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Video Replay: 39th Annual NC/SC Labor & Employment Law Program

Tuesday, January 30th-Wednesday, January 31st, 2024

This program qualifies for 10.50 MCLE; 1.0 LEPR; 1.0 SA/MH
Day 1: 6.75 MCLE; 1.0 SA/MH; 5.75 ELL Sp. Credit
Day 2: 3.75 MCLE; 1.0 LEPR; 3.75 ELL Sp. Credit
SC Supreme Commission on CLE Course #: 241636

Tuesday, January 30, 2024

8:15am	Registration
8:40 am	Welcome and Opening Remarks
8:45-9:45	**Supreme Court Review and Update** *Paul E. Smith, Patterson Harkavy LLP, Chapel Hill, NC*
9:45-10:30	**Investigations 201- The Importance of Investigations in Employment Litigations** *D. Michael Henthorne, Olgetree Deakins Nash Smoak & Stewart, PC, Columbia, SC* *B. Shawan Gillians, Santee Cooper, Moncks Corner, SC*
10:30-10:45	Break
10:45-11:45	**Mental Health Awareness for the Employment Law Practitioner** *April Harris-Britt, Ph. D., AHB Center for Behavioral Health & Wellness, Durham, NC*
11:45-1:00	Lunch Break (on your own)
1:00-2:00	**Fourth Circuit Update** *Sean F. Herrmann, Herrmann & Murphy, PLLC, Charlotte, NC* *Florence C. Thompson, Jackson Lewis P.C., Charlotte, NC*
2:00-3:00	**Panel: Tips from the Bench** *The Honorable L. Patrick Auld, U.S. District Court, Middle District of N.C* *The Honorable Molly Cherry, Magistrate Judge, U.S. District Court, District of S.C.* *The Honorable Clifton Newman, S.C. Circuit Court* *Moderator: Samantha E. Albrecht, Burnette, Shutt & McDaniel PA, Columbia, SC*
3:00-3:15	Break

3:15-4:15	**The False Claims Act Case Lurking in Your Employment Dispute** *Christopher P. Kenney, Chris Kenney Law, Columbia, SC* *Johanna C. Valenzuela, U.S. Attorney's Office, Columbia, SC*
4:15-5:15	**Being and Effective Advocate Through a Webcam: Tips for Arguing Remote** *The Honorable Catherine C. Eagles, U.S. District Court, Middle District of N.C.* *The Honorable Stephanie P. McDonald, S.C. Court of Appeals, Charleston, SC* *Richard "Rick" Krenmayer, Stasmayer, Inc. Charleston, SC* *Moderator: Andrea L. McDonald, Womble Bond Dickson (US) LLP, Charleston, SC*
5:15	Adjourn

Wednesday, January 31, 2024

8:15	Registration
8:45 -9:45	**Attorney Client Privilege in Employment Law (Ethics)** *Virginia M. Wooten, Ogletree Deakins, Charlotte, NC*
9:45-10:30	**Pending Regulatory Issues Impacting Employment Agreements** *Shannon R. Meares, Regional Attorney, NLRB* *William J. McMahon, IV, Constangy Brooks Smith & Prophete, LLP, Winston Salem, NC*
10:30-10:45	Break
10:45-11:45	**New Legislation and Its Impact on the Workforce: Overview of the PUMP Act and the Pregnant Workers Fairness Act** *Grant Burnette LeFever, Burnette Shutt & McDaniel, Columbia, SC* *Denise Smith Cline, Denise Smith Cline, PLLC, Raleigh, NC* *Shannon M. Polvi, Cromer Babb, Porter & Hicks, LLC, Columbia, SC* *L. Diane Tindall, Wyrick Robins Yates & Ponton, Raleigh, NC*
11:45-12:45	**South Carolina State and District Court Update** *George A. Reeves III, Fisher & Phillips, Columbia, SC*
12:45	Adjourn

39th Annual NC/SC Labor and Employment Law Conference

SPEAKER BIOGRAPHIES
(by order of presentation)

Paul E. Smith
Patterson Harkavy LLP, Chapel Hill, NC

Attorney Paul E. Smith is a Partner at Patterson Harkavy. An integral member of the firm's civil rights and appellate practice, Paul primarily represents employees, labor unions, and the victims of police misconduct. He is active in the North Carolina Bar Association Labor and Employment Section and the North Carolina Advocates for Justice.

Paul has successfully represented individuals and labor unions in private arbitration, the North Carolina Industrial Commission, State and Federal trial courts, and before the North Carolina Court of Appeals and North Carolina Supreme Court. In 2019, Governor Roy Cooper appointed him to the North Carolina Occupational Safety and Health Review Commission, where he currently serves as Chair.

A native of Kinston, North Carolina, Paul graduated from UNC-Chapel Hill in 2007 and from Columbia Law School in 2012, where he was a Senator Daniel Patrick Moynihan Fellow and a James Kent Scholar. While in law school, he worked for the North Carolina ACLU, won Columbia's internal moot court competition, and acted as a research assistant for Professor Nathaniel Persily's work in election law and redistricting. Before joining Patterson Harkavy he served as a law clerk to the Honorable N. Carlton Tilley in the Middle District of North Carolina.

Bar Admissions
North Carolina, 2012
U.S. District Court, Middle District of North Carolina, 2012
U.S. District Court, Western District of North Carolina, 2014
U.S. District Court, Eastern District of North Carolina, 2015
U.S. Court of Appeals, Fourth Circuit, 2017

Professional Experience
Patterson Harkavy, LLP, 2013-present
Honorable N. Carlton Tilley, Middle District of North Carolina, Law Clerk, 2012-2013

Education
Columbia Law School, 2012
- Senator Daniel Patrick Moynihan Fellow
- James Kent Scholar

University of North Carolina at Chapel Hill, B.A., 2007

Professional Associations & Memberships
North Carolina Advocates for Justice
North Carolina Bar Association

D. Michael Henthorne

Ogletree Deakins Nash Smoak & Stewart, PC, Columbia, SC

D. Michael Henthorne is a Shareholder with Ogletree, Deakins, Nash, Smoak & Stewart, P.C. Michael focuses his practice on representing management in employment litigation. A specialist in employment and labor law as certified by the South Carolina Supreme Court, Michael has litigated matters involving Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, wrongful discharge, defamation, "whistleblower" claims, employment torts, and workplace safety. Michael has significant trial experience and appears regularly on behalf of employers in federal and state courts in South Carolina as well as before regulatory and administrative tribunals such as the Equal Employment Opportunity Commission, the Department of Labor, the National Labor Relations Board, the South Carolina Human Affairs Commission, the South Carolina Department of Labor, Licensing and Regulation, and the South Carolina Occupational Safety and Health Administration. Listed in The Best Lawyers in America© (2013- present); America's Leading Lawyers for Business, Chambers USA (2013-present).
Michael previously served as the Deputy Staff Judge Advocate for the South Carolina State Guard.

D. Shawan Gillians

Santee Cooper, Moncks Corner, SC

B. Shawan Gillians is a transactional lawyer with the South Carolina Public Service Authority (Santee Cooper) South Carolina's state-owned electric and water utility and has the pleasure of serving as the company's Director of Sustainability and Associate General Counsel. Shawan has held various leadership positions with Santee Cooper, serving as the company's Director of Legal Services and Corporate Secretary. Prior to her recent return to Santee Cooper, Shawan was Of Counsel with Womble Bond Dickinson (US) LLP. She is a 2004 magna cum laude graduate of Wofford College where she majored in both Economics and Religion, and went on to receive her Juris Doctor from The College of William & Mary School of Law as well as a Master of Business Administration from the Darla Moore School of Business at the University of South Carolina.

April Harris-Britt, Ph.D.

AHB Center for Behavioral Health & Wellness, Durham, NC

Dr. April Harris-Britt is a licensed psychologist practicing in NC and VA. In addition to providing child, adolescent, adult, and family therapy, Dr. Harris-Britt conducts comprehensive psychological evaluations and forensic evaluations. She also serves as a Parent Coordinator. Specific areas of clinical and research expertise include trauma and violence, adoption and attachment, medically fragile children, divorce transitions, ADHD and learning disabilities, autism spectrum disorders, the promotion of wellness, and multicultural issues. Dr. Harris-Britt contributes to research and teaching at the University of North Carolina at Chapel Hill and Fielding Graduate University where she serves as the Lead Faculty for the Forensic Concentration. She emphasizes a strengths-based, ecological approach within her clinical practice, research, and teaching pedagogy. Dr. Harris-Britt has served on numerous Boards and Committees for the American Psychological Association (APA), North Carolina Psychological Association (NCPA), and the Association for Family and Conciliation Courts (AFCC). She is currently President for the NC Chapter of AFCC.

Sean F. Herrmann

Herrmann & Murphy, PLLC, Charlotte, NC

Sean is a Partner at Herrmann & Murphy in Charlotte, North Carolina. He has represented workers in matters involving race, age, sex, pregnancy, disability, religious, and national origin discrimination; whistleblowing and retaliation; and hostile work environment and sexual harassment. Sean also works with clients on executive pay, non-compete agreements, severance negotiations, and false claims act whistleblower matters. Sean is licensed in both North and South Carolina, and he represents employees throughout both states.

Sean graduated magna cum laude from the University of Illinois College of Law in 2012. Sean has been named to the Super Lawyers' Rising Stars list since 2019, and he has received Best Lawyers in America recognition each year since 2018. In 2023, Best Lawyers recognized Sean as the "Lawyer of the Year" for Employment Law (individuals) in the Charlotte region. Sean recently served as Chair of the North Carolina Bar Association's Labor and Employment Section. He is currently Membership Co-Chair of the North Carolina Advocates for Justice's Employment Section, and he is an active member of the National Employment Lawyers Association.

Florence C. Thompson

Jackson Lewis P.C., Charlotte, NC

Florence represents employers in a broad range of employment-related disputes and litigation in state and federal court, including claims brought under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Fair Labor Standards Act, and North Carolina's Retaliatory Employment Discrimination Act. Florence cares about each client and their outcomes. With experience both in litigating and advising, Florence seeks to provide her clients in-depth and comprehensive advice.

Prior to joining Jackson Lewis, Florence was an associate at a boutique law firm representing and advising employers and individuals in employment law matters. Florence represented clients in state and federal courts in matters related to, discrimination, harassment, retaliation, breach of contract, unfair competition, non-competition and non-solicitation agreements, and wage and hour violations. She also prepared employment and severance agreements and assisted businesses with internal investigations and administrative proceedings.

Florence is licensed to practice in North Carolina and South Carolina and is a member of the John S. Leary Bar Association of Black Attorneys and the Young Black Lawyers of Charlotte.

The Honorable L. Patrick Auld

U.S. District Court, Middle District of N.C.

United States Magistrate Judge L. Patrick Auld grew up in and attended the public schools of Sumter, South Carolina. He earned a Bachelor of Arts degree in History and Politics from Wake Forest University and received his law degree from Yale Law School. After law school, Magistrate Judge Auld spent a year as a law clerk for United States District Judge N. Carlton Tilley, Jr., at the United States District Court for the Middle District of North Carolina, and another year as a law clerk for United States Circuit Judge Phyllis A. Kravitch, at the United States Court of Appeals for the Eleventh Circuit. Magistrate Judge Auld then practiced law with a firm in Atlanta, Georgia, primarily in the area of media-related litigation, before joining the United States Attorney's Office for the Middle District of North Carolina in 1998. During his service with that office, Magistrate Judge Auld prosecuted a wide variety of cases, with an emphasis on fraud offenses and appeals. In 2004, he became Deputy Chief of the Criminal Division and remained in that role until his appointment to his current position with the United States District Court for the Middle District of North Carolina in 2009.

The Honorable Molly Cherry

Magistrate Judge, U.S. District Court, District of S.C.

Molly Cherry was born in Charleston and raised in Newberry, South Carolina. She received a BA degree in Government and Spanish, magna cum laude, from Wofford College and her Juris Doctor degree, cum laude, from the University of South Carolina School of Law, where she was a member of Law Review, the John Belton O'Neal Inn of Court, Order of the Barristers and Order of Wig and Robe.

After completing law school, Judge Cherry served as a judicial law clerk to the Honorable David C. Norton, United States District Court in Charleston, South Carolina. She was in private law practice with the firm of Nexsen Pruet, LLC, from 1996 to 2020, where she was a partner for over 16 years.

While in private practice, Judge Cherry was President of the South Carolina Women Lawyers in 2017, having previously served as Secretary and Treasurer from in 2015 and 2016, respectively. She was active in the South Carolina Bar in a variety of roles, including as Chair of the Employment and Labor Law and Torts Insurance Practice Sections. She also served on the Employment and Labor Law Specialization Board for the South Carolina Bar for several years, including as Chair in 2015 and 2016. From 2017 to 2020, Judge Cherry was on the Board of Directors for the International Association of Defense Counsel.

Judge Cherry was sworn in as a United States Magistrate Judge for the District of South Carolina on July 1, 2020.

The Honorable Clifton Newman

S.C. Circuit Court

Judge Clifton B. Newman was born in Kingstree, South Carolina, in 1951, to the late Reverend Dr. Marion L. Newman, Sr., and Alice Singleton Newman.

He was raised in Greeleyville, South Carolina, where he graduated valedictorian of Williamsburg County Training School in 1969. His inspiration to pursue a legal career originated while playing the role of an attorney in a high school play centered around the 1954 school desegregation case of Brown v. Board of Education.

He received his undergraduate degree from Cleveland State University where he served as the President of Student Government and a member of Kappa Alpha Psi Fraternity.

While attending Cleveland-Marshall College of Law, he served as Chief Justice of the University Judiciary – the student court – and worked for the Legal Aid Society representing indigent clients.

Upon receiving his Juris Doctor degree in 1976, he began practicing law in Cleveland, Ohio, where he formed the partnership of Belcher & Newman. Returning to South Carolina in 1982, Judge Newman started a private law practice in Columbia and Manning. The Manning office soon relocated to Kingstree, where the practice flourished. While continuing in private practice, he was appointed Assistant Solicitor for Williamsburg County in 1983. In 1994, he formed and served as managing partner of Newman & Sabb, P.A., with offices in Columbia, Kingstree and Lake City. After 24 years as a practicing attorney and 17 years as Assistant Solicitor, he was elected Circuit Court Judge by the South Carolina General Assembly on May 24, 2000.

Judge Newman received historical preservation awards for his work in restoring historic buildings in Kingstree and Columbia. Among his numerous accomplishments Judge Newman cites his designation as Patriarch of the Miles Newman Family as one of his most cherished. He succeeded his uncles, the late Senator I. DeQuincey Newman and Bishop Ernest W. Newman, as the leader of his family.

He is a member of I. DeQuincey Newman United Methodist Church where he faithfully serves as Chairperson of the Administrative Council. He is a member of the Ohio and South Carolina Bar Associations and is a member of the Executive Board of The I. DeQuincey Newman Institute for Peace and Social Change. He is married to the former Patricia Blanton of Cleveland, Ohio, and they have four children – Corwyn, Jocelyn, Kellee, and Brian DeQuincey. Judge Newman enjoys traveling, spectator sports, and spending time "in the country."

Christopher P. Kenney

Chris Kenney Law, Columbia, SC

For more than a decade, attorney Chris Kenney has litigated complex disputes at all levels of the state and federal trial and appellate courts. Kenney's efforts have helped clients recover millions of dollars of compensation in death, serious personal injury, and dram shop cases. His work on civil fraud cases has led to the recovery of tens of millions of dollars by taxpayers and millions of dollars being paid to whistleblower clients as a reward for coming forward with allegations of fraud. He has helped achieve excellent results for criminal defendants, including freeing three clients from incarceration through post-conviction relief (PCR).

Prior to starting Chris Kenney Law in 2023, Kenney worked for Columbia trial lawyer Dick Harpootlian. He is an adjunct professor teaching civil litigation in the paralegal program at Midlands Technical College and a part-time assistant solicitor for the First Circuit Solicitor's Office.

Bar Admissions

South Carolina, 2011
U.S. District Court for the District of South Carolina, 2011
U.S. District Court for the District of Columbia, 2020
U.S. Court of Appeals for the Fourth Circuit, 2012
U.S. Supreme Court, 2016

Education

Juris Doctor, University of South Carolina (May 2011)
Bachelor of Arts, History (Honors Program) Xavier University, Cincinnati, OH (May 2004)

Johanna C. Valenzuela

U.S. Attorney's Office, Columbia, SC

Johanna Catalina Valenzuela is an Assistant U.S. Attorney and Deputy Chief of the Civil Division in the U.S. Attorney's Office for the District of South Carolina. She is a member of the University of South Carolina School of Law's Young Alumni Council and a mock trial coach at Eau Claire High School. She has formerly served on the Board of the S.C. Women Lawyer's Association and the S.C. Bar's Board of Governors.

Prior to joining the U.S. Attorney's Office, Ms. Valenzuela worked as an attorney for the South Carolina Senate Judiciary Committee and the Judicial Merit Selection Commission. From 2013 to 2016, Ms. Valenzuela was as an Assistant Attorney General at the South Carolina Attorney General's Office in the Consumer Protection and Antitrust Section and then a Senior Assistant Deputy Attorney General in charge of the Post-Conviction Relief Section. From 2011 to 2013, Ms. Valenzuela worked as an Assistant Solicitor in the Sixteenth Circuit Solicitor's Office in York, South Carolina, and, from 2010 to 2011, she served as a law clerk for Federal District Court Judge G. Ross Anderson, Jr.

Before becoming an attorney, Ms. Valenzuela served in the United States Air Force as an Aircraft Maintenance Officer. She was stationed in Okinawa, Japan, with a Rescue Helicopter Unit before being stationed in Fayetteville, North Carolina, where she served as a Maintenance Unit Flight Commander and as a Section Commander.

Ms. Valenzuela received a Juris Doctor, Magna Cum Laude, from the University of South Carolina School of Law in 2010. During law school she worked as a Property Tutor and served as a member on the South Carolina Law Review, on the Moot Court Bar, as co-Vice-President of the Pro Bono Committee, and as President of Women in Law. She was a member of the Order of the Wig and Robe and Order of the Coif and was awarded the Bronze Compleat Lawyer Award at graduation.

A wife and mother (to pets and humans), you can find her cheering on the River Bluff marching band and hiking or traveling with her family on the weekends.

The Honorable Catherine C. Eagles

U.S. District Court, Middle District of N.C.

Judge Eagles was born in Memphis Tennessee and grew up in Arkansas. She graduated with a B.A. from Rhodes College (then called Southwestern at Memphis) in 1979 and a J.D. from George Washington Law School. After law school, she served as a staff law clerk for the United States Court of Appeals for the Eighth Circuit and as a clerk to Judge J. Smith Henley. After her clerkship, she worked as an associate and partner at Smith, Helms, Mullis & Moore in Greensboro, North Carolina. In 1993 she was appointed a Resident Superior Court Judge based in Greensboro. She was elected to serve the remainder of the term in 1994 and re-elected in 1996 and 2004 to eight year terms. In 2006 she became the Senior Resident Superior Court judge in Guilford County.

On March 10, 2010, President Barack Obama nominated her to a seat in the Middle District of North Carolina. She received her commission on December 22, 2010. She is the first female judge to serve in the Middle District. On August 1, 2023 she became the Chief Judge in the Middle District.

The Honorable Stephanie P. McDonald

S.C. Court of Appeals

After graduation from the University of South Carolina School of Law, Judge McDonald returned home to Charleston to practice civil litigation with the law firm of Stuckey and Kobrovsky. She then worked with Senn, McDonald & Leinbach, where her practice focused on civil litigation and appellate matters in state and federal courts. In 2011, she was elected to the Circuit Court and in 2014, she was elected to the South Carolina Court of Appeals.

Judge McDonald has been active with the Bar and in her community, serving as an attorney member of the South Carolina Commission on Judicial Conduct, an Attorney to Assist Disciplinary Counsel, and a South Carolina Bar Foundation board member. She is a former President of the Junior League of Charleston, St. Philip's Church Episcopal Church Women, and Charleston Lawyers Club. Prior to joining the bench, she served on a number of local boards and commissions in the Lowcountry, including the City of Charleston Mayor's Commission for Children, Youth and Families.

Judge McDonald's proudest achievement is her daughter, Susanne. In her very first role, Susanne played "Scout" in the Charleston Stage production of "To Kill a Mockingbird" and later attended the South Carolina Governor's School for the Arts and Humanities. Susanne is a summa cum laude graduate of the Boston Conservatory at Berklee. She now lives in New York, where she works in film and theatre.

Richard Krenmayer

Stasmayer, Inc., Charleston, SC

Richard Krenmayer is the Co-Founder and CEO of Stasmayer, Incorporated, a Managed IT and IT Security company. He attended the University of Massachusetts Dartmouth with his business partner, David Stasaitis, where they both received a B.S. in Business Information Systems and started Stasmayer.

As cybersecurity continues to evolve and come to the forefront of everyone's mind in business, Rick has given multiple speeches and CLEs to provide a call to action on the subject. He is also a co-author for the latest edition of the South Carolina BAR's Paralegal Survival Guide having written the section on cybersecurity.

In his other life, Rick is a professional songwriter and performer since age 6, enjoys traveling to new places around the world, being a weather hobbyist, reading lots of books, speaking other languages and always learning more, all while raising his two sons, who's interest in machines dwarfs his own interest in business and technology.

Andrea "Andi" L. McDonald

Womble Bond Dickinson (US) LLP, Charleston, SC

Andi McDonald is a litigation associate with experience in both state and federal court and in arbitration. Her practice includes a broad spectrum of commercial disputes with a particular focus on construction and complex litigation. As an attorney in the firm's Business Litigation Group, Andi handles a variety of cases such as construction defect, payment, and contract disputes; insurance litigation; personal injury and wrongful death; business tort actions; intellectual property cases; and real property disputes. She is a dedicated client advocate both in and outside the courtroom, also providing counsel in dispute avoidance, early resolution, and arbitration.

Andi is active in her local and professional community. Through the University of South Carolina Veterans Legal Clinic, she has assisted veterans with legal matters, including VA claims and appeals. She is an active member of the South Carolina Bar's Young Lawyers Division and serves on the Editorial Board for the ABA Litigation Section's Litigation News.

Education

J.D., University of South Carolina School of Law
- magna cum laude
- Order of the Coif
- Order of the Wig and Robe
- Associate Editor-in-Chief and Editorial Staff Member, South Carolina Law Review
- Honor Council Chair
- John Belton O'Neall Inn of Court
- CALI Awards: Trial Advocacy, Fourth Circuit Practice, Conflicts of Law, Legal Writing for the Courts, Professional Responsibility, Property Law

B.A., University of Wisconsin-Oshkosh, Radio-TV-Film & Political Science
- cum laude

Professional & Civic Engagement
- South Carolina Bar
- Co-Chair, YLD Make-A-Wish Committee
- American Bar Association
- Litigation Section
- Forum on Construction Law
- Contributing Editor, ABA Litigation Section's Litigation News

Joshua R. Van Kampen

Van Kampen Law PC, Charlotte, NC

Joshua R. Van Kampen is the founder and leader of Van Kampen Law, PC in Charlotte, North Carolina.

In 2018, SuperLawyers rated Josh in its "Top 100" attorney list for all of North Carolina and in its Top 25 attorney list for Charlotte. At 46, Josh is among the youngest attorneys in North Carolina to receive these recognitions. The road to the SuperLawyers Top Lists started in Chicago, Illinois where Josh worked as an associate for two nationally recognized employment law defense firms: Seyfarth Shaw and Franczek Radelet. During his six years as a defense attorney, Josh defended Fortune 500 companies as well as smaller businesses in age, race, sex, disability, sexual harassment, traditional labor, and wage and hour litigation. Josh's defense experience also included counseling employers on litigation avoidance and sexual harassment training.

In 2004, Josh left a safe and lucrative career as a management-side attorney, to open a practice in Charlotte devoted exclusively to representing victims of discrimination, sexual harassment, unequal pay, wrongful discharge, retaliation, and wage and hour violations. It was the best decision he ever made.

Prior to forming Van Kampen Law, PC in July 2011, Josh was a partner at two of the premier, plaintiff-side employment law firms in North Carolina: Fosbinder & Van Kampen, PLLC, and Patterson Harkavy, LLP.

EDUCATION

Purdue University, B.A. 1993

University of Illinois College of Law, J.D. 1998, magna cum laude

MEMBERSHIPS AND LEADERSHIP POSITIONS

North Carolina Advocates for Justice, Employment Law Section: Past Chairman, Executive Committee Member and Ethics Chair

North Carolina Bar Association Employment Law Council Executive Committee Member (2012-2014)

Federal Bar Association – Labor and Employment Section

Law 360's Employment Law Editorial Advisory Board

Southern Trial Lawyers Association

National Employment Lawyers Association

Virginia M. Wooten

Ogletree Deakins, Charlotte, NC

Virginia is a graduate of Davidson College and the University of North Carolina at Chapel Hill law school. She is currently an attorney with the Ogletree Deakins law firm in Charlotte where she advises clients on a wide range of employment matters, including the defense of class action matters, discrimination claims, contract disputes, internal and administrative investigations, and a wide range of other personnel issues. She has experience defending lawsuits in state and federal courts as well as arbitrations in various states and jurisdictions.

Virginia is currently serving on the Mecklenburg County Bar Board of Directors and previously served on the Mecklenburg County Bar Grievance Committee. Recently, she was selected by the Charlotte Business Journal as one of the 40 Under 40 emerging business leaders exemplifying professional excellence and community involvement. She has also been recognized by Super Lawyers as a North Carolina Rising Star and received the NC Lawyers Weekly 2019 Rising Star Award.

Shannon R. Meares

Regional Attorney, NLRB

Shannon is a transplant from the cornfields of the Midwest. She graduated from the University of Illinois, Urbana-Champaign in 1997, with a double major in Psychology and Sociology. In 2000, she graduated from the Washington University in St. Louis School of Law. She began her career with the NLRB in the Winston-Salem office immediately following graduation. Shannon served as a Field Attorney for the first 13 years of her career; in 2013 the Region promoted her to Supervisory Attorney; and most recently in February 2022 she was promoted to Regional Attorney, the position she holds today.

William "Bill" J. Mc Mahon

Constangy Brooks Smith & Prophete, LLP, Winston-Salem, NC

Bill McMahon is a partner in Constangy's Winston-Salem office, where he handles a wide range of employment law matters for publicly-traded and private companies. In addition to litigating disputes on behalf of employers, Bill regularly advises businesses on how to avoid problems before they occur. He is Co-Chair of Constangy's ERISA Litigation Practice Group and also teaches Employee Benefits & Pension Law (a course he created) at Wake Forest University School of Law, where he has served as an Adjunct Professor of Law since 2010.

M. Todd Sullivan

Fitzgerald Hanna & Sullivan, PLLC, Raleigh, NC

Todd has a niche practice focusing on employee departures and defections, including litigation of injunctions and trial work in non-compete, trade secret misappropriation, employee raiding and unfair competition cases.

Todd has litigated more than 100 employee defection matters in federal and state trial and appellate courts and arbitrated employment cases before FINRA, the AAA, and JAMS. Todd served as lead defense counsel in one of the most significant broker defection cases ever arbitrated before FINRA and also as lead plaintiff's counsel in one of the largest-ever trade secret misappropriation cases in North Carolina.

Todd has consistently been elected by his peers as a North Carolina Super Lawyer and has been named by Business North Carolina as one of its Legal Elite, as well as being regularly identified as one of the Best Lawyers in America for employment litigation. He has co-taught the Pre-Trial Litigation course at Duke Law School and he writes and presents frequently on employer/employee disputes involving departures and allegations of unfair competition by former employees. He has represented a number of lower-paid departed employees pro bono when they are threatened with non-compete litigation and has been recognized by the North Carolina Bar Association for his pro bono activities on behalf of non-profit entities.

Todd is a long-time resident of downtown Raleigh and an avid bluegrass music fan. He was formerly an NCAA Division III lacrosse player and regularly loses money playing golf. He maintains a home library dedicated to periodicals and original texts of libertarian history and philosophy.

Prior Experience

Graebe Hanna & Sullivan, PLLC (2012-2021)
Partner in Raleigh-based litigation firm
Womble Carlyle Sandridge & Rice, PLLC (1996-2012)
Associate and Partner in the Business Litigation Group in Raleigh

Education

Cornell Law School, J.D., 1994
Lake Forest College, B.A., magna cum laude, Phi Beta Kappa, 1990

Grant Burnette LeFever

Burnette Shutt & McDaniel, Columbia, SC

Grant Burnette LeFever is an attorney with Burnette Shutt & McDaniel, PA, in Columbia, SC, where she focuses her legal practice on employment law, including a range of civil rights and discrimination issues. She also practices family law and education law, including issues involving Title IX, special education, school discipline and teacher employment issues.

Grant is a 2018 graduate of the University of South Carolina School of Law. Prior to law school, Grant earned a master's degree in Southern Studies from the University of Mississippi and a bachelor's degree in English and History from Presbyterian College.

Grant has been selected by her peers for inclusion in The Best Lawyers in America: Ones to Watch, 2021 to present, in the fields of labor and employment law, civil rights law, education law, family law, and litigation. She also has been recognized in Super Lawyers Rising Stars and Legal Elite of the Midlands. Most recently, Grant was profiled by the National Law Journal as a 2023 Plaintiffs' Attorneys Trailblazer for her work in Planned Parenthood South Atlantic v. South Carolina.

Denise Smith Cline

Denise Smith Cline, PLLC, Raleigh, NC

Denise Smith Cline is an employment lawyer, mediator and arbitrator. After more than 20 years of partnership in large regional firms in North Carolina, Denise started the Law Offices of Denise Smith Cline, PLLC in 2010. As an advocate for both employers and employees, Denise is regularly recognized in the Top 50 Women Lawyers in North Carolina, Best Lawyers in America, Top 25 Lawyers in Raleigh by U.S. News. She is member of the "Legal Elite" and a "Super Lawyer." She is a fellow in the Litigation Council of America. A certified mediator and arbitrator, she is active on the panel of neutrals for the American Arbitration Association, the American Health Law Association and CPR. She serves as Chair of the Civil Service Commissioner for the City of Raleigh and Vice Chair of the Dispute Resolution Section Council of the North Carolina Bar Association. A native of Greer, SC, Denise is a graduate of Davidson College and UNC School of Law.

Shannon M. Polvi

Babb, Porter & Hicks, LLC, Columbia, SC

Shannon Polvi's legal career focuses on advocating for employees in South Carolina. Shannon is an experienced trial attorney in state and federal courts in South Carolina.

Shannon focuses on client needs throughout the litigation process. Although prepared to successfully present her client's case to a jury, Shannon is very aware of the high cost and risks of employment litigation. Shannon likes to explore the possibility of an early, cost-effective resolution of the dispute on terms favorable to the client. As such, she has earned a reputation as a proactive litigator who provides high quality, responsive, and conscientious representation for her clients.

Her practice focuses on the employee/plaintiff side of employment and labor law with various employment cases brought before federal, state, administrative, and appellate courts. Shannon represents individuals in discharge, wage and hour, discrimination, harassment, medical leave, whistleblower, and denial of benefits litigation (ERISA). Shannon also works with clients on claims pending before the U.S. Equal Employment Opportunity Commission, South Carolina Human Affairs Commission, South Carolina Department of Employment and Workforce, State Employee Grievance Committee, Department of Labor, National Labor Relations Board, State Ethics Commission, Department of Education, Occupational Safety and Health Administration, Securities and Exchange Commission, Merit Systems Protection Board, and Office of Inspector General.

Within the scope of her practice, Shannon advises employees on severance agreements, employment contracts, and retirement and benefit issues. Shannon regularly assists physicians and other professionals with employment contracts, contract modifications, and contract disputes. She also represents professors with tenure denials, grievances, and employment disputes.

Shannon is admitted to practice law in South Carolina, the United States District Court for the District of South Carolina, the South Carolina Court of Appeals, and the Federal Circuit Court of Appeals. Shannon has had oral arguments before the South Carolina Court of Appeals and the Fourth Circuit Court of Appeals.

Shannon worked with the National Women's Law Center to help advocate for women facing pregnancy discrimination in the workplace. One of Shannon's cases was used in support of the Pregnant Workers Fairness Act. This bill prohibits employment practices that discriminate against making reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions.

Shannon is an active member of the South Carolina Association for Justice, South Carolina Women Lawyers Association, and Legal Network for Gender Equity.

Shannon sets aside time for volunteerism. Shannon is a member of the Richland County Bar Association's Public Service Committee, and she regularly volunteers at Transitions Homeless

Center, where she provides pro bono assistance to homeless men and women in the Midlands region.
Prior to her employment with CBPH, Shannon clerked at the South Carolina Department of Consumer Affairs and Mabry Law Firm, LLC. She earned her B.A. from the University of Maryland, Baltimore County, and her J.D. from the University of South Carolina. Before attending the University of South Carolina School of Law, Shannon worked in Target retail stores for two years as an Executive Team Leader, and she was a volunteer teacher in Addis Ababa, Ethiopia.
In her personal time, Shannon travels the world, attends church, and spends quality time with family and friends.

L. Diane Tindall

Wyrick Robbins Yates & Ponton, Raleigh, NC

Diane's practice focuses on labor and employment law. She provides clients with representation, counseling and training on all state and federal employment laws, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Labor Standards Act, the Family and Medical Leave Act, and state wage and hour laws, as well as covenants not to compete, trade secrets, wage payment and collection, employment terminations and severance, policies and handbooks and other issues related to employment.
Diane is a member of the North Carolina Bar Association, a member of the NCBA Women in the Profession Committee (Chair, 2009-2011) and participated in the NCBA Joint Task Force on Diversity (2009-2010). She is also a Certified Mediator, North Carolina Civil Superior Court.
Diane is admitted to practice before all federal and state courts in North Carolina, the Fourth Circuit Court of Appeals and the U.S. Supreme Court, and regularly defends management clients in proceedings before the state and federal Departments of Labor and the Equal Employment Opportunity Commission.
Before her law career, Diane was an English professor at North Carolina State University. After law school, she clerked for former Justice Francis I. Parker on the Supreme Court of N.C. and with Chief Justice, now retired, Sarah Parker on the N.C. Court of Appeals.
Diane received her B.A. from the College of William and Mary, her M.A. from West Virginia University, and her J.D., cum laude, from the University of North Carolina at Chapel Hill.

Laura J. Wetsch

Winslow Wetsch, PLLC, Raleigh, NC

Laura was born in Fargo, ND, raised in Minot and Bismarck, ND, married a guy from Killdeer, ND, and graduated from the University of North Dakota School of Law in 1985. After law school she was a federal law clerk in the District of North Dakota, and then practiced small town law until 1991 when she and her family moved to North Carolina (the other Great North State).
Laura is a member of Winslow Wetsch, PLLC in Raleigh, NC, and is the author of "A Practitioner's Guide to North Carolina Employment Law," and co-author of the North Carolina chapter in the ABA's "Employment at Will: A State-By-State Survey."
She has previously served as the Chair of the NCBA Labor & Employment Law Section, and the Chair of the NCAJ Employment Law Section. She has been named to Best Lawyers in America, N.C. Super Lawyers and Top 50 Women Lawyers, and N.C. Legal Elite; and was honored to receive the NCAJ's Ebbie Award for excellence in advancing the cause of justice.

R. Michael Elliot

Elliot Morgan Parsonage Law Firm, Charlotte, NC

Michael's experience relating to clients from diverse backgrounds makes him well suited for representing his clients across a broad range of legal areas. He practices in the areas of employment law and family law, and is experienced in criminal law.

Michael has practiced as a public defender in Mecklenburg County and handled hundreds of cases in district and superior court. He serves as chapter editor of the Sixth edition of the North Carolina Prima Facie Torts Manual. Michael is a proud "double Tar Heel," having graduated with honors from the University of North Carolina at Chapel Hill with a bachelor of arts in English and a J.D. degree.

Areas of Practice

Employment Law
Family Law
Estate Planning
Criminal Defense

Credentials

North Carolina Bar
University of North Carolina at Chapel Hill, J.D.
University of North Carolina at Chapel Hill, B.A with Honors

Memberships

North Carolina Advocates for Justice
Mecklenburg County Bar Association

Awards/Recognition

North Carolina Super Lawyers
2023 – Employment Litigation: Plaintiff

Daniel C. Lyon

Elliot Morgan Parsonage Law Firm, Charlotte, NC

Daniel practices in the areas of employment and family law with a focus in litigation. Daniel also practices criminal law, ranging from impaired driving to drug-related offenses.

While at Elon University School of Law, he served as Student Bar Association President and a member of the Public Interest Law Society. Prior to joining EMP Law, Daniel served as an assistant public defender with the Mecklenburg County Public Defender's office. He currently serves as chapter editor of the Sixth edition of the North Carolina Prima Facie Torts Manual.

Areas of Practice

Employment Law
Family Law
Estate Planning
Criminal Defense

Credentials

North Carolina Bar
Elon University School of Law, J.D.
Elon University, B.A.

Memberships

North Carolina Advocates for Justice
Mecklenburg County Bar Association – Mecklenburg County Family Law Section, Mecklenburg County Criminal Law – Vice Chair 2014

Awards/Recognition

2023 North Carolina Super Lawyers Rising Stars – Employment Litigation: Plaintiff

George A. Reeves III

Fisher & Phillips, Columbia, SC

George Reeves is a partner in the Columbia office of Fisher & Phillips. His practice primarily involves representation of management in employment and labor litigation involving discrimination, harassment and retaliation under Title VII, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA); wage and hour litigation under the Fair Labor Standards Act (FLSA); and employment litigation under state law for workplace torts such as defamation, wrongful termination, invasion of privacy, and negligent hiring or supervision. George also represents employers in audits and investigations by federal and state agencies investigating or challenging employers' wage and hour practices and worker misclassification issues.

George is a frequent presenter on employment and labor issues for local and state Society for Human Resource Management (SHRM) chapters, chambers of commerce and other professional organizations. Prior to attending law school, George served in the United States Navy.

South Carolina Bar

Continuing Legal Education Division

Supreme Court Review and Update

2023 Supreme Court Commentary: Employment Law

Jonathan R. Harkavy

* * *

This article is dedicated to the following for their boundless devotion to family and for their support of personal dignity, reproductive autonomy and equal rights for women.

To Nahomi Harkavy, my partner in parenting, grand-parenting and legal practice, to whom I add thanks for editing my articles with patience, encouragement and insight. (I am, of course, solely responsible for this article's content, tone and errors.) To our daughters, Anne and Ellen, whose devotion to women's equality and social justice lights the path for our granddaughters. And, to the memory of my mother, Harriet Louise (Gerber) Harkavy, z'l, (November 16, 1910 - September 4, 1995). She was a women's rights trailblazer, having started work as a biochemist in 1932 after graduating from the University of Chicago. Thereafter, she remained an insistent supporter of women's equality and workplace justice and an exemplar for the generations that followed her.

The 2022-2023 Term of the Supreme Court of the United States assuredly will rank as a memorable one, not only for its momentous decisions, but also for the previously unreported out-of-Court activities of some Justices, namely Clarence Thomas and Samuel Alito. Leaving judicial propriety and ethics for others to debate elsewhere, this article focuses solely on the Court's decisions themselves. What these decisions reveal is an unabashed six-Justice majority, anointed by the Federalist Society and appointed by four Republican Presidents, exercising judicial power audaciously. A brief litany of some of the term's more notable cases illustrates this point. The Court --

* permitted a business owner to refuse offering her website design services to gay couples despite a state ban on sexual orientation discrimination in public businesses; *303 Creative LLC v. Elenis*, 600 U.S. ---, 143 S. Ct. --- (2023);

*overturned the federal government's student debt forgiveness program despite its authorization by Congress; *Biden v. Nebraska,* 600 U.S. ---, 143 S. Ct. --- (2023);

*rejected race as a permissible determinant of public and private college admissions; *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* 600 U.S. ---, 143 S. Ct. --- (2023);

*permitted an employer to pursue a tort claim in state court against its employees' union for strike-related damages despite pre-emption by federal labor law; *Glacier Northwest, Inc. Teamsters Local No. 174*, 598 U.S. ---, 143 S. Ct. 1404 (2023); and

*crafted new rules for an employer's required accommodation under Title VII of its employees' religious practices; *Groff v. DeJoy,* 600 U.S. ---, 143 S. Ct. 2279 (2023).

The common denominator of these cases is, as you will see in the body of this article, a diminished regard for co-equal branches of Government, for State authority and for the Court's own precedents. Thankfully, however, in one notable case the six-Justice majority did fracture in a way that rescued our democratic republic from what could have been its virtual extinction. That case is **Moore v. Harper, 600 U.S. ---, 143 S. Ct. --- (2023)**, in which the Chief Justice and Justices Kavanaugh and Barrett commendably joined Justices Sotomayor, Kagan and Jackson in rejecting a brazen - nay, partisan - attempt to impose a regime whereby state legislatures alone, without any check on their discretion, could displace the control of popular voting and dictate the outcomes of federal elections. While beyond the scope of this article, that case is, to say the least, worth the reader's attention.

Focusing more narrowly on this term's employment-related decisions, employees prevailed in some instances. But, a scorecard view of the term is not its appropriate measure. Instead, there is plainly visible in the Court's overall treatment of employment issues a majority-backed agenda to enhance employer prerogatives and stifle employees' collective voice and agency at the inevitable expense of American workers and their families. As a consequence, the true takeaway from this term's employment decisions is that the imperatives of equal opportunity and workplace fairness that Congress has mandated through a web of federal statutes seem in greater jeopardy today than ever.

Finally, one of this term's most distressing features is the majority's treatment of religion in American life. As I have expressed in these annual reviews for the past several years, I see in the Court's decisions a troubling thread of Christian nationalism dressed up in Free Exercise garb that continues to infuse the opinions of several Justices in the dominant majority. This insistent creep of Christian creed into the public sphere plainly contravenes the Establishment Clause and jeopardizes a foundational principle of our democratic republic -- that the United States of America is a secular nation, not a sectarian one.

In short, looking comprehensively at the Court's treatment of work-related issues, there is cause for concern about whether our employment laws are being applied as Congress intended and as justice requires. But, readers, judge for yourselves how the Court dealt with employment matters as you read the case summaries and commentaries that follow.

Section I of this article summarizes each of the term's employment-related decisions, as well as a number of non-employment decisions likely to affect the shape and scope of workplace regulation and worker-management relations. Included are cases not only from the Court's merits (or argument) docket, but also dissents from denials of certiorari and opinions

appearing in the Court's orders lists covering filings from the emergency or so-called "shadow docket." The cases are arranged by broad substantive topics. My own take on each principal decision is offered in the italicized paragraphs immediately following its case summary. That personal commentary ranges from the political to the predictive and from the philosophical to the practical. The aim is to assess the likely impact of these decisions on all stakeholders in the employment relationship, including working people, business owners, labor organizations and benefit providers.

Section II is a narrative listing, current as of the date of this article, of grants of certiorari presenting employment-related issues to be decided in the upcoming October 2023 Term scheduled to begin on Monday, October 2, 2023. Included are the questions presented by each granted petition for certiorari, along with a few comments describing the pertinence of the case to employment law.

Section III concludes this article with additional personal observations about this term's decisions, as well as the upcoming term's cases to be argued and decided in the midst of what looks to be a contentious and unpredictable 2024 election season.

I. Decisions of the 2022-2023 Term

The Court's continuing focus on the employment relationship and how the workplace should be regulated (or more accurately, deregulated) is exemplified by this term's statistics. Of the 58 decisions reported by the Court this term, 45 of them were civil disputes. Six or perhaps seven of those civil cases (*i.e.*, 13.3% to 15.5% of the Court's civil decision docket) are employment-related rulings. That statistic alone illustrates the Court's continuing interest in labor and employment law. Glancing ahead statistically to the 2023-2024 Term, the Court's concern with employment issues is assuredly not flagging. Indeed, of the 22 matters currently on the 2023-2024 argument docket, five cases (*i.e.*, nearly 23%) have some bearing on employment. *See infra*, section II.

The principal cases summarized below are, for the most part, disputes directly involving or affecting employment and the workplace. But, as previously indicated, also included are a number of cases not directly involving any employment issue that deal with adjective questions or bear in some less direct way on the employment relationship. Those more indirectly pertinent cases are typically treated in abbreviated fashion, sometimes without any personal commentary.

A. Labor Relations.

Labor lawyers for both unions and management may be quick to point out that, despite two Supreme Court labor law decisions this term, the real action in this area is at the National Labor Relations Board ("Board.") Now that the Board has a majority appointed by President Biden, and its General Counsel is also a Biden appointee, the National Labor Relations Act ("NLRA") is being applied in a way more favorable to employees and Unions (and, arguably, more closely aligned with Congress' intent in enacting the statute.) Nonetheless, an employer-friendly Court majority continues to tug in a different direction. Indeed, the first case reviewed below has potential to transform, if not eviscerate, our labor pre-emption doctrine that has been a settled aspect of traditional labor law for more than a half-century. Following that case is a dispute about how to treat an esoteric group of federal civil service employees who work in both civilian and military roles for State National Guards.

Glacier Northwest, etc. v. Teamsters Local No. 174, 598 U.S. ---, 143 S. Ct. 1404 (2023)

The Court held that the National Labor Relations Act did not preempt an employer's tort claims alleging that its employees' labor union intentionally destroyed company property during a labor dispute.

Glacier Northwest, Inc. ("Glacier") sells ready-mix concrete to customers in Washington State. Each batch of Glacier's concrete is mixed to its customer's specifications. Glacier combines raw ingredients (cement, sand, aggregate, admixture and water) in a hopper and transfers the resulting concrete to one of its trucks for prompt delivery. Concrete is highly perishable, as it begins to harden immediately once it is at rest. Glacier's ready-mix trucks can preserve the concrete for a limited time in rotating drums on the back of the trucks. If the concrete stays in the rotating drum for too long, however, it will harden and cause significant damage to the truck. And, the concrete will also begin to harden right away if the drum stops revolving.

Teamsters Local 174 ("Union") is the exclusive bargaining representative of Glacier's truck drivers. After the collective bargaining agreement between Glacier and the Union expired in the summer of 2017, the parties tried to negotiate a new contract. That had not succeeded by August 11, 2017. On that morning a Union agent signaled to the drivers for a work stoppage, purportedly when the Union knew that Glacier was in the midst of mixing and loading substantial batches of concrete into the ready-mix trucks and making deliveries. Glacier instructed its drivers to finish the deliveries in progress, but the Union told the drivers to ignore Glacier's instruction. Of the 16 drivers who had already set out for deliveries and returned fully loaded, 7 parked their trucks, notified a Glacier representative and took action to protect their trucks. The remaining 9 drivers abandoned their trucks "without a word to anyone." Slip Opin., p. 5. Glacier could not leave its concrete in the trucks, but it also could not dump that concrete at random because of the environmentally sensitive chemicals in the mixture. Over a

five hour period Glacier's nonstriking employees built special bunkers and offloaded the concrete from the trucks. While the trucks were spared damage, the concrete in the bunkers hardened and became useless.

Glacier sued the Union for damages in a Washington state court, claiming that the Union intentionally destroyed the concrete, thereby amounting to common law conversion and trespass to chattels. The Union moved to dismiss the tort claims on the ground that the National Labor Relations Act ("NLRA") preempted them. The Union, relying on *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), claimed that the NLRA at least arguably protected the drivers' strike conduct and that the State thus had no power to hold the Union accountable for any of the strike's consequences. The trial court agreed with the Union, but an intermediate appellate court reversed. The Washington Supreme Court reinstated the trial court's decision, expressing the view that the NLRA preempted Glacier's tort claims because any loss of concrete was incidental to a strike arguably protected by federal law. Glacier's petition for certiorari was granted.

The Court, in an 8 to 1 decision, reversed the Washington Supreme Court and held in a majority opinion by Justice Barrett (joined by the Chief Justice and Justices Sotomayor, Kagan and Kavanaugh) that the NLRA did not preempt Glacier's state tort action claiming that the Union intentionally destroyed company property during a strike. Justices Thomas, Gorsuch and Alito concurred in the judgment. Justice Jackson dissented.

Justice Barrett's majority opinion, accepting Glacier's allegations as true, first concludes that the Union did not take "reasonable precautions" to protect Glacier's property from imminent danger resulting from the drivers' sudden cessation of work. The majority additionally noted that the Union's manner of conducting its strike was designed to expose Glacier's bespoke concrete batches to foreseeable and imminent danger of destruction. Accordingly, the majority concluded that the Union's conduct was not arguably protected by the NLRA and the state court thus erred in dismissing Glacier's tort claims as preempted.

Justice Barrett first rejects the Union's argument that the right to strike should be interpreted generously, emphasizing that the right is not absolute and that the Court must analyze whether the strike exceeded the limits of conduct protected by the NLRA. Second, the majority also rejected the Union's position that it does not forfeit NLRA protection by striking when loss of a perishable product is foreseeable. Pointing out that by reporting for duty and pretending that they would deliver the new batches, the Union effectively prompted the product's mixing and loading, thus bringing about its eventual destruction, as well as putting Glacier's trucks in harm's way. Third, while acknowledging that initiating a strike during the workday and failing to give specific notice to an employer do not themselves make the Union's conduct unprotected, these actions are relevant considerations in evaluating whether the Union took reasonable precautions to avoid foreseeable and imminent harm to company property. Finally, while the majority noted that some drivers took steps to protect their trucks, it found more pertinent that the strikers affirmatively planned conduct posing a material risk of harm to

the trucks. Given these circumstances, the majority concluded that the NLRA does not arguably protect the Union's conduct, as characterized in Justice Barrett's opinion. Accordingly, the Court reversed the judgment of the Washington Supreme Court and remanded the case for further proceedings not inconsistent with its majority opinion.

Justice Thomas, joined by Justice Gorsuch, filed an opinion concurring in the Court's judgment while emphasizing "the oddity of *Garmon's* broad pre-emptive regime." Opin., p. 1. Criticizing what he characterizes as the "strange" and "unusual" *Garmon* doctrine, Justice Thomas openly invites a re-examination of labor law preemption that would focus on the NLRA's text and confront what should happen when federal and state law are in logical contradiction. *Ibid*., p. 4.

Justice Alito, joined by Justices Thomas and Gorsuch, filed an opinion concurring in the Court's judgment based on precedent limiting *Garmon* preemption where (as Glacier alleged here) employees intentionally destroy their employer's property.

Justice Jackson, in a 27-page dissenting opinion, faults the Court for ignoring the pendency of a Board complaint against Glacier that will determine whether the Union's strike conduct is arguably protected by the NLRA. In her view the Washington Supreme Court was correct in suspending state examination of the Union's conduct in deference to a Board proceeding that had already been tried and was in the midst of final briefing. Justice Jackson consequently explains in detailed fashion that in addition to impeding the Board's uniform development of federal labor law, the Court's decision also threatens to erode the right to strike under the NLRA.

* * * *

Perhaps the most notable consequence of this decision is neither its outcome for the employer nor even its application of a fortified "reasonable precaution" limit on Garmon preemption. Rather, the most startling feature of this case is an unmistakable signal that several Justices are ready to "re-examine" Garmon more broadly -- a soft euphemism for abandoning it for a more employer-friendly application of the NLRA.

Justice Jackson's dissent (as well as outside sources) also recounts evidence that the Court conveniently ignored because Glacier's factual allegations had to be taken as true for purposes of reviewing the Washington Supreme Court's decision. For instance, according to the dissent, Glacier's own submissions in state court suggest that the Union did instruct drivers to return the trucks to Glacier's yard at the onset of the strike and to keep the trucks and their rotating drums running. Glacier apparently even suggested in state court that the Union's precautions provided Glacier management and its non-striking employees with sufficient time to implement how best to prevent both harm to the trucks and loss of the already mixed concrete. Dissenting Opin., p. 24.

The dissenting opinion also reveals an arguable basis for the Washington state courts to dismiss Glacier's tort claims on remand in deference to an ongoing Board case against the Union for alleged strike misconduct under the NLRA. Shortly after the drivers went on strike Glacier sent disciplinary letters to some of the drivers. The Union filed an unfair labor practice charge with the Board claiming that the letters were retaliation for the drivers' strike conduct. After Glacier filed suit in state court, the Union filed a second charge with the Board alleging that the lawsuit was further retaliation. Following the Washington Supreme Court's decision, the Board's regional director filed an administrative complaint against Glacier asserting that the Union's strike conduct was protected activity under the NLRA. Earlier this year a Board administrative law judge held a nine-day hearing in which briefing was completed in late May. In light of the Board's proceeding, Justice Jackson disagrees with the Court's remand to the Washington Supreme Court for further state law proceedings. Instead, Justice Jackson asserts that the state courts should stand down and that Glacier's suit should either be dismissed or, at the very least, the lower court's judgment should be vacated with an instruction to consider on remand the import of the Board's complaint against Glacier.

Finally, from a political standpoint, this decision impairs the authority of the federal administrative state in favor of state jurisdiction to protect employers from union conduct. Justice Thomas makes no bones about his desire to "re-examine" the entire scheme of Garmon pre-emption. Nor is there much doubt about his willingness to abandon that doctrine in favor of using state tort laws to challenge union conduct that interferes with employer prerogatives. From one who writes so volubly about the need to respect exactly what Congress has enacted, Justice Thomas' proposed abandonment of the Congressionally mandated NLRA jurisdiction to oversee the workplace is as hypocritical as it is inequitable.

Ohio Adjutant General's Department v. Federal Labor Relations Authority, 598 U.S. ---, 143 S. Ct. --- (2023)

The Court held in a 7 to 2 decision that the Federal Labor Relations Authority has jurisdiction over a labor dispute involving dual-service technicians who work in both civilian and military roles for a state National Guard.

Dual-status technicians are federal civil service employees who work in both civilian and military roles for State National Guards. As civilian employees they organize, administer, instruct, train and maintain and repair supplies to assist the National Guard. As a condition of their employment, however, they must maintain membership in the National Guard and wear a uniform while working. Except when participating in National Guard part-time drills, training or active-duty deployment, these employees work full time in a civilian capacity and receive federal civil service pay. The dispute in this case centers on whether the Federal Labor Relations Authority ("FLRA") has jurisdiction over an unfair labor practices dispute between the American Federation of Government Employees, Local 3970 ("Union"), which represents dual-status technicians and their employer, the Ohio Adjutant General, the Ohio Adjutant

General's Department and the Ohio National Guard (collectively the "Guard").

In 1971 the Guard recognized the Union as the exclusive representative of the Guard's dual-status technicians under the Federal Service Labor-Management Relations Statute ("FSLMRS.") The Union and the Guard operated under collective bargaining agreements until expiration of the last agreement in 2014. The parties then adopted a memorandum of understanding in March of 2016 whereby the Guard promised to abide by certain practices in the expired bargaining agreement. Later that year, however, the Guard reversed course and asserted that it was not bound by the FSLMRS or any practices in the former bargaining agreement. Ultimately the Guard also terminated Union dues deductions for its dual-status technicians.

The Union filed unfair labor practice charges with the FLRA, whose General Counsel investigated and issued complaints against the Guard alleging that it had refused to negotiate in good faith and that its termination of dues deductions interfered with the exercise of worker rights. The Guard (and its intervenors) argued to an Administrative Law Judge ("ALJ") that it was not a statutory "agency" and that dual-status technicians are not statutory "employees." The ALJ ruled that the FLRA had jurisdiction over the Guard, that the technicians had bargaining rights as statutory employees and that the Guard's repudiation of the bargaining agreement's practices violated the FSLMRS. It ordered the Guard to bargain with the Union in good faith and to reinstate the dues withholding. A divided panel of the FLRA adopted the ALJ's ruling. The Sixth Circuit denied the Guard's petition for review, holding that the Guard is an agency subject to the FSLMRS when it employs dual-status technicians, that the technicians are federal civil service employees with bargaining rights under the FSLMRS and that the parties' dispute fell within the jurisdiction of the FLRA. The Supreme Court granted certiorari "to consider whether the FLRA had jurisdiction over this labor dispute under the [FSLMRS]".

The Court held in a 7 to 2 decision that the FLRA had jurisdiction over this labor dispute because the Guard acts as a federal agency for purposes of the FSLMRS when it hires and supervises dual-status technicians serving in their civilian role. Justice Thomas' majority opinion first finds that when the Guard employs dual-status technicians (who are technically employed by the Army or Air Force, components of the Department of Defense), it is exercising the authority of a federal agency. Furthermore, Congress has required the Secretary of the Army to designate state adjutant generals to employ dual-status technicians, and a 1968 order of the Secretary of the Army did so. Under that former regime, dual-status technicians were employees of the designee of the Secretary of the Army. Finally, Justice Thomas, referring to a Mississippi National Guard case, notes that the precursor to the FSLMRS (an Executive Order) also treated dual-status technicians as federal employees when they were employed and supervised by state adjutant generals acting as agents of the Army or Air Force. Accordingly, the Court presumes that the FSLMRS maintained the same coverage that existed and was approved under the prior regime. In short, the upshot is that the Guard functions as an agency under the FLSMRS when it employs dual-status technicians, and the FLRA thus has

jurisdiction over the labor dispute at issue.

Justice Alito, joined by Justice Gorsuch, dissented in an opinion expressing their view that the FLRA lacks jurisdiction over the Guard because the Court holds only that the Guard "acts as an agency" and exercises the authority of an agency, but does not actually determine that it and the adjutant generals are in fact agencies.

* * * *

What the Court left undecided is an issue that could essentially overturn the result here. The Guard's petition for certiorari had also presented a separate question disputing the constitutionality of the FLRA's authority to regulate the labor practices of its members who are not employed in the service of the United States. The grant of certiorari here, however, did not encompass that constitutional issue. And so, as Justice Thomas explains in a footnote, this case addresses only the statutory question, and its holding is limited to the unique class of federal employees hired and supervised by state adjutants general. Slip opin., p. 5, n. 1. Of course, if the Court were to grant review of the constitutional issue and determine it in the Guard's favor, the FLRA would have no jurisdiction over the unfair labor practices being challenged by the Union. For the time being, however, chalk up this decision as a modest victory for Local 3790 of the AFGE. And, in doing so, you can marvel at the oddity of Justice Thomas' being the author of a victory for a labor union.

B. Employment Discrimination.

First, no review of this term's cases - employment or otherwise - would be complete without reference to the so-called Affirmative Action decision, **Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. ---, 143 S. Ct. --- (2023).** There the Court held in a 6 to 3 ruling that the undergraduate admissions programs at Harvard College and The University of North Carolina at Chapel Hill violate the Equal Protection Clause of the Fourteenth Amendment. While the Court's college admissions ruling did not directly concern either public or private employment, commentary by the employment law bar in the immediate wake of the decision has been virtually unanimous that the Court's controversial embrace of a race-blind Equal Protection Clause is bound to affect in some way the meaning of race discrimination in the workplace, particularly in light of the recent push for diversity and inclusion by many employers. Indeed, already the most activist Justices pushing "race-blind" theory are seeking to extend the college admissions decision well beyond its confines. *E.g.*, **Thompson v. Henderson**, 600 U.S. ---, 143 S. Ct. --- (2023) (Alito, J., joined by Thomas, J.) (Criticism of Washington Supreme Court's treatment of claim of racial bias in jury tort award.)

As for the Court's work in the employment discrimination area, there are two full dress decisions and two opinions in denials of review to cover. In what might otherwise have been a

pedestrian religious accommodation case, the Court essentially reconfigured the employer's undue hardship defense under Title VII of the Civil Rights Act of 1964 ("Title VII"). Aside from that noteworthy decision, there are employment reverberations from a hotly debated landmark ruling about a website designer seeking to avoid having to serve gay customers.

Groff v. DeJoy, Postmaster General, 600 U.S. ---, 143 S. Ct. 2279 (2023)

The Court unanimously held that Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.

Gerald Groff is an Evangelical Christian who believes for religious reasons that Sundays should be devoted to worship and rest and not to secular labor and transportation of worldly goods. In April of 2012 the United States Postal Service ("USPS") hired Groff as a Rural Carrier Associate in Quarryville, PA. The job required Groff to assist regular carriers in delivering mail and at that time did not generally involve Sunday work. In 2013 USPS contracted with Amazon to facilitate Amazon's Sunday deliveries and in 2016 contracted with the carriers' union (National Rural Letter Carriers' Association ["NRLCA"]) to agree on how Sunday and holiday parcel deliveries would be handled. The union agreement specifies the order in which employees in Groff's position would be called for Sunday work from their regional hubs (Lancaster, PA for Groff.) The workers in Groff's category required all the employees in that category to work Sundays on a rotating basis. Groff then sought a transfer to a small station that did not then make Sunday deliveries.

In March of 2017 Amazon deliveries began at the small station to which Groff had transferred. With Groff unwilling to work Sundays, USPS arranged for the other employees (including the station's postmaster) to make Sunday deliveries during the two-month peak season. During the remainder of the year Groff's Sunday assignments were redistributed to other employees at the Lancaster hub. Some employees complained about Groff's failing to take Sunday work on a rotating basis as the NRLCA agreement required, and one of them filed a grievance. USPS settled the grievance by reaffirming its obligation to rotate Sunday work if there were insufficient volunteers. When Groff continued to refuse Sunday work, USPS gave him progressive discipline. In January of 2019 Groff resigned, allegedly because he expected to be terminated.

Groff sued USPS a few months later. He claimed under Title VII of the Civil Rights Act of 1964 ("Title VII") that USPS could have accommodated his Sunday religious practice "without undue hardship on the conduct of [USPS's] business" within the meaning of the statute. *See*, 42 U.S.C. 2000e(j). The district court granted USPS's summary judgment motion, and the Third Circuit affirmed based on a widely held construction of "undue hardship" in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) holding that an employer is not required to "bear more than a *de minimis* cost" to accommodate an employee's religious

practice. Because exempting Groff from Sunday work imposed on his co-workers, diminished employee morale and disrupted the workplace and workflow, the panel majority found the *de minimis* standard met. The Supreme Court granted Groff's petition for certiorari.

The Court unanimously vacated the Third Circuit's decision, ruling that demonstration of an undue hardship requires an employer to show that granting an employee's request for religious accommodation would result in substantial increased costs relating to the conduct of the employer's particular business. Justice Alito's opinion for the Court first examines at some length the origin and operation of Title VII's religious accommodation regime, culminating in a 1972 amendment to the statute adopting the undue hardship provision in section 2000e(j). Next, the opinion reviews in detail the *Hardison* case, noting especially its original (but later abandoned) focus on the constitutionality of the 1972 amendment. The Court then explains how the undue hardship requirement has been applied generously to employers by using the "*de minimis*" benchmark, despite only a mere fleeting reference to that standard in *Hardison* itself.

Holding that a "more than a *de minimis* cost" showing does not suffice to establish "undue hardship," Justice Alito's opinion purports to clarify what is required for that defense. The opinion says that the Court understands *Hardison* to mean that "undue hardship" is shown when a burden is "substantial" in the overall context of an employer's business. That is a fact-specific inquiry, and the Court leaves further development to the lower courts on remand instead of crafting any more requirements.

Clarifying further how an undue hardship defense may be established, Justice Alito looks first to Title VII's text, finding that "undue hardship" means something very different from the minimal burden that lower courts had been applying since *Hardison*. Second, Justice Alito notes that while all parties agree that a minimal showing is not right, an employer must now show that a particular accommodation would result in "substantial" increased costs in relation to the conduct of its particular business. In assessing an employer's showing, courts must take account of all relevant factors and their practical impact in light of the nature, size and operating cost of that employer. Third, the Court explicitly declines to adopt the body of other statutory and administrative interpretations suggested by the parties. including guidelines from the EEOC that are widely respected. Instead, Justice Alito stresses that "undue hardship" means what it says and that courts should determine this employer defense in the commonsense manner it would use in applying any such test. Fourth, the Court clarifies that the impact of an accommodation on co-workers is relevant only to the extent that it affects the conduct of the employer's business. Justice Alito also stresses that hardship based on employee animosity to a particular religion or to religion generally or even to the notion of accommodating religious practice cannot be considered "undue" and cannot supply a defense. Finally, Justice Alito reminds that Title VII requires accommodation of an employee's religious practice, not merely an assessment of a particular accommodation. In Groff's case, looking only at forcing other employees to work overtime is thus insufficient to establish an undue hardship defense, and other options would have to be considered.

Having thus "clarified" the Title VII "undue hardship" standard, the Court vacated the Third Circuit's decision and remanded the case for further proceedings consistent with its opinion. In doing so, Justice Alito expressly notes that further factual development may be considered on remand.

Justice Sotomayor, joined by Justice Jackson, filed a short concurring opinion stressing that the Court made a "wise choice" in not overruling *Hardison*. And, the concurrence also reminds that Congress is free to revise the Court's statutory interpretations. Justice Sotomayor further observes that undue hardship on the "conduct" of an employer's business may include hardship on a plaintiff's co-workers, noting that for many employers labor is more important to the conduct of the business than any other factor.

* * * *

The obvious importance of this decision is its unanimous re-interpretation of Title VII's "undue hardship" defense. To be sure, the outcome makes that defense a bit more of a stumbling block for employers. But because the precise components of undue hardship require a fact-specific determination, the Court leaves that task to the lower courts - with some additional clarifications, of course. So, for employers and employees alike, the undue hardship defense is no longer minimal, but its actual contours will vary with the facts of a particular accommodation. As a consequence of this ruling, therefore, the cause of religious exercise at the expense of non-discriminatory workplace rules is fortified. The fallout from the Court's approach may well be chaotic for employers that have to deal with the clash of religious exercise and non-discriminatory work rules.

Turning to a more troubling point, a respected Court observer has recently noted that both Hardison and this case involved union agreements. Andrew Strom, "In Groff v. DeJoy, the Supreme Court Left a Key Question Unanswered," On Labor (July 18, 2023), accessed on July 18, 2023 at https://onlabor.org/in-groff-v-dejoy-the-supreme-court-left-a-key-question-unanswered/. In Hardison a collective bargaining agreement required preference on the basis of seniority for weekend days off. In like fashion, USPS' memorandum of understanding with its employees' union required rotating Sunday work on a rotating basis. And, in Hardison the Supreme Court held that Title VII did not require ignoring of seniority rights to accommodate a junior employee's religious practice. Given that holding, how can Title VII require USPS here to accommodate Groff in disregard of its union agreement to rotate Sunday work? Separately, as Strom's On Labor essay also notes, the American Postal Workers Union also filed an amicus brief in Groff's case explaining that the grievance filed by Groff's co-worker was not based on hostility to Groff's religious practice, but was grounded on a claim that all workers should be able to enjoy a day of rest. Ibid. In the face of all this, Justice Alito simply declared that "an accommodation's effect on co-workers may have ramifications for the conduct of the employer's business." That vague reference, omitting any mention of a union agreement, must have prompted Justices Sotomayer and Jackson to stress

in their concurrence that an accommodation's effect on co-workers can itself constitute an "undue hardship on the conduct of the employer's business" because of labor's importance to the conduct of business. In short, the failure to deal explicitly with Hardison's seniority reference, confront APWU's explanation of Groff's co-worker's grievance and embrace the concurrence's explanation of hardship on the conduct of USPS' business leaves Justice Alito's opinion wanting, to say the least.

303 Creative LLC v. Elenis, 600 U.S. ---, 143 S. Ct. --- (2023)

The Court held in a 6 to 3 decision that the First Amendment prohibits Colorado from forcing a website designer to create expressive designs that convey a message contrary to the designer's religious beliefs.

Lorie Smith offers website and graphic design, marketing advice and social media management services to the public in Colorado through her solely owned business, 303 Creative LLC. Smith has a biblical-based belief that same-sex marriages are "false" because the only true marriages are between one man and one woman. Although 303 Creative has never sold wedding websites, Smith wants to enter that business because she believes that she is being "called" to explain the true story of marriage. Smith wants to sell wedding websites to the public, but not to same-sex couples, and she wants to post a notice on her company's website announcing that restriction. Because Smith was worried that Colorado would enforce its public accommodation law (Colorado Anti-Discrimination Act ["CADA"]) to force her to create wedding websites for gay couples, she sued in federal court to enjoin that prospect.

In district court, Smith and the State stipulated, among other things, that she is willing to work with all people regardless of their sexual orientation and that she will gladly create custom graphics and websites for clients of any sexual orientation, although she will not create content that contradicts biblical truth. The parties also stipulated that her website design services are expressive and that her creations contribute to messages her business conveys through those creations. The parties further stipulated that the wedding websites will express her message celebrating and promoting her view of marriage. The district court, while concluding that Smith had standing to seek relief concerning her proposed business, denied the relief she sought. The Tenth Circuit affirmed, concluding that while forcing Smith to create wedding websites for gay couples may be forcing speech, Colorado's interest in assuring equal access to publicly available goods and services was a compelling one justifying creation of websites for all. The Supreme Court granted Smith's petition for certiorari.

The Court decided 6 to 3 to reverse the Tenth Circuit's judgment, holding in an opinion by Justice Gorsuch, that the First Amendment prohibits Colorado from compelling Smith to create wedding websites that convey a message contrary to her beliefs. Recounting first a series of Supreme Court rulings (compelled flag salute, excluding gays from veterans' parade, and removing gay assistant scoutmaster from Boy Scouts), Justice Gorsuch characterizes

Smith's position in the same light - i.e., protecting a First Amendment right to speak her own mind and avoid Government compelled speech. Gorsuch's opinion again posits that Colorado intends to compel Smith to create websites celebrating marriages she does not believe are true. While recognizing that public accommodations laws play a vital role in realizing civil rights and that governments have a compelling interest in eliminating discrimination (including sexual orientation discrimination), those laws are subject to the First Amendment and cannot compel market participants to speak in a preferred way. Based on the parties' stipulation that Smith proposes to sell websites that are expressive, the majority rejects Colorado's claim that it is not forcing Smith to speak something she does not believe and that it is simply regulating the sale of a commercial product. Again relying on the parties' stipulation that Smith will work with gay couples so long as she does not have to create content that violates her beliefs, Justice Gorsuch rejects Colorado's argument that she is objecting to couples' protected characteristics. Instead, the majority concludes that Smith would not create expressions for anyone (gay or otherwise) that would defy any of her beliefs. Accordingly, Justice Gorsuch concludes that the First Amendment requires tolerance, not coercion and that Colorado cannot apply its public accommodations law to require Smith to create expressive websites inconstant with her beliefs. The Court therefore reversed the Tenth Circuit's judgment.

Justice Sotomayor, joined by Justices Kagan and Jackson, dissented in a 38 page opinion that opens by declaring that the Court, "for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. . . . [and] that the company has a right to post a notice that says, 'no [wedding websites] will be sold if they will be used for gay marriages." The dissent explains at length that the Colorado statute, like the laws in 45 states, targets conduct, not speech. Its purpose is to assure equal access to publicly available goods and services and equal dignity in a common market. After recounting the history of public accommodation and the response of states to discrimination on several bases, including sexual orientation, Justice Sotomayor reviews the challenges to laws like Colorado's, finding that the First Amendment provides no exclusion or defense to laws targeting discriminatory conduct. The dissent then takes direct issue with the Court's "grave error" of conflating denial of service and protected expression and concludes that in the case of Lorie Smith the Court "shrinks" from rejecting her claim to a constitutional right to discriminate. The dissent also reminds that Ms. Smith can publicize and speak freely about her belief in true marriage and her disagreement with gay marriage, but she cannot offer wedding websites to the public while refusing them to gay couples. The dissent continues with what it deems "dispiriting" comparisons to racial exclusion cases, among others. Justice Sotomayer concludes the dissent by remarking that this is a "sad day in American constitutional law" that imposes a public indignity on LGBT people. At the same time she reminds that we are not powerless to do something in the face of the majority's decision: "The meaning of our Constitution is found not in any law volume, but in the spirit of the people who live under it. Every business owner in America has a choice whether to live out the values in the Constitution." Dissenting Opin., p. 38.

* * * *

This decision, while couched in terms of the commercial marketplace, has significance for the American workplace, too. Does the majority's rationale support an employer's right to disobey generally applicable anti-discrimination laws because of a religious belief that Muslims, Atheists or Jews should not supervise true Christians or that black employees should not work next to white employees or that a woman's place is not on the shop floor? In the first weeks following the Court's June 30, 2023 decision, a wealth of commentary from Court observers and management attorneys remarking on these and other concerns has already appeared. E.g., Linda Greenhouse, "Look at What John Roberts and His Court Have Wrought Over 18 Years," The New York Times, (July 9, 2023). Indeed, during a webinar sponsored by the National Constitution Center and the Anti-Defamation League on July 13, 2023, one of the presenters remarked that it is hard to find a limiting principle in the Court's decision. In short, the likelihood that litigation of employment-related claims involving protected classes will ensue seems pretty high at this point.

Also in the immediate wake of the Court's decision, a disturbing perspective on Lorie Smith's particular claim has come to light. Without judging what is true, here is a summary of what has been reported: A writer for The New Republic claims to have uncovered the possibility that, contrary to the claim in Smith's petition for certiorari on page 5, Lorie Smith was not asked by a gay couple about creating a wedding website. See, Melissa Gira Grant, "The Supreme Court Doesn't Care That the Gay Wedding Website Case Is Based on Fiction," (The New Republic, June 30, 2023), last accessed July 19, 2023 at https://newrepublic.com/article/174048/supreme-court-doesnt-care-gay-wedding-website-case-based-fiction. The magazine reports that Lorie Smith claimed in court filings that she received an inquiry about building a website from "Stewart," whose contact information was included in the inquiry filed in Smith's suit. Stewart and Mike were supposedly the gay couple Smith claimed asked her about a website. So, the magazine writer used the contact information in the filings and telephoned Stewart. He told her that he never made this inquiry, that he would never support Smith's challenge, that he is not gay and that he has been married to a woman for more than a decade. Smith's counsel at the Alliance Defending Freedom has called any suggestion that it fabricated a basis for Smith's case "reprehensible and disgusting," according to the magazine writer. Ibid.; see also, S. Levine, "Key Document May Be Fake in LGBTQ Rights Case Before US Supreme Court," (The Guardian, June 30, 2023), Whether the Court's decision in this case may ultimately be affected by the reporting of this story, especially in light of the Court's recent grant of certiorari on the issue of "tester" standing (Acheson Hotels, v. Laufer, infra, section II), is entirely unpredictable at this point.

Finally, can there be much doubt that Lorie Smith's claim is actually one grounded on her religious free exercise instead of freedom of speech, regardless of Justice Gorsuch's contrived characterization of her case? The majority's clever masquerade of free speech for free exercise may seem alluring, but the essence of what Lorie Smith and the Alliance Defending Freedom are trying to accomplish is a religion-based attempt to reverse, or at least

impair, what the Court has done in the past few decades to protect the rights of gay people and other protected classes.

Kincaid v. Williams, 600 U.S. ---, 143 S. Ct. --- (2023) (Dissent from Denial of Certiorari)

The Court denied certiorari as to whether the Americans with Disabilities Act covers gender dysphoria in a dispute involving a transgender woman.

Justice Alito, joined by Justice Thomas, dissented from the Court's denial of certiorari on the question of whether gender dysphoria (i.e., psychological distress caused by conflict between a person's gender identity and their assigned sex at birth) is covered by the definition of disability in the Americans with Disabilities Act ("ADA"). 42 U.S.C. 12211(b).

Kesha Williams is a transgender woman who was diagnosed with gender dysphoria long before her incarceration for six months in 2018 at the Fairfax County Adult Detention Center in northern Virginia. At the time of her incarceration she had been receiving hormone therapy consistent with her identity as female for 15 years. Williams was originally assigned to the women's side of the detention center, but she was later moved to the men's side of the prison and required to wear men's clothing. She contends that she did not consistently receive her hormone therapy and that she was harassed by prison deputies and male inmates.

After leaving the detention center, Williams sued the Sheriff of Fairfax County, VA (who operated the center) in federal court, contending that her rights under the ADA had been violated. The district court dismissed Williams' case, agreeing with defendant that gender dysphoria is not a "disability" under the ADA. On appeal, the Fourth Circuit reversed the district court's ruling, *inter alia*, that due to "advances in medical understanding" since the ADA's adoption, gender dysphoria is a recognized disability and is not a "gender identity disorder" that the ADA excludes from coverage. Accordingly, entities subject to the ADA must accommodate feelings of stress and discomfort that result from a person's assigned sex. Judge Quattlebaum dissented from the panel decision and joined five other judges in dissenting from rehearing the case *en banc*. The defendant petitioned for certiorari to review the Fourth Circuit's judgment.

After considering defendant's petition at four consecutive conferences, the Court denied it. Justice Alito, joined by Justice Thomas, filed an opinion dissenting from the denial of certiorari. Justice Alito's opinion described the question of ADA coverage for gender dysphoria as one "of great national importance that calls out for prompt review." The court of appeals, he contended, "has effectively invalidated a major provision of the Americans with Disabilities Act (ADA), and that decision is certain to have far-reaching and highly controversial effects." Moreover, he added, the ruling is likely to "raise a host of important and

sensitive questions regarding such matters as participation in women's and girls' sports, access to single-sex restrooms and housing, the use of traditional pronouns, and the administration of sex reassignment therapy."

* * * *

The dissenters make no pretense about their opposition to gender dysphoria coverage under the ADA. Not only do they question the Fourth Circuit's judgment, but they also essentially reveal their concerns about transgender participation in women's and girl's sports, transgender access to single-sex restrooms and housing, the administration of sex reassignment therapy and even the use of traditional pronouns. Whether the dissenters' undisguised desire to construe the ADA in a manner that psychiatry no longer recognizes can draw the necessary votes to overrule a judgments like the one here is uncertain. But what is certain is that what the dissenters want to do would have a dramatic impact on how the ADA operates in the workplace. It behooves all employment stakeholders, therefore, to watch for further developments on this issue in the upcoming term or beyond. In the meantime, in light of this denial of certiorari, failing to accommodate gender dysphoria in the workplace certainly puts employers and managers in harm's way under the ADA.

City of Ocala, Florida v. Rojas, 598 U.S. ---, 143 S. Ct. 764 (2023)

The Court denied certiorari on the question of whether atheists who attended a prayer vigil organized by a municipal police department had standing to contest religious speech they found offensive.

Following a shooting spree that left several children injured, police in the City of Ocala, Florida asked community leaders for help in bringing the community together to address its problems. As a result, the police chief organized a public prayer vigil in which police chaplains participated. Several atheists who attended sued the City, alleging that the religious themes of the event violated the Establishment Clause of the First Amendment. The district court granted summary judgment in favor of the plaintiffs, reasoning that they had standing to contest religious speech they found offensive and that the vigil violated the Establishment Clause. The Eleventh Circuit agreed that one plaintiff who chose to attend and actually heard prayers had standing to complain, but the Circuit vacated the district court's ruling, remanding the case for reconsideration in light of *Kennedy v. Bremerton School Dist.*, 597 U.S. --- (2022). The Supreme Court denied plaintiff's petition for certiorari.

Justice Gorsuch, while agreeing with the Court's disposition of this petition, expressed his firm disagreement with the notion that an offended observer has standing to bring an Establishment Clause claim. For those observers who are genuinely offended by religious expression, Justice Gorsuch says they may "avert their eyes" or "pursue a political solution."

Justice Thomas dissented from the denial of certiorari in an opinion saying that the Court should have granted review of whether the offended viewers had standing and whether the lower courts thus lacked jurisdiction. Justice Thomas expressed "serious doubt" about the legitimacy of the offended observer theory of standing, as it is contrary to precedent and "warps" the essence of judicial power to address actual injuries, not hurt feelings.

* * * *

The two opinions here push the cause of religious nationalism by indirection. Justices Gorsuch and Thomas openly seek to preclude observers who are offended by public religious expression from relying on the Establishment Clause to stop it. Their position that offended observers lack standing to sue to enforce their First Amendment rights would effectively impair the internal check and balance of the First Amendment, which says simply: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . " Whether the no standing device will attract enough votes from others in the six Justice group bears watching in the upcoming term and beyond.

C. Employee Compensation and Benefits

A bit unusual this term is the absence of retirement and pension fund decisions, ordinarily a feature of the benefits and compensation area. The two principal cases below, however, should be of some interest both to regular Court observers as well as practitioners in the benefits and compensation area.

Helix Energy, etc. v. Hewitt, 598 U.S. 39, 143 S. Ct. 677 (2023)

The Court held in a 6 to 3 decision that an offshore oil rig employee who earned more than $200,000 annually and whose paychecks are based solely on a daily rate (without overtime) is not paid on a salary basis and is thus a non-exempt employee entitled to overtime pay under the Fair Labor Standards Act.

Michael Hewitt was employed from 2015 to 2017 by Helix Energy Solutions Group ("Helix") as a "tool pusher" on an offshore oil rig. He reported to the captain of the rig, supervised 12 to 14 workers and oversaw various aspects of the rig's operation. Hewitt worked 28 day hitches with 28 days off between hitches. During each hitch he typically worked 12 hours every day so that he was working 84 hours per week during each hitch. Helix paid Hewitt on a daily rate basis with no overtime compensation. His daily rate ranged from $963 to $1341 per day. Hewitt's paychecks, issued every two weeks, amounted to his daily rate times the number of days worked during the pay period. Under this scheme, Helix paid Hewitt over $200,000 annually.

After Helix fired Hewitt for performance issues, Hewitt filed suit against Helix under the

Fair Labor Standards Act of 1938 ("FLSA") to recover overtime pay for himself and other employees. Helix responded that Hewitt was an exempt employee under section 213(a)(1) of the FLSA and the regulations adopted by the Secretary of Labor because he was employed in a "bona fide executive" capacity and paid on a salary basis. 29 C.F.R. 541.601, *et seq*. Hewitt conceded that his compensation met two of the Secretary's three tests for being an exempt employee: his compensation met the salary level test and his job responsibilities met the "duties" test for highly compensated employees. The parties disagreed, however, as to the third test - whether Hewitt was paid on a "salary basis." The district court agreed with Helix that Hewitt was paid on a salary basis and granted Helix's motion for summary judgment. The Fifth Circuit, *en banc*, concluded that Hewitt was not paid on a salary basis and reversed the district court's judgment. The 12-judge majority reasoned that a daily rate employee does not fall within the regulatory coverage of employees paid without regard to days or hours worked. The 6 remaining judges dissented in two opinions. The Supreme Court granted Helix's petition for certiorari.

The Court, in a 6 to 3 decision, affirmed the Fifth Circuit's judgment and held, in an opinion by Justice Kagan, that Helix did not pay Hewitt on a salary basis under the Secretary's regulations. Relying on the text and structure of the regulations, Justice Kagan concluded that Helix failed to persuade that it paid Hewitt on a salary basis under section 602(a) of the Secretary's regulations. Hewitt was a daily rate worker who was not entitled to be paid a full salary (i.e., a predetermined amount) for any week in which he worked at all. And, the Court rejected Helix's argument that receipt of paychecks every two weeks meets the "basis" element of the exemption. The term "basis" refers to the unit or method of calculating pay, not the frequency of its distribution.

Looking also at the broader structure of the Secretary's regulations, Justice Kagan's opinion fortifies its reading of the regulations' text. None of the various ways to meet the salary basis requirement covers daily rate employees like Hewitt - even highly compensated ones. The regulatory structure is thus aimed at other employees - highly paid or not - who were paid at a weekly (or longer) rate. Additionally, the Court rejected Helix's policy arguments. Not only did Justice Kagan find such arguments inadequate to overcome a clear textual directive, but their plea that ruling for Hewitt would provide a "windfall" runs counter to Congress' choice not to impose a simple compensation cap for an exemption. Finally, Helix's objection based on cost and its complaint about retroactive liability were rejected as having been considered - and not altered - by Congress for decades.

Justice Gorsuch's brief dissent says that the petition should have been dismissed as improvidently granted because the salary basis test was not the petition's original focus and because Helix failed to raise whether the Secretary's regulations are *ultra vires* the FLSA itself. (a point Justice Kagan addressed in footnote 2 to the Court's opinion. Slip Opin. p. 7).

Justice Kavanaugh, joined by Justice Alito, dissented in an opinion concluding that Hewitt was a "bona fide executive" for Helix and thus not entitled to overtime pay. The dissent

reasons that because Hewitt was guaranteed more than $455 for any week that he worked, he met the salary basis test for an exemption. And, like Justice Gorsuch, these dissenters agree that it is an open question whether the Secretary's regulations are consistent with the FLSA itself.

* * * *

This decision is more notable for its lineup of Justices and for its outcome than for any lasting interpretation of the FLSA. For instance, it is a mystery why Justice Thomas did not join Justice Gorsuch in urging a dismissal for an improvident grant of certiorari. Also noteworthy is that the Chief Justice and Justice Barrett joined in full the nearly jaunty, but unyielding, opinion of Justice Kagan favoring a generous application of the FLSA on the side of an employee already making more than $200,000 annually. To be sure, 28-day hitches on an oil rig requiring 12 hours of work every day is no picnic. But, it is still remarkable that the six-Justice pro-employer majority failed to hold together on behalf of a high-paying employer. At any rate, this decision can be scored as a win for employees and a warning to employers about applying the FLSA's overtime provisions to employees paid on a daily rate.

Perhaps as noteworthy as the decision is what the Court did not decide. We now know that there are at least three votes for granting certiorari on whether the Secretary's salary basis regulations are consistent with the FLSA itself. It may not be long, therefore, before the Court has an opportunity to confront that issue squarely.

Mallory v. Norfolk Southern Railway Co., 600 U.S. ---, 143 S. Ct. --- (2023)

The Court held that the Fourteenth Amendment's Due Process Clause does not prohibit a State from requiring out of state corporations registering to do business in the State to consent to personal jurisdiction in suits brought there.

Robert Mallory worked for Norfolk Southern Railway Company ("NS") as a freight-car mechanic for nearly 20 years, first in Ohio and then in Virginia. Mallory left NS and moved to Pennsylvania before returning to Virginia. During this time he was diagnosed with cancer. Contending that he was exposed to carcinogens when he sprayed boxcar pipes with asbestos, handled chemicals in the paint shop and demolished car interiors, he hired Pennsylvania lawyers who sued NS in Pennsylvania state court under the workers' compensation provisions of the Federal Employers' Liability Act ("FELA") covering railroad workers. NS responded that Pennsylvania state courts could not exercise personal jurisdiction over it because Mallory resided in Virginia when the suit was brought, his complaint claimed that the exposures to carcinogens were in Virginia and Ohio, and NS was incorporated in Virginia and had its headquarters there. Mallory countered by pointing out that NS manages 2000 miles of track, operates 11 rail yards and runs 3 locomotive shops in Pennsylvania and that it registered to do business there in 1998 because of its Pennsylvania operations. Moreover, when NS registered

in Pennsylvania, it was required to agree to appear in Pennsylvania courts on "any cause of action" against it. The Pennsylvania Supreme Court sided with NS, finding that the Pennsylvania law requiring registered companies to submit to suits in Pennsylvania violated the Due Process Clause of the Fourteenth Amendment.

The United States Supreme Court granted certiorari. The Court vacated the state court ruling and remanded the case. Justice Gorsuch announced the judgment of the Court, delivered the opinion of the Court with respect to Parts I and III–B, in which Justices Thomas, Alito, Sotomayor and Jackson joined, and an opinion with respect to Parts II, III–A, and IV, in which Justices Thomas, Sotomayor and Jackson joined. Justice Jackson filed a concurring opinion. Justice Alito filed an opinion concurring in part and concurring in the judgment. Justice Barrett, joined by the Chief Justice and Justices Kagan and Kavanaugh filed a dissenting opinion.

The Court found this case controlled by its decision in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), which held that laws like Pennsylvania's do not deny a defendant due process of law. It makes no difference that Mallory no longer lives in Pennsylvania or that his cause of action did not accrue there. The Court also found that its decisions after *Pennsylvania Fire* did not implicitly overrule that case. The state courts here were thus required to apply *Pennsylvania Fire* and rule for Mallory.

Justice Jackson concurred in the plurality opinion and expressed the view that another line of decisions also supports Mallory's position. Justice Alito concurred in the judgment, but noted in his separate concurrence that Pennsylvania's law may be unconstitutional under the Commerce Clause. Justice Barrett's dissenting opinion would side with NS because the Court's decisions since *Pennsylvania Fire* make clear that Pennsylvania could not legitimately assert personal jurisdiction over NS on Mallory's claims.

* * * *

This highly truncated coverage of a personal jurisdiction decision is included here only because it arose in an employment context and, happily for Mallory, sustained his ability as a former railroad employee to sue his employer for federal workers' compensation benefits arising out of his employment.

For employment lawyers, this decision may also be regarded as significant for its upholding of Pennsylvania's regime of foreign corporation registration conditioned on acceptance of personal jurisdiction on all causes of action against it. For employers caught in this bind, this decision strips away - but only in part - a due process defense. It is still an open question (as forcefully put in Justice Alito's opinion) whether this compelled jurisdiction device may constitutionally be imposed on out-of-state companies doing business in the state where suit is brought.

D. Arbitration.

This term's decisions include one significant procedural ruling that protects arbitration proponents from the burden of parallel court proceedings while the parties fight over whether their dispute is arbitrable. Although that decision arose outside the employment realm, its holding is squarely applicable to employment disputes. Another non-employment case deals with enforcement of a foreign arbitration award in a situation unlikely to affect employment disputes. The case is briefly described here because of the Court's inclination to permit American courts to protect the sanctity of arbitration awards generally. Based on these two decisions, one can easily conclude that the Court's romance with arbitration continues apace.

Coinbase, Inc. v. Bielski, 599 U.S. ---, 143 S. Ct. --- (2023)

The Court held in a 5 to 4 decision that a district court must stay its proceedings while an interlocutory appeal on the question of arbitrability is ongoing.

Abraham Bielski was a user of Coinbase, an online currency platform. The Coinbase User Agreement he signed when opening his account provides for dispute resolution through binding arbitration. Bielski filed a class action on behalf of Coinbase users alleging that Coinbase had failed to replace funds fraudulently taken from the users' accounts. Coinbase filed a motion to compel arbitration under its User Agreement. The district court denied the motion, and Coinbase filed an interlocutory appeal to the Ninth Circuit under section 16(a) of the Federal Arbitration Act ("FAA"), which authorizes such an appeal from the denial of a motion to compel arbitration. Coinbase also moved the district court to stay its proceedings pending resolution of the interlocutory appeal. The district court denied the stay motion, and the Ninth Circuit likewise declined to stay the district court's proceedings pending appeal. The Supreme Court granted Bielski's petition for certiorari.

The Court held in a 5 to 4 decision that a district court must stay its proceedings during the pendency of an interlocutory appeal on the issue of arbitrability. Justice Kavanaugh's majority opinion notes that the FAA does not say whether district court proceedings must be stayed pending resolution of an interlocutory appeal. But, the interlocutory appeal provision was enacted by Congress against a clear background principle based on Court precedent that interlocutory appeals "divest" district courts of control over aspects of a case having to do with such an appeal. *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56 (1982) Declaring that this *Griggs* principle resolves this case, Justice Kavanaugh concludes that Bielski's appeal on whether this case belongs in arbitration or court necessarily involves the entire case and that the district court must stay its proceedings while the appeal is ongoing.

Justice Kavanaugh explains that this common practice of staying proceedings during an interlocutory appeal makes common sense by preserving the benefits of arbitration (e.g., less

intrusive discovery, reduced expense and the like) and by not forcing settlements just to avoid district court discovery and trial proceedings. The majority also points out that Congress has a long-standing practice of not saying anything about staying proceedings when it enacts interlocutory appeal provisions, except when it specifically provides by statute that stays are not automatic in particular cases. Given this practice based on the *Griggs* rule, the absence of a stay provision in the FAA is of no moment. Finally, the majority concludes that Bielski's other arguments to overcome *Griggs* are unpersuasive, noting particularly that the result here does not treat arbitration in a preferred way and that courts of appeals have robust means to prevent unwarranted delay and deter frivolous interlocutory appeals.

The Court reversed the Ninth Circuit's judgment and remanded the case for further proceedings consistent with this opinion. In doing so, the Court remarked that it anticipates that on remand the Ninth Circuit "will proceed with appropriate expedition" in considering the interlocutory appeal. In a footnote the Court also wrote that its judgment pertains only to Abraham Bielski and that the writ of certiorari as to the other respondents is dismissed as improvidently granted.

Justice Jackson, joined fully by Justices Sotomayor and Kagan and as to Parts II - IV by Justice Thomas, dissented. The dissent expresses disagreement with the Court's imposing a mandatory stay in place of the traditional discretionary approach. The dissent also criticizes the Court's concluding that a dispute about one matter (arbitrability) bars district court proceedings on other matters - such as the merits.

* * * *

The only crack in the usually cohesive pro-business and pro-arbitration group of six Justices is a somewhat odd and unexplained dissenting vote by Justice Thomas (who joined 3 of 5 sections in Justice Jackson's dissenting opinion. Absent a separate opinion by Justice Thomas (who ordinarily is quick to pen his own views), his disagreement with the Court here remains a bit of a mystery.

Notable in this case is a very pointed dissent by Justice Jackson. Along with her solo dissent penned with a similar edge in Glacier Northwest, supra, her voice seems to be that of a new outspoken challenger to the group of six, particularly in cases pitting powerful interests against workers, consumers and others who believe they are being exploited.

Yegiazaryan, etc. v. Smagin, 599 U.S. ---, 143 S. Ct. --- (2023)

The Court held that a plaintiff alleges a "domestic injury" for purposes of an alleged RICO violation arising from confirmation of a foreign arbitration award when the circumstances surrounding the injury indicate that it arose in the United States.

In briefest summary, Vitaly Smagin, a Russian resident, won an arbitration award in

London of $84 million in 2014 against Ashot Yegiazaryan (who fled from Russia to a Beverly Hills, CA mansion in 2010.) The award stemmed from Yegiazaryan's theft of Smagin's shares in a joint real estate venture in Moscow. Smagin sued in a California federal court to confirm and enforce the arbitration award. The district court froze Yegiazaryan's California assets, entered judgment enforcing the award and enjoined him from preventing collection on the judgment. In the meantime Yegiazaryan, assisted by a California law firm, obtained the proceeds of a $198 million arbitration award he had won in an unrelated proceeding. Yegiazaryan sought to avoid the freeze on his assets by concealing and encumbering the newly obtained funds. Upon learning of the $198 million settlement in the course of Yegiazaryan's California divorce case, Smagin sued Yegiazaryan under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for unlawfully frustrating collection of the California judgment enforcing the original arbitration award. The district court, relying heavily on Smagin's Russian residency, dismissed his complaint for failure to plead a "domestic injury" under RICO. The Ninth Circuit reversed, concluding that the RICO injury to Smagin occurred in California.

The Supreme Court in a 6 to 3 decision affirmed the Ninth Circuit's judgment, holding that for purposes of RICO a plaintiff alleges a domestic injury when the circumstances surrounding the injury indicate it arose in the United States. Rejecting Yegiazaryan's argument that Smagin's residency foreclosed his claim, the Court remanded the case for further proceedings consistent with its opinion. Justice Alito, joined by Justice Thomas in full and Justice Gorsuch in part, dissented. The dissent criticizes the Court's opinion as unhelpful and concludes that the writ of certiorari should be dismissed as improvidently granted.

* * * *

The upshot of this decision for purposes here is that a London arbitration award on a dispute between two Russian citizens about a Russian investment is ultimately determined to injure the Russian proponent of the award because he sought to confirm and enforce it in California (where his opponent had fled) and where he had to sue his opponent under RICO for trying to frustrate collection on the award. Once again, the Court never paused to question the sanctity of the arbitration itself - a positive signal to arbitration proponents. Finally, as to this decision's applicability to employment, I suppose it is not out of the question, given the strength of unions in Europe, that a foreign employment award requiring enforcement against assets in the United States could result in a justiciable dispute here.

E. Sundry Decisions

The Court decided a False Claims Act ("FCA") dispute that essentially confirms the Government's unfettered authority to control the prosecution of fraud allegations by whistleblowing employees as relators in *qui tam* cases. In the course of doing so, at least three Justices signaled that the entire *qui tam* regime may be constitutionally infirm. In a separate *qui tam* decision beyond the scope of this article and thus not independently reviewed here, the

Court ruled that the False Claims Act's *scienter* requirement refers to a respondents' knowledge and subjective beliefs and not to what an objectively reasonable person may have known or believed. **U.S. ex rel. Schutte v. Supervalu Inc**., **598 U.S. ---, 143 S. Ct. --- (2023).**

Also summarized in truncated fashion are a number of other decisions, including the discharge of a community bank president by a supervising federal agency and a number of other opinions that could ultimately affect the employment relationship in some way.

U.S. *ex rel.* Polansky v. Executive Health, etc., 599 U.S. ---, 143 S. Ct. --- (2023)

The Court held in an 8 to 1 decision that the Government may, after intervening at any time, move to dismiss a False Claims Act ("FCA") *qui tam* action over the relator's objection and that disposition of such a motion should be determined by the rule generally governing voluntary dismissals.

Jesse Palansky is a doctor who worked for Executive Health Resources, Inc. ("EHR"), a company that helped hospitals bill the United States for Medicare-covered services. In 2012 Polansky filed a *qui tam* action against EHR (under seal as the False Claims Act ["FCA"] requires) alleging that it was enabling its clients to cheat the Government by charging inpatient rates for what should have been outpatient services. The Government investigated Polansky's evidence and declined to intervene during the period when the complaint was sealed. After years of discovery the Government decided that the burdens of litigation outweighed the suit's potential value, so it filed a motion to dismiss the action over Polansky's objection. The district court granted the motion, and the Third Circuit affirmed, concluding first, that the Government had effectively intervened by filing the motion and second, that F. R. Civ. P. 41(a) governing voluntary dismissals in ordinary cases should govern disposition of the Government's dismissal motion. The Supreme Court, recognizing circuit splits on both issues, granted certiorari.

The Court decided 8 to 1 to affirm the Third Circuit's conclusions. Justice Kagan's opinion for the Court first concludes that despite the relator's objections, the Government may move to dismiss the case whether or not it has previously intervened. As to the second question, Rule 41(a) governs disposition of the Government's dismissal motion. A notice of dismissal will suffice if the defendant (EHR here) has not answered or filed a summary judgment motion. Where, as in this case, the defendant has filed an answer, dismissal requires a "court order, on terms that the court considers proper." F. R. Civ. P. 41(a)(2). Agreeing with the district court that the suit would not vindicate the Government's interests, the Government may prevail on its motion.

Justice Kavanaugh, joined by Justice Barrett filed a concurring statement joining the Court's opinion in full, but agreeing with Justice Thomas' dissent that the Court should consider whether the *qui tam* device is inconsistent with Article II of the Constitution because

private relators cannot represent the interests of the United States in litigation.

Justice Thomas dissented, expressing the view that the FCA does not afford the Government power to dismiss a pending *qui tam* action after it has declined to intervene. As noted above, Justice Thomas would vacate the Third Circuit's judgment and remand for consideration of the serious constitutional questions the defendant has raised about *qui tam* suits.

* * * *

Justice Kagan's opinion for the Court obscures to some extent the Government's reasons for seeking dismissal of Polansky's qui tam action. Slip Opin., pp 6-7. As summarized in a commentary when certiorari was granted, "[t]he government investigated the matter for two years and declined to intervene, but expressly reserved the right to seek dismissal later. In February 2019, the government declared its intent to seek dismissal but chose not to do so after consulting with the parties. The government continued to evaluate the matter and, in August 2019, moved to dismiss under [31 U.S.C.] §3730. The motion cited "additional developments," including protecting the government's interests in responding to discovery requests; doubts about Polansky's ability to prove an FCA violation; and litigation conduct for which the district court had sanctioned Polansky." D. Schweitzer, Nat. Ass'n of Attorneys General, accessed on July 14, 2023 at www.naag.org/attorney-general-journal/supreme-court-report-united-states-ex-rel-polansky-v-executive-health-resources-inc-21-1052/. In terms of the Government's rationale for seeking dismissal, therefore, after more than two years of oversight and assessment, the prospect of burdensome discovery and uncertainty about Polansky's ability to prevail seems objectively supportive of dismissal.

Justice Kagan' majority opinion clearly establishes that the Government may seek dismissal of a qui tam action over the objection of the relator - whether or not the Government has previously intervened. Only Justice Thomas contests that conclusion. And, there is likewise agreement by the entire majority that the standards of Rule 41(a)(2) will govern a district court's disposition of such motions. The true underlying fracture among the Justices is that Justices Thomas, Kavanaugh and Barrett agree that the very existence of the qui tam device for an FCA action may well be unconstitutional. That's because Article II of the Constitution vests execution of the laws in the Executive Branch, not in the hands of a private relator. Whether a fourth Justice will join to grant a petition for certiorari on this important aspect of FCA litigation leaves the qui tam device in jeopardy for the time being. As for Dr. Polansky, his prospect of recovering a share of his employer's alleged ill-gotten gain does not look promising.

Calcutt v. Fed. Deposit Ins. Corp., 598 U.S. ---, 143 S. Ct. 1317 (2023)

The Court unanimously held *per curiam* that a reviewing court that determined the FDIC had applied the wrong standards in an enforcement proceeding

is required to remand the case to the FDIC instead of reviewing the record and deciding the case on its own.

Harry C. Calcutt, III was the CEO of a Michigan-based community bank. The Federal Deposit Insurance Corporation ("FDIC"), which insures bank deposits and superintends community banks, brought an enforcement action against Calcutt for mismanaging a $38 million loan relationship with the bank's largest borrower that ultimately resulted in a default. After an administrative investigation involving Calcutt and other bank officials, an evidentiary hearing before an FDIC administrative law judge and review by the FDIC Board, the agency issued a final decision ordering that Calcutt be removed from office, prohibited from further banking activities and assessed civil penalties of $125,000. Calcutt sought review of the agency decision in the Sixth Circuit. That court determined that the FDIC had made two legal errors in adjudicating Calcutt's case. Instead of remanding the case back to the FDIC, however, the Sixth Circuit concluded that remand would be wasteful and conducted its own review of the record. It found that, despite the agency's errors, substantial evidence supported the FDIC's decision to discharge Calcutt and impose injunctive and monetary penalties on him.

The Supreme Court granted certiorari and, without briefing and argument, ruled *per curiam* that *SEC v. Chenery Corp*., 318 U.S. 80 (1943) and its progeny required the Sixth Circuit to remand the case to the FDIC after determining that the agency had misapplied the applicable law to the claims against Calcutt. In short, the Supreme Court reasoned that, absent exceptional circumstances, remand is necessary to determine on a proper basis whether Calcutt should be sanctioned and, if so, to what extent. And, the Court remarked that here the FDIC should not be denied the flexibility in addressing issues in the banking sector, as Congress has allowed. Accordingly, the Court reversed the Sixth Circuit's judgment and remanded for further proceedings consistent with the Court's opinion.

* * * *

Whether Calcutt should have been removed and sanctioned for failing to manage the complicated loan portfolio of his bank's biggest borrower in the wake of the Great Recession of 2007-2009 is a discretionary judgment Congress has committed to agency determination. The Court's embrace of this principle dictated its treatment of the Sixth Circuit's error in summary fashion. For purposes here, a comparison of the protection afforded Calcutt with the typical employment of CEO's at the will of their employers is informative. In a highly regulated industry like banking other people's money, additional oversight of management is what the Court believes Congress intended. Of course, that oversight has more to do with protection of the public than fairness to employees like Harry Calcutt.

Arellano v. McDonough, Secretary etc., 598 U.S. 1, 143 S. Ct. 543 (2023)

The Court unanimously held that the effective date of a veteran's claim for disability compensation is not subject to equitable tolling.

Adolfo Arellano served in the Navy from 1977 to 1981, when he was honorably discharged. Thirty years later, on June 3, 2011, the Veterans Administration ("VA") received Arellano's application for disability compensation based on his psychiatric disorders resulting from trauma he suffered on an aircraft carrier that collided with another ship. The VA regional office granted benefits from service-connected disabilities effective on the 2011 date. Arellano appealed to the Board of Veterans' Appeals, arguing that because he had been too ill to know about these benefits, the regional office should have equitably tolled their effective date to make the award run from the day after his discharge or, at the latest, January 1, 1982. The Board denied the appeal, and the Court of Appeals for Veterans' Claims affirmed. The Federal Circuit, en ban, affirmed, though it split on whether equitable tolling was or should be available for disability claims.

The Supreme Court granted Arellano's petition for certiorari and affirmed the Federal Circuit's judgment, holding in an opinion by Justice Barrett that disability claims under 38 U.S.C. 5110(b)(1) are not subject to equitable tolling. The Court's unanimous opinion reasons that when Congress said that an award's effective date shall not be earlier than the date of filing, it foreclosed an earlier date for Arellano's claim, as his claim did not fit within any of the stated exceptions to the default rule of section 5110(a) that an effective date shall not be earlier than the date of receipt of an application. Ruling that the limited exception in section 5110(b)(1) is not a simple time limit subject to equitable tolling, the Court concluded that Congress did not intend that Arellano's claim could be equitably tolled consistent with the statute's text and structure.

* * * *

There is little to say about the Court's unanimous, clear and unequivocal construction of the Veterans disability statute. While Arellano's personal circumstances appear to support an equitable way to allow his claim because of his psychiatric condition, the Court simply finds that Congress said in the statute that such an exception was not included among all the other exceptions to the one-year filing rule. In its most favorable light, perhaps Justice Barrett's opinion is an invitation for Congress to amend the law so others like Arellano will not be excluded from coverage.

Health and Hosp. Corp., etc. v. Talevski, 599 U.S. ---, 143 S. Ct. --- (2023)

The Court held in a 7 to 2 decision that the Federal Nursing Home Reform Act ("FNHRA") creates a private right of enforcement under 42 U.S.C. 1983.

This care and discharge dispute under the Federal Nursing Home reform Act between a county-owned nursing home and one of its residents with dementia has no relationship to employment law and its facts will not be recounted here. The Court's decision is included here

solely because the holding is based partly on rejection of an argument that statutes enacted pursuant to the Constitution's Spending Clause cannot be enforced by means of a private action under 42 U.S.C. 1983. To the extent, therefore, that Congress enacts any employment-related statutes pursuant to the Spending Clause, this decision assures that rights under those statutes may be enforced by a private action under Section 1983.

Justice Jackson's opinion for the majority concludes that the nursing home legislation here unambiguously confers individual rights on nursing home residents without any intent to preclude their private enforcement under section 1983. Justice Gorsuch filed a concurring statement agreeing with the Court's disposition, but noting that the constitutionality of Spending Clause legislation's application to the States is an issue "lurking" here to be resolved "another day." Justice Barrett's concurring opinion, joined by the Chief Justice, restates the majority's reasoning in different terms and expresses the view that courts "must tread carefully before concluding that Spending Clause statutes may be enforced through section 1983." Justice Thomas dissented in an opinion declaring that Spending Clause legislation does not "secure" rights by "law" within the meaning of section 1983. Justice Alito dissented in an opinion concluding that the remedial scheme of the nursing home legislation here forecloses enforcement under section 1983.

* * * *

As noted above, the importance of this case in the employment realm relates to Spending Clause statutes such as Title IX of the Education Amendments of 1972 prohibiting sex discrimination in schools and the Rehabilitation Act of 1973 prohibiting disability discrimination. At least for the time being, a majority of the Court supports the notion that legislation based on the Constitution's Spending Clause can be enforced by a private right of action under 42 U.S.C. 1983, if the statute unambiguously confers private rights without any indication of precluding that enforcement.

Axon Enterprise, Inc. v. Fed. Trade Comm., 598 U.S. ---, 143 S. Ct. 890 (2023)

The Court unanimously held that claims arising under 28 U.S.C. 1331 to challenge a federal agency's structure in district court are not displaced by the agency's special statutory review scheme.

Axon Enterprise, Inc. and Michelle Cochran were respondents in enforcement actions brought by the Federal Trade Commission ("FTC") and Securities and Exchange Commission ("SEC") respectively. Each filed suit in district court challenging the constitutionality of the agency proceeding against them. These suits sought to enjoin determinations by each agency's own internal administrative proceedings typically involving ALJ decisions followed by federal court review. Axon and Cochran premised their suits on the district court's ordinary authority to resolve civil actions arising under the Constitution or laws of the United States as provided

in 28 U.S.C. 1331.

The district courts dismissed both suits, concluding that each agency's administrative review scheme displaced district court jurisdiction under 28 U.S.C. 1331 over the plaintiff's claims against the agency. The Ninth Circuit affirmed the district court's ruling in Axon's case against the FTC, but the Fifth Circuit, *en banc*, found that Cochrane's claim against the SEC could proceed because it fell outside the agency's expertise, was wholly collateral to the SEC's review scheme and would not receive meaningful judicial review on appeal. The Supreme Court granted certiorari in both cases and ruled unanimously that neither the FTC's nor the SEC's administrative review scheme displaced a district court's federal question jurisdiction over claims challenging the agencies' structure or existence.

Justice Kagan's opinion for the Court recognized that Congress may substitute an alternate review regime for claims against a federal agency and that the Court has permitted displacement of district court jurisdiction on occasion. In these cases, however, the Court concluded that Axon's and Cochran's claims were not of the sort that should be subject to review within the agency. Justice Thomas' separate concurrence agreed that the Court's ruling was correct, but expressed at length his "grave doubts" about the Constitutional propriety of vesting administrative agencies with authority to adjudicate private rights subject only to deferential judicial review. Justice Gorsuch likewise filed a separate concurrence agreeing with the Court's judgment, but declaring that the grant of district court jurisdiction in 28 U.S.C. 1331 expresses Congress' desire to afford Axon and Cochran an opportunity for a federal court to determine their claims.

* * * *

The Court's unanimous decision to bypass federal agency determination of private claims in favor of federal district courts appears limitless as to its coverage of federal agencies. What that means as a practical matter is that claims by employees or employers against federal agencies administering employment statutes (e.g., EEOC, NLRB, OSHA and the DOL's Wage and Hour Division) may avoid the vagaries and expense of administrative litigation and go directly to federal court to seek relief. Especially to the extent that challenges to agency authority at the Board, the EEOC or the Wage and Hour Division may seem attractive to owners, management, labor or other stakeholders, be on the lookout for these challenges in federal court in the near term. And, needless to say, this decision certainly provides a clearer path for those wishing to challenge the administrative state.

II. Grants of Certiorari for the October 2023 Term

At the time this article was prepared in July of 2023, the Court had granted review in just 24 cases yielding 22 arguments because of two consolidations.

Muldrow v. City of St. Louis, MO
No. 22-193

The question presented is: Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

Jatonya Muldrow, a sergeant with the St. Louis, MO police department sued her employer, alleging sex discrimination when she was involuntarily transferred from the Intelligence Division to a patrol position because her supervisor wanted to hire a man for her job. The Eighth Circuit ruled against Muldrow, reasoning that her transfer had not resulted in any significant employment disadvantage for her. The Supreme Court's grant of certiorari was limited by the Court to the Title VII question as phrased above.

The case is not yet scheduled for oral argument.

Murray v. UBS Securities, LLC
No. 22-660

The question presented is: Under the burden-shifting framework that governs [The] Sarbanes-Oxley [Act of 2002] cases, must a whistleblower prove his employer acted with a "retaliatory intent" as part of his case in chief, or is the lack of "retaliatory intent" part of the affirmative defense on which the employer bears the burden of proof?

Trevor Murray was hired by UBS Securities, LLC in April of 2011 as its sole research strategist servicing its commercial mortgage-backed securities line of business. He was fired after he complained that he had been pressured to skew his research and reporting contrary to SEC regulations. Murray filed a whistleblower complaint with the Department of Labor alleging that his termination violated the Sarbanes-Oxley Act, and when the Department failed to act, he sued in district court. Upon trial of the case, the jury ruled for Murray and awarded back pay and compensatory damages. The district court upheld the verdict. On appeal, the Second Circuit reversed, holding that Murray failed to prove Sarbanes-Oxley discrimination by showing that UBS had "retaliatory intent" in firing him. The Supreme Court granted certiorari in light of a circuit conflict.

This case is scheduled for oral argument on October 10, 2023.

Lindke v. Freed
No. 22-611

The question presented is: Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

James Freed became City Manager of Port Huron, MI in 2014, serving as the chief administrative officer of the City. Freed connected with many of his constituents through Facebook, a social media platform. He maintained a publicly accessible "page" where he posted information, including comments about the COVID-19 pandemic. Kevin Lindke, a Port Huron resident, posted critical comments on Freed's page, and Freed blocked Lindke's accounts and deleted Lindke's comments. Lindke sued Freed under 42 U.S.C. 1983, alleging that Freed had violated the First Amendment by blocking his accounts. The district court granted summary judgment for Freed, concluding that this Facebook activity was not state action. The Sixth Circuit affirmed, explaining that Freed's actions were not taken under color of law because they were neither in pursuit of Freed's duties nor his authority under state law. The Supreme Court granted Lindke's petition for certiorari.

This case has not yet been scheduled for oral argument.

Acheson Hotels, LLC v. Laufer
No. 22-429

The question presented is: Does a self-appointed Americans with Disabilities Act "tester" have Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place?

Deborah Laufer, a Florida resident, uses a wheelchair and qualifies as "disabled" under the ADA. A self-proclaimed ADA "tester," Laufer uses the internet to find hotels that do not, in her view, provide sufficient information about ADA accessibility. Since 2018 she has filed more than 600 suits, generally targeting small businesses and independent hotels. On September 24, 2020 Laufer filed seven suits in Maine federal court, one of which was against Acheson Hotels, LLC, the owner-operator of Coast Village Inn and Cottages in Wells, ME. Her suit alleged that Acheson's facility violated a regulatory rule requiring hotels to furnish enough information for disabled individuals to determine accessibility to meet their needs. The district court dismissed Laufer's suit because, as a "tester" she lacked any plausible injury that is concrete and imminent. The First Circuit reversed, concluding that Laufer had standing as a website "tester" to sue to enforce the regulatory rule. The Supreme Court granted Acheson

Hotels' petition for certiorari.

In light of what has been written about the gay couple who allegedly wanted to purchase one of Lorie Smith's wedding website designs in the 3*03 Creative LLC case, supra*, the question of tester standing may take on particular significance as to the enduring quality of the Court's decision in Lorie Smith's case.

This case is scheduled for oral argument on October 4, 2023.

Loper Bright Enterprises v. Raimondo
No. 22-451

The question presented is: Whether the Court should overrule *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the Magnuson-Stevens Act does not constitute an ambiguity requiring deference to the agency?

The Magnuson-Stevens Act governs fishery management in federal waters and provides that the National Marine Fisheries Service ("NMFS") may require vessels to carry federal observers and pay all or portions of their salaries in certain circumstances. Loper Bright Enterprises and three other family-owned herring fishing vessel operators sued the Secretary of Commerce and others to set aside industry-funded monitoring in the Atlantic herring fishery. The district court granted defendant NMFS' motion for summary judgment, concluding that its analysis is governed by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council,* 467 U.S. 837 (1984), which requires a deferential review of the paid monitoring requirement. The D.C. Circuit affirmed based on the *Chevron* framework. The Supreme Court granted the fisheries' petition for certiorari.

During the pendency of this case Justice Gorsuch dissented from a denial of certiorari in another case and expressed the hope that the Court would abandon the *Chevron* doctrine. **Buffington v. McDonough**, 598 U.S. ---, 143 S. Ct. --- (2023). If the Court were to overrule *Chevron* in *Loper Bright*, its decision could have a transformational impact on how employment laws administered by the EEOC, NLRB, OSHA and the Wage and Hour Division of DOL are applied. Employers have argued for years that deference to these agencies on application of employment statutes in the workplace has been one-sided and overly solicitous of employees (such as recent attempts by the Board and the FTC to nullify non-compete and no-poach agreements. The Court will decide this case with eight Justices, as Justice Jackson is recused because of her prior service on the D.C. Circuit.

This case is not yet scheduled for oral argument.

III. Concluding Observations

At the risk of sounding gossipy, let me say a few words about some of the individual Justices. Most intriguing, perhaps, is the work of Justice Jackson in her first term on the Court. Her assertive writing certainly provided some entertaining and thoughtful interaction with her colleagues. Indeed, the lone dissent by Justice Jackson in *Glacier Northwest, Inc. v. Teamsters Local No. 174, supra*, is a prime example of her singular approach to judging. Her thorough disagreement with every other member of the Court about the central role of pre-emption in enforcing the NLRA as Congress intended looked like the hallmark of a mature jurist, not a brand new Justice. Apparently, Justice Jackson is also a frequent and persistent questioner at oral argument. The consequences of Justice Jackson's spirited judicial manner are also notable. For instance, the repartee between Justice Jackson and Justice Thomas in their separate opinions in the college admissions affirmative action decision has been widely reported as a remarkable confrontation between two minority Justices who approach racial issues from quite differing angles. Given Justice Thomas' employment law background and Justice Jackson's fearless approach to addressing issues, more back-and-forth between those two Justices on labor and employment issues may be on the horizon.

Other Justices's opinions were revealing in like fashion. Most notably, the Chief Justice and Justices Kavanaugh and Barrett voted (thankfully and correctly in my view) with Justices Sotomayor, Kagan and Jackson to reject the so-called Independent State Legislatures doctrine when applying the Elections Clause of the Constitution. *Moore v. Harper, supra, p. 2.* In several other cases some of the six-Justice conservative bloc declined to join opinions of Justices Thomas, Alito and Gorsuch (or vice versa.) In particular, Justice Barrett has demonstrated a ready willingness to express herself in a commendably independent fashion. *E.g.*, *Glacier Northwest, Inc. v. Teamsters Local No. 174, supra,* p. 4; *Mallory v. Norfolk Southern Railway Co., supra*, p. 20. It will be interesting to observe whether her work with three other women on the Court will affect her views about employment issues affecting women. Finally, a quick aside: Before concluding that the six so-called "conservative" Justices are abandoning the cohesion that has empowered them, remember that this bloc may be more likely to stand together on labor and employment issues because of their long-term adherence to the *laissez-faire* agenda of the business community.

Looking briefly at employment law itself, the Court's pursuit of deregulation of fair employment laws over the last two decades has captured the attention of many observers, yours truly included. *E.g.,* J. Harkavy, *Deregulating Equal Employment Opportunity* (July 12, 2011). (Access at SSRN: https://ssrn.com/abstract=1885186) Now, however, with an ambitious six-Justice majority comfortable in its third term together, there is a discernible shift away from mere deregulation to a more audacious attempt to disempower the administrative state more thoroughly. The recent grant of certiorari in a case seeking to overrule the *Chevron* doctrine certainly looks like a pivot from deregulation to disempowerment. *See, Loper Bright*

Enterprises v. Raimondo, supra, section II. One unspoken caution: Politically speaking, bold moves against the administrative state may look attractive to a party not in charge of the Executive Branch right now. Yet, given the vagaries of politics, one has to wonder whether that is a winning strategy for a party trying to retake the Presidency (and the consequent authority to shape the administrative state.)

Without harping more on the First Amendment opinions of several of the six Justices in the conservative majority, I feel the need to reflect on that majority's overt push to support public religious exercise in spite of the increasingly secular views of a larger part of the population. Witness not only this term's landmark case of *303 Creative LLC v. Elenis, supra, p. 13,* but also some Justices' opinions on denials of certiorari in *Kincaid v. Williams* and *City of Ocala, Florida v. Rojas*, *supra.* My concern is that the creep toward Christian nationalism seems so insistent on the part of Justices Alito, Thomas and Gorsuch that capturing two additional votes to establish a sectarian United States - in total disregard of our Constitution and history - is a frightening prospect, and certainly one that religious minorities should rightly fear. Perhaps our best hope for individual autonomy lies with citizens themselves instead of Justices: That is, one hopes that thoughtful employers, unions and employees alike will desist from religious exercise where it does not belong, while feeling free to practice their faith and pursue their beliefs in the appropriate places and manner.

Finally, one more critical takeaway from the 2022-2023 term: **Elections matter!**

So many of this term's decisions, some outside the employment area, painted in bold relief the profound jurisprudential differences that determined outcomes. Bear in mind that in the employment area these "outcomes" affect the lives of employees and their families, as well as the prospects for businesses and their owners. For anyone interested in changing those outcomes to achieve more just and equitable workplaces in a more productive economy, the composition of the Court is central to that quest. That is why elections matter when it comes to who serves on the Supreme Court and gets to make the decisions that count.

Thank you, readers. Stay well and stay engaged as observers of the Supreme Court's important work.

Jonathan R. Harkavy
July 29, 2023

South Carolina Bar

Continuing Legal Education Division

Investigation 201—The Importance of Investigations in Employment Litigation

Investigations 102: The Importance of Workplace Investigations in Employment Litigation

B. SHAWAN GILLIANS, SANTEE COOPER
D. MICHAEL HENTHORNE, OGLETREE DEAKINS

Agenda

- Understanding the “Why” of Investigations
- So , You’re Investigating the Boss…
- “Oh @#$%” Moments in Investigations
- Parallel Investigations: The Federales Knock
- Questions

Understanding the "Why" of Investigations

Every Employment Case Requires Some Level of Investigation

"My pay isn't right."

"I'm being treated differently."

"This isn't fair. Why wasn't I promoted?"

"I need to take some time off."

"I found these union authorization cards on the shop floor. What should I do with them?"

"There's been an accident…"

Discover facts

- Witnesses
- Documents
- Policies and Procedures
- Emails and Text Messages
- Journals or Diaries
- Calendars
- Computer files
- Maps

Find Evidence

- Job descriptions
- Policies and procedures
- Applicant tracking information
- Payroll records
- Benefit summary plan descriptions
- Emails and text messages
- Calendar entries and meeting invites

Reveal Issues or Problems

Avoid Liability; Gain the Court's Trust

Plaintiff supervisor (over 60) was terminated for combative behavior and profane language toward a younger subordinate after failing to complete an assigned task.

- During an investigation, the employee who was yelled would not confirm or deny the allegations
- The supervisor denied the incident occurred stating he would never use profanity with a subordinate.

Fortunately, the investigator did not stop there.

Avoid Liability; Gain the Court's Trust

The investigator talked to three witnesses that were bystanders. The witnesses provided a consistent version of events in separate interviews. Each confirmed the supervisor yelled at the employee and used profanity.

The Sixth Circuit upheld the trial court's dismissal on summary judgment of the supervisor's age discrimination claim based the investigation. The court relied on the "honest belief rule" to counter the supervisor's statement that the employer's reason for his termination was false.

Tell Your Client's Story

- Prompt response
- Thorough investigation
- Well documented
- Appropriate and proportionate action

So, You're Investigating the Boss…

No Respecter of Persons

- Does it really matter who is the subject of the investigation?
  - Headline risk
  - Increased company exposure
    - Pervasiveness and culture issues
  - Appearance of bias/pressure to avoid the appearance of bias
- Does it really matter who performs the investigation?
  - Practically NOBODY wants to investigate their executive
  - Someone who affirmatively wants to investigate their executive is a red flag
  - This will not be your typical investigation

But You Are Going to Do it

- First things first
  - What's the anticipated scope
  - Who are the likely witnesses
  - Who is the designated decision maker
- An external investigator will almost always be the prudent approach
- The external investigator should be someone other than the attorney who will be making findings to the decision maker

The Investigation

- Select an investigator with experience investigating complaints against executives
  - Witnesses will be particularly hesitant to come forward
  - Separate the wheat from the chaff
  - Facts and observations ONLY
- If your client is a publicly traded company some level of disclosure may become necessary
  - Either because of the results of the investigation or in response to leaks
  - ESG guidelines won't necessarily require disclosure, but failure to disclose will likely impact market credibility

Conclusion

- Best practices
  - Know your expected risks from the outset
  - Identify and establish communication protocols with the decision maker
  - Call in external assistance as soon as possible
  - Quarantine, quarantine, quarantine
  - It’s never too early to begin thinking about crisis management

“Oh @#$%” Moments in Investigations (DMH)

Bear

“Bear… @#$%!”

A Quick Disclaimer

Things can go sideways regardless of which side you represent.

When the Plaintiff is Still Employed

The goal is to resolve, and avoid adding to, the dispute, but there can be complications:

- Strained relationships across the board
  - Managers
  - Co-workers/peers
- Supervisor's reluctance to be perceived as retaliatory
- "I'm bulletproof" attitude
- Resolving the litigation – and what happens after

When the Plaintiff is a “Star” or an Executive

- A top salesperson or “rainmaker”
- The EVP
- The Production Manager
- The IT Pro
- The Assistant General Counsel
- Chief Compliance Officer

When the Plaintiff has Your Documents – and You Didn't Know It

After receiving Plaintiff's written discovery responses, Defendant employer (a health care provider) discovered for the first time that Plaintiff had printed and removed confidential, medical records maintained by Defendant from one of the facilities that Defendant served on violation of Defendant's policies.

When the Plaintiff has Your Documents

Defendant notified Plaintiff's counsel about this issue, requested that Plaintiff return these documents - and terminated him. Defendant then moved to exclude the documents from being used in the case.

When the Plaintiff has Your Documents

The Court (USDC for the Northern District of Georgia) held an evidentiary hearing.

Plaintiff did not appear at the hearing to testify as to the falsity of these documents, nor did he present any witnesses.

During the evidentiary hearing, Plaintiff's attorney stated:

"We didn't file a response [to Defendant's motion] because to the extent that the allegation is that the records at issue are confidential patient records, *there is not really a defense to that . . . We don't really disagree with excluding confidential patient records*.

When the Plaintiff has Your Documents

The Court's Order:

The Court hereby **GRANTS** Defendant's motion and **PROHIBITS** Plaintiff from using, disclosing, or retaining, in any form, those medical records which Plaintiff obtained without permission. Specifically, Plaintiff may not refer to, disclose, or retain those records comprising Defendant's sealed Exhibit 1, and Plaintiff's email attachments. Further, Plaintiff is **ORDERED within ten (10) days of this order** to remit any and all forms of these documents to counsel for Defendant

When the Plaintiff has Your Documents

At his deposition, Plaintiff admitted that he took the medical records from the Jail to support his claims and disclosed them to his attorney, the EEOC, and Defendant's counsel.

He also admitted that he had received training on the confidentiality of such records.

Plaintiff attempted to redact the patient names, signatures, birth dates, and jail booking numbers for these records but did so improperly, such that much of the information was still visible.

When the Defendant's Key Witness…

- Leaves the Company (and South Carolina).
- Was fired and hates your client.
- Is still employed and hates your client.
- Is Too Busy.
- Is Not Engaged.
- Is Too Engaged.
- Has a "Past."

When the Defendant's Key Witness…

Says exactly what you need – and you don't believe him or her.

When the Defendant's Witness Says…

- "I don't want to be involved."
- "I want a lawyer."
- "I don't remember."
- "I threw that away."
- The exact opposite of what he/she told your client earlier.
- The exact opposite of what you had hoped.

Parallel Investigations: The Federales Knock

The Scene

Your good client Susan Barron, Chairman and CEO of Barron Environmental, has just called you in a frenzy. Some months ago, Ms. Barron received an EEOC complaint alleging gender discrimination and retaliation at her largest facility. However, unlike with claims in the past, it appears the EEOC plans to conduct onsite interviews for those who are willing to participate.

Ms. Barron would like to retain you to represent BE. You accept the engagement and notify the identified investigator of your representation. The investigator advises you he has several employees he intends to contact and he will be begin conducting interviews on Tuesday (four days from now).

Now what?

- The Obvious
  - Review the complaint and response
  - Review the client's investigation efforts thus far
- For Discussion
  - Can you interview the complainant?
  - Should you interview the complainant?
- Must Dos
  - Conduct your standard investigation
    - Well…sorta, kinda

Delicate Toes

- Employee obligations to cooperate
  - Most employers have some policy on employee cooperation with investigations
    - But complainants will always require kid gloves and extra precautions
  - In a world where there are parallel investigations some concessions may need to be made
    - Perhaps coordinate with EEOC on timing of interviews if the employee is willing to speak to both investigators
- It's a good practice to cooperate with EEOC investigator
  - This does NOT mean handing over the employer's information simply because you obtained it as a part of your investigation

Communication is Key

- The easiest lawsuit to defend is the one that doesn't get filed
  - While you shouldn't hand over your files to the EEOC's investigator there may be situations when some additional disclosure is advantageous
  - The EEOC is charged with impartially seeking facts surrounding the allegations. Its job is not that of a prosecutor/solicitor
- It's never too late to mediate
  - If your investigation is indicating some wrongdoing by your client or there is otherwise an increased risk of an adverse finding, have that conversation with your client early on
  - It is not necessary to wait until the conclusion of the EEOC's investigation to move forward with conciliation

Conclusion

- Best practices
  - Cooperate with the EEOC to extent possible
  - You are the master of your investigation, and the EEOC is the master of its investigation
  - Be mindful of your surroundings when interviewing witnesses
  - Take note of your exit points

Questions?

South Carolina Bar

Continuing Legal Education Division

Mental Health Awareness for the Employment Law Practitioner

Mental Health Awareness for the Employment Law Practitioner

April Harris-Britt, PhD
Licensed Psychologist

NC/SC Labor & Employment Law Conference, Oct. 27-28, Charleston, SC

1

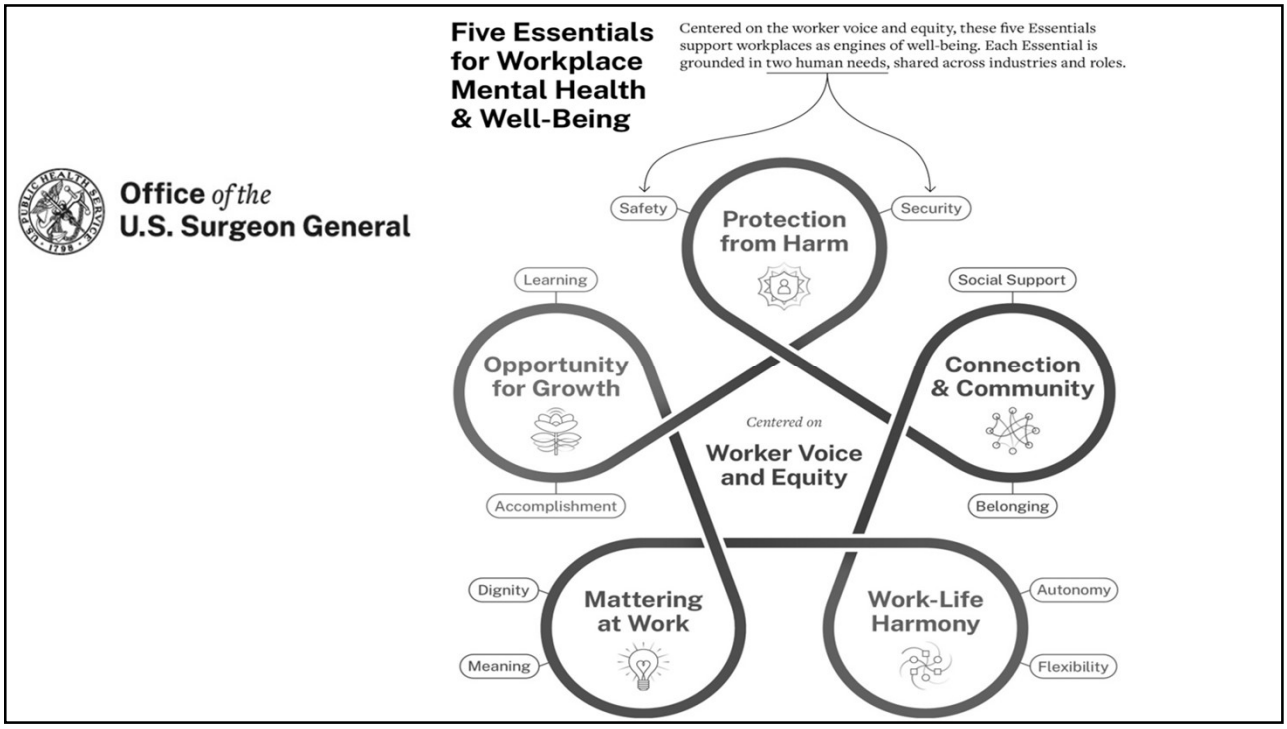
Goals

- Understand how worker burnout is related to stress and a lack of mental wellness
- Understand how systematic pandemic stressors impact workers' mental health and burnout
- Recognize the stressors that impact employment attorneys' mental health
- Develop strategies to support and deescalate clients
- Identify strategies for personal mental and physical wellness

2

Worker Mental Wellness and Burnout

3



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Occupational Stress: Relationship to Well-Being

- Paradoxical Effect of Challenge
- Both individual and workplace factors contribute to stress response
  - Dysfunctional stress responses are more significantly related to organizational than individual factors

5

Definition of Relevant Terms

- Worker Burnout
  - Three core dimensions include emotional exhaustion, cognitive distancing (i.e., depersonalization or cynicism), and reduced personal accomplishment
- Toxic Workplace
  - Commonly involves “a sense of fear” in the workplace, which can stem from a wide variety of variables
- Mental Health
  - “a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community.” (WHO, 2022)

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Stress and the COVID-19 Pandemic

When faced with unprecedented environmental threats of harm, how does the mind and body react?

7

Threat Characteristics of Pandemic

- Perceptions of threat to ourselves or loved ones
- Experiencing loss
- Witnessing or knowledge about trauma to others

- Trauma is an *individual's* response to a deeply distressing or disturbing experience that overwhelms their ability to cope.

8

In the midst of uncertainty, anxiety, and fear…

- **Activation of Fight, Flight, Freeze, or Fawn response**
  - Some people become more irritable and confrontational
  - Some people may be more apt to feel hypervigilant or anxious even if they never have before.
  - Some people cope through escapism or avoidance of responsibilities, tasks, and pressure
  - The fawn response involves immediately moving to try to please a person to avoid any conflict. People pleasing!

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In the midst of uncertainty, anxiety, and fear…

- Activation of Fight, Flight, Freeze, or Fawn response
  - Parts of our brain have shut down in order for us to survive
  - Feeling somewhat numb and out of touch with our emotions can be normal
  - Others may feel hopeless, become withdrawn, or feel depressed

There is no "right or wrong" way to feel.

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The Human Brain Under Stress

Three Key Brain Areas Under Investigation

Prefrontal cortex

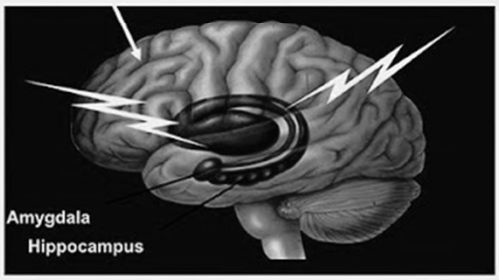
Decision making, working memory, self regulatory behaviors: mood, impulses

Helps shut off the stress response

Hippocampus

Memory of daily events; spatial memory; mood regulation

Helps shut off stress response



Amygdala

Anxiety, fear; aggression

Turns on stress hormones and increases heart rate

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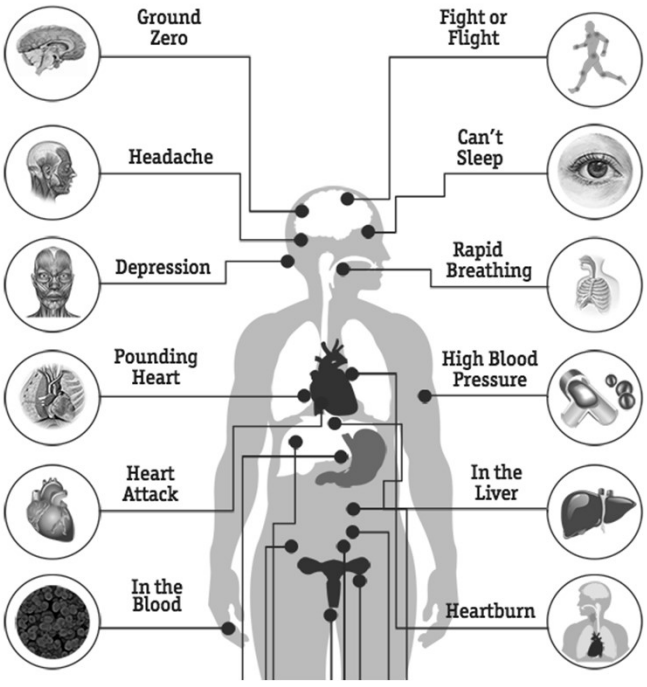
Our Body Under Stress



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The Effects of Social Isolation

- Physiological Impacts
  - Increased Stress Hormones
  - Neurochemical changes
  - Brain changes
  - Muscle atrophy
  - Chronic health conditions
- Psychological Impacts
  - Increased risk for depression, anxiety, and other symptoms
  - Increased risk for substance and alcohol abuse

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Systemic Pandemic Impacts

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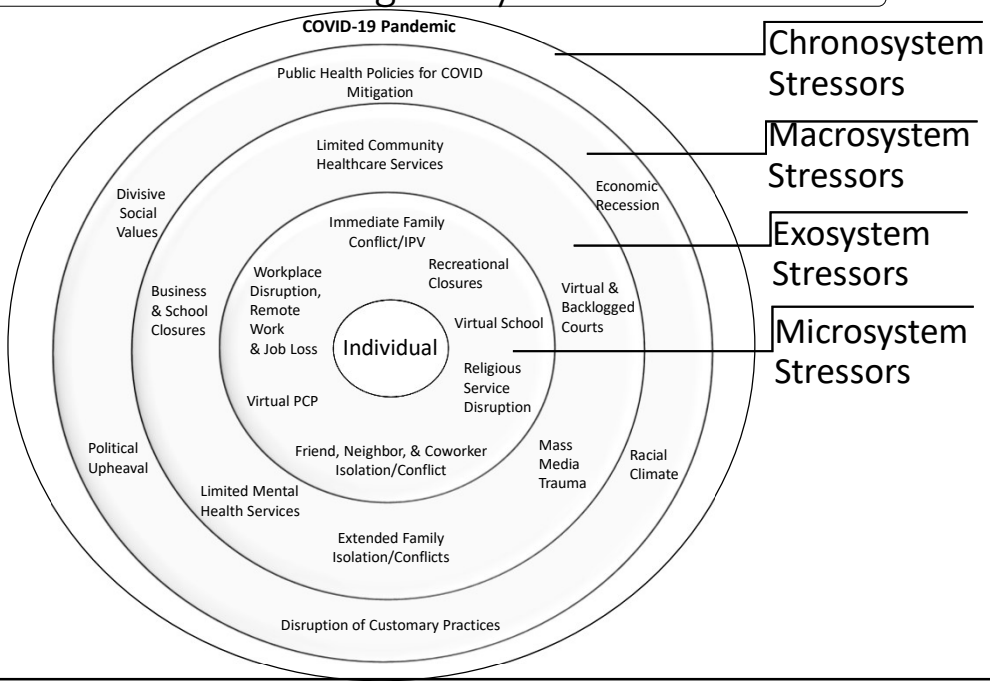
COVID-19 Ecological Systems Model



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Macrosystem Stressors that Impact Workers

- Public Health Mitigation Policies
- Political Upheaval
- Economic Inflation and Recession
- Increased Social Divisiveness
  - Conflicting values about COVID-19 federal and local government mitigation policies, vaccines, social distancing, business closures, political ideologies, etc.

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Exo/Microsystem Stressors that Impact Workers

- Business Closures, Disruptions, and Restructuring
- Unemployment and Underemployment
- Remote Work
  - Isolation and Conflicts with Coworkers
- School and Childcare Closures
  - Increased Parenting Stress
- Shortage of Mental Health Providers

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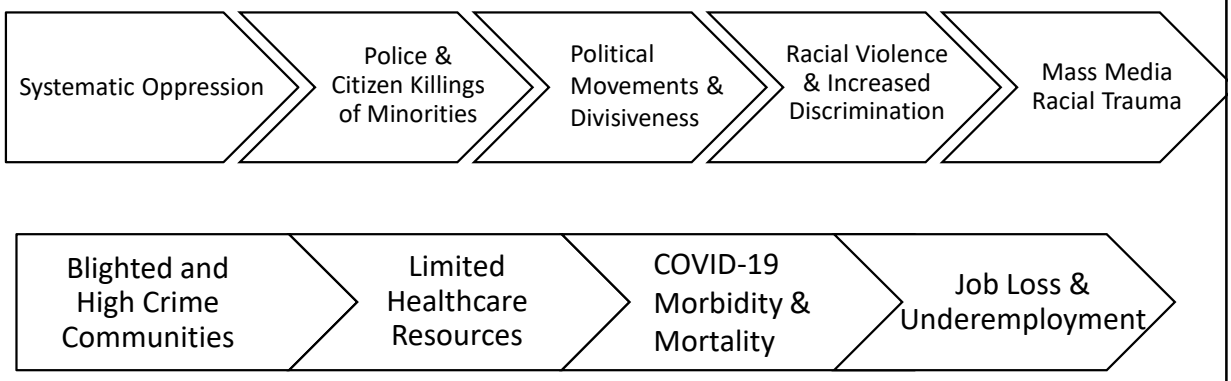
Systemic Pandemic Factors Impacting Oppressed and Disadvantaged Groups



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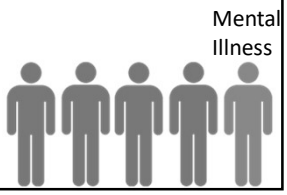
Pandemic Impact Mental Health: US Adults

- Increased rates of depression, anxiety, & posttraumatic stress
  - **22.8% (57.8 million US adults)** with any past-year mental illness, highest rate in young adults (33.7%; SAMHSA, 2023)
- Increased alcohol and substance abuse
  - **Nearly half** of young adults aged 18 to 25 (45.8% or 15.3 million people) had either a substance use disorder or any mental illness (SAMHSA, 2023)
- Worsened preexisting conditions
- Widened disparity gaps



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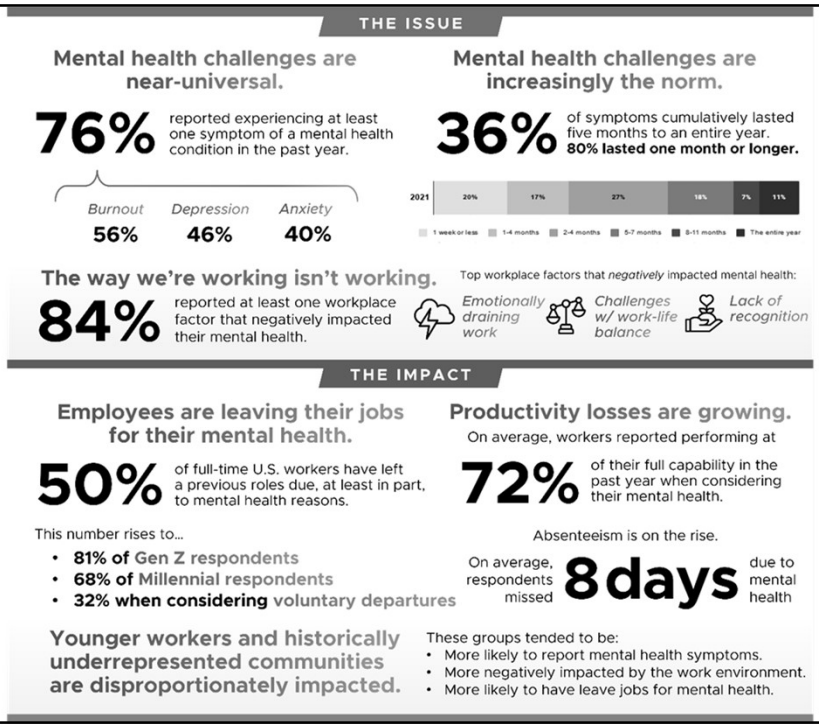

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American Psychological Association's 2023 Work in America Survey

- **77%** of Workers Reported Work-Related Stress in Past Month
- **57%** of Which Endorsed Psychological Features of **Burnout**:
  - Exhausted emotionally (31%)
  - Unmotivated to do very best (26%)
  - Wanted to keep to themselves (25%)
  - Desired to quit job (23%)
  - Lowered productivity (20%)
  - Angered or Irritable with customers and coworkers (19%)
  - Felt ineffective (18%)

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APA's 2023 Work in America Survey

- **1 in 5** Workers Reported:
  - Having a somewhat or very toxic workplace (19%)
  - Experiencing mental health harm at work (22%)
  - Experiencing harassment at work (22%)
  - Witnessing workplace discrimination (22%)
    - 15% reported experiencing discrimination

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Attorneys' Mental Health and Occupational Stressors

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Pre-Pandemic Mental Health Challenges for Attorneys

Alcohol	Depression	Stress	Anxiety	Suicide
36%	28%	23%	19%	Top Ten
21-36% qualify as problem drinkers. Higher for men; under 30; private practice and solo practitioners.	28% report mild or higher depression symptoms. Highest for men and solo practitioners.	23% report mild or higher stress symptoms. Highest for women and solo practitioners.	19% report mild or higher anxiety symptoms. Highest for women and solo practitioners.	Ranked #8 in a study of suicide by occupation. Rate is 1.33 times the national norm.

(Krill, Johnson, & Albert, 2016)

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Post-Pandemic Work-Related Stressors for Attorneys

Systemic Disruptions

- Court Closings, Virtual Court, and Delays in Dispute Resolution
- Remote or Virtual Work

Work-Related Stressors

- Work-Family Conflict or Work-Life Balance
- Work Overcommitment or "Overwork"
- Virtual Work Increased Loneliness and Negatively Impacted Colleague Relationships

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Pandemic Impact on Attorneys' Mental Health

- Due to Burnout or Stress, ***Nearly Half (46%)*** of Attorneys are Considering Leaving the Profession
- **Three-Quarters** Reported Increased Work Stress
- Suicidal Thoughts **2x** More Likely
- **66%** Reported the Legal Profession was Detrimental to Mental Health
  - Increased Alcohol Use (25.0-35.2%)
  - Frequent Depression (28.4%)

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Additional Stressors for Employment Lawyers

- Compassion Fatigue
- Vicarious Trauma
  - Loss of motivation or interest, fatigue, procrastination, burnout, etc.

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Unique Stressors for Employment Lawyers

- Adversarial Practice and Cognitive Dissonance
- Perceived discrimination
  - Hypervigilance
  - Paranorm Expression

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Strategies for Addressing Client-Related Stressors in Employment Law

- Autonomy Supportive Behaviors
- Conflict Management Training
- De-Escalation Strategies

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Autonomy Supportive Behaviors

- Taking full account of their perspectives
- Not interrupting
- Affording choices
- Offering information respectfully
- Providing a rationale for recommendations
- Sharing power in decision-making (when appropriate)
- Accepting clients' decisions.

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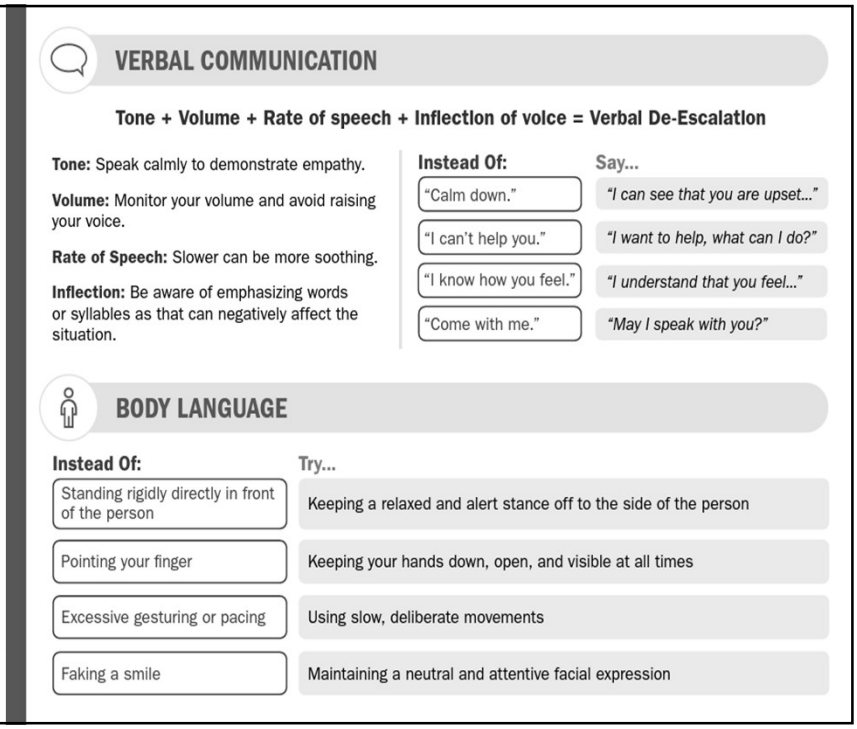
De-Escalation: Verbal and Nonverbal Communication



VERBAL COMMUNICATION

Tone + Volume + Rate of speech + Inflection of voice = Verbal De-Escalation

Tone: Speak calmly to demonstrate empathy.

Volume: Monitor your volume and avoid raising your voice.

Rate of Speech: Slower can be more soothing.

Inflection: Be aware of emphasizing words or syllables as that can negatively affect the situation.

Instead Of:	Say...
"Calm down."	*"I can see that you are upset..."*
"I can't help you."	*"I want to help, what can I do?"*
"I know how you feel."	*"I understand that you feel..."*
"Come with me."	*"May I speak with you?"*

BODY LANGUAGE

Instead Of:	Try...
Standing rigidly directly in front of the person	Keeping a relaxed and alert stance off to the side of the person
Pointing your finger	Keeping your hands down, open, and visible at all times
Excessive gesturing or pacing	Using slow, deliberate movements
Faking a smile	Maintaining a neutral and attentive facial expression

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Additional De-Escalation Strategies

1. Simplify Problems that are Complex
2. Set Expectations that are Realistic
3. Narrate your Assistance Actions or Offer Explanation
4. Provide Options for Resolution
5. Apologize or Express your Reasonable Limits Assisting with their Case

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Advanced De-Escalation Strategies

- Change the Environment
  - Separate the Client from Others, then Continue to De-Escalate
- Implement a Break and Model Self-Care
- Seek External Assistance

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Strategies for Improving Attorneys' Well Being

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"A career in law should not be antagonistic to the full expression of lawyer's humanity." — Patrick Krill, Stress, Drink Leave study

Reasons to Improve Attorney Well-Being

- ✔ Good for business
- ✔ Good for clients
- ✔ The right thing to do

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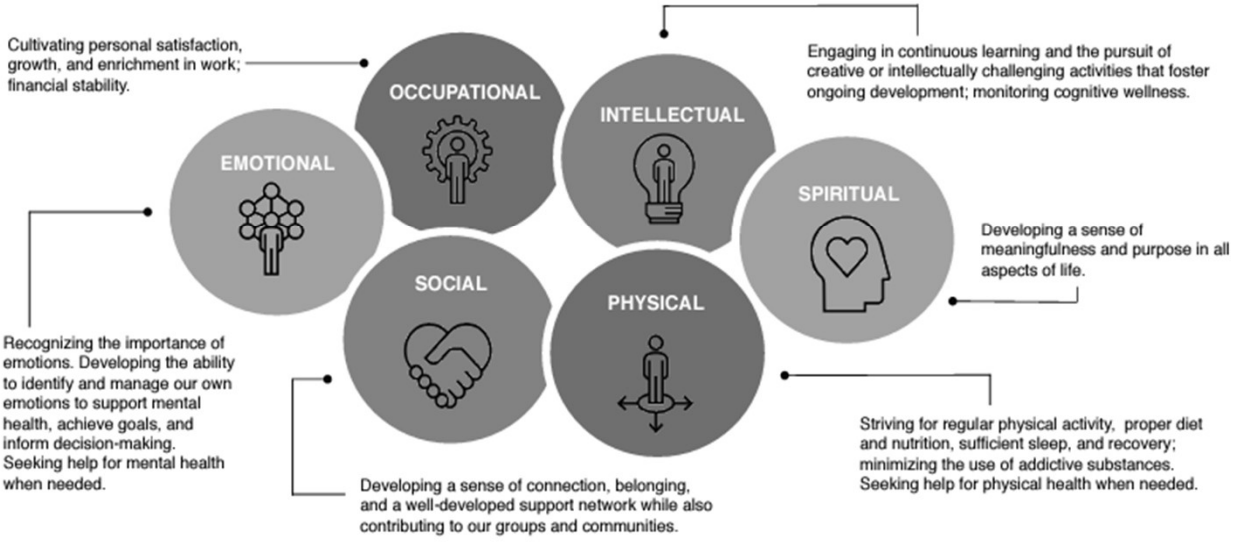
Defining Lawyer Well-Being

A continuous process in which lawyers strive for thriving in each dimension of their lives:



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Physical Care

- Prioritize Physical Activity
  - Physical exercise improves depression, low energy, and brain functioning
  - Schedule movement breaks
- Prevent eye strain
- Think ergonomics
- Prioritize outdoor time

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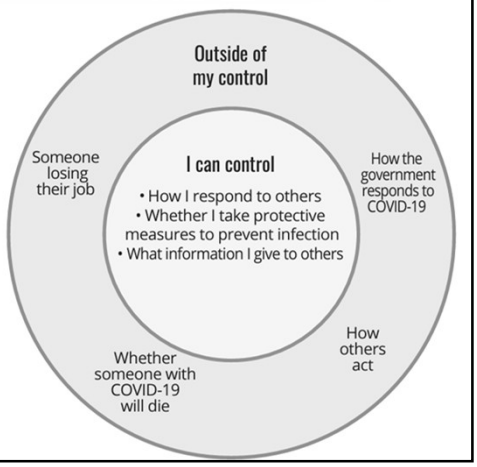
Strategies for Coping with Stress by Developing a New Mindset

38

Shifting Mindset: Circles of Control

- Helps with being realistic about what you ***can*** and ***cannot*** control
- If you feel powerless to help others, identifying the problems you can and cannot do something about is helpful
- Recognize your power to choose

Inter-Agency Standing Committee (IASC, 2020)



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Additional Strategies to Calm an Overwhelmed Nervous System

- Deep Breathing
- Meditation
- Gratitude Practice
- Progressive Muscle Relaxation
- Grounding

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Additional Resources for Attorney Wellness

North Carolina Lawyer Assistance Program
704-892-5699 or 919-828-6425

BarCARES of North Carolina
919-659-1453

South Carolina Bar Lawyers Helping Lawyers

1-(855)-321-4384

Institute for Well-Being in Law (2023). https://lawyerwellbeing.net/

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Thank you

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South Carolina Bar

Continuing Legal Education Division

Fourth Circuit Update

Fourth Circuit Update

Florence Thompson
Jackson Lewis P.C.

Sean Herrmann
Herrmann & Murphy, PLLC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT MAKE-UP

Current Composition

- Biden Nominee: Judge Toby J. Heytens (Va) and Judge DeAndrea Gist Benjamin (SC)
- Trump Nominees: Judge Julius N. Richardson (SC), Judge A. Marvin Quattlebaum (SC), and Judge Allison Jones Rushing (NC)
- Obama Nominees: Judge James Andrew Wynn (NC), Judge Albert Diaz (NC), Judge Stephanie D. Thacker (WVa), and Judge Pamela A. Harris (Md)
- G.W. Bush Nominee: Judge G. Steven Agee (Va)
- Clinton Nominees: Judge Robert B. King (WVa), Chief Judge Roger L. Gregory (Va)
- G.H.W. Bush Nominee: Judge Paul V. Niemeyer
- Reagan Nominees: Judge J. Harvie Wilkinson III (Va)

Senior Status

- Senior Judge William B. Traxler, Jr.—August 31, 2018
- Senior Judge Barbara Milano Keenan (Va)—August 31, 2021
- Senior Judge Henry F. Floyd (SC)—December 31, 2021
- Senior Judge Diana Gribbon Motz (Md)—September 30, 2022

New Judge: Judge DeAndrea Gist Benjamin (Judge Floyd's Seat)

- South Carolina Circuit Court for the fifth district, 2011
- September 6, 2022: Nomination sent to Senate
- February 9, 2023: nomination confirmed; Sworn into office on February 21, 2023.

Pending Nomination/Vacancy

- Judge Motz's seat remains vacant

CASES TO KNOW FROM THE LAST YEAR

***Balderson v. Lincare Inc.*, 62 F.4th 156 (4th Cir. 2023)**

- The Court reversed the Southern District of West Virginia's judgment in the employee's favor.
- Judge Niemeyer wrote the published opinion.
- The company terminated the employee, alleging she had violated its "Corporate Health Care Law Compliance Program" and "Code of Conduct."
- The employee argued a male coworker engaged in similar conduct and only received a written warning.
- At a bench trial, the district court found for the employee and awarded her $30,141 in compensatory damages and $120,000 in punitive damages.
- In reaching this decision, the court found the male coworker was a proper comparator and the company's termination explanation was pretext for unlawful sex discrimination.
- The Fourth Circuit reversed, finding (1) the district court misapplied *Reeves,* and (2) it incorrectly credited the identified male as a proper comparator.
- Judge Niemeyer used a pretext-plus standard in the *Reeves* discussion, which is not the law.
- The Court says it isn't doing anything unusual here:
    - "The Court thus recognized that while there will be cases in which the 'trier of fact [can] infer the ultimate fact of discrimination' from the combination of the plaintiff's prima facie case and 'the factfinder's disbelief of the reasons put forward by the defendant,' . . . , it does not follow that 'such a showing by the plaintiff will *always* be adequate to sustain a factfinder's finding of liability,' . . . Instead, the Court observed, there will 'certainly . . . be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, *no rational factfinder could conclude that the action was discriminatory.*'" (cleaned up) (emphasis in original).
    - The Court said the district court erred because it *automatically* found for the employee because she met her *McDonnell Douglas* burden shifting standard.
    - But that's not what happened at the district court:

- The district court engaged in a lengthy weighing of evidence on the male comparator.

- The fact-finder made credibility determinations.

- "Ms. Balderson has proved a prima facie case of disparate treatment and discrimination. Because it finds Lincare's proffered reason for termination was pretextual, the Court may infer the ultimate fact of sex discrimination."

- **"Having considered the testimony and exhibits presented at trial and being fully apprised of the parties' respective positions, the Court finds by a preponderance of the evidence that the disparate treatment between Ms. Balderson and Mr. Brady was a result of discriminatory animus."**

- *Balderson v. Lincare Inc.*, No. 2:19-CV-00666, 2021 WL 2322827, at *4 (S.D.W. Va. June 7, 2021), rev'd, 62 F.4th 156 (4th Cir. 2023) (cleaned up) (emphasis added).

- But on appeal, the Court did its own, lengthy, weighing of the evidence. It made its own credibiltiy determinations.

- Judge Niemeyer said, "Balderson presented *no evidence*, explicit or implied, that would allow a factfinder to find that sex played any role in Lincare's decision to terminate her employment."

  - Extremely dangerous view of "evidence."

    - "Evidence is relevant if: **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the action." Fed. R. Evid. 401.

    - There was plenty of evidence upon which a fact finder could find discriminatory animus.

  - This was pretext-plus case even if the Court didn't call it that—e.g., "[n]o one ever made any gender-related comments directed at [her]"

- Comparator discussion:

  - "Not only was the record bare of evidence that Balderson's sex played a role in her termination, the district court clearly erred in finding, as the core of its cursory analysis, that the two employees 'circumstances were 'nearly indistinguishable.'"

- "While Brady and Balderson engaged in *similar* conduct in providing 'leading' information to physicians, it is just not the case that the 'only difference' between them was sex."

- The district court's standard: "Ms. Balderson must show that Mr. Brady is similar to her 'in all relevant respects.'"

    - Then, the district court spent three long paragraphs diving into the evidence—same decision-maker; comparator testified the two were "co-workers" and their duties overlapped; same duties relevant to the discharge; subject to same policy at issue; same core conduct, etc.

    - The district court made credibility determinations—"Lincare's attempt to distinguish the two by characterizing Mr. Brady's conduct as providing 'examples' is merely semantics."

- The Court used a much stricter similarly situated standard, and substituted its own credibility determinations to find there was no proper comparator here.

***Nat'l Lab. Rels. Bd. v. Pain Relief Centers P.A.*, No. 22-1366, 2023 WL 5380323, 2023 U.S. App. LEXIS 22068 (4th Cir. Aug. 22, 2023)**

- The Court granted the NLRB's application for enforcement against the employer.

- Judge Harris wrote the majority opinion, in which Judge Wilkinson joined. Judge Wilkinson wrote a concurring opinion, and Judge Richardson wrote an opinion dissenting in part and concurring in part.

- The employees alleged that the practice violated the National Labor Relations Act. Specifically, they alleged (1) the practice unlawfully interrogated them in a manner that unlawfully chilled collective action, and (2) the Practice wrongfully discharged them for concerted protected activity.

- In Spring 2020 Medical Assistants became frustrated with the Conniver Practice Manager's treatment of them. Some alleged she was belittling, disrespectful, and bullying. They felt their jobs were threatened by her. The Medical Assistants raised their concerns with a nurse practitioner and discussed their complaints as a group.

- Things came to a head in May 2020. First, the Nurse Practitioner confronted the Practice Manager about the Medical Assistants' complaints about her. The Nurse Practitioner let her know that the Medical Assistants were uncomfortable raising their complaints to her themselves. Cromer became furious and yelled and cursed at Edwards.

- Cromer then held a mandatory meeting with all of the Medical Assistants where she berated them for disrespecting her and talking behind her back. She demand that any complaints they may have be made right then and there. The next day there was another disagreement between Edwards and Cromer, which resulted in Cromer telling Edwards to go home.

- Edwards told Cromer she would leave. However, she said she would do so with the Medical Assistants with her—"Let's go; let's roll out, girls." According to Cromer, Edwards and the Medical Assistants quit. But the ALJ rejected that testimony as "lacking credibility." Instead, the ALJ credited testimony from multiple witnesses that Cromer pointed at each Medical Assistant and yelled, "[Y]ou're fired, you're fired, you're fired, you're fired." The Medical Assistants and Edwards left.

- Edwards and the four Medical Assistants filed separate unfair-labor-practice NLRB charges. The NLRB issued a single complaint against the Company.

- The ALJ found: (1) Cromer unlawfully interrogated employees about activity protected by the NLRA; and (2) the Practice unlawfully discharged Edwards and the four Medical Assistants.

- The 4th Circuit affirmed:

    - Termination:

        - Straightforward—the Practice argued Edwards and the Medical Assistants quit.

        - The evidence showed they did not quit.

    - Interrogation:

        - "Questioning employees—even about concerted activity protected by Section 7 of the Act—is not *per se* unlawful, but it will 'rise to the level' of a Section 8(a)(1) violation 'if it is coercive in nature.' . . . And conduct is coercive for purposes of Section 8(a)(1) if it 'can have a deterrent effect on protected activity'– that is, if it might 'chill[ ]' the exercise of Section 7 rights." (Cleaned up).

        - Wilkinson concurrence: "While my friend in dissent rightly emphasizes the speech values that a supervisor possesses in questioning, it will not do to overlook the speech values Congress sought to protect in Section 7. That provision allows collective action and communication among employees without the need for workers to go through all the formal steps necessary to form a union."

- Judge Richardson Dissent:
    - "Our test for whether questioning is coercive enough to violate § 158(a)(1) must be read alongside § 158(c). . . . That provision largely codifies an employer's First Amendment rights, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), ensuring that she can question her employees as long as those questions do not contain any 'threat of reprisal,' § 158(c). So an employer's questioning can be an unfair labor practice—in other words, can be unlawfully 'coercive'—only if the employer threatens the employee with retaliation for engaging in a protected activity."
    - Because there was no direct threat of reprisal, Judge Richardson would have ruled different on the interrogation issue.

***Brown v. Bratton*, No. 21-1998, 2022 WL 17336572, 2022 U.S. App. LEXIS 33041 (4th Cir. Nov. 30, 2022)**

- The Court affirmed District of Maryland decision granting the employer's summary judgment motion.
- Unpublished *per curiam* opinion.
- The employee sued the employer and alleged, among other claims, a racially hostile environment in violation of Title VII.
- In finding for the employer, the district court did not find sufficient evidence that the harassment was severe or pervasive. It also found there was no basis for imputing liability to the employer.
- The Court agreed.
- "To survive summary judgment on his hostile work environment claims pursuant to Title VII, 42 U.S.C. § 1981 and the MFEPA Appellant 'must show that there is (1) unwelcome conduct; (2) that is based on [his] . . . race; (3) which is sufficiently severe or pervasive to alter [his] conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer.'"
    - "[W]e agree with the district court that Appellant easily satisfied his burden based on multiple instances where Appellant voiced objection to the conduct he experienced."
    - We turn next to an analysis of whether the unwelcome conduct was "because of" Appellant's race.

- "The district court determined that, apart from the racially charged remarks made by Peach and Eastland, Appellant failed to show the unwelcome conduct was based on his race. Specifically, the district court found Appellant 'failed to carry his burden in establishing that, *because* of his race, [Appellant] (1) was not offered overtime opportunities ...; (2) was not promoted to the MEO III position; (3) was forced to work with unsafe equipment; (4) was directed to singlehandedly complete dangerous tasks ordinarily reserved for two people; and (5) received his work assignments last.'"

- "Nevertheless, the district court properly determined that certain statements were racially motivated. The district court concluded that Peach's March 9, 2016 comment that 'if my daughter ever dated . . . a n*****, [I] would kill him', J.A. 91, and Eastland's September 29, 2016 remark that he 'didn't want to be around black people,' *id.* at 133–34 constitute the sort of direct proof of discrimination necessary to satisfy the second element of a hostile work environment claim for purposes of summary judgment. We agree."

- On the "because of race" analysis, the Court heavily weighed that the employee did not hear the overtly racist comments first-hand.

- The Court also refused to link the overtly racist comments to the other treatment, which was not racist on its face.

- On severe: "In evaluating severity, we look to the language utilized. On two occasions Peach utilized the N-word, which we have expressly held 'is pure anathema to African-Americans.' . . . 'Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet ... by a supervisor in the presence of his subordinates.' . . . We acknowledged even 'an isolated incident of harassment can amount to discriminatory changes in the terms and conditions of employment, if that incident is extremely serious.' . . . However, we have also recognized that 'a single act of harassment may not be actionable on its own.' . . . And the 'mere utterance of an . . . epithet which engenders offensive feelings in an employee[ ] does not sufficiently affect the conditions of employment to implicate Title VII.'"

- On pervasive: "As to frequency, over the course of nearly five years working for the County, Appellant points to three admissible statements constituting unwelcome conduct based on race: (1) Peach's March 9, 2016 comment; (2) Peach's second separate use of the N-word; and (3) Eastland's 2017 statement."

    - However, the Court limited this to overtly racist comments and ignored other harassing behavior, as discussed above.

- The Court also found that the harassment could not be imputed to the employer.
    - "As outlined above, upon Appellant's reporting, the County verbally reprimanded Peach causing the alleged discriminatory comments to cease."
    - "Additionally, the record clearly demonstrates that Appellant had the ability to report Eastland's behavior—as he previously reported their communication issues—but failed to take advantage of this preventative or corrective opportunity. Therefore, we conclude liability may not be imputed to the County."

***Palmer v. Liberty Univ., Inc.*, No. 21-2390, 2023 U.S. App. LEXIS 16635, 2023 WL 4281845 (4th Cir. 2023)**

- The Court affirmed and dismissed/vacated the Western District of Virginia's decision to grant the employer's motion for summary judgment and agreed that the employee failed to produce sufficient evidence of age-based discrimination
- Judge King wrote the published opinion.
- The plaintiff was a teacher at Liberty University, a Christian higher education institution in Lynchburg, Virginia, whose teaching contract was not renewed for the 2018-19 school year.
- The plaintiff claimed that she presented both direct and circumstantial evidence of age-based discrimination.
- "Direct evidence of age discrimination has been described in the employer/employee context as evidence that the employer 'announced, or admitted, or otherwise unmistakably indicated that age was a determining factor.'"
    - The plaintiff's evidence of direct evidence:
        - The resistant-to-change comment: Dean said in an email to the Provost that the plaintiff would "have great difficulty with any changes, and this would most likely exacerbate negative student experience."
        - The first retirement comment: The Department Chair sent the Dean "a document identifying [the plaintiff] as 'Retiring' for the 2018-19 school year, as opposed to indicating a 'Non-Renewal.'"

- The second retirement comment: The Provost said "he would consider characterizing [the plaintiff's] forthcoming nonrenewal as a 'retirement,' but only if [the plaintiff] brought up an issue of retirement in response to the nonrenewal."

- The Court agreed with the Fifth and Sixth Circuit who have both concluded "mere comments or inquiries about retirement — without more — fail to constitute direct evidence of discrimination." "We agree with and adopt that well-reasoned proposition. As applied to the facts here, neither the first nor the second retirement comments amount to direct evidence of age-based discrimination that is attributable to Liberty."

  - The comments weren't presented to the plaintiff but were made during internal deliberations about how to handle the nonrenewal. Also, they were devoid of any references to the plaintiff's age.

  - "As the Seventh Circuit explained, 'the possibility of retirement was raised by [the employer] only in order to spare [the employee] the embarrassment of being terminated.'" Here, the Dean and Provost "contemplated retirement as an option if [the plaintiff] brought up that issue as an alternative to non-renewal."

- The resistant-to-change comment was also not connected to the plaintiff's age.

- The plaintiff's claim based on circumstantial evidence also failed because she was not performing her "job duties at a level that met the employer's legitimate expectations at the time."

  - The plaintiff argued that her 2016 promotion demonstrates that she had adequate performance at the time of her 2018 nonrenewal. However, her nonrenewal was based partially on her failure to develop technology or digital art skills.

  - As the district court recognized, "Liberty has put forward substantial evidence documented repeated attempts to prompt [the plaintiff] to develop a digital art skillset." And the plaintiff "failed to explain why her performance in October 2016 means that she was performing adequately at the time of her nonrenewal — which was in April 2018."

  - The plaintiff also argued that in *Sempowich v. Tactile Systems Technology* the Court "concluded that a plaintiff-employee — who had been repeatedly rated by her employer as a high-performing employee — was satisfying the employer's legitimate expectations at the time of an adverse employment action."

- "If an employer genuinely believed that one of its employees was performing poorly on metrics the employer perceives as critical…it seems likely that it would at the very least not rate the employee's performance highly or give her awards, a salary raise, or an equity grant."

- Here, the plaintiff "was simply not meeting Liberty's technology-related expectations up and until the time of her 2018 nonrenewal. Unlike *Sempowich*, the lone accolade that [the plaintiff] can point to — her October 2016 promotion — was bestowed upon her more than a year before her nonrenewal."

- Moreover, the plaintiff failed to show that her age was the but-for cause of her nonrenewal. The comments she characterized as evidence "were made subsequent to the Chair and the Dean having resolved not to renew her teaching contract for the 2018-19 school year."

- Liberty cross-appealed to get the Court to decide whether Palmer was a minister under the First Amendment's ministerial exception, but the Court declined under the constitutional avoidance doctrine.

- Concurrence by Motz:

  - The concurrence was solely to address that this is not a case where the ministerial exception would apply.

  - Liberty had previously moved for summary judgment asserting that the ministerial exception bars the plaintiff's ADEA lawsuit alleging that the plaintiff qualified as a minister under the legal principles established by the Supreme Court.

  - The Supreme Court explicitly endorsed the ministerial exception to certain antidiscrimination lawsuits between an employee and employer in 2012 in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012) and further defined the exception in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

    - These cases clarify that "the ministerial exception can apply even when the employee, in addition to performing religious functions has substantial secular responsibilities."

    - "[T]he ministerial exception does not apply to *everyone* employed by a religious entity."

  - "When determining whether an employee of a religious entity qualifies for the ministerial exception, we must examine all the 'circumstances of her employment,' training our focus on 'what [the] employee does.'"

- "[O]ne important factor in determining the ministerial exception's applicability is whether an employee provides religious instruction — and it is not one that should be lightly disregarded." The plaintiff did not.

- The employee must also be a "key employee[] for the purposes of the schools' religious mission." The plaintiff "did not instruct her students on the significance of various religious sacraments…was not required to install religious displays in her classroom, and she was not expected to attend religious education courses or accompany her students to religious services." She was also not required to report to a religious leader.

- "An employee does not shed her right to be free from workplace discrimination simply because she believes in God, prays at work, and is employed by a religious entity. Absent clear guidance from the Supreme Court, I cannot agree with a view of the ministerial exception so capacious that it entirely erodes vital antidiscrimination protections for scores of workers throughout the United States."

- Concurrence by Richardson:

  - The "First Amendment's 'ministerial exception' bars Palmer's suit. Though Palmer did not perform formal religious instruction, her job description required her to integrate a 'Biblical worldview' into her teaching. And Palmer admits to regularly praying with students, indeed starting her classes with a psalm or prayer. Accordingly, Liberty viewed her as an official 'messenger' of its faith. Under the Supreme Court's recent precedent, Palmer thus qualified as a 'minister.'"

***Resendiz v. Exxon Mobil Corp.*, 72 F.4th 623 (4th Cir. 2023)**

- The Court affirmed the Eastern District of North Carolina's decision to grant the employer's motion to dismiss plaintiff's Section 1981 claim alleging that the employer's policy was facially discriminatory.

- Judge Richardson wrote the published opinion.

- The plaintiff was a Deferred Action for Childhood Arrival (DACA) program recipient. Because he had arrived in the U.S. as a minor, his deportation status was deferred. However, deferred-action status only granted him permission to stay in the United States and apply for temporary work authorization.

  - He attended North Carolina State University. The plaintiff applied for an internship and received an offer after his interview which was explicitly contingent upon, *inter alia*, permanent work authorization to work in the United States, supported by proper documentation.

- As a DACA recipient, the plaintiff only had temporary work authorization, and Human Resources instructed him to answer 'Yes' to the question on the application asking if he would require sponsorship for a visa or employment authorization.

- The plaintiff's offer was revoked because he did not have permanent work authorization.

- To survive a motion to dismiss, the plaintiff: (1) "must establish that § 1981 contains an implied private right of action for alienage discrimination" and (2) "plausibly allege that ExxonMobil intentionally discriminated against him on the basis of alienage." The Court ultimately held (1) Section 1981 does contain a private right of action for alienage discrimination, but (2) the plaintiff failed to plausibly allege the employer intentionally discriminated against him based on alienage.

- <u>Section 1981 does contain a private right of action for alienage discrimination</u>

  - While the Supreme Court has expanded Section 1981's protections and implied a private right of action, "it has not yet held that it encompasses alienage-based discrimination." However, the Fourth Circuit has.

  - *Duane v. GIECO*, 37 F.3d 1036, 1038-41 (4th Cir. 1994) held that Section 1981 protects aliens and that the private right of action reaches alienage-based discrimination

    - GIECO refused to sell Duane a home-insurance policy because he was not a U.S. citizen. "After tracing § 1981's origins back to the Civil Rights Act of 1866, we concluded that the law protects aliens from such discrimination and extended the implied right of action."

    - The Court rejected the employer's attempts to draw a distinction between Duane who was a lawfully-admitted permanent resident alien and the plaintiff who is not lawfully admitted.

      - "[A]liens [are] protected without limiting that protection to lawfully admitted aliens."

      - "This is consistent with Supreme Court precedent that certain legal protections extend to aliens, whether legally present or not."

- <u>The plaintiff failed to plausibly allege the employer intentionally discriminated against him based on alienage</u>

- Section 1981 "can be violated only by purposeful discrimination," "is limited to conduct motivated by a discriminatory purpose," and "does not extend to a policy with only a discriminatory impact."

- The plaintiff could have (but did not) alleged intentional discrimination under Section 1981 by

    - (1) alleging that the policy expressly distinguishes between employees based on a protected characteristic — that it blatantly tells aliens they need not apply

    - (2) arguing that the policy distinguishes between employees based on a proxy for a protected characteristic — alleging that requiring permanent work authorization is an irrational way to choose employes and qualifies as a proxy for alienage

    - (3) allege facts apart from the policy's terms that allow an inference of discriminatory motive against the employee's protected trait.

- Instead he argued that "ExxonMobil intentionally discriminated against him because its policy—though not barring aliens—relies on alienage" and points to *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

    - In *Bostock*, the Supreme Court used an example to show how an employer's policy can "inescapably intend[]" to rely on a protected characteristic without naming that characteristic.

    - "An employer with a no-homosexuals policy imposes different outcomes on employees based purely on their sex, a protected characteristic. That policy can be pursued only by reference to sex: a man who is attracted to a man is fired but a woman who is attracted to a man is not. Said differently, there is a trait (attraction to men) that the employer tolerates in women but not in men. This, *Bostock* tells us, is intentional discrimination based on sex."

    - "So, when an employer imposes a policy that leads to different outcomes between otherwise identical employees based purely on the employees' protected characteristic, we know the employer intentionally discriminates based on that characteristic."

    - "To figure out whether we're faced with such a policy, we 'change one thing at a time'—specifically, the employee's protected trait — 'and see if the outcome changes.'"

        - Here, the *Bostock* analysis does not work because the plaintiff would need to allege that aside from his protected trait he is "materially identical" to another employee who is treated differently.

        - The plaintiff would need to be changed to a citizen who still possessed only temporary work authorization and then compare the outcomes, but that category—citizens with temporary work authorization—does not exist.

        - "And there is nothing in the complaint suggesting that ExxonMobil would have been willing to hire a citizen if, hypothetically, he did not have permanent work authorization."

    - The employer hired the plaintiff despite knowing he was an alien, so its policy doesn't facially screen out all aliens. "Maybe the impact of ExxonMobil's policy requiring permanent work authorization is felt only by aliens. But discriminatory impact alone does not suffice. The discrimination must be intentional."

        - "As the Supreme Court explained, it is not enough for one's status to relate to a protected class 'in some vague sense' or for discrimination based on the status to have 'some disparate impact' on the protected class."

***DiCocco v. Garland*, 52 F.4h 588 (4th Cir. 2022)**

- The Court reversed and remanded the Eastern District of Virginia's decision to grant the U.S. Attorney General's motion to dismiss.

- Judge Richardson wrote the published opinion.

- The plaintiff sued the U.S. Attorney General because she failed a physical-fitness test that was a condition of her federal employment at the Bureau of Prisons ("BOP") and was told to either retake the test, resign, or be fired.

- The district court dismissed the complaint for lack of Article III standing, finding that her resignation did not constitute an adverse employment action and therefore could not serve as the basis for a Title VII or Age Discrimination in Employment Act claim. Specifically, the plaintiff "had not suffered an injury in fact traceable to the BOP's actions because the facts in her complaint did not constitute an 'adverse employment action' under Title VII or the ADEA."

- After being hired with the BOP at the Federal Correctional Complex in Petersburg, Virginia, the plaintiff (a psychiatrist), like all new employees, had to take and pass a fitness test. She failed on her first try. Under BOP policy, she could retake the test within 24 hours. She declined due to fear that she would be unable to pass because she was exhausted. She was informed that unless she resigned, her employment with BOP would be terminated for failure to pass the test within the required times.

- "A plaintiff has Article III standing if she (1) suffers an injury in fact that is (2) fairly traceable to the challenged conduct and (3) likely to be redressed if the court rules in her favor." The government brought a facial challenge stating that the complaint "fails to allege facts upon which subject matter jurisdiction can be based."

- The Court found that the district court improperly conflated the threshold standing question with the merits of her claims. "Standing does not turn on whether a plaintiff has definitively stated a valid cause of action."

    - "A valid claim for relief is not a prerequisite for standing."

    - The plaintiff adequately plead an injury in fact — she was injured by a loss of employment and the resulting loss of wages and other benefits.

    - To plead causation the alleged injury must be "fairly…trace[able] to the challenged action of the defendant, and not…th[e] result [of]the independent action of some third party not before the court." The allegations did not show that the plaintiff independently caused her own injuries.

        - The choice to resign did not defeat standing. The complaint alleged "that the BOP's ultimatum, which followed from the allegedly discriminatory policy, was the but-for cause of her injuries."

    - The government did not dispute that the plaintiff's injury would likely be redressed by a favorable decision.

- "The government at first asked that we affirm the district court on tow alternative grounds should we reject the district court's standing analysis: (1) absence of a disparate-impact cause of action falling under the ADEA's sovereign immunity waiver, and (2) failure to state a claim under Title VII. We decline to address those arguments now."

***Rogers v. Tug Hill Operating, LLC*, 76 F.4th 279 (4th Cir. 2023)**

- The Court reversed and remanded the Northern District of West Virginia decision on the motion to intervene and the employer's motion to dismiss.

- Judge Niemeyer wrote the published opinion.

- The plaintiff sued an oil and gas exploration and production company, "Tug Hill," for improperly classifying him as an independent contractor under the Fair Labor Standards Act and for overtime pay.

- Tug Hill moved to dismiss and compel arbitration. There was an arbitration agreement between the plaintiff and "RigUp" a third-party company that connects skilled workers with oil and gas companies for a fee. The agreement said it was only related to a dispute between the plaintiff and Rig Up and Rig Up would not be a party to disputes between Rogers and Tug Hill. RigUp moved to intervene.

- The district court granted the motion to intervene and the motion to dismiss.

- The arbitration agreement said, in relevant part:

    - After RigUp helped match the plaintiff with a company, he *and that company* would "solely negotiate and determine… when and where [he would] perform [p]rojects" and that "[a]ny interactions or disputes between [him] and a Company [would be] solely between [him] and that Company."

    - "RigUp…shall have no liability, obligation or responsibility for any interaction between you and any Company."

    - "RIGUP WILL NOT BE A PARTY TO DISPUTES OR NEGOTIATONS OF DISPUTES, BETWEEN YOU AND COMPANIES."

    - The plaintiff would "indemnify and old the RigUp Parties and Company harmless from and against all losses, damages, liabilities,…actions, [and] judgments…arising out of or resulting from" several occurrences, one of which was "a determination by a court or agency that [Rogers] [was] an employee of RigUp or a Company."

    - "In the interest of resolving disputes between you and RigUp in the most expedient and cost effective manner, you and RigUp agree that every dispute arising in connection with these Terms will be resolved by binding arbitration…This agreement to arbitrate disputes includes all claims arising out of or relating to any aspect of these Terms…"

- RigUp moved to intervene "as of right" pursuant to Fed. R. Civ. P. 24(a)(2) or "by permission" pursuant to Rule 24(b)(1)(B). It argued that intervention was warranted so that it could "represent…[its] unique interest in preserving its business model by protecting the independent-contractor status of the workers it serves." In addition, if the plaintiff prevailed, it might have some liability as a potential indemnitor under a contract it had with Tug Hill.

- The initial question for the Court was whether a court or an arbitrator must decide whether Tug Hill can enforce the arbitration clause in a contract between Rogers and RigUp because of the delegation provision.

- The Court cited *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) which makes it clear that "a *court*, not an arbitrator…must initially decide whether a nonparty to an arbitration agreement is entitled to enforce it."

    - "Tug Hill fails to address the contractual source of the arbitrator's authority."

    - "[I]t is plain that [the plaintiff] agreed to arbitrate issues — including threshold issues — arising *between him and RigUP*. But he did not enter into any agreement that allows an arbitrator to decide whether a third party like Tug Hill has rights under the arbitration agreement."

    - "[T]he fact that Tug Hill itself was not itself a party to the arbitration agreement does not categorically mean that Tug Hill is ineligible to obtain relief from the district court under the FAA…But it does mean that, as a *precondition* to granting Tug Hill the right to enforce any portion of an arbitration clause to which it was not a party, the *district court* was required, when that right was challenged, to determine whether 'the relevant state contract law allow[ed] [Tug Hill] to enforce [that] agreement,' so as to ensure that the FAA's terms 'are fulfilled.'"

- Thus, the Court concluded the district court erred in granting Tug Hill's motion to compel arbitration without first resolving whether, as a matter of state contract law, Tug Hill was authorized to enforce the arbitration agreement between RigUp and the plaintiff.

    - Citing *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 398-99 (5th Cir. 2022) and *CCC Intelligent Solutions Inc. v. Tractable Inc.*, 36 F.4th 721, 723-24 (7th Cir. 2022) with similar holdings.

    - *But see Becker v. Delek US Energy Inc.*, 39 F.4th 351, 355-56 (6th Cir. 2022) (holding that the question of whether a third party could enforce a delegation provision in an arbitration clause was for the arbitrator not the court).

- The Court looked state contract law to determine whether Tug Hill could enforce the agreement as a third-party beneficiary. (The Court did not decide on whether Texas or West Virginia law applies because they agree with respect to the third-party beneficiary issue.)

    - Both states apply a presumption against finding that a contract confers third-party beneficiary status. Parties must have intended to secure a benefit to a third party.

    - The "Agreement between [the plaintiff] and RigUp contains no provision stating specifically that it was entered into *for the sole benefit of* Tug Hill or *directly* for its benefit." In fact, the Agreement states it purpose "was to govern *only* the legal relationship *between RigUp and [the plaintiff*]."

- It also anticipated that the plaintiff and Tug Hill would have to negotiate separately to determine when and where the plaintiff would perform its job duties.

- It expressly disclaimed any responsibility for any interaction between the plaintiff and ug Hill and said that "[a]ny interactions or disputes between [the plaintiff] and [Tug Hill] are solely between [the plaintiff] and [Tug Hill]."

- It also said that RigUp "will not be a party to disputes or negotiations of disputes, between" the plaintiff and Tug Hill.

- "Finally, and perhaps most tellingly, the arbitration clause itself limits its applicability to disputes *between [the plaintiff] and RigUp.*"

- Thus, this precluded any conclusion that the Agreement was entered into solely or directly for the benefit of Tug Hill

- The Court also held that the district court abused its discretion in granting RigUp's motion to intervene "because it failed to recognize, as [the plaintiff] specifically argued, that 'RigUp contractually disclaimed any right to be [a] party to…disputes' like this one."

***Hannah v. UPS*, 72 F.4th 630 (4th Cir. 2023)**

- The Court affirmed the decision from the Southern District of West Virginia granting the employer's motion for summary judgment.

- Judge Niemeyer wrote the published opinion.

- The employee, a package delivery driver, sued her employer, UPS for violation of the Americans with Disabilities Act alleging that UPS's refusal to provide him with the accommodations he requested violated his rights under the ADA.

- The district court concluded, as a matter of law, that the employee failed to demonstrate he requested a reasonable accommodation hat would allow him to perform the essential functions of his job, as required by the ADA.

- The employee injured his hip and buttocks and requested to either drive in a smaller truck, with a softer suspension, or be assigned to an "inside job."

    - The employee drove a truck that was 600 cubic feet, which had a stiff suspension. This made for a rough ride and aggravated the employee's injury.

- He requested a better padded seat, which UPS accommodated. He was then cleared to return to work so long as he avoided prolonged sitting.

- He requested a vehicle with a capacity of 300 to 400 cubic feet which would have a softer suspension.

    - Under the collective bargaining agreement with the union, (1) delivery routes are determined based on seniority and (2) drivers cannot work more than 9.5 hours per day.

    - For the employee's delivery route, a smaller vehicle would be insufficient to complete the route. The employee would have had to (1) give part of his rote to another driver or (2) complete the route in multiple trips

    - There were no "inside job" openings at the time, but UPS said it would consider him for any such opening when it occurred.

- While he was denied the specific accommodation he requested, UPS allowed him to retain his job and take leave without pay until he could return to work.

- To establish a prima facie case under the ADA, the employee 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."

- "In carrying out the burden of establishing a reasonable accommodation in the context of a workplace governed by a collective bargaining agreement, the employee must show either that the requested accommodation would not violate the agreement that some 'special circumstances' exist that nonetheless make 'the requested accommodation…reasonable on the particular facts.'"

    - To grant the employees requested accommodation, UPS would have had to violate the collective bargaining agreement. They either would need to adjust another driver's delivery route to take on part of the employee's route, or have the employee work over 9.5 hours.

    - The employee "provided no solution to these problems arising form his request to be given a smaller truck or van."

    - The employee also did not address whether the proposed accommodation required alteration of the essential functions of the jobs he had previously occupied.

- The Court determined that when the employee bid on the route, "the essential functions of the job of driving that route were so defined." The employees "requested accommodation for a smaller truck or van fails to give the appropriate consideration to UPS's requirements for his job; he fails to demonstrate that he can, with his requested accommodation, 'perform the essential functions of the employment position' that he held before his injury."

- Additionally, UPS accommodated the employee, just not in the way the employee wanted. "While a period of unpaid leave might not always be a reasonable accommodation, such leave may be reasonable where the disability that interferes with an employee's capacity to complete assigned tasks is temporary and there is reason to believe that a leave of absence will provide a period during which the employee will be able to recover and return to work."

    - During the leave of absence, the employee "received treatment, and, when he felt ready, he returned to full-time employment as a UPS package delivery driver. That [the employee] would have preferred to be accommodated in some other way does not support a claim of discrimination under the ADA."

- Though the employee contended there were factual disputes about whether he would have been able to complete his route with the requested vehicle, the Court determined the dispute was actually whether the requested van could handle all packages for delivery on his route.

    - The employee did not dispute that UPS selected a 600-cubic-foot truck because the truck was necessary for the packages on the route and said that UPS did not try to see if the smaller van would work. However, his own affidavit submitted without sufficient factual basis to support that the smaller truck could handle all the packages was not sufficient to create a material issue of fact.

- Finally, the employee claimed UPS did not engage in the interactive process. However, there were at least three discussions with UPS about the requests. The Court determined that the employee failed to state "what additional interaction he believes was required or what additional discussions he and UPS representatives could have had with each other that could have made a difference."

***Polak v. Virginia Dep't of Env't Quality*, 57 F.4th 426 (4th Cir. 2023)**

- The Court affirmed the decision from the Eastern District of Virginia granting the employer's motion for summary judgment.

- Judge Niemeyer wrote the published opinion.

- The employee sued the employer under the Equal Pay Act alleging that she was paid lower than her male counterpart.

- The district court found that although the two employees held the same job description, there were differences explained by factors other than sex that accounted for the differing pay. Effectively, the male counterpart was not a proper comparator because he did not hold a virtually identical job.

- Under the EPA, the plaintiff "must make an initial (*i.e.*, prima facie) showing of three elements: (1) the [employer] paid higher wages to an employee of the opposite sex who (2) performed equal work on jobs requiring equal skill, effort, and responsibility (3) under similar working conditions."

- The appeal focuses on the prima facie claim – the requirement that the employee establish that she and her comparator, "performed 'equal work' on jobs requiring 'equal skill, effort, and responsibility.'"

- Having the same title and general responsibility is not enough. Employees must rely on more than "broad generalities" especially "where the work is an exercise in intellectual creativity that can be judged only according to intricate, field-specific, and often subjective criteria."

- While both employees had the job title of "coastal planners," had the same supervisor, worked closely together, and collaborated on issues, this was not enough to establish that they were sufficient comparators.

    - They had different responsibilities involving projects and requesting grants.

    - The employees' supervisor testified that the male comparator employee had expertise in coastal hazards, sea level rise, and shoreline erosion. The plaintiff employee did not have the same "kind of background or experience" in those topics.

    - Their supervisor further testified that the male comparator "was responsible for 'facilitating implementation of the… Section 309 Coastal Hazards Strategy, including annual grants and projects of special merit.'" The plaintiff employee was "not qualified" to perform that responsibility.

    - The record also showed that the plaintiff employee carried out duties that the comparator did not have. "She managed certain grant…and helped 'implement the Section 309 Cumulative Secondary impacts strategies." She also organized a statewide summit.

- Based on plaintiff's understanding of what the comparator male employee did, she stated her declaration that she and the male comparator "filled 'complementary' roles while having 'equal' duties and 'essentially the same job.'" However, she could not and did not "have full comparative knowledge of both [her comparator's] job and hers, as they each performed their work simultaneously in different contexts and on distinct projects to which each were assigned."

- Their supervisor testified that because of the male comparator's "background and experience, [he] was doing different and more complex assignments than those given to" plaintiff. The comparator male employee "worked on more challenging issues" because he had more experience and "handled more different and complex grant application assignments."

- Because plaintiff "did not have the same vantage point as [their supervisor, she] could not assess the differences in [the male comparator's] work to which [the supervisor] testified, nor could she assess the relative complexity of his work."

***Carrera v. E.M.D. Sales Inc.*, 75 F.4th 345 (4th Cir. 2023)**

- The Court affirmed the District of Maryland decision made after a nine-day bench trial.

- Judge Harris wrote the published opinion.

- Three employees sued the employer, under the Fair Labor Standards Act alleging that employees were improperly identified as exempt under the "outside sales" exemption and improperly denied overtime pay.

- The district court found that the employees were owed overtime pay because the employer failed to prove by "clear and convincing evidence" that the employees met the "outside sales" exemption. The district court granted liquidated damages for the employees but found that the employer's actions were not willful; therefore it applied the standard two-year statute of limitations.

- The Court affirmed the district court's judgment in all respects.

- An outside salesman is defined by the DOL as an employee whose primary duty is making sales and who customarily and regularly works away from employer's place of business performing that primary duty.

- The primary question was whether it was the "primary duty" of the employees to make sales.

- Relying on *Shockley v. City of Newport News*, 977 F.2d 18, 21 (4th Cir. 1993), plaintiffs argued that the employer's burden of proof to show that the exemption applies is by clear and convincing evidence.

- Relying on *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), defendants argued that the employer's burden of proof to show that the exemption applies is by a preponderance of the evidence.

    - The Court disagreed with defendants finding that *Encino Motorcars* is a case about statutory interpretation where the Supreme Court "rejected a canon of construction calling for a narrow interpretation of the FLSA's exemptions, and argued for a lower 'preponderance of the evidence standard.'"

    - "[T]hat is distinct from the question of what burden of proof an employer bears in proving the facts of its case – here, what EMD's employees actually *do* on the job, and whether they can make sales at the independent stores where they spend most of their time."

    - Therefore precedent dictated that it follow the Fourth Circuit's "clear and convincing" evidence standard established in *Shockley* for determining whether an employer has proved an exemption.

- In determining liquidated damages, "only if an employer can 'show to the satisfaction of the court' that he acted in 'good faith' or had 'reasonable grounds' for believing he was in compliance with the FLSA may the court, 'in its sound discretion,' deny liquidated damages." The Court could only overturn the decision if there was an abuse of discretion – there was not.

    - The district court granted liquidated damages based on the CEO's testimony that the employer failed to investigate what daily tasks the employees engaged in and lacked actual knowledge of their job responsibilities.

    - The lack of investigation was sufficient to show that the employer did not act in good faith but not sufficient to show a willful violation of the action, which would extend the statute of limitations.

    - Willfulness requires a showing that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA."

        - "[D]efendants acted unreasonably but not willfully in violating the FLSA. [The CEO], the district court concluded, was "impermissibly but credibly uninformed" on the application of the FLSA to her sales representatives; her failure to inform herself was negligent, but it did not amount to reckless or willful misbehavior."

- "Finally, to the extent the parties each argue that the district court's findings as to good faith and reasonableness (for liquidated damages) and willfulness (for the limitations period are in conflict, they are mistaken. To be sure, a finding that a defendant did not act willfully in violating the FLSA might support a determination that the defendant acted reasonable and in good faith, *see, e.g.*, *Roy v. County of Lexington*, 141 F.3d 533, 548 (4th Cir. 1998), and, of course, the opposite is also true. But the two need not go hand in hand. It can be the case both that an employer was unable to show an objectively reasonable basis for its pay practices *and* that the employer did not intentionally or recklessly underpay."

South Carolina Bar
Continuing Legal Education Division

Tips from the Bench

NO MATERIALS

South Carolina Bar

Continuing Legal Education Division

The False Claims Act Case Lurking in Your Employment Dispute

The False Claims Act case lurking in your employment dispute

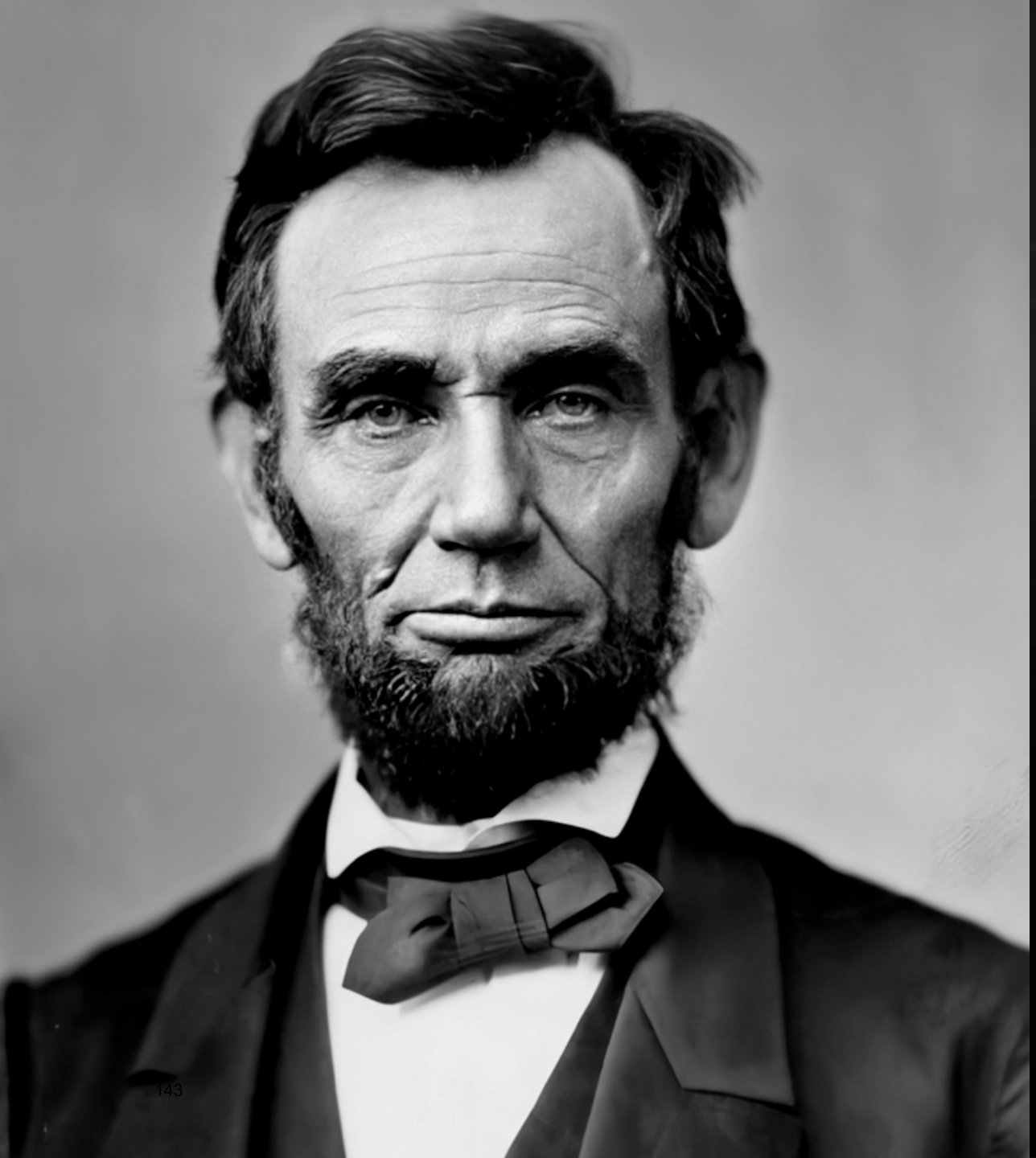
CHRISTOPHER P. KENNEY

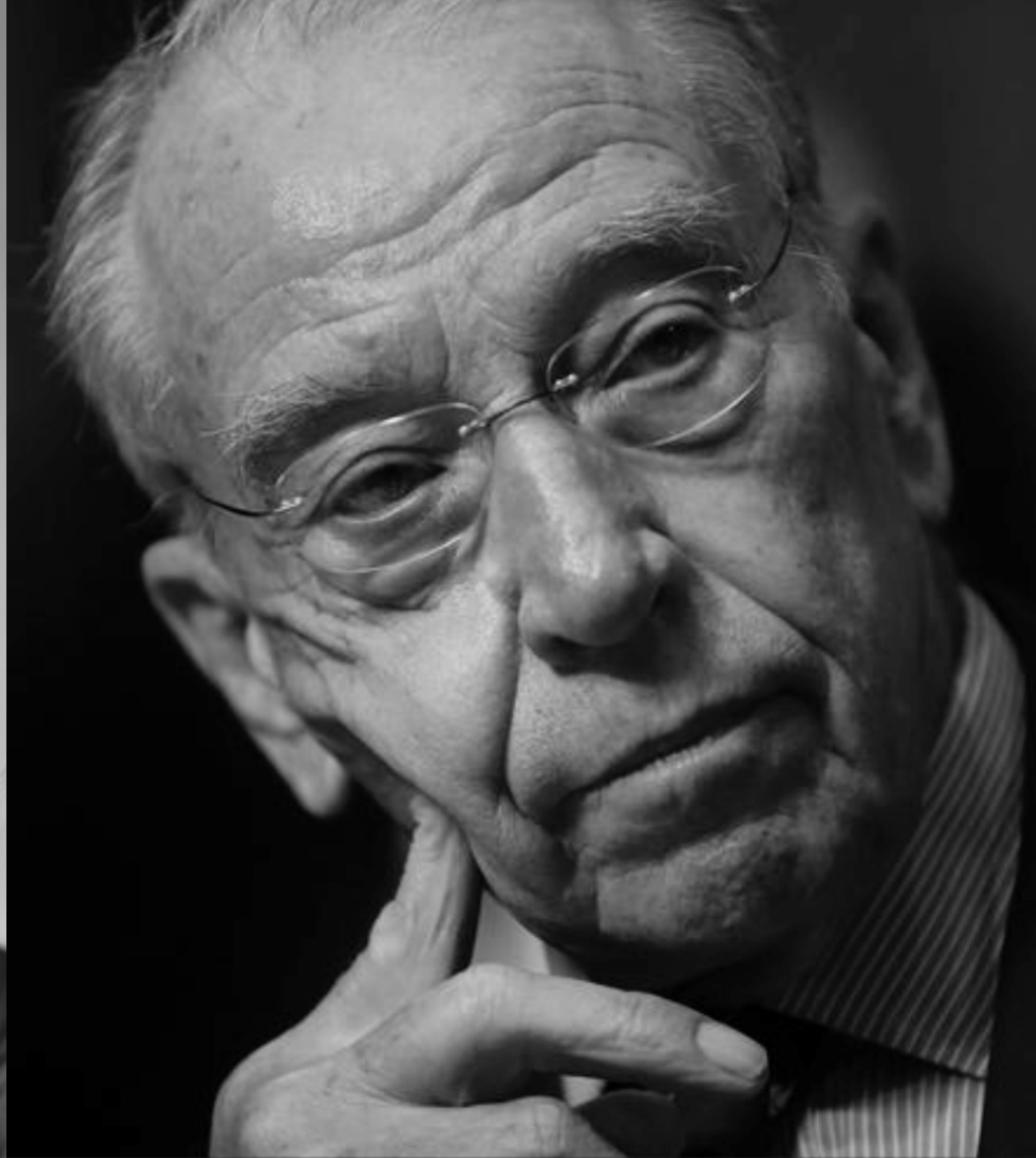
JOHANNA VALENZUELA, USAO

Disclaimer

United States Attorney's Office
District of South Carolina

Opinions and remarks are made in Valenzuela's personal capacity and do not reflect the policy of the U.S. Attorney's Office for the District of South Carolina, the U.S. Department of Justice, or the United States.





Grassley on the *qui tam* provision

"One of the smartest things Congress has ever done is to empower whistleblowers to help the government combat fraud. They get results. Without whistleblowers, the government simply does not have the capability to identify and prosecute the ever-expanding and creative schemes to bilk the taxpayers. That is not rhetoric. That is history."

-Sen. Chuck Grassley (April 28, 2016)

$1.96 Billion in qui tam recovery

$488 Million in relator share awards

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2022

Civil Division, U.S. Department of Justice

FY	NEW MATTERS°		SETTLEMENTS AND JUDGMENTS¹					RELATOR SHARE AWARDS²		
	NON QUI TAM	QUI TAM	NON³ QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2006	76	385	1,712,459,257	1,491,105,499	22,711,363	1,513,816,862	3,226,276,119	219,976,072	5,647,836	225,623,908
2007	146	365	564,826,844	1,251,726,955	160,246,894	1,411,973,849	1,976,800,693	194,463,212	4,616,899	199,080,111
2008	166	379	312,193,480	1,103,918,516	12,678,936	1,116,597,452	1,428,790,932	208,432,587	2,997,615	211,430,202
2009	134	433	470,685,686	1,964,005,251	33,776,480	1,997,781,730	2,468,467,417	249,567,135	9,684,147	259,251,282
2010	144	576	644,090,368	2,279,055,248	109,778,613	2,388,833,862	3,032,924,230	379,518,436	30,915,991	410,434,427
2011	136	634	241,365,995	2,656,802,414	173,888,703	2,830,691,117	3,072,057,112	525,035,022	49,041,606	574,076,628
2012	158	655	1,612,212,862	3,375,495,169	90,248,343	3,465,743,512	5,077,956,374	439,622,456	24,861,743	464,484,199
2013	117	757	188,376,772	2,816,519,362	203,992,659	3,020,512,021	3,208,888,794	512,893,518	51,197,091	564,090,609
2014	119	716	1,677,608,226	4,390,679,739	91,136,701	4,481,816,440	6,159,424,665	698,127,381	17,615,475	715,742,857
2015	129	639	738,442,487	1,898,041,298	516,875,695	2,414,916,993	3,153,359,480	344,293,369	139,015,177	483,308,546
2016	185	709	1,929,502,680	2,928,674,132	108,298,069	3,036,972,202	4,966,474,881	525,393,509	29,658,600	555,052,108
2017	177	681	283,626,021	2,547,523,870	602,682,052	3,150,205,922	3,433,831,942	410,079,051	135,360,010	545,439,060
2018	133	649	769,596,453	2,004,176,517	210,796,053	2,214,972,569	2,984,569,022	311,761,493	37,505,357	349,266,850
2019	150	637	852,782,697	1,914,480,113	305,517,113	2,219,997,225	3,072,779,923	290,926,847	75,132,492	366,059,339
2020	261	676	547,903,198	1,522,461,904	193,883,475	1,716,345,380	2,264,248,578	276,749,867	51,274,154	328,024,020
2021	212	598	3,993,378,820	1,237,816,864	480,654,272	1,718,471,136	5,711,849,956	201,375,057	62,488,398	263,863,455
2022	296	652	245,586,952	776,751,374	1,184,884,813	1,961,636,187	2,207,223,139	141,943,568	347,050,712	488,994,280

Damages

3x damages + penalties

31 U.S.C. § 3729(a)(1).

15-30% relator bounty

Id. § 3730(d)(1)-(2).

2x damages for retaliation

Id. § 3730(h).

Attorneys' fees & costs

Id. § 3730(d)(1)-(2) & (h).

Anti-Kickback Statute (AKS), 42 U.S.C. § 1320-7b

- Criminalizes the knowing/willful offer, payment, solicitation, or receipt of remuneration to induce something reimbursable by a federal health insurance program.
- Remuneration means any kickback, bribe, or rebate, direct or indirect, overt or covert, cash or in kind.

PRESS RELEASE

Court Enters $487 Million Judgment Against Precision Lens and Owner Paul Ehlen for Paying Kickbacks to Doctors in Violation of the False Claims Act

Monday, May 15, 2023

Share

For Immediate Release

U.S. Attorney's Office, District of Minnesota

ST. PAUL, Minn. – U.S. District Judge Wilhelmina M. Wright has entered a judgment against Defendants Cameron-Ehlen Group, Inc. dba Precision Lens and its owner Paul Ehlen in the amount of $487,048,705.13.

On February 27, 2023, a federal civil jury concluded that the Defendants violated the False Claims Act and the Anti-Kickback Statute by paying kickbacks to ophthalmic surgeons to induce their use of the Defendants' products in cataract surgeries reimbursed by Medicare. The jury found that 64,575 false claims were submitted to Medicare due to the Defendants' conduct, which resulted in $43,694,641.71 in damages to Medicare.

Under the False Claims Act (FCA), a person or entity found to have violated the FCA is liable to the United States Government for a minimum civil penalty of $5,000 per false claim and three times the amount of damages sustained by the Government. In this matter, the amount included $358,445,780 in statutory penalties and an additional $131,083,925.13 in trebled damages, resulting in a total amount of $489,529,705.13, less $2,481,000 in proceeds from a previous settlement with Sightpath Medical.

31 U.S.C. § 3729(a)(1)

Liability (paraphrased) for:

(A) knowingly presenting or causing to be presented a false/fraudulent claim;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of these subparagraphs;

(D) Knowingly causing the return of less government property or money than due;

(E) Defrauding the government by making or delivering a receipt concerning property used or to be used by the government without knowing whether the receipt is true;

(F) knowingly buying or receiving public property from a government officer, member of the armed forces, or employee who lacks authority to sell or pledge the property;

(G) knowingly making/using/causing a false record or statement material to an obligation to pay/transmit money/property to the Government, or knowingly concealing/improperly avoiding/ decreasing an obligation to convey money/property to the government.

Liability

"The False Claims Act is intended to reach all types of fraud, without qualification, that might result in financial loss to the Government. The Court has consistently refused to accept a rigid, restrictive reading. The False Claims Act reaches beyond claims which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money. Thus, any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach."

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999) (quotations, brackets, and ellipses omitted, emphasis added, quoting United States v. Neifert-White Co., 390 U.S. 228, 232-33 (1968)).

Defense contracting

PRESS RELEASE

Booz Allen Agrees to Pay $377.45 Million to Settle False Claims Act Allegations

Friday, July 21, 2023

Share

For Immediate Release

Office of Public Affairs

Booz Allen Hamilton Holding Corporation has agreed to pay the United States $377,45
resolve allegations that it violated the False Claims Act by improperly billing commerc
international costs to its government contracts. Booz Allen, which is headquartered in
Virginia, provides a range of management, consulting, and engineering services to the
government, as well as commercial and international customers.

Defense contracting

First to file

In this case, back before this Court for a third time, we consider whether the first-to-file rule mandates dismissal of a relator's action that was brought while related actions were pending, even after the related actions have been dismissed and the relator's complaint has been amended, albeit without mention of the related actions. We conclude that it does.

Carter, 866 F.3d at 202.

866 F.3d 199
United States Court of Appeals, Fourth Circuit.

UNITED STATES EX REL. Benjamin CARTER, Plaintiff-Appellant,
v.
HALLIBURTON CO.; Kellogg Brown & Root Services, Inc.; Service Employees International Inc.; KBR, Inc., Defendants-Appellees.
Chamber of Commerce of the United States of America, Amicus Supporting Appellees.

No. 16-1262
|
Argued: March 22, 2017
|
Decided: July 31, 2017

Pleading with specificity

However, the SAC fails to allege how, or even whether, the bills for these fraudulent services were presented to the government and how or even whether the government paid United for the services. Merely alleging fraudulent conduct and an umbrella payment, without more, is insufficient particularly where, as the SAC itself alleges, United is three levels removed from the Air Force, which contracts directly with Boeing.

Grant, 912 F.3d at 198.

912 F.3d 190
United States Court of Appeals, Fourth Circuit.

UNITED STATES EX REL. David GRANT, Plaintiff – Appellant,

v.

UNITED AIRLINES INC., Defendant – Appellee.

No. 17-2151

|

Argued: September 27, 2018

|

Decided: December 26, 2018

Falsity

FACTUALLY FALSE

LEGALLY FALSE

Falsity

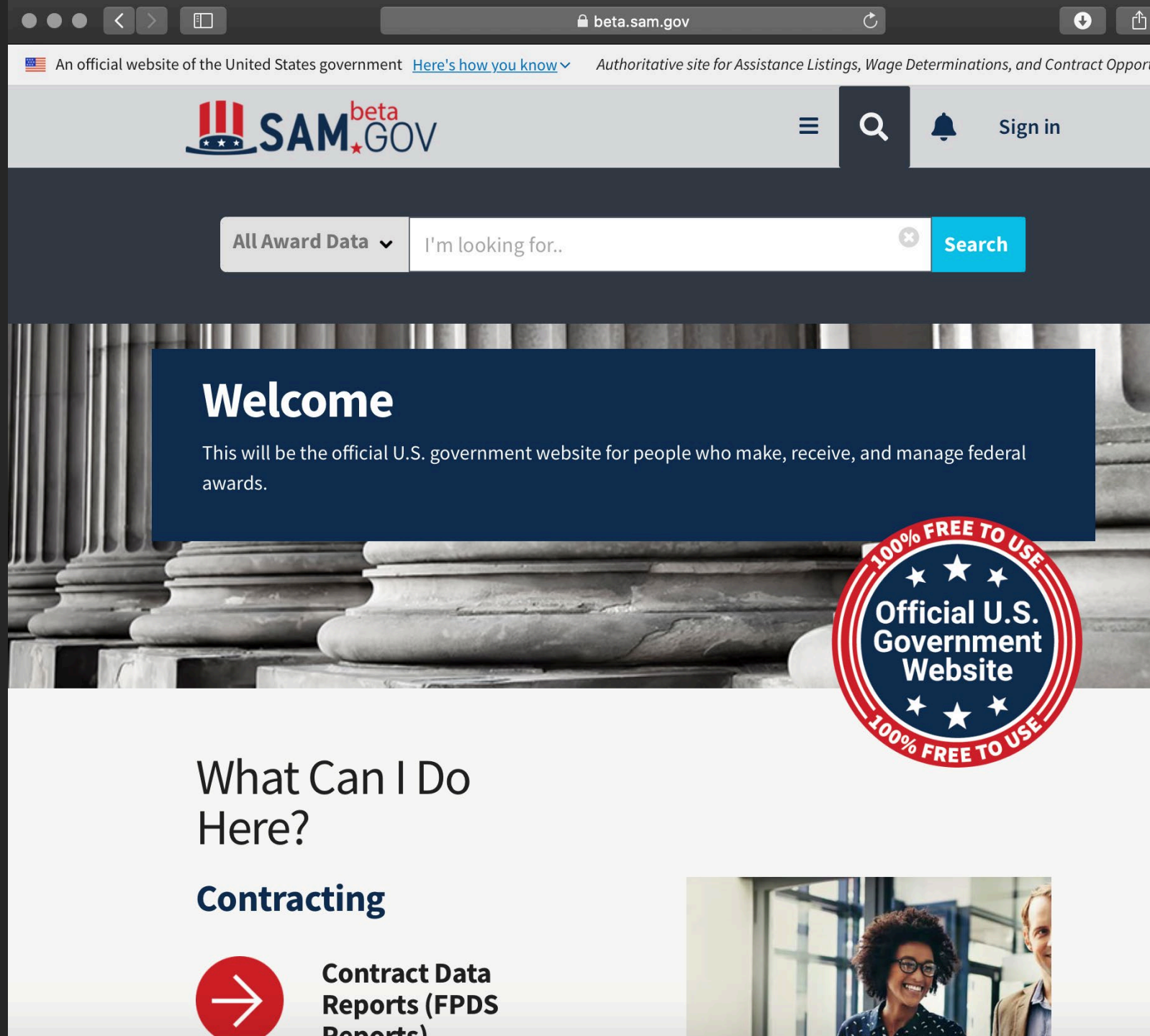
FACTUALLY FALSE

LEGALLY FALSE

Express

Implied

General contracting



Legal falsity: express false certification

Plaintiff-Relators allege … , Fencon and Carolina Wrecking knowingly agreed to present to the Government statements seeking payment and certifying statutory compliance with prevailing wage requirements, and did make such presentments, which were false, in order to bring about payment from the Government. These allegations are sufficient to plead a claim for conspiracy to defraud the Government.

Carolina Wrecking, 2019 WL 1777964, at *2.

2019 WL 1777964
Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Charleston Division.

UNITED STATES of America, ex rel. Willie Cooley and Frank Rawlinson, Plaintiffs,

v.

CAROLINA WRECKING, INC., Charles Dowey, individually, and Fencon, Inc., Defendants.

Civil Action No.: 2:17-0276-RMG

|

Signed 04/22/2019

|

Filed 04/23/2019

Legal falsity: implied false certification

Guns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight.

Triple Canopy, Inc., 857 F.3d 178–79 (quoting Universal Health, 136 S.Ct. at 2001–02).

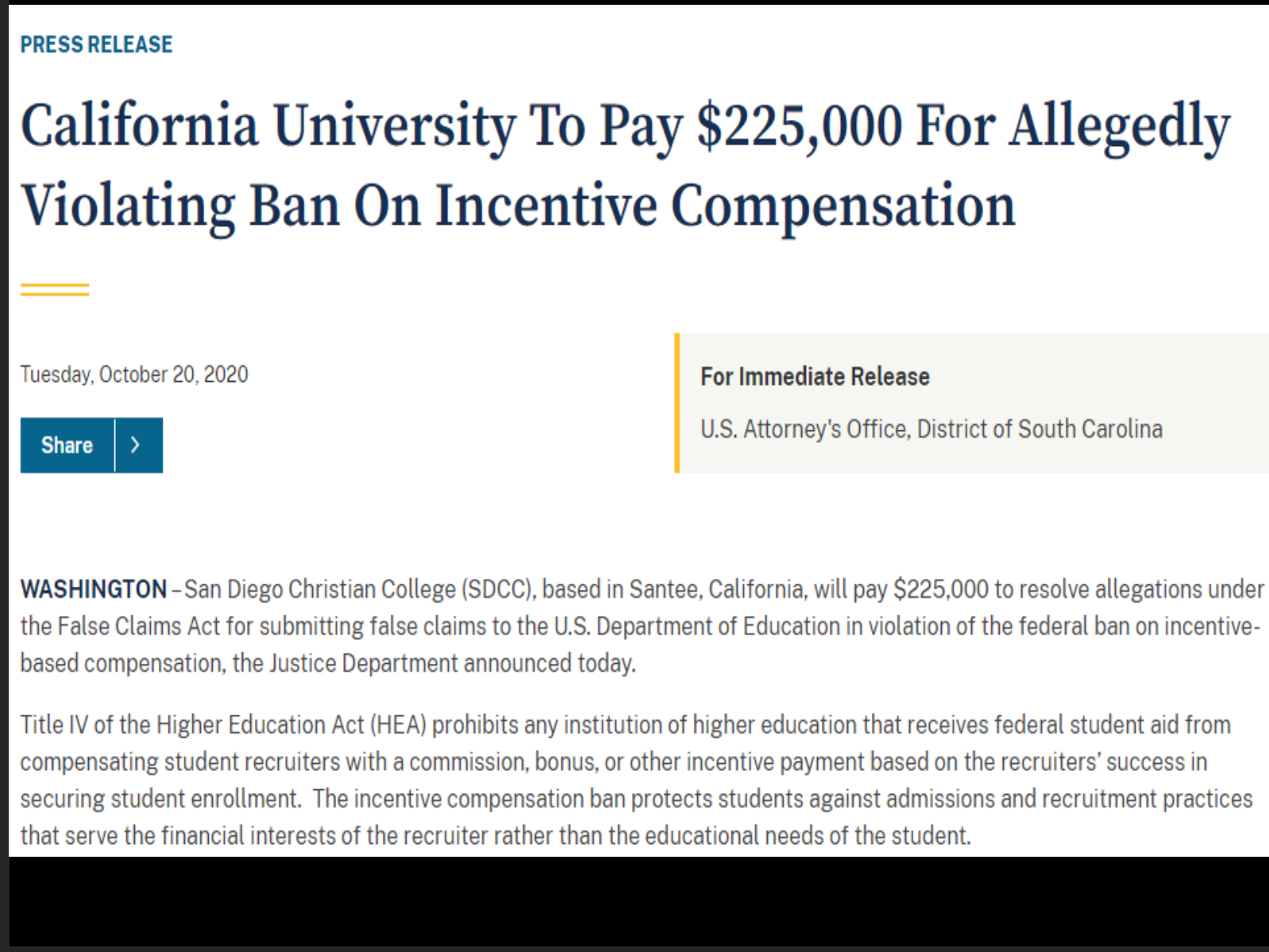
857 F.3d 174
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America,
Intervenor/Plaintiff–Appellant,
and
United States ex rel. Omar Badr, Plaintiff,
v.
TRIPLE CANOPY, INC., Defendant–Appellee.
United States ex rel. Omar
Badr, Plaintiff–Appellant,
v.
Triple Canopy, Inc., Defendant–Appellee.

No. 13-2190, No. 13-2191
|
Argued: January 26, 2017
|
Decided: May 16, 2017

Higher ed borrowing & GI Bill benefits

Higher education and federal grants



PRESS RELEASE

California University To Pay $225,000 For Allegedly Violating Ban On Incentive Compensation

Tuesday, October 20, 2020

Share

For Immediate Release

U.S. Attorney's Office, District of South Carolina

WASHINGTON – San Diego Christian College (SDCC), based in Santee, California, will pay $225,000 to resolve allegations under the False Claims Act for submitting false claims to the U.S. Department of Education in violation of the federal ban on incentive-based compensation, the Justice Department announced today.

Title IV of the Higher Education Act (HEA) prohibits any institution of higher education that receives federal student aid from compensating student recruiters with a commission, bonus, or other incentive payment based on the recruiters' success in securing student enrollment. The incentive compensation ban protects students against admissions and recruitment practices that serve the financial interests of the recruiter rather than the educational needs of the student.

Knowledge

To take advantage of the favorable return offered by the program, Oberg claims that between 2002 and 2006, PHEAA submitted false claims for SAP subsidies by improperly transferring student loans from non-tax-exempt bonds into tax-exempt bonds. In doing so, PHEAA converted lower-interest floating-rate loans into loans that guaranteed a 9.5 percent return. This translated into millions of dollars in additional revenue for PHEAA.

Oberg, 912 F.3d at 735.

912 F.3d 731
United States Court of Appeals, Fourth Circuit.

UNITED STATES EX REL., Jon H. OBERG, Plaintiff–Appellant,
v.
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, Defendant–Appellee,
and
Nelnet, Inc.; Kentucky Higher Education Student Loan Corp.; SLM Corporation; Panhandle Plains Higher Education Authority; Brazos Group; Arkansas Student Loan Authority; Education Loans Inc/SD; Southwest Student Services Corporation; Brazos Higher Education Service Corporation; Brazos Higher Education Authority, Inc.; Nelnet Education Loan Funding, Inc.; Panhandle-Plains Management and Servicing Corporation; Student Loan Finance Corporation; Education Loans Inc.; Vermont Student Assistance Corporation, Defendants.

No. 18-1028
|
Argued: October 31, 2018
|
Decided: January 8, 2019

Defense verdict; affirmed

FCA claims require a relator to show only that the defendant had knowledge of the illegality of its actions, rather than specific intent to defraud. As the district court correctly explained: 'It doesn't really make any difference whether they were operating well or not well or whatever. The only issue in this case is: Did they commit fraud and file a false claim?' … In any event, whether PHEAA's management had benevolent motive was a collateral issue of limited relevance, making any error harmless.

Oberg, 912 F.3d at 735-36 (citation omitted).

912 F.3d 731
United States Court of Appeals, Fourth Circuit.

UNITED STATES EX REL., Jon H. OBERG, Plaintiff–Appellant,
v.
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, Defendant–Appellee,
and
Nelnet, Inc.; Kentucky Higher Education Student Loan Corp.; SLM Corporation; Panhandle Plains Higher Education Authority; Brazos Group; Arkansas Student Loan Authority; Education Loans Inc/SD; Southwest Student Services Corporation; Brazos Higher Education Service Corporation; Brazos Higher Education Authority, Inc.; Nelnet Education Loan Funding, Inc.; Panhandle-Plains Management and Servicing Corporation; Student Loan Finance Corporation; Education Loans Inc.; Vermont Student Assistance Corporation, Defendants.

No. 18-1028
|
Argued: October 31, 2018
|
Decided: January 8, 2019

Kickback and Stark Law claims

The Stark Law, 42 U.S.C. § 1395nn

- Generally, federal health insurance programs prohibit self-interested referrals
- Numerous, complicated exceptions that eclipse the rule
- E.g., Employee referral mandate might be permissible so long as compensation does not vary based on volume or value

13. In addition to submitting an interim claim, CMS also requires Medicare provider hospitals to submit an annual "Hospital Cost Report" on form CMS-2552. The Hospital Cost Report is a final claim by a provider in which a provider declares its annual Medicare reimbursement to the fiscal intermediary for items and services provided to Medicare beneficiaries that year. See 42 U.S.C. § 1395g(a); 42 C.F.R. § 413.20; see also 42 C.F.R. § 405.1801(b)(1). Medicare relies on the Hospital Cost Report to determine whether the provider is entitled to more reimbursement than already received through interim payments, or whether the provider has been overpaid and must reimburse Medicare. 42 C.F.R. §§ 405.1803, 413.60 & 413.64(f)(1).

14. Each Hospital Cost Report contains an express certification that must be signed by the provider's chief administrator or designee. The Hospital Cost Report Certification warns providers that:

> MISREPRESENTATION OR FALSIFICATION OF ANY INFORMATION CONTAINED IN THIS COST REPORT MAY BE PUNISHABLE BY CRIMINAL, CIVIL AND ADMINISTRATIVE ACTION, FINE AND/OR IMPRISONMENT UNDER FEDERAL LAW. FURTHERMORE, IF SERVICES IDENTIFIED IN THIS REPORT WERE PROVIDED OR PROCURED THROUGH THE PAYMENT DIRECTLY OR INDIRECTLY OF A KICKBACK OR WERE OTHERWISE ILLEGAL, CRIMINAL, CIVIL AND ADMINISTRATIVE ACTION, FINES AND/OR IMPRISONMENT MAY RESULT.

Anti-Kickback Statute (AKS), 42 U.S.C. § 1320-7b

- Criminalizes the knowing/willful offer, payment, solicitation, or receipt of remuneration to induce something reimbursable by a federal health insurance program.
- Remuneration means any kickback, bribe, or rebate, direct or indirect, overt or covert, cash or in kind.

13. In addition to submitting an interim claim, CMS also requires Medicare provider hospitals to submit an annual "Hospital Cost Report" on form CMS-2552. The Hospital Cost Report is a final claim by a provider in which a provider declares its annual Medicare reimbursement to the fiscal intermediary for items and services provided to Medicare beneficiaries that year. See 42 U.S.C. § 1395g(a); 42 C.F.R. § 413.20; see also 42 C.F.R. § 405.1801(b)(1). Medicare relies on the Hospital Cost Report to determine whether the provider is entitled to more reimbursement than already received through interim payments, or whether the provider has been overpaid and must reimburse Medicare. 42 C.F.R. §§ 405.1803, 413.60 & 413.64(f)(1).

14. Each Hospital Cost Report contains an express certification that must be signed by the provider's chief administrator or designee. The Hospital Cost Report Certification warns providers that:

> MISREPRESENTATION OR FALSIFICATION OF ANY INFORMATION CONTAINED IN THIS COST REPORT MAY BE PUNISHABLE BY CRIMINAL, CIVIL AND ADMINISTRATIVE ACTION, FINE AND/OR IMPRISONMENT UNDER FEDERAL LAW. FURTHERMORE, IF SERVICES IDENTIFIED IN THIS REPORT WERE PROVIDED OR PROCURED THROUGH THE PAYMENT DIRECTLY OR INDIRECTLY OF A KICKBACK OR WERE OTHERWISE ILLEGAL, CRIMINAL, CIVIL AND ADMINISTRATIVE ACTION, FINES AND/OR IMPRISONMENT MAY RESULT.

PRESS RELEASE

Philips Subsidiary to Pay Over $24 Million for Alleged False Claims Caused by Respironics for Respiratory-Related Medical Equipment

Friday, September 2, 2022

Share

For Immediate Release

U.S. Attorney's Office, District of South Carolina

WASHINGTON – Philips RS North America LLC, formerly known as Respironics Inc., a manufacturer of durable medical equipment (DME) based in Pittsburgh, Pennsylvania, has agreed to pay over $24 million to resolve False Claims Act allegations that it misled federal health care programs by paying kickbacks to DME suppliers. The affected programs were Medicare, Medicaid and TRICARE, which is the health care program for active military and their families.

Healthcare & Kickbacks

PRESS RELEASE

Electronic Health Records Vendor NextGen Healthcare Inc. to Pay $31 Million to Settle False Claims Act Allegations

Friday, July 14, 2023

Share

For Immediate Release

Office of Public Affairs

NextGen Healthcare Inc. (NextGen), an electronic health record (EHR) technology vendor, has agreed to pay $31 million to resolve allegations that NextGen violated the False Claims Act (FCA) by misrepresenting the capabilities of certain versions of its EHR software and providing unlawful remuneration to its users to induce them to recommend NextGen's software.

Cybersecurity & Healthcare Technology

Legal falsity: Materiality

In the [PPACA], Congress provided that a claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim. … Although the provision that a claim is false and fraudulent if it results from an AKS violation does not explicitly state that the AKS violation is material to the Government's payment decision, the only reasonable inference is that AKS violations are *per se* material. … Further, the Court holds that AKS compliance was *per se* material even before the PPACA.

Berkeley Heartlab, 2017 WL at *1-2 (quotations and citations omitted).

2017 WL 6015574
Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Beaufort Division.

UNITED STATES of America, et al., Plaintiffs,
ex rel. Scarlett Lutz, et al., Plaintiffs-Relators,
v.
BERKELEY HEARTLAB, INC., et al., Defendants.

Civil Action No. 9:14-230-RMG
|
Signed 12/04/2017

Medical necessity & off-label marketing

Legal falsity: implied false certification

The parties do not appear to dispute that the representation that a laboratory service is medically necessary is material to the Government's decision to pay a claim for the service. Indeed, the relevant Government agencies lack discretion to reimburse laboratory tests they know to be medically unnecessary.

Berkeley Heartlab, 2017 WL at *3.

2017 WL 6015574
Only the Westlaw citation is currently available.
United States District Court, D.
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UNITED STATES of America, et al., Plaintiffs,
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Signed 12/04/2017

FCA procedure

- First to file bar, 31 U.S.C. § 3030(b)(5)
- Public disclosure bar, id. § 3730(e)(4)(A)
- The qui tam seal, id. § 3730(b)(2)
- Intervention/declination, id. § 3730(c)(2)(D)(4)
- Government control/approval, id. § 3730(c)(2)(A).

Qui tam procedure

Because a pro se plaintiff cannot represent the Government's interest in a qui tam suit, we affirm the district court's dismissal order.

Wojcicki, 947 F.3d at 241.

947 F.3d 240
United States Court of Appeals, Fourth Circuit.

Joseph Edward WOJCICKI, Plaintiff - Appellant,
v.
SCANA/SCE&G, Defendants – Appellees.
United States of America, Amicus Curiae.

No. 17-2045
|
Argued: September 20, 2019
|
Decided: January 14, 2020

Government control: dismissal over relator's objection

> Plaintiff asserts that dismissal will further its interest in preserving scarce resources by avoiding the time and expense necessary to monitor this action. … As Relator has put forth no evidence that Plaintiff's decision is 'fraudulent, arbitrary and capricious, or illegal,' dismissal is appropriate.

Stovall, 2018 WL 3756888, at *3.

2018 WL 3756888
Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Columbia Division.

UNITED STATES of America, Plaintiff,
EX REL. Vincent J. STOVALL, Plaintiff-Relator,
v.
WEBSTER UNIVERSITY, Defendant.

C/A No. 3:15-cv-03530-DCC
|
Signed 08/08/2018

Analyzing a Relator's Case

- Meet all the elements
  - Federal dollars?
- Government priorities
- Patient harm
- Government resources (U.S. Attorney's Office and agents)
- Public disclosure/Relator's knowledge

PRESS RELEASE

Victory Automotive Group Inc. Agrees to Pay $9 Million to Settle False Claims Act Allegations Relating to Paycheck Protection Program Loan

Wednesday, October 11, 2023

Share

For Immediate Release

Office of Public Affairs

Port Richey, Florida-based automotive management company Victory Automotive Group Inc. (VAG) has agreed to pay $9 million to resolve allegations that it violated the False Claims Act (FCA) by knowingly providing false information in support of a Paycheck Protection Program (PPP) loan forgiveness application it submitted.

Analyzing a Relator's Case

Existing priorities:

- Healthcare (Healthcare Technology)
- Contracting and procurement

New enforcement priorities:

- Fraud in pandemic relief programs
- Cybersecurity requirements in government contracts and grants

Filing a qui tam?
As to the disclosure statement, do . . .

- Serve both AG and USAO
- Provide a list of relevant witnesses
- Raise key issues with the assigned AUSA early

Filing a qui tam? Do not . . .

- Violate the seal
- Continue to investigate on United States' behalf, including trying to obtain documents or information from the defendant or witnesses
- Send the Government privileged documents

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South Carolina Bar
Continuing Legal Education Division

Being an Effective Advocate Through a Webcam: Tips for Arguing Remote

NO MATERIAL

South Carolina Bar

Continuing Legal Education Division

Attorney Client Privilege in Employment Law

Blurred Lines… Navigating Ethics Rules and Zealous Advocacy in the Assertion of Privilege

Joshua Van Kampen, Van Kampen Law

Virginia M. Wooten, Ogletree Deakins

Road Map

- Rules of Professional Responsibility
- Basics of Attorney Client Privilege
  - Special Considerations for In House Counsel
- Basics of Work Product Privilege
- Privileges in Practice
  - Intake Forms
  - Investigation Notes and Documents
  - Privilege Logs
  - Privilege Assertions as to Preservation and Discovery Due Diligence


HOLLY
STAR

Rule 3.4 Fairness to Opposing Party and Counsel

- A lawyer shall not:
  - ***Unlawfully obstruct another party's access to evidence*** or ***unlawfully*** alter, destroy or ***conceal*** a document or other material having ***potential*** evidentiary value. A lawyer shall not counsel or assist another person to do any such act
  - ***Fail to make a reasonably diligent effort*** to comply with a legally proper discovery request by an opposing party.
  - ***Fail to disclose evidence or information*** that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions

Truthfulness to Others and Tribunals

- **Rule 3.3 Candor to Tribunal:** A lawyer shall not knowingly: make a false statement of material fact or law or fail to correct a false statement of material fact or law . . . or, offer evidence the lawyer knows to be false.
- **Rule 4.1 Truthfulness to Others:** In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Practice Pointer – Cite to Rule 3.4 in Instructions

- Duty of Defense Counsel Under the North Carolina Rules of Professional Responsibility. Rule 3.4 of the North Carolina Rules of Professional Responsibility prohibits attorneys from unlawfully obstructing another party's access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value. Lawyers are also prohibited from counseling or assisting their clients from undertaking any such acts. Lawyers, not just clients, are further required to conduct a reasonably diligent search for responsive documents and information sought by legally proper discovery requests. Accordingly, a lawyer cannot ethically rely on his/her client to conduct a reasonably diligent search or assume the client has not withheld documents. North Carolina Rules of Professional Responsibility require the attorney to look behind and confirm the client's responses are compliant. The lawyer's oversight role is particularly important with respect to the review of electronically stored information. Keyword searches are sought in these discovery requests and should be conducted, or at the very least, reviewed by a third-party vendor or defense counsel.


WILLIAM E. BUFALINO
ATTORNEY AT LAW

Attorney-Client Privilege Basics

- Attorney Client Privilege: the belief that only "full and frank" communications between attorney and client allow the attorney to provide the best counsel… benefits out-weighing the risks of truth-finding posed by barring full disclosure in court. *In re Death of Miller*, 357 N.C. 316, 329 (2003).
- It rests on presumption that an attorney can only render accurate advice if the client fully and truthfully discloses relevant facts.

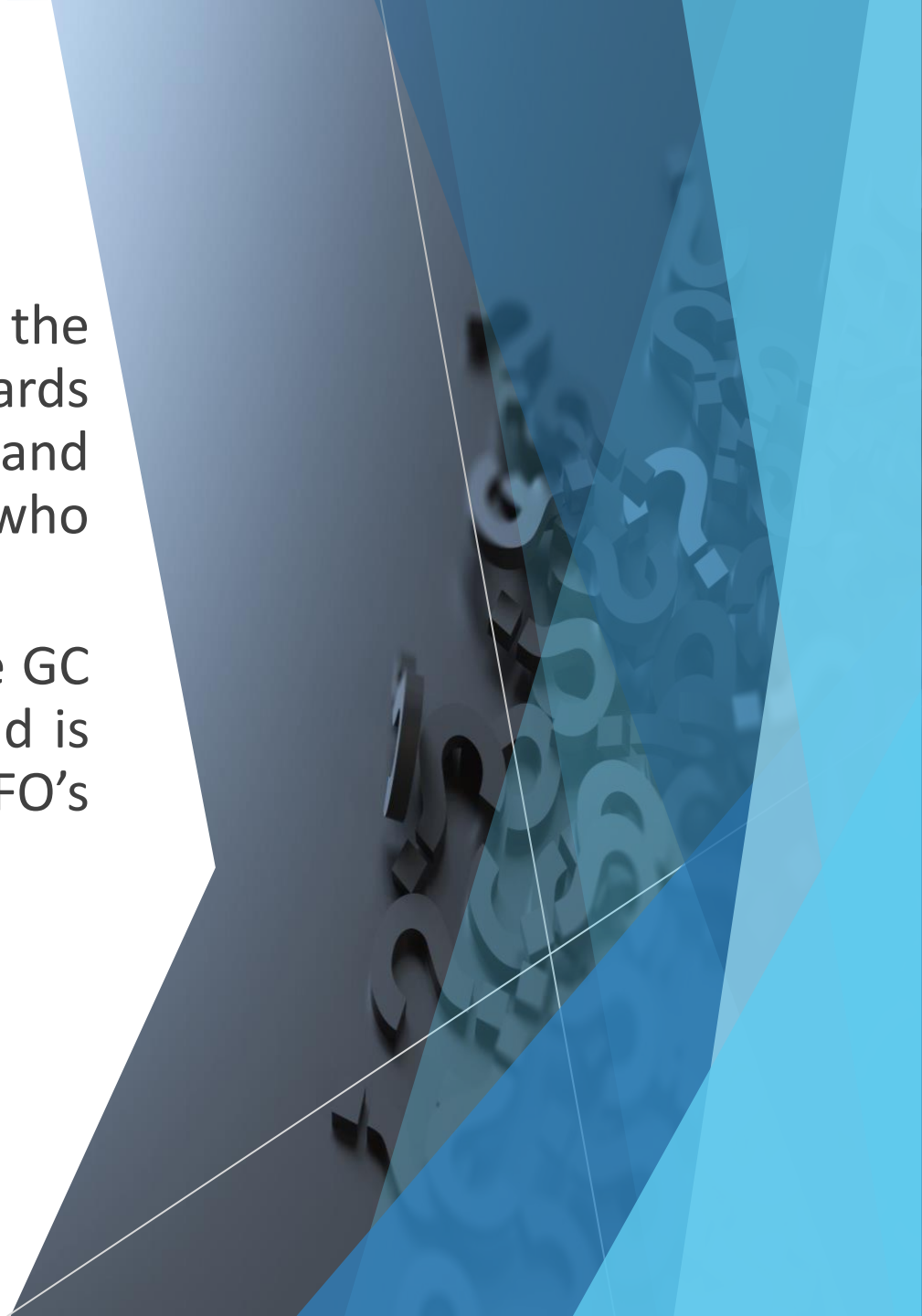
Attorney-Client Privilege Basics

- For the attorney-client privilege to apply, the communication must be:
  - Between an attorney and a client
  - Confidential
  - Made for purpose of securing legal advice
  - Made outside the presence of a third party
  - Not otherwise be waived

Hypothetical

- The Company's CFO receives a spreadsheet from the CEO regarding a property valuation. The CFO forwards it to a co-employee with several questions and comments and copies several other executives, who also comment and chime in.
- The Company's GC is among those copied, but the GC provided no input or instructions on this issue and is not specifically addressed in the CFO's communication.

- IS THE EMAIL COMMUNICATION PRIVILEGED?



Waiver of the Attorney-Client Privilege

- How can the privilege be waived?
  - Disclosures to third parties
  - Disclosure to corporate employees who do not have a “need to know”
  - Disclosure outside the company
    - Exceptions for unauthorized disclosures
  - Response to governmental investigation
  - Response to auditor or accountant inquiry
  - Insurance renewals
  - Audit responses

Waiver of the Attorney-Client Privilege

- When a lawyer receives a writing that was mistakenly sent or produced by the opposing lawyer or party, he or she should promptly alert the opponent so that the opponent can take measures to protect the client. N.C. Rules of Prof'l Conduct R. 4.4(b).

Attorney-Client Privilege Basics

- What is **NOT** protected by the attorney-client privilege:
  - **Factual information**
    - What about a report from in-house counsel reflecting the status of litigation that *also* contains factual information?
  - Providing "**business" advice** instead of legal advice
  - The **fact** that a **meeting occurred** and the **general subject matter** of the meeting
  - **Crime/Fraud** exception

In-House Counsel Wear Multiple Hats

- **Presumption with Outside Counsel**: Communications between a corporation and its *outside counsel* are *presumed* privileged and made to seek *legal* advice.
- **Roles of In-House Counsel:** Can serve *multiple functions* within the corporation, including legal and business, and sometimes business only.
- **No In-House Counsel Presumption**: the same presumption that exists for communications with outside counsel does *not* extend to communications with in-house counsel.

Dual Purpose Communications

- What if you have business ***and*** legal advice in one communication – what happens?
- Courts primarily use two different tests:
  - ***A*** significant purpose test (also known as ***a*** primary purpose test)
  - ***The*** primary purpose test
- Earlier this year, the Supreme Court was set to make a decision that would have produced uniformity across the courts.

The Two Tests

The Primary Purpose: communication is privileged if the primary purpose is to obtain or provide legal advice.

A Significant Purpose: communication is privileged if one of its significant purposes is providing or obtaining legal advice.

Work-Product Doctrine Basics

- Protects documents and tangible things that are:
  - Produced by an attorney or party representative; and
  - Made in anticipation of litigation

Work-Product Doctrine Basics

- Fed. R. Civ. P. 26(b)(3) codifies the common law work product doctrine. It protects from discovery documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). FED. R. CIV. P. 26(b)(3)(A).

Work Product Doctrine Basics

"In anticipation of litigation" consists of two related concepts:

- Temporal: document must be prepared before and in anticipation of, or during, litigation.
- Motivational: document must be prepared for litigation and *not* some *other* purpose.

Is qualified, not an absolute privilege

Question 1

- Is the intake form or pre-consult paperwork submitted to counsel by a **prospective client** protected and non-discoverable?
- **Easy Scenario:**
  - Yes, if the potential client becomes an actual client
  - NCRPR Rule 1.6 Confidentiality of Information
    - (a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Are intake forms discoverable for prospective clients who do NOT become clients from the law firm or prospective client?

- Common Law Privilege:
  - Protects communications with prospective clients who engage in confidential communications with lawyers who have invited such communications and who explicitly or implicitly agree to keep them confidential even if the prospective clients did not retain the lawyers.
  - NCRPR 1.18: Duties of confidentiality to Prospective Clients

NCRPR 1.18 Duties to Prospective Clients

- Even when no client-lawyer relationship ensues, a lawyer who has learned information from a ***prospective client*** shall not use or reveal that information . . .
  - A "prospective client" is a person who "***consults*** with a lawyer about the possibility of forming a client-lawyer relationship"
  - "Whether communications, including **written,** oral, or **electronic communications**, constitute a **consultation** depends on the circumstances."

The touchstone – did the client have a "consult"?

What is a “consult” for purposes of being a “potential client”?

- A person who has a virtual or in person consult is a potential client – lawyer cannot disclose the intake form if subpoenaed.

If no live consult,

- A person who “***unilaterally***” submits information and documents to law firm (i.e., not responding to law firm advertising or solicitation for submission on website) is not a potential client, lawyer **may produce records if subpoenaed**.
- If a lawyer’s website contains “clear and reasonably understandable warnings and cautionary statements” and a live consultation does not ultimately occur, then submission of intake form will likely **not** qualify person as “prospective client” and lawyer **may produce records if subpoenaed.**
- Lawyer website does **not** contain “clear and reasonably understandable warnings and cautionary statements” and live consultation does not ultimately occur, then person submitting intake form is protected as “prospective client” and lawyer may **not** produce records if subpoenaed.

Practice Pointers:

- Defense Counsel:
  - Discovery request: Identify all plaintiff firms you submitted intake forms or information/documents to, and whether you had a consultation.
  - If no consultation occurred, examine firm website/intake form for disclaimer disavowing confidentiality of process.
  - If disclaimer exists, subpoena law firm for intake form or seek to compel from client and send RFP to client.
  - If no disclaimer or if website promises confidentiality of intake, drop it.
- Plaintiff's Counsel:
  - Use reverse disclaimer on your website to protect potential client intakes – Van Kampen law: *"**If you are a potential client, please complete our Intake Form for faster service. All information on this form is strictly confidential**. However, the mere submission of this form does not create an attorney-client relationship."*

Question 2

- Are internal investigation documents created in anticipation of litigation but not at the direction of counsel privileged?
  - Fed. R. Civ. P. 26(b)(3)(A) makes it clear that documents produced by non-attorneys may also enjoy work product privilege: (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things ***that are prepared in anticipation of litigation or for trial*** by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

Question 2

- BUT:
  - If attorney is not involved, then it can be difficult to show documents were actually prepared in anticipation of litigation and require protection.
  - Materials prepared in the ***ordinary course of business*** or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3). *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (citing *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, 52 (4th Cir.1963).

Question 2

- Additionally, if the documents do not contain the ***mental impressions, conclusions, opinions, or legal theories*** of an attorney or other representative of a party concerning the litigation, then they may be discoverable if the party seeking the discovery "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means" Fed. R. Civ. P. 26(b)(3)(A)(ii).

Hypothetical

- VP of HR calls a meeting with the local HR Manager and a supervisor to discuss performance concerns with an employee.
- The company's GC is also invited to the meeting and the meeting invite states, "for the purpose of legal advice."
- Prior to the meeting, the VP of HR prepares a memorandum outlining the timeline of the employee's performance concerns.
- The VP of HR distributes the memorandum at the meeting.

Hypothetical (continued)

- At the meeting, the GC makes small revisions to the memorandum and adds one sentence concluding that the employee's termination would be considered "lawful."
- After the meeting, the VP of HR revises the memorandum to incorporate the GC's edits and sends it back to the GC and notes, "Please see the attached with your requested revisions."
- The VP of HR marks the email "Privileged and Confidential."

Hypothetical (Questions)

- Are communications at the meeting privileged?
  - The mere fact that in-house counsel is present at a meeting does not shield otherwise unprivileged communications from disclosure. *See Neuder v. Battelle Pac. Nw. Nat. Lab'y, 194 F.R.D. 289, 293* (D.D.C. 2000).
  - If the true intent of the meeting was to have the GC provide legal guidance and the particular communications in the meeting revolved around that need, then there would be a stronger argument that the meeting was privileged.
  - The fact that the GC's invite to the meeting noted "legal advice" is helpful to that argument and to clarify the intent of the parties.

Hypothetical (Questions)

- Are communications at the meeting privileged?
  - If the intent of the meeting was simply to review the timeline of the employee's misconduct, that would not necessarily be privileged and would be considered more business advice.
  - Under the two different tests courts might view this meeting in two different ways. Is the primary purpose truly to obtain legal advice? Maybe not, thus no privilege. On the other hand, a significant purpose test could hold differently. Part of the significant purpose of the meeting was to obtain legal advice and guidance about the termination, that could provide a shield for the communications.

Hypothetical (Questions)

- Is this memorandum privileged?
  - If the GC was simply editing the facts or making small grammar changes – that is not going to turn this memorandum into something that is privileged.
  - The addition of the sentence that notes the termination would be "lawful" does not automatically transform this whole document into a privileged document.
  - The fact that the VP wrote "privileged and confidential" on the email does not automatically make it privileged.
  - The GC did not draft it and did not request it. The VP drafted it and prepared it.
  - If the facts were different, and the GC prepared the memorandum and provided a legal analysis of the termination at the request of the VP, that would lean heavily towards a privileged communication especially with the significant purpose test.

Practice Pointers

- Plaintiff Attorneys:
  - Investigate and examine the purpose of communications.
  - Investigate whether Defendant had adequate notice of potential claim at the time document was created.
  - Examine whether the type of investigation is normally done by company when similar situation occurs.
- Defense Attorneys:
  - Advise client to get legal counsel involved before initiating investigation.
  - Advise client to keep legal and business advice separate. When not possible to keep separate, the best thing to do is make clear in a communication when something is legal advice, when someone has requested legal advice, and/or that the purpose of the communication is legal advice.

Privilege Logs

- Must a party provide a privilege log?
  - Fed.R.Civ.P. 26(b)(5)(A)(ii) requires that a party withholding information "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."
  - Most courts and some local rules require a privilege log.

  Consequences for not providing . . . waiver

  - *Kotsias v. CMC II, LLC*, No. 1:15 CV 242, 2016 WL 6841080, at *2 (W.D.N.C. Nov. 21, 2016) ("'A party simply cannot claim privilege and refuse to provide a privilege log; indeed, some courts have found that doing so results in waiver of the privilege.'")
  - *See Herbalife Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.,* No. 5:05CV41, 2006 WL 2715164, at *4 (N.D.W.Va. Sept. 22, 2006) ("Failure to timely produce a privilege log or the production of an inadequate privilege log may constitute waiver of any asserted privileges.");

What is required to be disclosed in a privilege log?

- Bates number and cross reference to respective RFP
- Type of document (e.g., memo, email, notes), number of pages, if there are attachments
- Date
- All participants/recipients (including names of attorney(s))
- General description to permit analysis of privilege standard

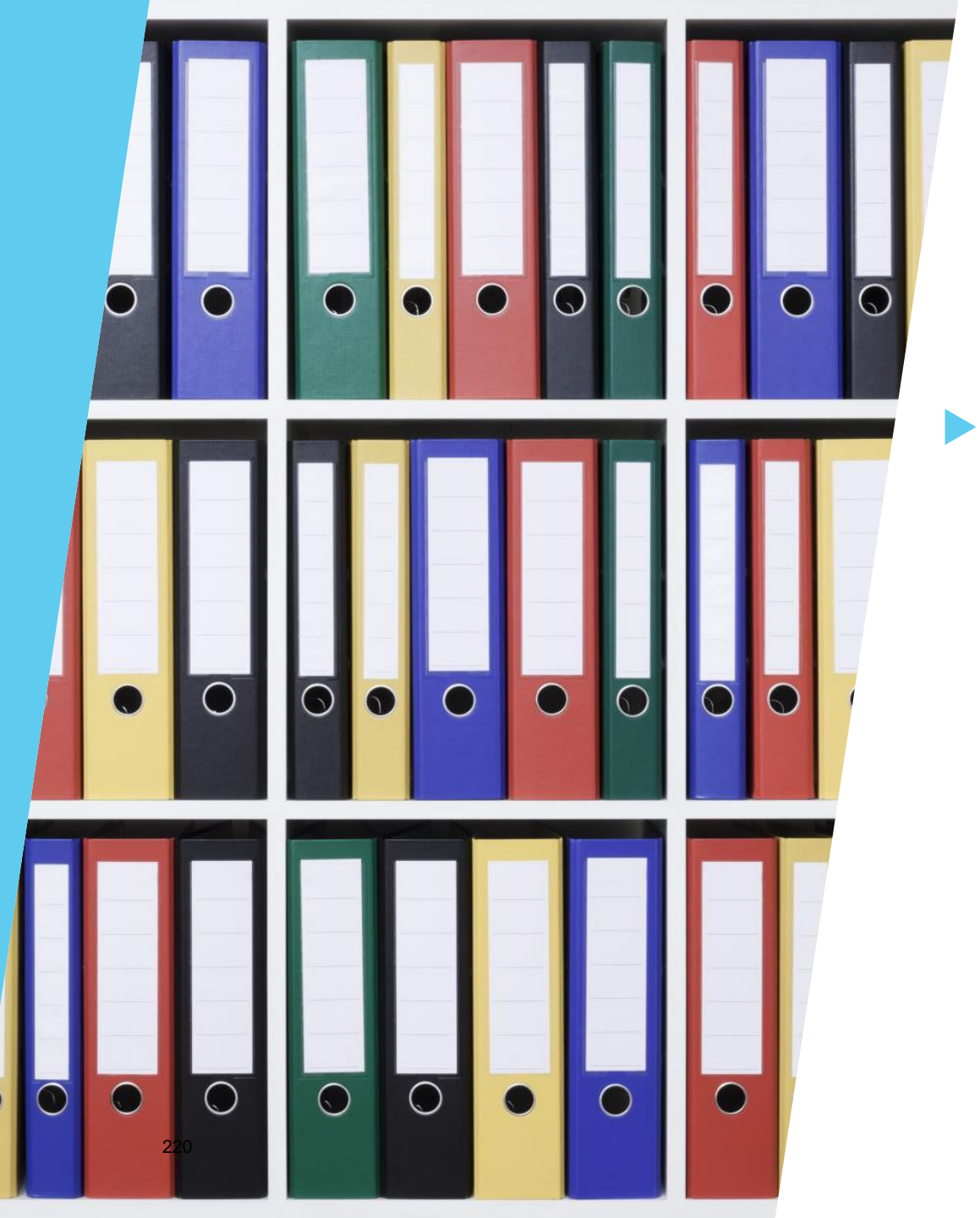
It is the general description where the ethics danger lies. Rule 3.1 prohibits lawyers from failing to disclose relevant evidence or unlawfully obstruct access to evidence. Assume judge will conduct in camera review implicating truthfulness to tribunal.

Omissions from Description of Withheld Document in Privilege Logs

- **Hypothetical** – What if an email chain discusses Plaintiff's termination **and** disciplinary action issued to a peer or complaint made against supervisor that was subject to a relevance objection?
  - Yes – must identify other personnel matters on two grounds: (i) they were withheld documents based on an objection generally and (ii) D would otherwise assert privilege as to the document.
- **Hypothetical** – If privilege is only asserted as to portion or HR Director's notebook and remainder of notes of the day are non-privileged, should non-privileged portion of notes be produced **along with privilege log**?
  - Yes – the privilege log does not replace the requirement to produce document containing non-privileged information.

Practice Pointers on Privilege Log

- Always produce privilege log with initial discovery responses to avoid waiver argument, especially plaintiff's lawyer who will want "their side of the street clean" when filing a motion to compel.
- Avoid vague entries which will beget motions to compel and in camera review.
- Assume court will conduct in camera review and ask:
  - Will the judge think I hid or concealed necessary detail in the description?
  - Did I withhold non-privileged information or content in the document prompting judge to say, "why wasn't this produced with redaction for attorney client content?"



Privilege Assertions re Preservation Efforts and Search for Responsive Documents

- About steps to preserve evidence
  - Document Preservation Letters generally protected in absence of spoliation concerns
  - But steps taken **by client** to preserve evidence even if directed by counsel are **not** privileged.
  - Cannot instruct not to answer about client's **actions** to preserve or search for evidence.

Practice Pointers

- **Plaintiff**
  - Conduct 30b6 deposition about preservation efforts and search for responsive documents
    - “eBay stands for the proposition that the steps taken by a client to implement a litigation hold are discoverable, without any showing of need, loss of ESI, or otherwise. Quite simply, those steps are both relevant and unprivileged. As noted, however, the eBay court did not, on the facts presented, permit discovery of counsel's litigation hold instructions to the client."

      The Honorable Paul W. Grimm et. al., *Discovery About Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?*, 37 U. Balt. L. Rev. 413, 427 (2008).
  - Issue litigation hold letters to clients in every case / put in fee agreement.
- **Defendant**
  - Don’t put legal advice or analysis in litigation hold letters
  - Produce litigation hold letters that:
    - Are helpful to protect other attorney-client communications
    - Obtain Plaintiff stipulation production of preservation letter does not waive privilege as to other comms.

South Carolina Bar
Continuing Legal Education Division

Pending Regulatory Issues Impacting Employee Agreements

KEY FEATURES AND LINKS REGARDING FTC PROPOSED RULE BANNING EMPLOYMENT-BASED NONCOMPETE COVENANTS.

Key Features:

The proposed rule's reach is extensive and would supercede all contrary state law. If the proposed rule is ultimately adopted, it would prohibit employers from requiring non-competes from employees and independent contractors, and the prohibition would extend to all contract provisions that create "de facto" non-compete clauses; e.g., any other contractual clause that may have the "effect" of prohibiting workers from seeking or accepting other employment.

For example, a broadly worded NDA that has the "effect" of limiting a worker's mobility could also be banned as could some existing training repayment arrangements and liquidated damages provisions that require a departed employee to make a payment to their former employer in connection with their election to compete in the contractually prohibited area.

The rule, if adopted, applies retroactively. Should the rule be enacted in its current form, not only would preexisting non-compete agreements become unenforceable, but the rule would also require employers to proactively rescind the non-compete, e.g.., to tell individual employees that such provisions are no longer valid and have become void as a matter of law.

"Sale-of-business" noncompetes are granted an exception, but the exception only applies where the individual has at least 25% ownership in the business. Nonsolicitation of customers and employees provisions are not affected by the proposed rule.

Key Links Regarding the Proposed Rule and FTC Statements and Analysis:

(1) https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition
(2) https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking
(3) https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioners-slaughter-bedoya-concerning-notice-proposed
(4) https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioners-rebecca-kelly-slaughter-alvaro-m-bedoya-concerning-notice-proposed
(5) https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-concerning-notice-proposed-rulemaking-non

Potential Legal Challenges to the FTC's Currently Proposed Rule

In the words of the FTC's own dissenting member, "the NPRM is vulnerable to meritorious challenges that (1) the Commission **lacks authority** to engage in "unfair methods of competition" rulemaking, (2) the **major questions doctrine** addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the **non-delegation doctrine**, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals." January 5 Statement of FTC Commissioner Christine S. Wilson (emphasis supplied).

What is the status of the proposed rule currently?

The FTC received approximately 27,000 comments during the public comment period that ended in April of 2023. It has been reported that the FTC delayed its plan to formally vote to on a final rule until April 2024. It is unclear whether the initially published proposed rule will be modified, potentially requiring a new notice of potential rulemaking and public comment process.

McLaren Macomb *and* Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL–CIO. Case 07–CA–263041

February 21, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX AND PROUTY

On August 31, 2021, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Charging Party filed an answering brief in support of the General Counsel's exceptions and in opposition to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The main issue presented is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by offering a severance agreement to 11 bargaining unit employees it permanently furloughed. The agreement broadly prohibited them from making statements that could disparage or harm the image of the Respondent and further prohibited them from disclosing the terms of the agreement. Agreements that contain broad proscriptions on employee exercise of Section 7 rights have long been held unlawful because they purport to create an enforceable legal obligation to forfeit those rights. Proffers of such agreements to employee have also been held to be unlawfully coercive. The Board in *Baylor University Medical Center*[2] and *IGT d/b/a International Game Technology*[3] reversed this long-settled precedent and replaced it with a test that fails to recognize that unlawful provisions in a severance agreement proffered to employees have a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the Act. We accordingly overrule *Baylor* and *IGT* and, upon careful analysis of the terms of the nondisparagement and confidentiality provisions at issue here, we find them to be unlawful, and thus find the severance agreement proffered to employees unlawful.

I.

The Respondent operates a hospital in Mt. Clemens, Michigan, where it employs approximately 2300 employees. After an election on August 28, 2019, the Board certified Local 40 RN Staff Council, Office of Professional Employees International Union (OPEIU), AFL–CIO (Union) as the exclusive collective-bargaining representative of a unit of approximately 350 of the Respondent's service employees. Following the onset of the Coronavirus Disease 2019 (Covid-19) pandemic in March 2020,[4] the government issued regulations prohibiting the Respondent from performing elective and outpatient procedures and from allowing nonessential employees to work inside the hospital. The Respondent then terminated its outpatient services, admitted only trauma, emergency, and Covid-19 patients, and temporarily furloughed 11 bargaining unit employees because they were deemed nonessential employees.[5] In June, the Respondent permanently furloughed those 11 employees[6] and contemporaneously presented each of them with a "Severance Agreement, Waiver and Release" that offered to pay differing severance amounts to each furloughed employee if they signed the agreement. All 11 employees signed the agreement. The agreement required the subject employee to release the Respondent from any claims arising out of their employment or termination of employment. The agreement further contained the following provisions broadly prohibiting disparagement of

[1] We shall modify the judge's recommended Order to conform to the violations found, to the Board's standard remedial language, and in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021). In accordance with our decision in *Thryv, Inc*., 372 NLRB No. 22 (2022), we have also amended the make-whole remedy and modified the judge's recommended order to provide that the Respondent shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful furloughs, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified.

[2] 369 NLRB No. 43 (2020).

[3] 370 NLRB No. 50 (2020).

[4] All subsequent dates are in 2020.

[5] The 11 employees primarily greeted patients and visitors in the welcome area of the surgery center. The temporary furloughs are not alleged to be unlawful.

[6] The permanently furloughed employees are Roxane Baker, Shanon Chapp, Susan Debruyn, Amy LaFore, Mona Mathews, Brenda Reaves, Patrina Russo, Linda Taylor, Tameshia Smith, Charles Stepnitz, and Mary Valentino. No party disputes that their employment with the Respondent permanently ended in June.

the Respondent and requiring confidentiality about the terms of the agreement:

> 6. **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> 7. **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

The agreement provided for substantial monetary and injunctive sanctions against the employee in the event the nondisparagement and confidentiality proscriptions were breached:

> 8. **Injunctive Relief.** In the event that Employee violates the provisions of paragraphs 6 or 7, the Employer is hereby authorized and shall have the right to seek and obtain injunctive relief in any court of competent jurisdiction. If Employee individually or by his/her attorneys or representative(s) shall violate the provisions of paragraph 6 or 7, Employee shall pay Employer actual damages, and any costs and attorney fees that are occasioned by the violation of these paragraphs.

The Respondent neither gave the Union notice that it was permanently furloughing the 11 employees nor an opportunity to bargain regarding that decision and its effects. The Respondent also did not give the Union notice that it presented the severance agreement to the employees, nor did it include the Union in its discussions with the employees regarding their permanent furloughs and the severance agreement. Thus, the Respondent entirely bypassed and excluded the Union from the significant workplace events here: employees' permanent job loss and eligibility for severance benefits.

II.

The judge found, and we agree for the reasons set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by permanently furloughing the 11 employees without first notifying the Union and giving it an opportunity to bargain about the furlough decision and its effects. The judge properly found that the Respondent had not met its burden under *RBE Electronics of S.D., Inc.*[7] of establishing an economic exigency compelling prompt action that excused its failure to satisfy its bargaining obligation.[8] We further agree with the judge's finding, as set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by communicating and directly dealing with the 11 employees to enter into the severance agreement, while entirely bypassing and excluding the Union. However, for the reasons set forth below, we reverse the judge's finding under *Baylor* and *IGT* that the Respondent did not violate Section 8(a)(1) of the Act by proffering the severance agreement to the permanently furloughed employees.

III.

The gravamen of the General Counsel's amended complaint is that the nondisparagement and confidentiality provisions of the severance agreement unlawfully restrain and coerce the furloughed employees in the exer-

[7] 320 NLRB 80, 81 (1995). See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[8] While we recognize, as did the judge, that the Covid-19 pandemic presented a significant crisis in the health care industry, the Respondent has simply failed to carry its heavy burden under *RBE Electronics*. The Respondent argues that "there can be no genuine dispute" that it was "losing business and suffering a financial decline" during the Covid-19 pandemic. As the judge explained, however, the Respondent failed to adduce even a single balance sheet or financial statement establishing a major economic effect on it from the pandemic. Further, the Respondent's reliance on governmental restrictions on its operations that were imposed in March is insufficient to establish economic exigency. While the Respondent responded to those restrictions by temporarily furloughing the 11 employees in March, it has failed to show that conditions had changed in June in such a manner that required it to immediately permanently furlough them at that time without bargaining with the Union. *Port Printing AD & Specialties*, 351 NLRB 1269 (2007), enfd. 589 F.3d 812 (5th Cir. 2009), relied on by the Respondent, is inapposite. The employer's failure there to bargain over layoffs was excused under the economic exigency exception because of an immediate, mandatory, citywide evacuation order due to an impending hurricane. Such patent evidence of an unexpected shutdown resulting in forced layoffs is lacking here.

Because no party has excepted to the applicability of *RBE Electronics*, and because the Respondent has failed to show economic exigency under *RBE*, we find it unnecessary to pass on whether the economic exigency defense is available to an employer who—as here—was testing the validity of the union certification by refusing generally to recognize and bargain with the union at the time it acted unilaterally. See *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 fn. 2 (2017).

cise of their Section 7 rights.[9] Applying *Baylor* and *IGT*, the judge found these provisions to be lawful, and thus concluded that the severance agreement was lawful and that the proffer of the agreement to the furloughed employees was lawful. The General Counsel excepts to the dismissal and argues, among other things, that the Board should overrule *Baylor* and *IGT.* We agree.

Until *Baylor*, when faced with an allegation that a severance agreement violated the Act, Board precedent focused on the language of the severance agreement to determine whether proffering the agreement had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 rights.[10] For example, in *Metro Networks*, the Board specifically analyzed the nonassistance and nondisclosure provisions of the severance agreement at issue and found that "the plain language of the severance agreement would prohibit [employee] Brocklehurst from cooperating with the Board in important aspects of the investigation and litigation of unfair labor practice charges." 336 NLRB at 67. The Board accordingly concluded that the proffer of the severance agreement to Brocklehurst was unlawful. Id., at 65–67. In *Clark Distribution Systems*, the Board likewise carefully scrutinized the language of the confidentiality provision contained in the severance agreement offered to employees. The Board found that the language of the provision prohibited employees from participating in the Board's investigative process, and thus, that the proffer of the severance agreement was unlawful. 336 NLRB at 748–749. More recently, in *Shamrock Foods Co.*, the Board found that a separation agreement proffered to an employee that contained confidentiality and non-disparagement provisions was unlawful. The Board, citing and analyzing the specific language of the provisions, found the agreement unlawful because the provisions "broadly required" the employee to whom it was proffered "to waive certain Sec[tion] 7 rights." Specifically, the separation agreement prevented him from assisting his former co-workers, disclosing information to the Board, and making disparaging remarks which could be detrimental to the employer. 366 NLRB No. 117, slip op. at 3 fn. 12.

In none of these cases was the presence of additional unlawful conduct by the employer necessary to find that the plain language of the agreement violated the Act.[11] Rather, the Board treated the legality of a severance agreement provision as an entirely independent issue. What mattered was whether the agreement, on its face, restricted the exercise of statutory rights.[12]

In *Baylor*, the Board abandoned examination and analysis of the severance agreement at issue. *Baylor* shifted focus instead to the circumstances under which the agreement was presented to employees. The *Baylor* Board held that the Respondent did not violate the Act by the "mere proffer" of a severance agreement that re-

[9] The amended complaint alleges that the two provisions threatened employees with the loss of benefits described in the severance agreement and that the Respondent thereby has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Sec. 7 of the Act in violation of Sec. 8(a)(1) of the Act. We disagree with our colleague's assertion that the General Counsel litigated the case on a "different theory" than whether the proffer of the agreements was, as our colleague phrases it, "merely coercive." In both her post-hearing brief and her brief in support of exceptions, the General Counsel asserted that, "[i]n determining whether an employer has violated the Act through interference, restraint, and coercion under Sec. 8(a)(1), one must apply the Board's well-established objective test, which depends on 'whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act,'" and that "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." (Citations omitted.) Thus, the Respondent has at all times been on notice that the coerciveness of the provisions was under consideration, the parties fully and fairly litigated the issue, and there is no meaningful difference between the complaint allegations and the violations found. See, e.g., *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1136 fn. 3 (4th Cir. 1982) (rejecting employer's argument of improper variance between allegation that employer unlawfully threatened loss of benefits and finding that employer unlawfully promised benefits where benefits contingent on same employee action and issue fully litigated), cert. denied 460 U.S. 1083 (1983). We agree with the General Counsel that the proffer of the severance agreements unlawfully threatened employees with the loss of the severance benefits by conditioning the receipt of those benefits on acceptance of unlawfully coercive terms.

[10] See, e.g., *Shamrock Foods Co*., 366 NLRB No. 117 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019); *Clark Distribution Systems*, 336 NLRB 747 (2001); *Metro Networks*, 336 NLRB 63 (2001); *Phillips Pipe Line Co*., 302 NLRB 732 (1991).

[11] In *Shamrock Foods*, the Board found that the employer had unlawfully discharged the employee to whom it offered the unlawful separation agreement, but the maintenance of the agreement was an independent violation of Sec. 8(a)(1), separately found and separately remedied, that was based entirely on the provisions of the agreement that would have required the employee to waive Sec. 7 rights. 366 NLRB No. 117, slip op. at 2–3 & fn. 12. In *Clark Distribution Systems*, the Board's finding that the confidentiality provision in the severance agreement was unlawful on its face was entirely separate from the issue of whether the employees who signed the agreement had been unlawfully terminated. See id. at 749–750 (examining terminations). In *Metro Networks*, severance agreements were found unlawful based on the terms of the agreement, independent of the discharge allegations in the case. 336 NLRB at 66–67. Indeed, the *Metro Networks* Board observed that an employer's restriction on the exercise of a discharged employee's Sec. 7 rights may be found unlawful even where the Board does "not address the question of whether the discharge was unlawful." Id. at 66 (footnote omitted).

[12] Thus, in *Phillips Pipe Line Co*., the Board examined the facial language of the severance agreement at issue, and found "it clear from the language of the release itself" that it did not unlawfully waive the employees' right of access to the Board. 302 NLRB at 732–733. It was immaterial that the Board dismissed an additional unfair labor practice allegation. Id.

quired the signer to agree not to "pursue, assist, or participate in any [c]laim" against Baylor and to keep a broad swath of information confidential. *Baylor*, supra, slip op. at 1. The Board reasoned that the agreement was not mandatory, pertained exclusively to post-employment activities and, therefore, had no impact on terms and conditions of employment, and there was no allegation that anyone offered the agreement had been unlawfully discharged or that the agreement was proffered under circumstances that would tend to infringe on Section 7 rights. Id., slip op. at 1–2. The *Baylor* Board overruled prior decisions to the extent they held to the contrary:

> *Clark Distribution Systems* is overruled to the extent it holds that it is invariably unlawful to offer employees a severance agreement that includes a nonassistance clause. Instead, the holding of *Clark* is limited to the fact pattern that case presents, where an employer offers such an agreement to one or more employees it has discharged in violation of the Act. And *Metro Networks*, supra, and *Shamrock Foods*, supra, are also limited accordingly.

369 NLRB No. 143, slip op. at 2 fn. 6.

Only a few months later, in *IGT*, the Board again dismissed an allegation that the respondent maintained an unlawful nondisparagement provision in the severance agreement it offered to separated employees. The provision required the signer to agree not to "disparate or discredit IGT or any of its affiliates, officers, directors and employees." *IGT*, supra, slip op. at 1. Citing *Baylor*, the Board again reasoned that the agreement was "entirely voluntary, does not affect pay or benefits that were established as terms of employment, and has not been proffered coercively." Id., slip op. at 2.[13] The *IGT* Board underscored that *Baylor* had "overruled" *Shamrock Foods*, *Clark Distribution Systems*, and *Metro Networks*.[14]

As discussed below, *Baylor* and *IGT* are flawed in multiple respects. We therefore overrule both decisions and return to the prior, well-established principle that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful. In making that determination we will examine, as pre-*Baylor* precedent did, the language of the agreement, including whether any relinquishment of Section 7 rights is narrowly tailored.

Notably absent from either *Baylor* or *IGT* was any analysis of the specific language in the challenged provisions of the severance agreements. That is because, under those decisions, an employer's mere proffer to employees of a severance agreement with unlawful provisions cannot be unlawful. Under *Baylor,* coercive language cannot have a reasonable tendency to coerce employees unless it is also proffered in circumstances deemed coercive, independent of the agreement itself. See *IGT*, slip op. at 2; *Baylor*, slip op. at 1–2. In this respect the *Baylor* Board "entirely failed to consider an important aspect of the problem," making its decision arbitrary under the Supreme Court's standard in *Motor Vehicle Manufacturers Assn. v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983).

The *Baylor* test arbitrarily adopts a two-factor analysis for finding that a severance agreement violates Section 8(a)(1) of the Act. First, it requires the employer proffering the severance agreement to have discharged its recipient in violation of the Act, or committed another unfair labor practice discriminating against employees under the Act.[15] *Baylor* thus held that absent such unlawful

[13] Then-Member McFerran, dissenting in *IGT*, argued that the *Baylor* Board had wrongly broken with precedent and "ignore[d] the coercive potential that is inherent in any agreement requiring workers not to engage in protected concerted activity, if they wish to receive the benefits of the agreement." *IGT*, 370 NLRB No. 50, slip op. at 3. She asserted that "[e]ven a broad voluntary waiver of statutory rights undermines the public purposes of the Act, which depend on the freedom of all employees to engage in Section 7 activity, and to support each other in doing so," and that Sec. 7 rights do not depend on the existence of an employment relationship and have long been held to extend to former employees. Id., slip op. at 5.

[14] See *IGT*, slip. op. at 2, fn. 8 ("the Board overruled those cases to the extent they suggested it is '*invariably* unlawful to offer employees a severance agreement that includes a nonassistance clause' or other similar prohibitions," quoting *Baylor*, slip op. at 2 fn. 6 (emphasis added in *IGT*).

[15] *Baylor* rejected the allegation that the proffer of the agreement there was unlawful because "[t]he complaint does not allege that . . . anyone . . . offered th[e] agreement was unlawfully discharged for conduct protected by the Act, or that the Respondent's proffers were made under any circumstances that would tend to infringe on the separating employees' exercise of their own Section 7 rights or those of coworkers." *Baylor*, supra, slip op. at 2 (footnotes omitted). Similarly, *Baylor* concluded that the proffer of the agreement was lawful because "the complaint does not allege that the Respondent has violated the Act in *any* way other than by offering the severance agreements themselves") (emphasis in original). Id., slip op. at 2, fn. 6.

The Board majority in *IGT* further held that only certain unfair labor practices will suffice to find a violation under *Baylor*: violations which "support a finding that the Respondent has discriminated against employees for engaging in Sec. 7 activity." See *IGT*, slip op. at 2 fn. 7 (quoting *Baylor*, slip op. at 2. fn. 6). As the *IGT* majority held, "[a]lthough we found in our original decision that the Respondent unlawfully refused to bargain over a subcontracting decision and threatened employees, during bargaining, with a loss of overtime, such violations do not support a finding that the Respondent has discriminated against employees for engaging in Sec. 7 activity." *IGT*, slip op. at 2 fn. 7.

coercive circumstances, an employer is entirely free to proffer any provision, even a facially unlawful one. The Board did not explain what legitimate employer interest is served by permitting that step, which reasonably could result in the employee's acceptance of the agreement (and its unlawful provisions) and, in turn, the employee's decision not to violate the agreement by exercising Section 7 rights. Nor did the Board offer a persuasive reason to find that an agreement with an unlawful provision has no reasonable tendency to coerce employees unless the employer has a proclivity to violate the Act otherwise or has violated the Act or infringed on employees' Section 7 rights while carrying out actions surrounding the provision of the severance agreement. The presence of such exacerbating circumstances certainly enhances the coercive potential of the severance agreement. But the absence of such behavior does not and cannot eliminate the potential chilling effect of an unlawful severance agreement on the exercise of Section 7 rights. And yet, the standard set by *Baylor* does nothing to protect employees confronted with patently coercive severance agreements, if their employer has not otherwise violated the Act.[16]

Second, the *Baylor* test is incorrectly premised on the contention that employer animus towards the exercise of Section 7 rights is a relevant component of an allegation that provisions of a severance agreement violate Section 8(a)(1) of the Act. The Board in *Baylor* justified its refusal to find a violation of the Act on grounds that "[t]here is no reason to believe that the Respondent harbors animus against Sec. 7 activity, let alone that it is willing to terminate employees who engage in it. Under these circumstances, the offer of a severance agreement does not *reasonably* tend to interfere with the free exercise of employee rights under the Act[.]") (emphasis in original). 369 NLRB No. 43, slip op. at 2, fn. 6. The *IGT* majority made the same finding.[17]

But whether an employer harbors animus against Section 7 activity is irrelevant to the long-established objective test for determining whether Section 8(a)(1) of the Act is violated. "It is well settled that the test of interference, restraint, and coercion under Section 8(a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959). Consistent with Section 8(a)(1) law generally, evaluation of the tendency of a severance agreement to coerce (and therefore its lawfulness) does not involve inquiring, as did the Board in *Baylor* and *IGT,* whether employer animus surrounds or infects the circumstances surrounding the offer of the severance agreement. The *Baylor* Board offered no justification for its consideration of animus and discrimination apart from the terms of the severance agreement, which altered the long-established construction of Section 8(a)(1) of the Act.[18]

Indeed, neither *Baylor* nor the *IGT* majority attempted to articulate any policy considerations that would justify its severely constricted view of Section 7 rights. The *IGT* majority reasons that because *some* employee waivers of Section 7 rights are permissible, *no* waivers can be facially unlawful, but this is a non sequitur. Whether or not employees view employer documents through the prism of Section 7 rights (a proposition questioned by the *IGT* majority), the Board must do so when the General Counsel issues a complaint alleging that a severance agreement violates employee Section 7 rights. Because both *Baylor* and the *IGT* majority fail this test, we overrule them.

IV.

Baylor and the *IGT* majority ignore well-established precedent concerning waiver of employee rights. The Board does not write on a clean slate regarding employee waiver of Section 7 rights via a severance agreement. There is a backdrop of nearly a century of settled law that employees may not broadly waive their rights under the NLRA.[19] Agreements between employers and employees that restrict employees from engaging in activity protected by the Act,[20] or from filing unfair labor practice

[16] The dissent maintains that objectively coercive circumstances other than unlawful discharges or other discriminatory unfair labor practices are sufficient to find unlawful the proffer of a severance agreement under *Baylor* and *IGT*. However, neither *Baylor* nor *IGT* identifies such other circumstances. Nor does the dissent. In any event, this is beside the point. The key point is that the absence of additional objectively coercive misconduct by the employer external to the severance agreements does not ameliorate the reasonable tendency of an unlawful provision in a severance agreement to coerce employees in their exercise of their Sec. 7 rights.

[17] See *IGT*, slip op. at 2 (finding the proffer of the agreement lawful because "this case does not involve 8(a)(3) allegations or evidence of other unlawful discrimination"). Animus against Sec. 7 activity is a long-established required component to find unlawful discrimination under Sec. 8(a)(3) of the Act. See, e.g., *Constellium Rolled Products Ravenswood, LLC,* 371 NLRB No. 16, slip op. 2-3 (2021), enfd. 45 F.4th 234 (D.C. Cir. 2022).

[18] The dissent's assertion that *Baylor* does not suggest that an employer must exhibit animus in order for the Board to find the proffer of a severance agreement unlawful cannot be squared with *Baylor's* consideration and focus on animus and related discrimination.

[19] *National Licorice Co. v. NLRB*, 309 U.S. 350, 360-361 (1940).

[20] See *M & M Affordable Plumbing, Inc.,* 362 NLRB 1303, 1308 (2015) ("Since the enactment of the Norris-LaGuardia Act (29 U.S.C. §101 et seq.) in 1932, all variations of the yellow dog contract have

charges with the Board, assisting other employees in doing so, or assisting the Board's investigative process,[21] have been consistently deemed unlawful. The "future rights of employees as well as the rights of the public may not be traded away" in a manner which requires "forebearance from future charges and concerted activities."[22] This broad proscription underscores that the Board acts in a public capacity to protect public rights to give effect to the declared public policy of the Act. See *National Licorice Co. v. NLRB*, supra, 309 U.S. at 362-364.[23]

The broad scope and the wide protection afforded employees by Section 7 of the Act bear repeating. "It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008). Section 7 rights are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employer,[24] and the Board has repeatedly affirmed that such rights extend to former employees.[25] It is further long-established that Section 7 protections extend to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). These channels include administrative, judicial, legislative, and political forums,[26] newspapers,[27] the media,[28] social media,[29] and communications to the public that are part of and related to an ongoing labor dispute.[30] Accordingly, Section 7 affords protection for employees who engage in communications with a wide range of third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection. See *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 477 (1953).[31]

The Board is tasked with safeguarding the integrity of its processes for employees exercising their Section 7 rights.[32] "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). "This complete freedom is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972), quoting *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (1951). "It is also consistent with the fact that the Board does not initiate its own proceedings; implementation is dependent 'upon the initiative of individual persons.'" *NLRB v. Scrivener*, 405 U.S at 122, quoting *Nash v. Florida Industrial Comm'n*, supra, 389 U.S. at 238. The Board's "'ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully to obtain relevant information and supporting statements from individuals[,]'" and "such investigations often rely heavily on the voluntary assistance of individuals in providing information." *Metro Networks*, supra, 336 NLRB at 67, quoting *Certain-Teed Products*, 147 NLRB 1517, 1519–1520 (1964) and citing *NLRB v. Scrivener*, supra, 405 U.S at 122.

It is through the lens of this broad grant of rights and the Board's duty to protect them that the Board scrutiniz-

been deemed invalid and unenforceable, including '[a]ny promise by a statutory employee to refrain from union activity.' *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992).").

[21] See, e.g., *Shamrock Foods Co*., supra, 366 NLRB No. 117, slip op. at 2–3 & fn. 12; *Ishikawa Gasket America*, 337 NLRB 175, 175–176 (2001), affd. 354 F.3d 534 (6th Cir. –2004); *Clark Distribution Systems*, supra, 336 NLRB at 748749; *Metro Networks*, supra, 336 NLRB at 64-67; *Mandel Security Bureau*, 202 NLRB 117, 119 (1973).

[22] *Mandel Security Bureau*, supra, at 119.

[23] See *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (the Board's power to prevent unfair labor practices "is to be performed in the public interest and not in vindication of private rights").

[24] The Act confers Sec. 7 rights on statutory employees. Sec. 2(3) of the Act provides in relevant part that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer."

[25] See *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977); *Briggs Manufacturing Co.*, 75 NLRB 569, 570 (1947). See, e.g., *Cedars-Sinai Medical Center*, 368 NLRB No. 83, slip op. at 8 fn. 7 (2019).

[26] See *Eastex, Inc. v. NLRB*, supra, 437 U.S. at 565 ("Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context.").

[27] See *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995).

[28] See *Tesla, Inc.*, 370 NLRB No. 101, slip op. at 4 (2021).

[29] See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 308-309 (2014), affd. 629 Fed.Appx. 33 (2d Cir. 2015).

[30] See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub nom. *Nevada Service Employees, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009); *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 230–231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980).

[31] The definition of "labor dispute" under Sec. 2(9) of the Act, is itself broad, and includes "*any* controversy concerning terms, tenure, or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee." (Emphasis supplied.)

[32] *Metro Networks*, supra, 336 NLRB at 66. See *Filmation Associates*, 227 NLRB 1721, 1721 (1977) ("[T]he duty to preserve the Board's processes from abuse is a function of th[e] Board and may not be delegated to the parties").

es a severance agreement containing provisions alleged to violate Section 8(a)(1) of the Act. Inherent in any proffered severance agreement requiring workers not to engage in protected concerted activity is the coercive potential of the overly broad surrender of NLRA rights if they wish to receive the benefits of the agreement.[33] Accordingly, we return to the approach followed by Board precedent before *Baylor*, and hold that an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights.[34] Such an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances.

Certainly such surrounding circumstances may enhance the reasonable tendency of the severance agreement to coerce employees, but that tendency does not depend on them.[35] Where an agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates the Act, because it has a reasonable tendency to interfere with or restrain the prospective exercise of Section 7 rights, both by the separating employee and those who remain employed.[36] Whether the employee accepts the agreement is immaterial. As the Board explained in *Metro Networks*, the employer's "proffer of the severance agreement . . . constitutes an attempt to deter [the employee] from assisting the Board" and the employee's "conduct in *not* signing the agreement [did] not render the [employer's] conduct lawful." 336 NLRB at 67 fn. 20 (emphasis in original).[37] If the law were to the contrary, it would create an incentive for employers to proffer severance agreements with unlawful provisions to employees. Only if the employee signed the agreement, subjected herself to its unlawful requirements, and then came to the Board would the Board be able to address the situation, belatedly. No policy of the Act is served by creating this obstacle to the effective protection of Section 7 rights. In fact, under established standards, no showing of actual coercion is required to prove a violation of Section 8(a)(1) of the Act. Rather, it is the high potential that coercive terms in separation agreements may chill the exercise of Section 7 rights that dictates the Board's traditional approach of viewing severance agreements requiring the forfeiture of Section 7 rights—whether accepted or merely proffered—as unlawful unless narrowly tailored.[38]

V.

Examining the language of the severance agreement here, we conclude that the nondisparagement and confidentiality provisions interfere with, restrain, or coerce employees' exercise of Section 7 rights. Because the agreement conditioned the receipt of severance benefits on the employees' acceptance of those unlawful provisions, we find that the Respondent's proffer of the

[33] This is what happened in *Clark Distribution*. An employee signed a severance agreement, found unlawful by the Board, in which he promised not to "assist in the prosecution of any claims . . . against the company." When the employee was contacted by a Board agent in the course of an unfair labor practice investigation, he subsequently refused to assist a Board agent's investigation, expressing fear that he would lose his severance pay under the agreement and be sued by the employer. 336 NLRB at 748.

[34] See, e.g., *Shamrock Foods Co*., supra, 366 NLRB No. 117; *Clark Distribution Systems*, supra, 336 NLRB 747; *Metro Networks*, supra, 336 NLRB 63; *Phillips Pipe Line Co*., supra, 302 NLRB 732.

The Board applies *Independent Stave*, 287 NLRB 740 (1987), when analyzing the validity of a severance agreement presented as a defense to Board liability. See *A.S.V., Inc.*, 366 NLRB No. 162 (2018); *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007); *Webco Industries*, 334 NLRB 608 (2001), enfd. 90 Fed.Appx. 276 (10th Cir. 2003); *Hughes Christenson Co.*, 317 NLRB 633 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996). However, where, as here, specific provisions of the proffered severance agreement are alleged to be unlawful, the Board analyzes the provisions under the traditional Sec. 8(a)(1) objective test, entirely apart from *Independent Stave*. See *A.S.V., Inc.*, supra, slip op. at 3 ("Separate from the application of *Independent Stave*, the judge also properly found . . . that several of the requirements imposed by the severance agreement would reasonably tend to chill statutorily protected activity, and that the agreements were unenforceable on that independent ground."). Under either analytical approach, the Board will not endorse an agreement containing unlawful provisions that are at odds with the Act or the Board's policies. See *Metro Networks*, supra, 336 NLRB at 66 fn. 17.

[35] See fn. 11, supra.

[36] The Board must carefully scrutinize proffered separation agreements that require the waiver of statutory rights because of the high potential for coercion in these circumstances. When an agreement is proffered as the quid pro quo for receiving severance benefits, it is generally on a take-it-or-leave-it basis and occurs at a time when an employee is particularly vulnerable and unlikely to seek to vary the terms of the agreement.

[37] Similarly, in *Shamrock Foods*, supra, the respondent's presentation of a separation agreement to a discharged employee, which he was not required to sign and did not sign, violated Sec. 8(a)(1) of the Act because terms of the agreement "broadly required [the employee] to waive certain Sec[tion] 7 rights." 366 NLRB No. 117, slip op. at 2-3 & fn. 12. In *Clark Distribution*, supra, the Board adopted the judge's finding that the respondent had violated Sec. 8(a)(1) "by conditioning acceptance of [a] severance package on a requirement that employees not participate in the Board's investigative process." 336 NLRB at 748. As the judge's decision adopted by the Board explained, the General Counsel had "allege[d] that the terms of the severance agreement violated Section 8(a)(1)." Id. at 761. The judge agreed, explaining that the agreement was "an overbroad restriction of the [statutory] rights of employees." Id. at 762. It was the offer that was unlawful.

[38] We are not called on in this case to define today the meaning of a "narrowly tailored" forfeiture of Sec. 7 rights in a severance agreement, but we note that prior decisions have approved severance agreements where the releases waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement. See *Hughes Christensen Co.*, supra, 317 NLRB 633; and *First National Supermarkets*, supra, 302 NLRB 727.

agreement to employees violated Section 8(a)(1) of the Act.

The nondisparagement provision on its face substantially interferes with employees' Section 7 rights. Public statements by employees about the workplace are central to the exercise of employee rights under the Act.[39] Yet the broad provision at issue here prohibits the employee from making any "statements to [the] Employer's employees or to the general public which could disparage or harm the image of [the] Employer"—including, it would seem, any statement asserting that the Respondent had violated the Act (as by, for example, proffering a settlement agreement with unlawful provisions). This far-reaching proscription—which is not even limited to matters regarding past employment with the Respondent—provides no definition of disparagement that cabins that term to its well-established NLRA definition under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, supra, 346 U.S. at 477. Instead, the comprehensive ban would encompass employee conduct regarding any labor issue, dispute, or term and condition of employment of the Respondent. As we explained above, however, employee critique of employer policy pursuant to the clear right under the Act to publicize labor disputes is subject only to the requirement that employees' communications not be so "disloyal, reckless or maliciously untrue as to lose the Act's protection." *Emarco, Inc*., 284 NLRB 832, 833 (1987).[40]

Further, the ban expansively applies to statements not only toward the Respondent but also to "its parents and affiliated entities and their officers, directors, employees, agents and representatives." The provision further has no temporal limitation but applies "[a]t all times hereafter." The end result is a sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights by the subject employee. This chilling tendency extends to efforts to assist fellow employees, which would include future cooperation with the Board's investigation and litigation of unfair labor practices with regard to any matter arising under the NLRA at any time in the future, for fear of violating the severance agreement's general proscription against disparagement and incurring its very significant sanctions. The same chilling tendency would extend to efforts by furloughed employees to raise or assist complaints about the Respondent with their former coworkers, the Union, the Board, any other government agency, the media, or almost anyone else.[41] In sum, it places a broad restriction on employee protected Section 7 conduct.[42] We accordingly find that the proffer of the nondisparagement provision violates Section 8(a)(1) of the Act.[43]

Our scrutiny of the confidentiality provision of the severance agreement leads to the same conclusion. The provision broadly prohibits the subject employee from disclosing the terms of the agreement "to *any* third person." (Emphasis supplied.)[44] The employee is thus precluded from disclosing even the existence of an unlawful provision contained in the agreement. This proscription would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the Respondent's use of the severance agreement, including the nondisparagement provision. Such a broad surrender of Section 7 rights contravenes established public policy that all persons with knowledge of unfair labor practices should be free from coercion in cooperating with the Board.[45] The confidentiality provision has an impermissible chilling tendency on the Section 7 rights of all employees because it bars the subject employee from providing information to the Board concerning the Respondent's unlawful interference with other employees' statutory rights. See *Metro Networks*, supra, 336 NLRB at 67.

[39] See *Valley Hospital Medical Center*, supra, 351 NLRB at 1252.

[40] See *Valley Hospital Medical Center*, 351 NLRB at 1252 ("To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive" or be "maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity") (internal citation omitted).

[41] We observe that the nondisparagement provision left unexamined by the Board in *IGT* is substantially identical to the instant provision in its extreme circumscription of employee Sec. 7 rights:

You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT. [See 370 NLRB No. 50, slip op. at 7.]

[42] *See Shamrock Foods Co*., supra, 366 NLRB No. 117, slip op. at 2-3 & fn.12, and slip op. at 29 (Board adopted judge's finding that agreement was unlawful because it broadly prohibited "mak[ing] any disparaging remarks or tak[ing] any action now, or at any time in the future, which could be detrimental" to the employer).

[43] Comparing our scrutiny of the nondisparagement provision here to the analysis performed in *IGT* brings into sharp relief the insufficiency of the *Baylor* test to protect employees' Sec. 7 rights. In *IGT*, the Board did not offer a flawed interpretation of the challenged nondisparagement provision of the agreement---instead, the Board's analysis did not evaluate the provision at all. In the absence of any evaluation of the provision for its coercive potential, the Board's conclusion in *IGT* that the employee's "free will to accept or decline" such a severance agreement is not "in any way restricted" simply begs the statutory question. See *IGT*, 370 NLRB No. 50, slip op. at 2 fn. 6.

[44] The only exceptions are disclosure to spouse, for obtaining legal counsel or tax advice, or if compelled to do so by a court or administrative agency.

[45] It effectively occasions the same deterrent effect as the explicit non-assistance provision found unlawful in *Clark Distribution*, supra, 336 NLRB at 748–749.

The confidentiality provision would also prohibit the subject employee from discussing the terms of the severance agreement with his former coworkers who could find themselves in a similar predicament facing the decision whether to accept a severance agreement. In this manner, the confidentiality provision impairs the rights of the subject employee's former coworkers to call upon him for support in comparable circumstances. Additionally encompassed by the confidentiality provision is discussion with the Union concerning the terms of the agreement, or such discussion with a union representing employees where the subject employee may gain subsequent employment, or alternatively seek to participate in organizing, or discussion with future co-workers.[46] A severance agreement is unlawful if it precludes an employee from assisting coworkers with workplace issues concerning their employer, and from communicating with others, including a union, and the Board, about his employment. Id. Conditioning the benefits under a severance agreement on the forfeiture of statutory rights plainly has a reasonable tendency to interfere with, restrain, or coerce the exercise of those rights. unless it is narrowly tailored to respect the range of those rights. Our review of the agreement here plainly shows that not to be the case.[47] We accordingly find that the proffer of the confidentiality provision violates Section 8(a)(1) of the Act.[48]

VI.

Our main disagreement with the dissent's adherence to *Baylor* and *IGT* is the refusal in those cases to analyze the terms of the severance agreements which are the very subject of the alleged unlawful proffer to recipient employees. The dissent instead focuses solely on other surrounding circumstances as the sole determinant of whether the severance agreement's proffer is unlawful.

The dissent asserts that *Baylor* and *IGT* are not contrary to long-standing Board precedent analyzing the legality of severance agreements. However, as we have explained above, Board precedent from *Phillips Pipe Line* in 1991, to *Clark Distribution Systems* and *Metro Networks* in 2001, through *Shamrock Foods* in 2018, all carefully scrutinized the language of the severance agreements to determine whether their proffer to employees was unlawful. Thus, contrary to our dissenting colleague's assertion otherwise, the case law clearly shows that *Baylor* and *IGT* are at odds with long-standing Board precedent.

Our dissenting colleague attempts to justify the departure from this long-standing precedent by contending that the outcome in those pre-*Baylor* pre-*IGT* cases turned on the presence of unlawful conduct in addition to the proffer of the severance agreement at issue. To the contrary, none of the cases we have cited link the analysis of—in the words of *Metro Networks*—the "plain language" of the severance agreement to the presence or absence of additional unlawful conduct or other circumstances, as we have explained above in full. Rather, the analysis of the lawfulness of the proffer of the severance agreement in these cases was entirely independent of the Board's consideration of other alleged unfair labor practices. See *Shamrock Foods Co*., 366 NLRB No. 117; *Clark Distribution Systems*, 336 NLRB 747; *Metro Networks*, 336 NLRB 63; *Phillips Pipe Line Co*., 302 NLRB 732. [49]

The dissent erroneously contends that the holdings of *Baylor* and *IGT* were limited to severance agreements with "facially neutral" provisions. However, that term appears nowhere in either *Baylor* or *IGT*. Neither of

[46] See *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (the guarantee of Sec. 7 "includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves").

[47] An employer can have no legitimate interest in maintaining a facially unlawful provision in a severance agreement, much less an interest that somehow outweighs the Sec. 7 rights of employees.

[48] We overrule *Shamrock Foods Co.* and *S. Freedman & Sons* to the extent they are inconsistent with our decision today. In *Shamrock Foods*, the Board found lawful a confidentiality provision that broadly prohibited disclosing "to anyone" the terms of the separation agreement in which the provision was contained, with extremely limited exceptions. See 366 NLRB No. 117, slip op. at 3 fn. 12. That provision, which is substantially similar to the challenged provision here, likewise bars the subject employee from providing information to the Board and communicating with or assisting other employees or a union about such matters. In *S. Freedman & Sons*, the Board found lawful a broadly worded confidentiality provision in a settlement agreement that prevented "any disclosure" of the agreement, and "arguabl[y] . . . affect[ed] [the employee's] right to assist other employees with future claims (in his capacity as a shop steward)." 364 NLRB 1203, 1204 (2016), enfd. 713 Fed. Appx. 152 (4th Cir. 2017). The provision at issue in *S. Freedman* likewise impaired the Sec. 7 rights of the subject employee to the same extent and in the same fashion as in the instant case and in *Shamrock Foods*. (Then-Member McFerran dissented in *Shamrock Food*s and *S. Freedman & Sons* and would have found the respective provisions unlawful.)

[49] Our dissenting colleague maintains that *Baylor* and *IGT* did not, in fact, overturn long-standing case precedent analyzing the language of the proffered severance agreement at issue. But it is clear that those cases did overrule prior precedent, as we have set forth above. Moreover, *Baylor* and *IGT* mischaracterized that prior precedent as suggesting that the presence of a non-assistance clause or similar prohibitions in a proffered severance agreement "invariably" was unlawful. *IGT*, slip op. at 2 fn. 9; *Baylor,* slip op. at 2 fn. 6. To the contrary, under the case-law, after careful analysis of the language of the provisions at issue, the proffer of the agreement might be found lawful (like in *Phillips Pipe Line*) or unlawful (like in *Clark Distribution Systems*). Therefore, the dissent errs in claiming that our position—which returns to that precedent—would find unlawful the proffer of any provision "that could possibly be interpreted as interfering with Section 7 rights."

those cases made any distinction among the types of provisions that might be the subject of an unlawful proffer. They did not, and, of course, could not, because they never examined the language of the provisions.

Our dissenting colleague further seeks to distance himself from the limitations *Baylor* and *IGT* placed on the types of unfair labor practices that would warrant finding a proffer unlawful. The *IGT* majority found that an unlawful refusal to bargain over a subcontracting decision—a violation of Section 8(a)(5)—and an unlawful threatening of employees with a loss of overtime—a violation of Section 8(a)(1)—were insufficient to find an unlawful proffer, holding "such violations do not support a finding that the Respondent has discriminated against employees for engaging in Sec[tion] 7 activity." *IGT*, slip op. at 2 fn. 7. That our dissenting colleague in the instant case is willing to find an unlawful proffer based on the Section 8(a)(5) direct dealing violation does not make our analysis of *IGT* and *Baylor* erroneous. As we explained above, *Baylor* and *IGT* would find a violation only where the proffer was made to an unlawfully discharged employee, or where the respondent has discriminated against employees—findings that require a showing of animus directed toward Section 7 activity.[50]

Finally, the dissent claims our analysis of the provisions of the severance agreement proffered to the employees in this case is erroneous because it is a work-rules analysis. We have not applied a work rules analysis here. We have applied long-standing precedent analyzing severance agreements.[51]

In sum, our decision today overrules *Baylor* and *IGT*, restores prior law embodied in cases like *Clark Distribution Systems* which examine the facial language of proffered severance agreement, and finds the proffer of the severance agreement unlawful in this case because the language itself restricts Section 7 rights, without regard to the commission of additional unfair labor practices or other external circumstances. That the dissent declines to pass on the lawfulness of the facial language here, finding it "not necessary to decide the case," entirely ignores that under *Baylor* and *IGT*, the Board will never have occasion to analyze the language of a proffered severance agreement. Contrary to the dissent, our holding today overruling that approach is not dicta, but a return to a principled analysis of the proffer of severance agreements to employees who reasonably may be concerned with their Section 7 rights.[52]

VII.

Baylor granted employers carte blanche to offer employees severance agreement that include unlawful provisions. That cannot be correct under the Act, a statute designed to protect employees in the exercise of their rights. For all the reasons explained above, the Board's approach in *Baylor* must be abandoned.

ORDER

The National Labor Relations Board orders that the Respondent, McLaren Macomb, Mount Clemens, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Furloughing bargaining unit employees in the following appropriate collective-bargaining unit without first notifying the Union and giving it an opportunity to bargain over the decision and its effects:

> **INCLUDED:** All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.

[50] See *Baylor*, slip op. at 2 and fn. 6; *IGT*, slip op. at 2. However, *Baylor* failed to define its reference to undefined "other circumstances" which might provide the basis for finding an unlawful proffer.

[51] While we agree with our dissenting colleague that terms in a severance agreement are not work rules, he misses the mark in asserting that severance agreements are "inherently less coercive" than facially neutral work rules. Overbroad work rules may coerce employees to forego Sec. 7 activity for fear of discipline or discharge. Severance agreements, on the other hand, may coerce the loss of Sec. 7 rights by requiring their forfeiture to obtain offered benefits, at a particularly vulnerable time when the employee is already facing job loss. The maintenance of an unlawful work rule and the proffer of a severance agreement containing unlawful provisions are both coercive, then, though for different reasons, and our analysis does not turn on a comparison between the two. As explained above, the coercion in an unlawful severance agreement is inherent in the agreement itself, which purports to condition benefits on the legal forfeiture of Sec. 7 rights. A broad voluntary waiver of statutory rights undermines the public purposes of the Act, which depend on the freedom of all employees to engage in Sec. 7 activity, to support each other in doing so, and to assist the Board in vindicating employee rights under the Act.

[52] We accordingly do not decide this case under *Baylor* and *IGT*. We do observe that our dissenting colleague finds that even under *Baylor* the severance agreement in this case would not survive legal scrutiny. With this we agree. The severance agreement was part and parcel of the Respondent's unlawful permanent furlough of the 11 employees, and was the product of its unlawful direct dealing with those employees soliciting them to sign the agreement, and entirely bypassing the Union.

EXCLUDED: All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

(b) Bypassing the Union as the exclusive collective-bargaining representative of the bargaining unit described above by directly dealing with employees regarding their terms and conditions of employment.

(c) Presenting the permanently furloughed employees with a severance agreement prohibiting them from making "statements to [the Respondent's] employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

(d) Presenting the permanently furloughed employees with a severance agreement prohibiting them from disclosing the terms of the severance agreement "to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(b) On request, bargain with the Union concerning its decision to permanently furlough unit employees and the effects of that decision.

(c) Rescind the permanent furloughs that were unilaterally implemented in June 2020.

(d) Within 14 days from the date of this Order, offer Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor and Mary Valentino whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of their unlawful furloughs in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Compensate Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) File with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed by

agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Roxanne Baker's, Shanon Chapp's, Susan DeBruyn's, Amy LaFore's, Mona Matthews', Brenda Reaves', Patrina Russo's, Tameshia Smith's, Charles Stepnitz's, Linda Taylor's, and Mary Valentino's corresponding W-2 forms reflecting the backpay award.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful permanent furlough of Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino, and within 3 days thereafter notify them in writing that this has been done and that the furloughs will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its facility in Mount Clemens, Michigan, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 10, 2020.[53]

(k) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. February 21, 2023

Lauren McFerran,	Chairman
Gwynne A. Wilcox,	Member
David M. Prouty,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

The Respondent, without giving the Union notice and an opportunity to bargain, permanently furloughed 11 employees while they were already on an unchallenged temporary furlough and, excluding the Union, directly dealt with them to enter into severance agreements. I agree with my colleagues that the Respondent's conduct in these regards violated Section 8(a)(5) and (1).[1] I also agree with my colleagues and the General Counsel that, in light of this unlawful conduct, the Respondent's offering the severance agreements containing the nondisparagement and confidentiality provisions was unlawful under *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020). Despite the fact that

[53] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In remedying the unlawful furloughs, unlike my colleagues, I would require the Respondent to compensate the affected employees for other pecuniary harms only insofar as the losses were directly caused by the furloughs, or indirectly caused by the furloughs where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with my partial dissent in *Thryv, Inc.*, 372 NLRB No. 22 (2022).

extent law is sufficient to resolve this matter, my colleagues take this opportunity, not raised by the General Counsel until her Brief in Support of Exceptions to the Board, to address circumstances not present in this case and overrule the sound law of *Baylor* and *IGT*. On this aspect of their decision, I dissent.

The Board Should Retain the Analysis Set Forth in *Baylor* and *IGT*

In *Baylor* and *IGT*, the Board addressed whether the mere proffer by an employer of severance agreements containing non-disparagement, non-assistance, and confidentiality provisions interfere with, restrain, or coerce employees in the exercise of their rights under the Act. The Board concluded that, absent outside circumstances that could render the proffers coercive, the mere action of *offering* these agreements to former employees does not constitute a violation of the Act. See *IGT*, 370 NLRB No. 50, slip op. at 2; *Baylor*, 369 NLRB No. 43, slip op. at 1–2.

The Board's analysis in these cases centered on several factors. First, the Board considered whether that the General Counsel was alleging that the severance agreement *itself* was unlawful.[2] *Baylor*, 369 NLRB No. 43, slip. op at 1. Next, the Board concluded that because severance agreements were not analogous to work rules, the analysis for interpreting facially neutral work rules under *Boeing*[3] was not applicable.[4] In so finding, the Board reasoned that employees' decision whether or not to accept severance benefits in these circumstances was entirely voluntary, absent evidence of separate unlawful conduct on the part of the Respondent that would render the proffers unlawful. *IGT*, 370 NLRB No. 50, slip op. at 2; *Baylor*, 369 NLRB slip. op at 2 & fn. 6 ("There is no reason to believe that the [r]espondent harbors animus against Sec. 7 activities," let alone that it would retaliate against employees who exercised those rights.) The Board also recognized that, in the absence of any prior instance in which the employer had attempted to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, there would be no reason for an employee to believe that the employer would invoke the agreement in response to the employee's exercise of her Section 7 rights. This is particularly so given the Board's recognition that employees do not "view every employer document through the prism of Section 7." *IGT*, 370 NLRB No. 50, slip op. at 2 fn. 8 (quoting *L.A. Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019) (citing *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017))). Finally, the Board reasoned that, unlike agreements pertaining to employees' former terms and conditions of employment, severance agreements do not, nor do they have the potential to, affect employees' pay or benefits or any other terms of employment that were in place before the employees were discharged. See *IGT*, 370 NLRB No. 50, slip op. at 2; *Baylor*, 369 NLRB No. 43, slip op. at 1–2. Consistent with my prior votes in *Baylor* and *IGT*, I find that this is the proper standard to apply in deciding whether an employer's *mere proffer* of voluntary severance agreements violates the Act.

My Colleagues' Justification for Overruling *Baylor* and *IGT* Is Based on an Incorrect, or Speculative, Interpretation of those Cases

My colleagues' decision that *Baylor* and *IGT* must be overruled is based on a few fundamental misunderstandings of the Board's holdings in in *Baylor* and *IGT*.

To begin, my colleagues repeatedly assert that *Baylor* and *IGT* must be reversed because they were in conflict with "long-standing precedent." However, none of the cases cited by my colleagues involved the circumstances at issue in *Baylor* and *IGT;* to the contrary, in the three cases they cite where the Board found that an employer violated the Act by proffering a severance agreement, the employer had engaged in unlawful conduct in addition to the proffering of the severance agreement at issue.[5] Accordingly, under *Baylor* and *IGT*, the proffering of those

[2] Unlike in *Baylor* and *IGT*, the General Counsel alleged that the terms of the severance agreement were unlawful here. What the General Counsel did not allege throughout litigation before the administrative law judge, however, is that the mere *proffer* of the severance agreement in the absence of any other coercive conduct violated the Act. Nor did the General Counsel have reason to make such an argument, as my colleagues and I agree that even under *Baylor* and *IGT*, the unlawful circumstance under which the Respondent proffered the agreements renders that action unlawful.

Again, because this case does not involve a scenario in which an employer is presenting a severance agreement in a context where it has never exhibited any proclivity to violate the Act, it was not necessary for my colleagues to reach to address such contexts in deciding this case, my colleagues' holding insofar as it would apply in such contexts is dicta.

[3] *Boeing Co.*, 365 NLRB No. 154 (2017).

[4] My colleagues correctly note that the holdings in *Baylor* and *IGT* were not expressly limited to "facially neutral" severance agreements—i.e., those containing provisions that did not expressly prohibit Sec. 7 activity but rather could be interpreted as unlawfully overbroad. Where my colleagues err, however, is asserting that *Baylor* unquestionably applies to facially unlawful provisions. The Board has not yet been faced with a case presenting those facts, nor need I address that scenario here where the severance agreement at issue is facially neutral.

[5] The other two cases cited by my colleagues as the "long-settled precedent" in this area are clearly distinguishable. See *Phillips Pipe Line Co.,* 302 NLRB 732, 732–733 (1991) (finding that the employer did not violate the Act by proffering a voluntary severance agreement that *did not restrict Sec. 7 rights*); *First National Supermarkets*, 302 NLRB 727, 731 (1991) (involving the settlement of a grievance over vacation pay allegedly *accrued during the employee's employment*).

severance agreements would still be unlawful. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 fn. 12 (2018) (finding maintenance of separation agreement unlawful because, among other reasons, the employee had been unlawfully discharged), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019) (per curium); *Metro Networks*, 336 NLRB 63, 66–67 (2001) (same); *Clark Distribution Systems*, 336 NLRB No. 117 (finding employer that committed additional violations of the Act unlawfully conditioned severance benefits on an agreement not to participate in Board processes). As a result, far from running counter to "long-settled precedent," *Baylor* and *IGT did not overturn* the decisions in those cases, but merely declined to continue to apply the overbroad holdings contained therein to cases involving a significantly different factual scenario.

Next, the majority erroneously asserts that the *Baylor* and *IGT* decisions require an unlawful discharge or other unfair labor practices for the proffer to be a violation. As explained above, however, the standard set forth in *Baylor* and *IGT* examines if there are circumstances external to a severance agreement that render its proffer *objectively* coercive. Unlawful discharges or other unfair labor practices occurring before the severance agreement certainly would be the most likely scenario for finding such an agreement unlawful under *Baylor*, but the standard is not limited in such a way. And nowhere is there any suggestion that an employer *must* exhibit animus against Section 7 activity for there to be a violation.[6] To the contrary, in the instant case, I am finding that the 8(a)(5) and (1) direct-dealing violation committed by the Respondent—a violation that does not require a finding of animus—is sufficient to create an atmosphere in which the Respondent's proffer of the settlement agreements was objectively coercive.

But regardless, the majority's position that an employer's intent is not relevant to determining whether a reasonable employee would be coerced under the Act misses the point. *Baylor* and *IGT* have nothing to do with an employer's intent. Rather, the entire issue is evaluating whether a reasonable employee would find that the *proffer* of the settlement agreement would interfere with, retrain, or coerce them in the exercise of their Section 7 rights. And, as the majority concedes, the presence of prior conduct suggesting a proclivity to violate the Act *would* affect the way in which employees would interpret the severance agreement.

Second, the majority writes from the puzzling assumption that because, in their view, the provisions in the severance agreements are themselves facially unlawful, *Baylor* and *IGT* were absurdly deciding whether the proffer of *unlawful provisions* was unlawful. This is not the case. Neither *Baylor* nor *IGT* analyzed the severance agreements at issue in those cases as if they were equivalent to work rules. My colleagues' analysis searching for coercion in the facial overbreadth of specific severance-agreement provisions is indistinguishable from a work-rules analysis. But, as the Board found in *Baylor* and *IGT*, facially neutral severance agreements are inherently less coercive than facially neutral work rules and warrant a different analysis looking at whether the circumstances of the proffer were coercive rather than analyzing the language itself.[7]

Finally, my colleagues repeatedly state that the holdings in *Baylor* and *IGT* established that "an employer is entirely free to proffer any provision, even a facially unlawful one" and "granted employers carte blanche to offer employees severance agreements that include unlawful provisions." With respect, although my colleagues may speculate about the breadth of the holding in those cases, the Board has never applied those cases to find facially unlawful severance agreement provisions lawful. In both *Baylor* and *IGT*, the severance agreements at issue were facially neutral. Indeed, in *IGT*, the Board expressly addressed this concern, noting that a work rule containing identical language to that contained in the severance agreement had been found lawful in another case. *IGT*, 370 NLRB No. 50, slip. op. at 2 fn.8 (citing Motor City Pawn Brokers Inc., 369 NLRB No. 132, slip op. at 5–7 (2020)). My colleagues' assertion that a future Board would apply *Baylor* and *IGT* to find that employers may lawfully proffer severance agreements that specifically and expressly require the waiver of Section 7 rights is pure speculation. And pure speculation does not provide a reasonable justification for overruling Board precedent.[8]

[6] The *Baylor* decision referenced animus in considering the surrounding circumstances of the severance agreements' proffer. The Board did not, as my colleagues assert, "focus on animus as a significant factor under the *Baylor* test." The Board's decision in *IGT*, that applied *Baylor*, did not even mention animus.

[7] To the extent my colleagues are taking the position that provisions of *voluntary* severance agreements cannot be considered facially neutral like *mandatory* work rules can be, their approach is nothing short of arbitrary. Mandatory work rules that can cause employees to lose their jobs cannot reasonably be regarded as less coercive than agreements that offer a benefit not arising from their former employment to employees who no longer work for the employer.

[8] My colleagues' reliance on this speculation is especially ironic given that, under their standard, an employer's proffer of any severance agreement containing any term that could *possibly* be interpreted as interfering with Sec. 7 rights would be per se unlawful, without regard for whether a reasonable employee would interpret the term at issue as coercive in the context of either the severance agreement as a whole or their former employer's history in response to activity protected by the Act.

The Majority's Justification for Finding a Violation in this Case Contains Additional Errors

Even assuming that the act of proffering a facially neutral, totally voluntary severance agreement should be analyzed by the same standards as the maintenance of facially neutral work rules, my colleagues arbitrarily fail to apply current Board law in analyzing the severance agreements at issue in this case.[9] The current standard for evaluating whether facially neutral work rules are unlawful is set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). Rather than apply these decisions, my colleagues' analysis appears to be implicitly based on the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which considers whether there is any potential interference with Section 7 rights rather than balancing a rule's tendency to interfere with Section 7 rights against the legitimate interests supporting the rule. Although my colleagues have signaled their intention to reverse *Boeing* and *LA Specialty* in the Notice and Invitation to File Briefs in *Stericycle, Inc.*, 371 NLRB No. 48 (2022), they must apply current Board law until such time as those cases are overruled. Under *Boeing* and *LA Specialty*, it is clear that the non-disparagement and confidentiality provisions in the severance agreements at issue would be lawful to maintain. See *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 2–3 (2021) (confidentiality rule lawful); *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132, slip op. at 5-7 (2020) (nondisparagement rule lawful).

Furthermore, throughout most of their decision, my colleagues analyze this case by determining whether the Respondent's proffer of the severance agreements was merely coercive. But, despite my colleagues' protestations to the contrary, the General Counsel litigated this case on a different theory—that the severance agreements constituted an unlawful *threat*. The allegations in the Amended Complaint state that the Respondent violated the Act because it "*threatened* its employees with loss of benefits described in permanent furlough agreements." (Emphasis added.) And, in her brief in support of exceptions, the General Counsel continued to assert that the Respondent violated the Act by threatening its employees with the loss of benefits set forth in the severance agreement.

But clearly there was no threat here. Former employees were presented with a facially neutral severance agreement and informed that it was entirely their choice whether or not to sign. There is no evidence that the Respondent indicated that any term and condition of employment would be affected based on any employee's decision whether or not to sign the agreement. Accordingly, the mere proffer of the agreement did not constitute a threat to take action against protected Section 7 activity; rather it indicated that, should an employee choose to sign the agreement, they would have to abide by the facially neutral terms of the agreement.[10]

CONCLUSION

Baylor and *IGT* were sound, pragmatic decisions fully consistent with the Act, and my colleagues have failed to establish sufficient grounds for overturning those decisions. Contrary to my colleagues' assertions, the holdings in *Baylor* and *IGT* did not conflict with "longstanding precedent." None of the cases cited by my colleagues found that an employer, never having suggested any proclivity to violate the Act, violated the Act by proffering a severance agreement that could possibly be interpreted as limiting Section 7 rights. Indeed, the instant case does not present those circumstances. Nevertheless, my colleagues have used this case to overrule extant law that was consistent with finding the violation in this case in order to change the law, in effect, for cases *not* involving the facts presented in this case. Not only does this new standard go beyond what is necessary to decide this case but, for the reasons I have discussed, my colleagues' finding of a threat violation under this new standard is neither correct under Board law nor consistent with the General Counsel's complaint and litigation of this matter. Accordingly, I must respectfully dissent from this aspect of my colleagues' decision.

Dated, Washington, D.C. February 21, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

[9] Because the question whether the Respondent's proffer of the severance agreement was unlawful based solely on the language of the settlement agreement is not necessary to decide the case, I decline to pass on that question.

[10] My colleagues, seeming to recognize that the Respondent's proffer of the severance agreement did not constitute an unlawful threat, "correct" the General Counsel's theory of the case and find the violation on a different basis. Although of course it is preferable not to make the General Counsel's case for her, the Board can be justified in taking such action when otherwise it would not be able to enforce a violation of the Act. Here, however, there is no such problem; the Board is already finding that the Respondent's proffer of the severance agreement was unlawful under *Baylor* and *IGT*. Under such circumstances, I do not believe that it is in the Board's best interest, as a neutral decisionmaker, to find the violation here under a different theory than that proffered by the General Counsel.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT furlough our bargaining unit employees in the following appropriate collective-bargaining unit without first notifying the Union and giving it an opportunity to bargain over the decision and its effects:

INCLUDED: All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.

EXCLUDED: All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT bypass the Union as the exclusive collective-bargaining representative of the bargaining unit described above by directly dealing with our employees regarding their terms and conditions of employment.

WE WILL NOT present our permanently furloughed employees with a severance agreement containing an unlawful nondisparagement provision prohibiting them from making "statements to [our] employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

WE WILL NOT present our permanently furloughed employees with a severance agreement containing an unlawful confidentiality provision prohibiting them from disclosing the terms of the severance agreement "to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the

Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described above.

WE WILL, on request of the Union, bargain with it concerning our decision to permanently furlough unit employees and the effects of that decision.

WE WILL rescind the permanent furloughs that were unilaterally implemented in June 2020.

WE WILL, within 14 days from the date of the Board's Order, offer Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino whole for any loss of earnings and other benefits resulting from their permanent furlough, less any net interim earnings, plus interest, and WE WILL make these employees whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful layoffs, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order, or such additional time as the Regional Director may allow for good cause shown, a copy of Roxanne Baker's, Shanon Chapp's, Susan DeBruyn's, Amy LaFore's, Mona Matthews', Brenda Reaves', Patrina Russo's, Tameshia Smith's, Charles Stepnitz's, Linda Taylor's, and Mary Valentino's corresponding W-2 forms reflecting the backpay awards

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful permanent furloughs of Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the permanent furloughs will not be used against them in any way.

MCLAREN MACOMB

The Board's decision can be found at www.nlrb.gov/case/07-CA-263041 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Larry Smith, Esq., for the General Counsel.
Dennis M. Devaney and *Brian D. Shekell, Esqs. (Clark Hill PLC),* for the Respondent.
Scott A. Brooks, Esq. (Gregory, Moore, Brooks & Clark, PC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard on June 21, 2021. The complaint alleged, inter alia, that McLaren Macomb (McLaren) violated: §8(a)(1) by having employees sign furlough agreements containing confidentiality and non-disclosure provisions; and §8(a)(5) by directly dealing with employees over their furloughs and failing to give Local 40, RN Staff Council, Office and Professional Employees International Union (the Union) notice or a chance to bargain over the furloughs. On the record, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

McLaren provides inpatient and outpatient medical care. Annually, it derives gross revenues exceeding $250,000, and purchases and receives at its Michigan hospital goods exceeding $5000 directly from outside of Michigan. It is, as a result, engaged in commerce under §2(2), (6), and (7) of the Act. The Union is a §2(5) labor organization.

II. UNFAIR LABOR PRACTICES

A. Unionization at McLaren

On August 28, 2019, these McLaren employees voted to un-

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

ionize (the Unit):

> **INCLUDED:** All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.
>
> **EXCLUDED:** All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

On December 9, 2019, the Board certified the Union as the Unit's exclusive collective-bargaining representative. The parties are presently negotiating a first contract for the Unit.

B. Furloughs

In June and July 2020, McLaren approached several Unit employees about their selection for permanent furloughs. The Union was neither notified nor included in these discussions. These Unit employees (the furloughed workers) consequently signed *Severance Agreement, Waiver and Release* agreements terminating their tenure (the severance agreements):

Employee	Date	Severance Amount	Exhibit
Roxanne Baker	July 24, 2020	$1,892.38	GC Exh. 2
Shanon Chapp	July 24, 2020	$6,941.45	GC Exh. 3
Susan DeBruyn	June 10, 2020	$2,263.52	GC Exh. 4
Amy LaFore	July 27, 2020	$2,005.51	GC Exh. 5
Mona Matthews	July 31, 2020	$2,284.85	GC Exh. 6
Brenda Reaves	June 10, 2020	$5,140.80	GC Exh. 7
Patrina Russo	July 21, 2020	$928.80	GC Exh. 8
Tameshia Smith	July 29, 2020	$3,783.48	GC Exh. 9
Charles Stepnitz	July 30, 2020	$2,043.55	GC Exh. 10
Linda Taylor	July 29, 2020	$288	GC Exh. 11
Mary Valentino	July 25, 2020	$1,676.23	GC Exh. 12

The severance agreements contained these confidentiality and non-disparagement clauses, which have been alleged to be unlawful:

> **6. <u>Confidentiality Agreement</u>.** The Employee acknowledges that the … Agreement … [is] confidential and agrees not to disclose … [it] to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> **7. <u>Non-Disclosure</u>.** … [T]he Employee … agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer ….

(GC Exhs. 2–12.)

Laura Gibbard, Regional Vice-President of Human Resources, credibly indicated that the COVID-19 pandemic began severely impacting McLaren's operations in March 2020, when the hospital terminated its outpatient services and began solely admitting trauma, emergency and COVID-19 patients. This

prompted McLaren to decide to permanently furlough its non-essential staff in June 2020, including the furloughed Unit employees at issue herein. She described a crisis scenario at that time, which required the hospital to simultaneously juggle a COVID-stricken staff, a PPE shortage, a shutdown of its non-essential services, a dramatic expansion of in-patient COVID services, and increased mortalities associated with COVID. McLaren applied its *Severance Pay and Benefits Related to Workforce Reduction* policy to the furlough (GC Exh. 15), and its *Reduction in Force* policy (R. Exh. 2).

Vice-President Gibbard contended that COVID-19 created exigent circumstances, which excused McLaren from discussing the furloughs with the Union. She added that, to date, the Union has never sought bargaining over the furloughs or raised it during contract negotiations.

III. ANALYSIS

A. 8(a)(1) Allegations

The confidentiality and non-disclosure provisions in McLaren's severance agreements were lawful. In *Baylor University Medical Center*, 369 NLRB No. 43 (2020), the Board held that the employer lawfully included confidentiality and non-disclosure provisions in separation agreements, where the agreements provided severance monies and benefits that the affected employees would not have otherwise received. In making this finding, the Board noted that the severance agreements were voluntary, the confidentiality and non-disclosure provisions only applied to postemployment activities, and an employee's decision to enter into a separation agreement had no impact on their receipt of previously accrued benefits. Id.; see also *International Game Technology*, 370 NLRB No. 50, slip op. at 2 (2020) (finding that a separation agreement containing a non-disparagement was valid, where the employee's entry was voluntary, previously vested benefits were unaffected and the "case does not involve 8(a)(3) allegations or evidence of other unlawful discrimination, nor is there evidence that the Respondent proffered the Agreement under circumstances that would reasonably tend to interfere with the separating employees' . . . Section 7 rights or those of their coworkers.").

The confidentiality and non-disclosure provisions in McLaren's severance agreements were lawful. The agreements were voluntary, only offered to separated workers, and did not impact their previously accrued benefits. This case also does not involve "[§]8(a)(3) allegations" or other circumstances interfering §7 rights as cited by *International Game Technology*.

B. 8(a)(5) Allegations

1. Permanent furloughs

McLaren violated §8(a)(5), when it unilaterally offered furlough agreements to Unit employees without giving the Union notice or an opportunity to bargain. It is well established that furloughs and layoffs are mandatory subjects of bargaining, which require notice and bargaining. See, e.g., *Thesis Painting, Inc*., 365 NLRB No. 142, slip op. at 1 (2017); *Eugene Iovine, Inc*., 353 NLRB 400 (2008), reaffirmed 356 NLRB 1056 (2011), affd. 371 Fed. Appx. 167 (2d Cir. 2010), vacated on other grounds 562 U.S. 956 (2010); *Tri-Tech Services, Inc*., 340 NLRB 894, 894 (2003).[2] Additionally, because the parties had not reached an impasse in their first contract bargaining, McLaren cannot defend its actions on this basis. It, thus, must show that its unilateral furloughs were somehow privileged. *Fresno Bee*, 339 NLRB 1214, 1214 (2003).

McLaren's actions were not privileged by the COVID-19 pandemic. It is well-settled that bargaining is excused only where "extraordinary" and "unforeseen" events "having a major economic effect" demand that a business "take immediate action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), quoting *Hankins Lumber Co*., 316 NLRB 837, 838 (1995); see also *Ardit Co.*, 364 NLRB 1836, 1840 (2016). For example, in *Ardit Co*., the Board found that unilateral layoffs were not justified even though the company "lost a major contract" after a stop-work order and "its bid for another contract was unsuccessful." 364 NLRB 1836, 1840. Moreover, the Board has found that adverse business circumstances such as "loss of significant accounts or contracts" and "operation at a competitive disadvantage" are insufficient to obviate a bargaining obligation, unless the evidence establishes "a dire financial emergency." *RBE Electronics of S.D.*, 320 NLRB at 81, citing *Farina Corp*., 310 NLRB 318, 321 (1993) (loss of a customer account); *Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994), enf'd. 136 F.3d 727 (11th Cir. 1998).

McLaren failed to establish that its actions were privileged. It failed to show that the unforeseen events associated with the COVID-19 pandemic had a "major economic effect," which required immediate action. Although it demonstrated that COVID-19 presented a horrendous crisis that required it to temporarily divert its health care resources and encounter several difficult and unexpected social and operational changes, it failed to show that this turbulence caused a "major economic effect" requiring the immediate layoff of a dozen Unit workers from a workforce of 2300 employees. McLaren failed to offer a single balance sheet or other financial statement, which supported its contention that economic necessity privileged an immediate furlough. In addition, it is hard to imagine that this very tiny, isolated Unit furlough would have provided a sizeable economic impact to a large hospital. Lastly, the fact that McLaren found time to bargain with the Union over the first collective-bargaining agreement and simultaneously handle other labor relations duties suggests that it could have found a narrow window to engage in pre-decision bargaining over these permanent furloughs. In sum, it failed to show that it was excused from bargaining over these furloughs.

2. Direct dealing

McLaren violated §8(a)(5), when it engaged in direct dealing with Unit employees in connection with the furloughs. An employer engages in direct dealing when: it communicates directly

[2] Even though McLaren's decision was dually based upon the COVID-19 pandemic and the economics of eliminating non-clinical personnel, the Board has held that even decisions that are partially motivated by economic reasons remain mandatory subjects of bargaining. See, e.g., *Pan-American Grain Co*., 351 NLRB 1412, 1413–1414 (2007) (layoffs due to both economic reasons and automation were a mandatory subject of bargaining).

with union-represented employees; its discussion was to establish or change wages, hours, and terms and conditions of employment or to undercut the union's role in bargaining; and the communication was made to the exclusion of the union. *El Paso Electric Co*., 355 NLRB 544, 545 (2010). In this case, McLaren communicated directly with the furloughed Unit workers over their separations (i.e., which were mandatory bargaining topics) to the exclusion of the Union; this constituted direct dealing.

CONCLUSIONS OF LAW

1. McLaren is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.
2. The Union is a §2(5) labor organization.
3. At all material times, the Union has been the designated bargaining representative of McLaren's employees in the following appropriate bargaining unit:

> **INCLUDED:** All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.
>
> **EXCLUDED:** All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

4. Between June and July 2020, McLaren violated §8(a)(5) by permanently furloughing Unit employees without first notifying the Union and giving it an opportunity to bargain about its furlough decision and its effects.
5. Between June and July 2020, McLaren violated §8(a)(5) by bypassing the Union and dealing directly with Unit employees by soliciting them to enter into furlough agreements.
6. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

REMEDY

Having found that McLaren committed unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that McLaren violated §8(a)(5) by permanently furloughing Unit employees without first notifying the Union and giving it an opportunity to bargain, it shall offer affected Unit employees full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of their unilateral furloughs. Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, McLaren shall compensate the furloughed workers for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In accordance with *King Soopers, Inc*., 364 NLRB 1153 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), McLaren shall compensate the furloughed workers for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. McLaren shall remove from its files all references to the unlawful furloughs and notify the affected workers in writing that this has been done and they will not be used against them in any way. It shall also post a notice under *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the

entire record, I issue the following recommended[3]

ORDER

McLaren Macomb, Mount Clemens, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Permanently furloughing bargaining unit employees in the following appropriate collective bargaining unit without first notifying the Union, as the exclusive collective-bargaining representative of these employees, and without affording the Union a chance to bargaining over this decision and its effects:

> **INCLUDED:** All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.
>
> **EXCLUDED:** All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

(b) Bypassing the Union as the exclusive collective bargaining representative of the Unit described above by dealing directly with employees by soliciting them to enter into individual furlough agreements.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

2. Take the following affirmative action necessary to effectuate the Act's policies.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of employees in the Unit described above, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of these employees.

(b) On request, bargain with the Union concerning its decision to furlough Unit employees and the effects of that decision.

(c) Rescind the Unit furloughs that were unilaterally implemented in June and July 2020.

(d) Offer full reinstatement to furloughed employees Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor and Mary Valentino to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(e) Make the furloughed employees whole for any loss of earnings and other benefits caused by their unlawful furloughs in the manner set forth in the remedy section of this decision.

(f) Remove from its files any reference to the unlawful furloughs and within 3 days thereafter, notify the furloughed employees in writing that this has been done and that the furloughs will not be used against them in any way.

(g) Compensate the furloughed employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(h) File a report with the Social Security Administration allocating backpay for the furloughed employees to the appropriate calendar quarters.

(i) Compensate the furloughed employees for the adverse tax consequences, if any, of receiving lump-sum back awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(j) Within 14 days after service by the Region, post at its Mount Clemens, Michigan facility copies of the attached notice

[3] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 10, 2020.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated Washington, D.C. August 31, 2021

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT furlough our Unit employees in the following appropriate bargaining unit without first giving Local 40, RN Staff Council, Office and Professional Employees International Union (the Union) an opportunity to bargain over our decision and its effects:

INCLUDED: All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.

EXCLUDED: All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT bypass the Union as the exclusive collective bargaining representative of the above-described Unit by soliciting employees to enter into furlough agreements.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of Unit employees, notify and, on request, bargain with the Union as their exclusive collective-bargaining representative.

WE WILL, on request, bargain with the Union concerning our decision to furlough Unit employees and the effects of that

[4] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

decision.

WE WILL rescind the furloughs of our Unit employees that were unilaterally implemented in June and July 2020.

WE WILL offer full reinstatement to furloughed employees Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make the furloughed employees whole for any loss of earnings and other benefits resulting from their furloughs, less any net interim earnings, plus interest, and WE WILL also make them whole for their reasonable search-for-work and interim employment expenses, plus interest, regardless of whether those expenses exceed their interim earnings.

WE WILL compensate the furloughed employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL remove from our files any reference to the unlawful furloughs and within 3 days thereafter, notify the furloughed employees in writing that this has been done and that their furloughs will not be used against them in any way.

WE WILL remove from our files any reference to these furloughs, and WE WILL, within 3 days thereafter, notify each of the furloughed employees in writing that this has been done and that the furloughs will not be used against them in any way.

MCLAREN MACOMB

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-263041 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 23-05 **March 22, 2023**

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

RE: Guidance in Response to Inquiries about the *McLaren Macomb* Decision

On February 21, 2023, the Board issued *McLaren Macomb*, 372 NLRB No. 58, returning to longstanding precedent holding that employers violate the National Labor Relations Act (NLRA or Act) when they offer employees severance agreements that require employees to broadly waive their rights under the Act. Specifically, the Board held that where a severance agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates Section 8(a)(1) of the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of those rights - both by the separating employee and those who remain employed. I am issuing this Memo to assist Regions in responding to inquiries from workers, employers, labor organizations, and the public about implications stemming from that case.

The severance agreement at issue in the case contained overly broad non-disparagement and confidentiality clauses that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights. Specifically, the non-disclosure provision contained a non-disparagement clause that advised the employees that they are prohibited from making statements that could disparage or harm the image of the employer, its parent and affiliates, and their officers, directors, employees, agents and representatives. And, the confidentiality clause advised employees that they are prohibited from disclosing the terms of the agreement to anyone, except for a spouse or professional advisor, unless compelled by law to do so. The severance agreement included monetary and injunctive sanctions for breach of these provisions.[1]

The Agency acts in a public capacity to protect public rights in order to effectuate the Congressionally-mandated public policy of the Act.[2] The underlying Board policy and purpose depends on employees' freedom to engage in Section 7 rights and to assist each other and access the Agency. And, the future rights of employees as well as the rights of the public may not be traded away in a manner which requires forbearance from future

[1] Notably, the employees' collective bargaining representative, OPEIU, was not provided with notice nor included in discussions about the permanent furloughs and related severance agreement, thus the employer was found to have violated Section 8(a)(5) of the Act.
[2] *National Licorice Co. v. NLRB*, 309 US 350, 362-64 (1940).

charges and concerted activities.[3] Thus, the Board determined, based on a plethora of nearly a century of settled law, that employees may not broadly waive their rights under the Act, and that agreements between employers and employees that restrict employees from engaging in activity protected by the Act or from filing unfair labor practice (ULP) charges with the Agency, helping other employees in doing so, or assisting during the Agency's investigatory process are unlawful.

In so finding, the Board overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT*, 370 NLRB No. 50 (2020), which were wrongly premised on the notion that a showing of animus and additional coercive or otherwise unlawful conduct by the employer independent of the plain, overly broad language of the severance agreement was required in order to find a violation related to the severance agreement. As the Board noted, while the presence of additional violations would enhance the coercive potential of the severance agreement, the absence of such conduct does not and cannot eliminate the potential chilling effect of an unlawful severance agreement.

With that context in mind, I offer responses to some inquiries below:

Are severance agreements now banned?

No. In fact, prior Board decisions approved severance agreements where the releases waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement.[4] Thus, lawful severance agreements may continue to be proffered, maintained, and enforced if they do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees. This includes the rights of employees to extend those efforts to channels outside the immediate employee-employer relationship, such as through accessing the Board, their union, judicial or administrative or legislative forums, the media or other third parties.

Why should the circumstances surrounding the proffer not necessarily matter?

Surrounding circumstances do not matter when objectively analyzing whether a provision is facially lawful or not. And, in fact, in footnote 47 of the decision, the Board specifically said that an employer can have no legitimate interest in maintaining a facially unlawful provision in a severance agreement, much less an interest that somehow outweighs the Section 7 rights of employees.

[3] *Mandel Security Bureau*, 202 NLRB 117, 119 (1993).
[4] *Hughes Christensen Co.*, 317 NLRB 633 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996) (severance agreement was found lawful after an examination of the facial language led to the determination that it did not unlawfully waive the employee's right of access to the Board); *First National Supermarkets*, 302 NLRB 727 (1991); *Philips Pipe Line Co.*, 302 NLRB 732 (1991).

What if an employee does not sign the severance agreement?

Whether or not the employee actually signed the severance agreement is irrelevant for purposes of finding a violation of the Act since the proffer itself inherently coerces employees by conditioning severance benefits on the waiver of statutory rights such as the right to engage in future protected concerted activities and the right to file or assist in the investigation and prosecution of charges with the Board. That the employee did not sign the agreement does not render the employer's conduct lawful.[5]

Are severance agreements issued to supervisors beyond the scope of this decision?

While supervisors are generally not protected by the Act, under *Parker-Robb Chevrolet*,[6] the Act does protect a supervisor who is retaliated against, such as being fired, because they are refusing to act on their employer's behalf in committing an unfair labor practice against employees, in other words, they are refusing to violate the NLRA per their employer's directives. So, not only would it be violative for an employer to retaliate against a supervisor who refuses to proffer an unlawfully overbroad severance agreement, but I believe that an employer who proffers a severance agreement to a supervisor in connection with *Parker-Robb Chevrolet*-related conduct, such as preventing the supervisor from participating in a Board proceeding, could also be unlawful.

Does the decision have retroactive effect, such that it may invalidate agreements entered into prior to February 21, 2023, or would a violation only be considered if an employer attempts to enforce a previously-entered into agreement?

Board cases are presumed to be applied retroactively and this decision has retroactive application. If the Board determined that there was manifest injustice requiring prospective application, it would have so advised. Further, I believe that, while an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation language under Section 10(b), maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the Section 10(b) period would not be time-barred. I would note that Regions have settled cases involving severance agreements which had unlawfully broad terms that chilled the exercise of Section 7 rights by requiring the employer to notify its former employees that the overbroad provisions in their severance agreements no longer applied.

Would the entire severance agreement be null and void if there is just one overbroad provision?

While it is necessary to review the facts of each and every case in the first instance, Regions generally make decisions based solely on the unlawful provisions and would

[5] *Metro Networks*, 336 NLRB 63, 67, fn. 20 (2001); *Shamrock Foods*, 366 NLRB No. 117, slip op. at 2-3 & fn. 23 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019).
[6] 262 NLRB 402 (1982), enfd. sub. nom. *Automobile Salesmen Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

seek to have those voided out as opposed to the entire agreement, regardless of whether there is a severability clause or not. As mentioned previously, we have obtained settlement agreements doing just that. Relatedly, while it may not cure a technical violation of an unlawful proffer, employers should consider remedying such violations now by contacting employees subject to severance agreements with overly broad provisions and advising them that the provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions. That conduct could form the basis for consideration of a merit dismissal if a meritorious charge solely alleging an unlawful proffer is filed.

Why are former employees entitled to the same protections under the NLRA as current employees?

The Board in this case confirmed that former employees are entitled to the same protections under the Act based on the statutory language of Section 2(3), which states that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer." The Board reiterated that Section 7 rights are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employer.[7] In addition, former employees can play an important role in providing evidence to the NLRB and otherwise sharing information about the working conditions they experienced, in a way that constitutes both mutual aid and protection.

What is the role of the Board with respect to the rights of parties to make private contracts?

Per its Congressional mandate to address the inequality of bargaining power between employees, who do not possess full freedom of association or actual liberty of contract, and their employers, the Board must act in a public capacity to protect public rights to effectuate the public policy of the Act. Thus, the Board in this case correctly noted that the future rights of employees as well as the rights of the public may not be waived in a way that precludes future exercise of Section 7 rights, including engaging in protected concerted activities and accessing the Agency.

What if employees themselves request broad confidentiality and/or non-disparagement clauses?

In that unlikely scenario, I would reiterate that the Board protects public rights that cannot be waived in a manner that prevents future exercise of those rights regardless of who initially raised the issue.[8]

[7] *Cedars-Sinai Medical Center*, 368 NLRB No. 83, slip op. at 8 fn. 7 (2019); *Waco, Inc*., 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co*., 227 NLRB 1406 (1977); *Briggs Manufacturing Co*., 75 NLRB 569, 570 (1947).
[8] Based on the same reasoning, unions could not lawfully waive these rights on behalf of employees.

Is OM 07-27, which addresses acceptable terms in non-Board settlement agreements, still in full force and effect?

Yes. OM 07-27 is consistent with the *McLaren Macomb* decision. It provides guidance on, among other things, non-Board settlement agreements, which include: waivers of the right to file NLRB charges on future unfair labor practices and on future employment; waivers of the right to assist other employees in the investigation and trial of NLRB cases; narrowly-tailored confidentiality clauses[9] and clauses that prohibit an employee from engaging in non-defamatory talk about the employer; and unduly harsh penalties for breach of the agreement.

How does this decision affect other employer communications with employees, such as pre-employment or offer letters?

Based on extant Board law, overly broad provisions in any employer communication to employees that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights would be unlawful if not narrowly tailored to address a special circumstance justifying the impingement on workers' rights.

Are there ever confidentiality provisions in a severance agreement that could be found lawful?

Confidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful. See note 9, *supra*. However, confidentiality clauses that have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties are unlawful.

Are there ever non-disparagement provisions in a severance agreement that could be found lawful?

It is critical to remember that public statements by employees about the workplace are central to the exercise of employees' rights under the Act. In *McLaren Macomb*, the Board referenced *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953) and *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub. nom. *Nevada Service Employees, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009), when finding an overly broad non-disparagement ban that encompassed all disputes, terms and conditions, and issues, without a temporal limitation and with application to parents and affiliates and their officers, representatives, employees, directors and agents. Thus, a narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the

[9] *McLaren Macomb* allows for narrowly-tailored provisions, and I believe that approving a withdrawal request when a non-Board settlement has a confidentiality clause only with regard to non-disclosure of the financial terms comports with the Board's decision, would not typically interfere with the exercise of Section 7 rights, and promotes quick resolution of labor disputes.

definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity, may be found lawful.

Would a "savings clause" or disclaimer save overbroad provisions in a severance agreement?

While specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions. The employer may still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights. As noted in my *Stericycle* brief to the Board regarding employer rules, I asked it to formulate a model prophylactic statement of rights, which affirmatively and specifically sets out employee statutory rights and explains that no rule should be interpreted as restricting those rights, that employers may—at their option—include in handbooks in a predominant way to mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights and simplify compliance, which could also easily apply to severance agreements.[10] I noted that the description of statutory rights should focus on Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights), and likely to be chilled by overbroad rules, and provided suggested model language for inclusion to make it clear to employees that they had rights to engage in: (1) organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment; (2) forming, joining, or assisting a union, such as by sharing employee contact information; (3) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discussing wages and other working conditions with co-workers or a union; (5) taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (6) striking and picketing, depending on its purpose and means; (7) taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

Are there other provisions typically contained in severance-related agreements that you view as problematic?

Confidentiality, non-disclosure and non-disparagement provisions are certainly prevalent terms. However, I believe that some other provisions that are included in some severance agreements might interfere with employees' exercise of Section 7 rights, such as: non-

[10] This example does not mean that substantive work rules law must apply when determining whether certain provisions contained in severance agreements are lawful. See *Shamrock Foods Co.*, 366 NLRB No. 117 (2018), slip op. at 3, n.12.

compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.

As always, thank you for all you do for our Agency and the public we serve. I hope this memo provides useful guidance to you in addressing questions about the *McLaren Macomb* decision. Should you receive other inquiries about the decision that are not addressed in this memo, please contact the Division of Advice.

/s/
J.A.A.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 23-08 **May 30, 2023**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Non-Compete Agreements that Violate the National Labor Relations Act

In workplaces across America, many employers are requiring their employees to sign non-compete agreements to obtain or keep their jobs, or as part of severance agreements.[1] Generally speaking, non-compete agreements between employers and employees prohibit employees from accepting certain types of jobs and operating certain types of businesses after the end of their employment. As explained below, such agreements interfere with employees' exercise of rights under Section 7 of the National Labor Relations Act (the Act or NLRA). Except in limited circumstances, I believe the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the Act.

Section 7 protects employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[2] It is an unfair labor practice in violation of Section 8(a)(1) for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."[3] Under the standard I have urged the Board to adopt in *Stericycle, Inc.*,[4] a provision in an employment agreement violates Section 8(a)(1) if it reasonably tends to chill employees in the exercise of Section 7 rights unless it is narrowly

[1] *See* Evan P. Starr et al., *Noncompete Agreements in the US Labor Force,* 64 J. Law & Econ. 53, 60, 64 (2021) (estimating that approximately 18.1 percent of American workers—roughly 28 million individuals—are subject to a non-compete agreement, including approximately 13.3 percent of workers earning less than $40,000 per year). *See generally* U.S. Gov't Accountability Off., GAO-23-103785, Noncompete Agreements: Use Is Widespread to Protect Business' Stated Interests, Restricts Job Mobility, and May Affect Wages (2023).

[2] 29 U.S.C. § 157. Section 7 also generally protects employees' right to refrain from such activity. *See id.*

[3] *Id.* § 158(a)(1).

[4] *See* General Counsel's March 7, 2022 Brief to the Board, *Stericycle, Inc.*, Cases 04-CA-137660 et al.

tailored to address special circumstances justifying the infringement on employee rights.[5] The Board already applies a similar standard to provisions in severance agreements.[6] And, it is no defense that employees contractually agreed to any infringement on their Section 7 rights because employees cannot waive those rights in individual contracts.[7]

Non-compete provisions are overbroad, that is, they reasonably tend to chill employees in the exercise of Section 7 rights, when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work. Generally speaking, this denial of access to employment opportunities chills employees from engaging in Section 7 activity because: employees know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions;[8] employees' bargaining power is undermined in the context of lockouts, strikes, and other labor disputes;[9] and, an employer's former employees are unlikely to reunite at a local competitor's workplace, and, thus be unable to leverage their prior relationships—and the communication and solidarity engendered thereby—to encourage each other to exercise their rights to improve working conditions in their new workplace.

[5] *See Minteq International, Inc.*, 364 NLRB 721, 727 (2016), *enforced*, 855 F.3d 329 (D.C. Cir. 2017).

[6] *See McLaren Macomb*, 372 NLRB No. 58, slip op. at 4, 7 (2023) (a severance agreement "is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights" unless any relinquishment of those rights is "narrowly tailored"); Guidance in Response to Inquiries About the *McLaren Macomb* Decision, Memorandum GC 23-05 (Mar. 22, 2023). Although the general analysis in this memorandum is based on the standard I proposed in *Stericycle*, I believe that under the *McLaren Macomb* standard the same principles apply to non-compete provisions in severance agreements.

[7] *See McLaren Macomb*, 372 NLRB No. 58, slip op. at 5-6 ("The 'future rights of employees as well as the rights of the public may not be traded away' in a manner which requires 'forbearance from future . . . concerted activities.'" (quoting *Mandel Security Bureau*, 202 NLRB 117, 119 (1973))) (collecting cases).

[8] *See Minteq*, 364 NLRB at 727 (unilaterally adopted work rule stating that employees, who were covered by a collective-bargaining agreement that included protection from discipline and discharge without "just cause," were "employee[s]-at-will" had "a reasonable tendency to discourage employees from engaging in" protected activity "for fear that they could be discharged without the contractual 'just cause' protection").

[9] *See id.* at 723 n.11 (in determining that non-compete provisions are mandatory subjects of bargaining, "recogniz[ing] the serious impact on employees of [a non-compete provision] if, for example, employees . . . were locked out by the [employer] during a labor dispute," because the provision prohibits employees from replacing lost income by performing the type of work they had been performing for the employer).

In addition, non-compete provisions that could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting access to other employment opportunities chill employees from engaging in five specific types of activity protected under Section 7 of the Act.

First, they chill employees from concertedly threatening to resign to demand better working conditions.[10] Specifically, they discourage such threats because employees would view the threats as futile given their lack of access to other employment opportunities and because employees could reasonably fear retaliatory legal action for threatening to breach their agreements, even though such legal action would likely violate the Act.[11]

Second, they chill employees from carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions. Although extant Board law does not unequivocally recognize a Section 7 right of employees to concertedly resign from employment,[12] such a right follows logically from settled Board law, Section 7 principles, and the Act's purposes.[13] It is also consistent with the U.S. Constitution and other federal laws.[14] Accordingly, I will urge the Board to limit decisions inconsistent with that right to their facts or overrule them.

[10] *See, e.g.*, *Morgan Corp.*, 371 NLRB No. 142, slip op. at 3-4 (2022) (employee who complained to supervisor about coworker's raise and said that he and two other coworkers were threatening to quit because of it was engaged in protected concerted advocacy for higher wages).

[11] *See generally Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 3-7 (2018) (lawsuit targeting Section 7-protected consumer boycott violated Section 8(a)(1)).

[12] *See, e.g.*, *Crescent Wharf & Warehouse Co.*, 104 NLRB 860, 861-62 (1953) (voluntary resignation, by letter, of six employees dissatisfied with their employer's refusal to increase their wages was unprotected where there was "no basis for inferring that the letter was a device selected by the . . . employees to enforce demands upon [the employer]").

[13] *See, e.g.*, *QIC Corp.*, 212 NLRB 63, 68 (1974) (employees' seeking employment at competitor of their employer was protected where "[t]he employees were bound by no contract to remain with the [employer] and, as a result, were free at any time they wished to exercise economic self-help and seek better paying jobs").

[14] *See, e.g.*, *Pollock v. Williams*, 322 U.S. 4, 17-18 (1944) (explaining that the Thirteenth Amendment was meant to maintain a system of "completely free and voluntary labor" and that the "right to change employers" is the "defense against oppressive hours, pay, working conditions, or treatment"). *See generally* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3504 (proposed Jan. 19, 2023) ("FTC Proposed Non-Compete Rule") (non-compete clauses, which burden the ability to quit by forcing workers to either remain in their current job or take an action that would likely affect their livelihood, are exploitative and coercive at the time of the worker's potential departure from their job) and *https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers*; Antitrust Div. of the U.S. Dep't of Just., Comment on FTC Proposed Non-Compete Rule at 2-3 (Apr. 19, 2023), https://www.justice.gov/atr/page/file/1580551/download

Third, they chill employees from concertedly seeking or accepting employment with a local competitor to obtain better working conditions.[15] Such protected activity would also include a lone employee's acceptance of a job as a logical outgrowth of earlier protected concerted activity.[16]

Fourth, they chill employees from soliciting their co-workers to go work for a local competitor as part of a broader course of protected concerted activity.[17] They do so because employees cannot act on the solicitation without breaching the agreements and because potential solicitors could reasonably fear retaliatory legal action for soliciting co-workers to breach their agreements, even though such legal action would likely violate the Act.[18]

Finally, they chill employees from seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace.[19] In this regard, they effectively limit employees from the kind of mobility required to be able to engage in some particular forms of this activity, such as union organizing, which may involve obtaining work with multiple employers in a specific trade and geographic region.

Thus, in my view, the proffer, maintenance, and enforcement of a non-compete provision that reasonably tends to chill employees from engaging in Section 7 activity as described above violate Section 8(a)(1) unless the provision is narrowly tailored to special circumstances justifying the infringement on employee rights. In this regard, a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense.[20] Additionally, in my opinion, business interests

("Antitrust Div. Comment") (explaining that since at least 1414, the law has looked with skepticism on restraints on workers' future employment).

[15] *See, e.g.*, *Laurus Technical Institute*, 360 NLRB 1155, 1164-66 (2014) (employee's inquiry with competitor about job opportunities on behalf of coworkers was protected concerted activity and not unprotected "disloyalty").

[16] *Cf. Liberty Mutual Insurance Co.*, 235 NLRB 1387, 1387-88 (1978) (where employer unlawfully discharged employee in violation of Section 8(a)(3) and (1), employee thereafter formed competing enterprise in apparent violation of non-compete agreement, and employer sued to enforce the agreement, Board ordered the employer to reimburse employee's legal defense costs), *enforcement denied on other grounds*, 592 F.2d 595 (1st Cir. 1979).

[17] *See, e.g.*, *M.J. Mechanical Services*, 325 NLRB 1098, 1098, 1106 (1998) (union organizers were protected in telling their coworkers about the benefits of belonging to a union and referring them to the union hall, even where it caused one employee to join the union, which then assigned the employee to work for a union contractor), *enforced mem.*, 194 F.3d 174 (D.C. Cir. 1999).

[18] *See generally Ashford TRS Nickel*, 366 NLRB No. 6, slip op. at 3-7.

[19] *See, e.g.*, *M. J. Mechanical Services*, 324 NLRB 812, 812-14 (1997), *enforced mem.*, 172 F.3d 920 (D.C. Cir. 1998).

[20] *See* Restatement (Second) of Contracts § 188 cmt. b (1981) (post-employment restraint on competition "must usually be justified on the ground that the employer has a legitimate interest in

in retaining employees or protecting special investments in training employees are unlikely to ever justify an overbroad non-compete provision because U.S. law generally protects employee mobility,[21] and employers may protect training investments by less restrictive means, for example, by offering a longevity bonus. I note that employers' legitimate business interest in protecting proprietary or trade secret information can be addressed by narrowly tailored workplace agreements that protect those interests.

It is unlikely an employer's justification would be considered reasonable in common situations where overbroad non-compete provisions are imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectible interests, or in states where non-compete provisions are unenforceable. For example, in a recent case I authorized issuance of a complaint alleging unlawful maintenance of an overbroad non-compete provision, to which the employer had subjected low-wage employees, where there was no evidence of a legitimate business interest justifying the provision. The provision prohibited the employees from, until two years after the end of their employment with the employer, "enter[ing] the employment of any . . . business directly engaged" in the business of the employer in the entire state.

Notwithstanding the above, not all non-compete agreements necessarily violate the NLRA.[22] Some non-compete agreements may not violate the Act because employees could not reasonably construe the agreements to prohibit their acceptance of employment relationships subject to the Act's protection,[23] for example, provisions that clearly restrict only individuals' managerial or ownership interests in a competing business, or true

restraining the employee from appropriating valuable trade information and customer relationships to which he has had access in the course of his employment"); *see also, e.g.*, *Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471, 473 (Tenn. 1984) (to enforce non-compete agreement, employer must show "special facts present over and above ordinary competition" that would otherwise give former employee "an unfair advantage in future competition with the employer").

[21] *See supra* note 14.

[22] Non-compete agreements that do not violate the Act may violate other federal laws. *See, e.g.*, *U.S. v. Am. Tobacco Co.*, 221 U.S. 106, 181-83 (1911) (tobacco companies' collective practices, including "constantly recurring" use of non-compete provisions, violated the Sherman Act); FTC Proposed Non-Compete Rule, 88 Fed. Reg. at 3482 (proposing rule that would make non-compete agreements an unlawful "unfair method of competition") and *https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers*; Antitrust Div. Comment, *supra* note 14, at 3 (citing challenges the Division has brought to anticompetitive employment practices such as the use of non-compete clauses).

[23] *See Harrah's Lake Tahoe Resort*, 307 NLRB 182, 182 (1992) (employee's advocacy for proposal that employee stock option plan buy 50 percent of stock of employer's parent corporation was unprotected where proposal would not have advanced employees' interests as employees but rather their interests as "entrepreneurs, owners, and managers").

independent-contractor relationships.[24] Moreover, there may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances.

In conclusion, Regions should submit to Advice cases involving non-compete provisions that are arguably unlawful under the analysis summarized herein, as well as arguably meritorious special circumstances defenses. In appropriate circumstances, Regions should seek make-whole relief for employees who, because of their employer's unlawful maintenance of an overbroad non-compete provision, can demonstrate that they lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision. In this regard, Regions should seek evidence of the impact of overbroad non-compete agreements on employees and, where applicable, present at trial evidence of any adverse consequences, including specific employment opportunities employees lost because of the agreements.[25]

Please direct any questions about this memorandum to Advice.

/s/
J.A.A.

[24] A non-compete provision prohibiting independent-contractor relationships may, however, violate Section 8(a)(1) in the context of industries where employees are commonly misclassified as independent contractors. Regions should submit to the Division of Advice ("Advice") any cases where a non-compete agreement would chill Section 7 activity by effectively prohibiting employment relationships even though nominally prohibiting only independent-contractor relationships.

[25] As you know, I am committed to an interagency approach to restrictions on the exercise of employee rights, including limits to workers' job mobility. Last year, the NLRB entered into memoranda of understanding with the Federal Trade Commission and the Department of Justice's Antitrust Division, both of which have addressed the anticompetitive effects of non-compete agreements. Regions should alert the Division of Operations-Management about cases involving non-compete agreements that could potentially violate laws enforced by the FTC and the Antitrust Division for possible referral to those agencies.

South Carolina Bar

Continuing Legal Education Division

New Legislation and Its Impact on the Workforce: Overview of the PUMP Act and the Pregnant Workers Fairness Act

New Legislation and Its Impact on the Workforce: Overview of the PUMP Act and the Pregnant Workers Fairness Act

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Employers Take Note: Pregnant Workers Fairness Act Takes Effect This Summer

April 18, 2023 – By: L. Diane Tindall

https://www.wyrick.com/news-insights/employers-take-note-pregnant-workers-fairness-act-takes-effect-this-summer

Department of Labor Fact Sheet #73: FLSA Protections

January 2023

https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers

The Pregnant Workers Fairness Act

https://www.eeoc.gov/statutes/pregnant-workers-fairness-act

What You Should Know About the Pregnant Workers Fairness Act from the EEOC

https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act

(3) prioritize the collection of plankton samples and data that inform the conservation of North Atlantic right whales; and

(4) to the extent practicable, coordinate with the Government of Canada to develop a transboundary understanding of plankton abundance and distribution.

(c) AUTHORIZATION OF APPROPRIATIONS.—To carry out this section there is authorized to be appropriated to the Secretary of Commerce $300,000 for each of fiscal years 2023 through 2032, which shall be derived from existing funds otherwise appropriated to the Secretary.

DIVISION KK—PUMP FOR NURSING MOTHERS ACT

SEC. 101. SHORT TITLE.

This division may be cited as the "Providing Urgent Maternal Protections for Nursing Mothers Act" or the "PUMP for Nursing Mothers Act".

SEC. 102. BREASTFEEDING ACCOMMODATIONS IN THE WORKPLACE.

(a) EXPANDING EMPLOYEE ACCESS TO BREAK TIME AND SPACE.—The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) is amended—

(1) in section 7 (29 U.S.C. 207), by striking subsection (r); and

(2) by inserting after section 18C (29 U.S.C. 218c) the following:

"SEC. 18D. BREASTFEEDING ACCOMMODATIONS IN THE WORKPLACE.

"(a) IN GENERAL.—An employer shall provide—

"(1) a reasonable break time for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

"(2) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

"(b) COMPENSATION.—

"(1) IN GENERAL.—Subject to paragraph (2), an employer shall not be required to compensate an employee receiving reasonable break time under subsection (a)(1) for any time spent during the workday for such purpose unless otherwise required by Federal or State law or municipal ordinance.

"(2) RELIEF FROM DUTIES.—Break time provided under subsection (a)(1) shall be considered hours worked if the employee is not completely relieved from duty during the entirety of such break.

"(c) EXEMPTION FOR SMALL EMPLOYERS.—An employer that employs less than 50 employees shall not be subject to the requirements of this section, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

"(d) EXEMPTION FOR CREWMEMBERS OF AIR CARRIERS.—

"(1) IN GENERAL.—An employer that is an air carrier shall not be subject to the requirements of this section with respect to an employee of such air carrier who is a crewmember

"(2) DEFINITIONS.—In this subsection:

"(A) AIR CARRIER.—The term 'air carrier' has the meaning given such term in section 40102 of title 49, United States Code.

"(B) CREWMEMBER.—The term 'crewmember' has the meaning given such term in section 1.1 of title 14, Code of Federal Regulations (or successor regulations).

"(e) APPLICABILITY TO RAIL CARRIERS.—

"(1) IN GENERAL.—Except as provided in paragraph (2), an employer that is a rail carrier shall be subject to the requirements of this section.

"(2) CERTAIN EMPLOYEES.—An employer that is a rail carrier shall be subject to the requirements of this section with respect to an employee of such rail carrier who is a member of a train crew involved in the movement of a locomotive or rolling stock or who is an employee who maintains the right of way, provided that compliance with the requirements of this section does not—

"(A) require the employer to incur significant expense, such as through the addition of such a member of a train crew in response to providing a break described in subsection (a)(1) to another such member of a train crew, removal or retrofitting of seats, or the modification or retrofitting of a locomotive or rolling stock; or

"(B) result in unsafe conditions for an individual who is an employee who maintains the right of way.

"(3) SIGNIFICANT EXPENSE.—For purposes of paragraph (2)(A), it shall not be considered a significant expense to modify or retrofit a locomotive or rolling stock by installing a curtain or other screening protection.

"(4) DEFINITIONS.—In this subsection:

"(A) EMPLOYEE WHO MAINTAINS THE RIGHT OF WAY.—The term 'employee who maintains the right of way' means an employee who is a safety-related railroad employee described in section 20102(4)(C) of title 49, United States Code.

"(B) RAIL CARRIER.—The term 'rail carrier' means an employer described in section 13(b)(2).

"(C) TRAIN CREW.—The term 'train crew' has the meaning given such term as used in chapter II of subtitle B of title 49, Code of Federal Regulations (or successor regulations).

"(f) APPLICABILITY TO MOTORCOACH SERVICES OPERATORS.—

"(1) IN GENERAL.—Except as provided in paragraph (2), an employer that is a motorcoach services operator shall be subject to the requirements of this section.

"(2) EMPLOYEES WHO ARE INVOLVED IN THE MOVEMENT OF A MOTORCOACH.—An employer that is a motorcoach services operator shall be subject to the requirements of this section with respect to an employee of such motorcoach services operator who is involved in the movement of a motorcoach provided that compliance with the requirements of this section does not—

"(A) require the employer to incur significant expense, such as through the removal or retrofitting of seats, the modification or retrofitting of a motorcoach, or unscheduled stops; or

"(B) result in unsafe conditions for an employee of a motorcoach services operator or a passenger of a motorcoach.

"(3) SIGNIFICANT EXPENSE.—For purposes of paragraph (2)(A), it shall not be considered a significant expense—

"(A) to modify or retrofit a motorcoach by installing a curtain or other screening protection if an employee requests such a curtain or other screening protection; or

"(B) for an employee to use scheduled stop time to express breast milk.

"(4) DEFINITIONS.—In this subsection:

"(A) MOTORCOACH; MOTORCOACH SERVICES.—The terms 'motorcoach' and 'motorcoach services' have the meanings given the terms in section 32702 of the Motorcoach Enhanced Safety Act of 2012 (49 U.S.C. 31136 note).

"(B) MOTORCOACH SERVICES OPERATOR.—The term 'motorcoach services operator' means an entity that offers motorcoach services.

"(g) NOTIFICATION PRIOR TO COMMENCEMENT OF ACTION.—

"(1) IN GENERAL.—Except as provided in paragraph (2), before commencing an action under section 16(b) for a violation of subsection (a)(2), an employee shall—

"(A) notify the employer of such employee of the failure to provide the place described in such subsection; and

"(B) provide the employer with 10 days after such notification to come into compliance with such subsection with respect to the employee.

"(2) EXCEPTIONS.—Paragraph (1) shall not apply in a case in which—

"(A) the employee has been discharged because the employee—

"(i) has made a request for the break time or place described in subsection (a); or

"(ii) has opposed any employer conduct related to this section; or

"(B) the employer has indicated that the employer has no intention of providing the place described in subsection (a)(2).

"(h) INTERACTION WITH STATE AND FEDERAL LAW.—

"(1) LAWS PROVIDING GREATER PROTECTION.—Nothing in this section shall preempt a State law or municipal ordinance that provides greater protections to employees than the protections provided for under this section.

"(2) NO EFFECT ON TITLE 49 PREEMPTION.—This section shall have no effect on the preemption of a State law or municipal ordinance that is preempted under subtitle IV, V, or VII of title 49, United States Code.".

(b) CLARIFYING REMEDIES.—The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) is amended—

(1) in section 15(a) (29 U.S.C. 215(a))—

(A) by striking the period at the end of paragraph (5) and inserting "; and"; and

(B) by adding at the end the following:

"(6) to violate any of the provisions of section 18D."; and

(2) in section 16(b) (29 U.S.C. 216(b)), by striking "15(a)(3)" each place the term appears and inserting "15(a)(3) or 18D".

(c) AUTHORIZING EMPLOYEES TO TEMPORARILY OBSCURE THE FIELD OF VIEW OF AN IMAGE RECORDING DEVICE ON A LOCOMOTIVE OR ROLLING STOCK WHILE EXPRESSING BREAST MILK.—Section 20168(f) of title 49, United States Code, is amended—

(1) by striking "A railroad carrier" and inserting the following:

"(1) IN GENERAL.—Except as provided in paragraph (2), a railroad carrier"; and

(2) by adding at the end the following:

"(2) TEMPORARILY OBSCURING FIELD OF VIEW OF AN IMAGE RECORDING DEVICE WHILE EXPRESSING BREAST MILK.—

"(A) IN GENERAL.—For purposes of expressing breast milk, an employee may temporarily obscure the field of view of an image recording device required under this section if the passenger train on which such device is installed is not in motion.

"(B) RESUMING OPERATION.—The crew of a passenger train on which an image recording device has been obscured pursuant to subparagraph (A) shall ensure that such image recording device is no longer obscured immediately after the employee has finished expressing breast milk and before resuming operation of the passenger train.".

SEC. 103. EFFECTIVE DATE.

(a) EXPANDING ACCESS.—The amendments made by section 102(a) shall take effect on the date of enactment of this Act.

(b) REMEDIES AND CLARIFICATION.—The amendments made by section 102(b) shall take effect on the date that is 120 days after the date of enactment of this Act.

(c) AUTHORIZING EMPLOYEES TO TEMPORARILY OBSCURE THE FIELD OF VIEW OF AN IMAGE RECORDING DEVICE ON A LOCOMOTIVE OR ROLLING STOCK WHILE EXPRESSING BREAST MILK.—The amendments made by section 102(c) shall take effect on the date of enactment of this Act.

(d) APPLICATION OF LAW TO EMPLOYEES OF RAIL CARRIERS.—

(1) IN GENERAL.—Section 18D of the Fair Labor Standards Act of 1938 (as added by section 102(a)) shall not apply to employees who are members of a train crew involved in the movement of a locomotive or rolling stock or who are employees who maintain the right of way of an employer that is a rail carrier until the date that is 3 years after the date of enactment of this Act.

(2) DEFINITIONS.—In this subsection:

(A) EMPLOYEE; EMPLOYER.—The terms "employee" and "employer" have the meanings given such terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).

(B) EMPLOYEES WHO MAINTAINS THE RIGHT OF WAY; RAIL CARRIER; TRAIN CREW.—The terms "employee who maintains the right of way", "rail carrier", and "train crew" have the meanings given such terms in section 18D(e)(4) of the Fair Labor Standards Act of 1938, as added by section 102(a).

(e) APPLICATION OF LAW TO EMPLOYEES OF MOTORCOACH SERVICES OPERATORS.—

(1) IN GENERAL.—Section 18D of the Fair Labor Standards Act of 1938 (as added by section 102(a)) shall not apply to employees who are involved in the movement of a motorcoach of an employer that is a motorcoach services operator until the date that is 3 years after the date of enactment of this Act.

(2) DEFINITIONS.—In this subsection:

(A) EMPLOYEE; EMPLOYER.—The terms "employee" and "employer" have the meanings given such terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).

(B) MOTORCOACH; MOTORCOACH SERVICES OPERATOR.—The terms "motorcoach" and "motorcoach services operator" have the meanings given such terms in section 18D(f)(4) of the Fair Labor Standards Act of 1938, as added by section 102(a).

DIVISION LL—STATE, LOCAL, TRIBAL, AND TERRITORIAL FISCAL RECOVERY, INFRASTRUCTURE, AND DISASTER RELIEF FLEXIBILITY

SEC. 101. SHORT TITLE.

This division may be cited as the "State, Local, Tribal, and Territorial Fiscal Recovery, Infrastructure, and Disaster Relief Flexibility Act".

SEC. 102. AUTHORITY TO USE CORONAVIRUS RELIEF FUNDS FOR INFRASTRUCTURE PROJECTS.

(a) IN GENERAL.—Title VI of the Social Security Act (42 U.S.C. 801 et seq.), as amended by section 40909 of the Infrastructure Investment and Jobs Act, is amended—

(1) in section 602—

(A) in subsection (a)(1), by inserting "(except as provided in subsection (c)(5))" after "December 31, 2024"; and

(B) in subsection (c)—

(i) in paragraph (1)—

(I) in the matter preceding subparagraph (A), by striking "paragraph (3)" and inserting "paragraphs (3), (4), and (5)";

(II) by amending subparagraph (C) to read as follows:

"(C) for the provision of government services up to an amount equal to the greater of—

"(i) the amount of the reduction in revenue of such State, territory, or Tribal government due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or

"(ii) $10,000,000;";

(III) in subparagraph (D), by striking the period at the end and inserting "; or"; and

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S.L. 2023-138 – "An Act to …(VI) Prohibit Local Governments From Entering Nondisclosure Agreements In Order to Restrict Access to Public Records… and (VII) Establish Employee Classification and Compensation Exemptions for the Utilities Commission and Public Staff" (eff. 10/10/23, over governor's veto) – adds nuclear energy to list of "Clean Energy" sources, extends deadline for closing specific Duke Energy plants to 12/31/2035, allows for nongovernmental control of public enterprises if approved by Local Government Commission for Local Governments after local public hearing, prohibits any political subdivision of the State from entering into a nondisclosure agreement that restricts access to public records, any agreement re nondisclosure of confidential information is a public record unless existence of contract is deemed confidential under State law; provides that Utilities Commission employees are exempt from classification and compensation rules under State H.R. Commission except for rules re hours and days of work, vacation and sick leave, promotion and transfer, and prohibition of incentive pay programs – same re "Public Staff" under NCGS 62-15

S.L. 2023-137 – "An Act to Provide Further Regulatory Relief to the Citizens of North Carolina" (eff. 10/10/23 over governor's veto) -- among other things, at p. 27 amends NCGS 95-25.14 to exempt minor league baseball players employed under a collective bargaining agreement from minimum wage/OT and record-keeping requirements under NCGS 95-25.3, -25.4, and -25.15(b), where the CBA covers wages, hours of work, and working conditions. At p. 38 adds provisions prohibiting discrimination, discharge, demotion or other adverse employment action by any employee against an employee because he/she is a member of the NC Wing-Civil Air Patrol or has absences related to that membership that do not exceed 7 consecutive days at a time or 14 scheduled workdays per year – not require to pay salary or wages during absences except for paid leave that is otherwise available to employee

S.L. 2023-135 – "An Act to Require the Protection and Advocacy Agency for N.D. to Report Its Actions Regarding Its Impact on Persons With Disabilities" (eff. 10/3/23, without governor's signature) -- requires that the North Carolina Protection and Advocacy Agency report twice a year to the House and Senate Appropriations Committees on HHS on its efforts to advocate for persons with disabilities, and annually to the Joint Legislative Oversight Committee on HHS – including specific examples of how it reduced barriers to employment, enabled independent living, and increased post-secondary education opportunities for persons with disabilities.

S.L. 2023-134 – "An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions" (2023 Budget Bill) (eff. 9/22/23 without governor's signature) – among other things,

[1] All Session Laws are available at https://www.ncleg.gov/Laws/SessionLaws.

(a) raises retirement age for appellate judges to 76 (p. 414);

(b) clarifies that any action facially challenging validity of act of General Assembly must be transferred to Wake County superior court and eliminates provision dealing with judicial review of redistricting (p. 422);

(c) eliminates requirement that three judges appointed by the Chief Justice to the panel hearing the case come from different regions of the state, and adds requirement that no member of panel can be former member of General Assembly (p. 423);

(d) amends N.C.Gen.Stat. § 7A-30 to eliminate appeal of right to the Supreme Court from a Court of Appeals decision where there is a dissent (p. 425);

(e) allows any judge to carry a concealed handgun in any courthouse when they are there for work, if they have a concealed handgun permit (p. 438);

(f) creates new State Bar Review Committee comprised of political appointees to review and revise the grievance review process, including rules and processes (pp. 537-538);

(g) raised annual State Bar membership fee from max of $300 to max of $325 (p. 538)

S.L. 2023-111 – "An Act to Prohibit Gender Transition Procedures for Minors" (eff. 8/16/23, over governor's veto) - creates new NCGS §§ 90-21.150 et seq.:

(a) prohibits any physician from performing or providing any gender transition procedures for minors (under age 18), without parental consent AND specific physician diagnoses re genetic or biochemical disorders or treatment required for unrelated illnesses/injuries;

(b) includes prohibitions on cross-sex hormonal treatment, puberty-blocking drugs, surgery,

(c) allows physician and/or employer to decline such treatment;

(d) imposes mandatory revocation of medical license to practice for violation, and

(e) creates civil cause of action by minor or minor's parents against medical professional and/or their employer – SOL the later of 4 years from discovery, or minor's 25th birthday,

(f) voids any contractual waiver of liability between medical professional and their employer.

S.L. 2023-109 – "An Act to Protect Opportunities for Women and Girls in Athletics" (eff. 8/16/23, over governor's veto) -- requires that public, charter and private middle and high school teams,

as well as community colleges, public and private colleges and universities in North Carolina, place students on teams according to their "biological sex," ("reproductive biology and genetics at birth"), and allows a civil cause of action by

(a) a student deprived of athletic opportunity or "likely to suffer from any direct or indirect harm" as a result of violation of these provisions, or who is retaliated against for reporting violations; and/or

(b) the school/college/university, its representatives or employees who suffer direct or indirect harm as a result of complying with this statute.

2-year SOL, injunctive relief, declaratory relief, actual damages (emotional distress), attys' fees and costs available – State Board of Education to monitor schools for compliance and report schools to Joint Legislative Education Oversight Committee.

S.L. 2023-106 – "Parental Bill of Rights" – (eff. 8/16/23, over governor's veto) -- State employee who encourages, coerces, or attempts to encourage or coerce child to withhold information from parent may be subject to disciplinary action, parents may request "parental concern hearing" with State Board of Education, and may bring an action for declaratory and/or injunctive relief as well as attorneys' fees and costs – prohibits any health care provider and health care facility from providing treatment to minor child without written or document consent from parent – no exceptions, $5,000 penalty.

S.l. 2023-105 – "An Act Making Administrative and Conforming Change to the Laws Governing [TSERS, LGERS], Legislative Retirement System, Consolidated Judicial Retirement System, Disability Income Plan, and other Related Statutes…" (eff. 7/14/23, without governor's signature) - among other things, allows extension of STD benefits for an additional 365 days if application made for extension within 180 days after end of STD period, salary continuation payments, or monthly WC payments (whichever is later); also authorizes TSERS and LGERS to offset overpayments due to administrative errors by applying offsets

Related: *S.L. 2023-89* (eff. 7/10/23) – also allows TSERS to withhold monthly retirement benefits from member who is unable to make lump sum payment to repay retirement benefits paid due to early or service retirement allowance who is reemployed within 6 months of retirement

S.L. 2023-103 – "An Act to Make Various Changes and Technical Corrections To the Laws Governing the Administration of Justice…." (eff. 7/21/23) – among other things, at pp. 6-7:

(a) for courts participating in e-filing, allows the court to serve documents by directing the recipient to the internet location where the document is available, and

(b) allows attorneys to serve via the email address of record through the ecourt's case management system IF the recipient has consented to service via email and the consent is filed with the court,

(c) requires all Bar Members to provide mailing address, phone number and email address to the secretary-treasurer of the State Bar, which shall also be their contact information of record with the court.

S.L. 2023-102 – "An Act To Make Various Changes to the Laws Concerning the University of North Carolina" (eff. 7/14/23 without governor's signature) -- among other things, amends NCGS 126-1.1 definition of "Career State Employee" to include UNC employees who are exempt from FLSA overtime/minimum wage and attain career status before 9/1/23 to either continue in same position with career status or waive career status and continue as exempt employee under NCGS 126-5(c1)(8) – must provide written explanation of impact of election to waive career status, and must employee must acknowledge election within 60 days of receiving the written explanation – UNC probationary employees hired before 9/1/23 have option of continuing employment for time period required to attain career status, or continue as an exempt employee under NCGS 126-5(c1)(8) – must also receive written explanation of impact and have 60 days to make election – broadens NCGS 126-5(c1)(8) to add pilots, and to allow the UNC Board of Governors to establish additional positions exempt from Chapter without further review or approval by any other State agency.

S.L. 2023-97 – "An Act Amending Rule 4 of the NC.R.Civ.P. …" (eff. 12/1/23) – modifies N.C.R.Civ.P. 4(j5) to allow acceptance of service by completing a form (much like federal practice).

S.L. 2023-62 -- "An Act to Amend the State Human Resources Act to Prohibit Compelled Speech When An Individual Seeks State Government or Community College Employment…" (eff. 6/27/23, over governor's veto) – prohibits any state entity or community college from

(a) soliciting or requiring applicant to endorse or opine about political affiliation or contemporary political beliefs, ideals, principles as a condition of employment, or to describe their actions in support/opposition to same – huge exception for "speech protected by the First Amendment of the U.S. Constitution."

(b) prohibits promotion of discriminatory/insurrectionist concepts in the workplace or training programs based on sex/race (but also directed at critical race theory) – but exception for private contractor who provides training, and speech protected by First Amendment.

S.L. 2023-14 – "An Act to Make Various Change to Health Care Laws …" (eff. 5/16/23, over governor's veto) –

(a) prohibits advising, procuring, or causing a miscarriage or abortion after 12 weeks, and prohibits performing "a partial-birth abortion" at any time – exceptions for medical emergency, rape/incest in weeks 12-20 at "suitable facility", life-limiting anomaly identified in first 24 weeks (but long lists of requirements for informed consent provided at least 72 hours beforehand), and procedures in 1st 12 weeks by licensed physician in certified hospital, ambulatory surgical center or clinic;

(b) requires extensive physician documentation of procedures and reporting to DHHS;

(c) allows medical personnel to opt out of procedure based on moral, ethical or religious grounds – can't recover damages or impose discipline for refusal;

(d) requires annual inspections of facility performing abortions, and DHHS website publication of results – can't employ anyone under age 16 – exception for hospitals;

(e) imposes requirements on physicians prescribing abortion-inducing drugs, including verifying pregnancy, verifying probable gestational age, determining blood type and providing Rh immunoglobulin at time of abortion, perform other diagnostic tests for potential complications, screen for coercion/abuse, inform patient that she has right to view remains after abortion, schedule follow-up 7-14 days later, documentation, and reporting to DHHS of everything as well as information re patient (but not name), and how much was billed;

(f) creates private cause of action by patient, her parent or guardian (if she was a minor) for violations of statute – 3 year SOL from violation, date of discovery of violation/harm, or from date minor attains age of majority AND authorizes claim for injunctive relief (preventing or inducing further abortions) against violator by patient and/or spouse, parent, sibling, guardian or patient's current health care provider – winning plaintiff recovers attorneys' fees, defendant awarded attorneys' fees if suit frivolous or brought in bad faith;

(g) requires discipline against physicians, pharmacists and other licensed health care providers by their licensing agency or board – but patient who seeks abortion is not subject to professional discipline for attempting to do so;

(h) makes it an infraction ($5K fine per violation) to mail, provide or supply abortion-inducing drug directly to pregnant woman in violation of Act, or for manufacturer/supplier to mail drug directly to pregnant, or to have internet website or service directed to pregnant women to promote sale of abortion-inducing drugs;

(i) imposes requirements on health care providers re care of "child" (undefined) who is "born alive" (expulsion or extraction of any member of Homo Sapiens species at any stage of development, who after expulsion/extraction breathes, has beating heart, pulsation of umbilical cord, or definite movement of voluntary muscles, regardless of whether umbilical cord has been cut and regardless of whether expulsion/extraction occurs as result of natural or induced labor, c-section, or induced abortion) – class D felony for violation, intentional overt act punished as murder, creates private cause of action by pregnant woman against violator, including 3x cost of abortion, money damages, punitive damages and mandatory atty's fees to successful plaintiff; fees to defendant if lawsuit frivolous or brought in bad faith;

(j) includes new provisions re midwifery;

(k) includes new immunity provisions and procedures for parents' permanent, safe, good faith surrender of infants younger than 30 days to on-duty health care provider, first respondent, or on-duty social services worker – requires DSS report of neglect if parent changes their mind;

(m) includes various revisions to criminal statutes and satellite-based monitoring re violent and repeat sex offenders, creates new offense of misdemeanor domestic violence covering current and former spouses, parents, guardians (or people who act in that capacity), and persons in former or current dating relationships with victims;

(n) grants permanent, full-time State employees up to eight weeks of paid leave after giving birth , and four weeks for placement by adoption, foster care or other legal placement – part-time employees get 4/2 weeks (pro-rated basis, compared to FT workers), respectively – don't have to exhaust sick/vacation leave, is in addition to shared leave or other leave, has no cash value on termination, is not used in calculating retirement benefits – have to have worked for past 12 months for any public entity subject to the leave requirement (per Budget Bill).

Cases[2]

APPELLATE - Writ of Certiorari

A Primer[3] - *Cryan v. Nat'l Counsel of YMCAs of the U.S.*, No 424A21, 384 N.C. 569, 887 S.E.2d 848, 2023 N.C.LEXIS 428, 2023 WL 4037473 (N.C. 6/16/23) – Pegram pled guilty to multiple charges of felony sexual assault committed while he was employed by Defendant YMCA in Kernersville. Plaintiffs sued civilly under the SAFE Child Act, 2019 N.C. Sess. Law 1231, arguing that statute revived their claims which had expired long ago under existing SOL statutes. The YMCA moved to dismiss under Rule 12(b)(6), arguing that the SAFE Child Act violated the NC Constitution as it applied to defendants for whom the SOL had already expired prior to its enactment. The trial court transferred the case to the 3-judge panel authorized under NCGS 1-267.1 and the YMCA appealed and then, when Plaintiffs moved to dismiss the appeal as interlocutory, filed a petition for writ of certiorari. The majority on the court of appeals granted the writ, vacated the order transferring the case, and remanded for further proceedings. The dissent (Judge Carpenter) found it improper to issue the writ and gave a list of reasons for his opinion. Plaintiffs filed an appeal of right based on the dissent,[4] and the supreme court took the opportunity to reiterate the test for granting a writ of certiorari: (1) the petition must show "merit or that error was probably committed below," and (2) extraordinary circumstances justify issuance of the writ, including a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake. Whether to grant the writ rests in the sound discretion of the presiding court, and is reviewable only for abuse of discretion, examining whether the decision was manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. In this case, the court of appeals' grant of the writ was well within its sound discretion: the court determined that the YMCA's argument had merit, judicial economy was served by granting the writ, particularly with respect to a recurring issue concerning a relatively new statutory scheme with limited jurisprudence surrounding it, and it involved a question of subject matter jurisdiction which could render future work in the case a nullity.[5]

[2] All cases are available (for free!) at https://appellate.nccourts.org/opinion-filings/?c=coa or https://appellate.nccourts.org/opinion-filings/?c=sc, according to the date of issue.

[3] The red captions throughout this Paper were added to provide me with quick reminders of the facts/issues in the case. They may or may not be accurate. Apologies.

[4] This right no longer exists, with the General Assembly's amendments in S.L. 2023-134, as set out above.

[5] The supreme court also considered whether the dissent adequately set out its reasoning for purposes of the supreme court's review from a divided opinion, but that basis for appeal no longer exists so is not reported here.

APPELLATE – Vacating and Unpublishing

Unpublishing – *Mole' v. City of Durham*, No.394PA21, 384 N.C. 78, 894 S.E.2d 711, 2023 N.C.LEXIS 274, 2023 WL 2800409 (N.C. 4/6/23)(*per curiam*) – law enforcement officer fired after he negotiated peaceful surrender of armed and barricaded (and potentially suicidal) suspect by agreeing to allow suspect to smoke his own blunt once in custody, and then made good on that promise – the court of appeals unanimously dismissed plaintiffs' Article I, § 19 (due process) claim but reversed trial court's dismissal of plaintiff's "colorable" Article I, § 1 (denial of fruits of his labor by arbitrary failure to follow its own policies) claim – the supreme court ruled discretionary review was improvidently allowed and court of appeals decision was undisturbed but would be "unpublished" and stand without precedential value. However, Justice Dietz wrote a concurring opinion to respond to the dissenters (pointing out that it was "nothing new" to unpublish a court of appeals case, and the supreme court has often announced discretionary review improvidently granted when the various justice's views are so divergent that confusion would result from publishing their respective minority opinions), and Justices Morgan and Earl dissented, pointing out the importance of addressing the constitutional issues presented in the case, as urged by the court of appeals itself, both parties, and the bevy of amici curiae participating in the case, as well as the Court's unprecedented action of effectively unpublishing and declaring a properly published court of appeals decision without precedential value. As Justice Earls explained:

> It is unwise for the Court to hand itself this new power without even publishing an amendment to the Rules of Appellate Procedure to establish clear and fair guidelines for taking such action. The court is making a hasty and unexamined, yet fundamental and radically destabilizing shift in the authority to determine legal precedent. It has far-reaching implications for the jurisprudence of this state. "[T]he rules governing publication of and citation to judicial opinions are not only central to the judiciary's self-identity – they are also critical to lawyers and the public, shaping how litigants' cases are treated by the courts and how litigants communicate with courts through their counsel."

Vacating Mooted Case - *Walker v. Wake Cnty Sheriff's Dept.*, No. 279PA22, 890 S.E.2d 905, 2023 N.C.LEXIS 602, 2023 WL 5665577 (8/30/23)(Allen) (Dietz, concurring) (Earls, Morgan, concurring in part dissenting in part) (Berger, dissenting) – Arrest warranted entered for CNA accused of assault, a reporter asked the sheriff's department whether the charge was "related to this guy's job. He lists his employer as Capital Nursing. I'm guessing it's domestic but if it's related to a client from Capital Nursing I'm interested in more details." The Sheriff's department responded, "Related to his employer," and later that night the reporter's television station broadcast a report that "a Wake County man who works for the elderly is facing an assault charge. Wesley Walker works for Capital Nursing. According to the warrant Walker hit the victim in the face with a closed fist. The Sheriff's Office is telling us the charge is related to his job. …" The CNA was then fired,

and sued the television station and the Sheriff for defamation. Both the Sheriff's Department and the station moved to dismiss, and the superior court granted the motion, finding that the Sheriff's statements were protected by qualified privilege and dismissed under Rule 12(c), and the Plaintiff failed to state a claim against the station under Rule 12(b)(6). The court of appeals unanimously reversed the dismissal of the Sheriff's department, but affirmed dismissal of the broadcast station, ruling:

(1) the Sheriff's department failed to show based on the pleadings and as a matter of law that qualified privilege precluded liability (no showing it was made on a privileged occasion, or was of sufficient public or social interest to warrant qualified privilege, or any context showing propriety of manner of communication), and any such showing was rebutted by Plaintiff's allegation of actual malice;
(2) the pleadings did not support the Sheriff's position that it was entitled to public official immunity (there were no allegations supporting the conclusion that the officer who made the statement was a "public official");
(3) the station was entitled to the fair report privilege because they accurately reported, almost verbatim, the information they received from the Sheriff's Department.

284 N.C.App. 757, 877 S.E.2d 298, 2022 N.C.App. LEXIS 521 (Collins, Arrowood, Hampson) (8/2/22). Plaintiffs petitioned for discretionary review, which was granted on March 1, 2023. However, on August 14, 2023, the parties filed a Consent Motion to Dismiss Appeal, informing the supreme court that they had fully settled the dispute and a controversy no longer existed. Accordingly, on August 30, 2023, the supreme court granted the motion to dismiss the appeal, but at the same time *vacated* the court of appeals' opinion, citing *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 298, 221 S.E.2d 322, 324-25 (1976) and N.C. Bowling Proprietors Assoc., Inc. v. Cooper, 375 N.C. 374, 374, 845 S.E.2d 745, 746 (2020) and quoting *S. Bell* in a parenthetical:

> When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so. While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals.

Justice Dietz issued a concurring opinion, characterizing the court's action as "consistent with precedent" and "a routine order that draws an exaggerated, hyperbolic dissent from one of my colleagues," (Earls), which he further described as "a bit unhinged," "angry rhetoric," and

"needless, toxic disparagement," while characterizing Justice Morgan's and Berger's[6] dissents as "thoughtful."

Justices Earls and Morgan agreed that the case should be dismissed but disagreed that the previously published court of appeals' decision should be vacated. Justice Earls wrote that the majority's approach "flouts basic principles of the judicial process, and …signals to North Carolinians that '[p]ower, not reason, is the new currency of this Court's decisionmaking.'" Justice Earls distinguished the two cases cited by the majority (*S.Bell* was mooted by the Utilities Commission's replacement of the contested Order with a new Order; *N.C. Bowling* vacated a preliminary injunction because the underlying Executive Order had expired), and concluded:

> The action the Court takes today is not inconsequential, particularly in light of what it telegraphs about our judicial system. The case was calendared for oral argument at our November 2023 session. We have not heard oral arguments. We have not deliberated as a body on the legal issues. And we have not written or exchanged opinions on whether the Court of Appeals was correct. In short, this case has not yet entered the crucible of our deliberative process.
>
> Without any pretense of meaningful adjudication—without any semblance of "careful consideration and input from stakeholders," this Court changes the law.
>
> The upshot of that decision is clear. By its action in this case, the Court seems to be sending the message that ordinary doctrines of mootness are no longer operative. Moreover, the parties' oral arguments do not matter—we have not heard them. Our deliberations do not matter—we have not engaged in them. And our opinions do not matter—we have not written or exchanged any. All that matters is to achieve a particular result, namely, to make sure that no future litigants are bound by the legal rules articulated by the Court of Appeals in its opinion in this case. But that is not how our judicial system is supposed to work.
>
> The people of this state deserve more than "hasty and unexamined" jolts to the law. …And properly helmed, our judiciary curbs the arbitrary exercise of power by promoting consistency and certainty. By continuing a trek down a different path, the action taken with this Order disserves those values, injecting yet more confusion, arbitrariness, and partisanship into North Carolina's legal system. This radical approach allows the Court to brazenly warp the law to its policy preferences unconstrained by the need to have a live controversy to decide through careful

[6] In Berger's dissent, he pointed out that settlement does not reflexively render matters of law or legal inference moot, and parties must obtain leave of the Court before dismissal is allowed. However, the parties in this case made a consent motion to dismiss, which was allowed by the majority, so it's not clear to me why he dissented?

> deliberation; this is at the cost of the integrity of our justice system and our citizens' faith in it.

(citations omitted). Justice Morgan joined Justice Earls, and separately added,

> A majority of this Court once again chooses to pursue a newfound practice to confound the orderly methodology of this Court and our judicial system. This unfortunate overreach by a majority of this Court to deprive the Court of Appeals opinion of its appropriate precedential value is a bewildering indication of the extent to which this Court now goes in order to upend its institutionalized practices to achieve its desired ends.

[Behind the scenes: On March 20, 2023, the NC Judicial Standards Commission opened an investigation of Justice Earls based on her public comments at the NC General Assembly Courts Commission and the NC Bar Association Board of Governors, regarding the supreme court's decisions to rescind rules re citation format, "unpublish" published Court of Appeals decision, and the potential legislative change that eliminated a right of appeal to the supreme court based on a dissent in the court of appeals (a legislative change that has now occurred). In May 2023, the Commission dismissed the complaint against Justice Earls without further action.

However, in August 2023, the Judicial Standards Commission "reopened" its investigation, citing Justice Earls' responses to an interviewer's questions in a June 20, 2023 Law 360 interview, where she was asked to share her perspective as "a Black female Democrat on a state Supreme Court that is largely white, male and, after last year's elections, Republican."

On August 24, 2023, Justice Morgan – who faced re-election in 2024 -- announced he was stepping down from the supreme court in early September; on September 12, 2023 he announced he was running for governor.

On August 29, 2023, Justice Earls filed a federal lawsuit (MDNC) against the NC Judicial Standards Commission, alleging a 42 U.S.C. § 1983 claim (1st Amendment free speech) and seeking declaratory and injunctive relief. A motion for preliminary injunction (to prohibit the NC Judicial Standards Commission from undertaking any investigation or enforcement regarding her speech on matters of public concern) is pending; Judge Osteen will hear this case. A copy of the Complaint and accompanying Exhibits is attached at p. 31.

On September 11, 2023, Governor Cooper appointed Judge Allison Riggs (NC Court of Appeals) to Justice Morgan's seat. (Justice Riggs was a civil rights litigator and held positions with the Southern Coalition for Social Justice, serving as lead counsel in numerous voting rights cases.) He then appointed Judge Carolyn Thompson (Dep. Commissioner of NCIC) to fill Judge Riggs' spot on the court of appeals.]

APPELLATE – Appellant Errors[7]

Content of Notice- *Venters v. Lanier*, No. COA22-854, 886 S.E.2d 188, 2023 N.C.App. LEXIS 201 (4/18/2023) (Arrowood, Murphy, Riggs) – because pro se defendant's first notice of appeal was defective,[8] the appellate court never acquired jurisdiction, and the superior court should have ruled on defendant's subsequent (lawyered) motions in the superior court to amend his responses to requests for admission (by allowing him to deny) and defendant's motion to reconsider the grant of summary judgment in favor of plaintiff.

Untimely Service- *Thiagarajan v. Jaganathan*, No. COA22-745, 887 S.E.2d 473, 2023 N.C.App. LEXIS 269 (5/16/23)(Zachary, Tyson, Gore) – the trial court entered its Order on equitable distribution on Friday, February 4, 2022, and a copy of the Order was served upon defendant on Wednesday, February 9, 2022, via 1st-class mail. Under Rule 58, the time for appeal runs from the date that the Order was entered if served within 3 days of entry, or 30 days from the date of service, if the 3-day window is not satisfied. The Court of Appeals ruled that only business days were counted, pursuant to Rule 6(a), so that service was made within the 3-day rule, defendant's deadline ran from entry of the order, and was thus untimely, so had to be dismissed for lack of jurisdiction, citing *Magazian v. Creagh*, 234 N.C.pp. 511 (2013).

Statement of Facts, Issues, Record references, Cert of Compliance- *In re Estate of Patrick Lee Smith*, COA23-17, 887 S.E.2d 125, 2023 N.C.App. LEXIS 300, 2023 WL 3831569 (6/6/23) (Gore, Murphy, Flood)(unpub.) – party appealed trial court's order affirming clerk's decision barring spousal rights to estate. Court of Appeals dismissed based on noncompliance with Rules of Appellate Procedure, including failure to include statement of facts or statement of issues for review, failure to reference the Record on Appeal in her summary of the procedural history, and failure to include a Certificate of Compliance.

File-stamped Order - *City of Gastonia v. McDaniel*, COA23-104, 2023 N.C.App. LEXIS 622 (10/3/23) (Gore, Tyson, Carpenter) – defendants appealed from the superior court's order on liability, but the appeal was dismissed for lack of jurisdiction when defendants failed to include a *file-stamped* copy of the order in its Record on Appeal, per N.C.R.App.P. 3.

[7] These cases are reminders to always check (and comply with) the Rules. All but Venters were represented by counsel when the errors were made.

[8] The Record reflects two Notices of Appeal filed in the superior court – one captioned "DEFENDANT'S APPEAL OF ORDER GRANTING MOTION FOR SUMMARY JUDGMENT" that asserted two paragraphs denying liability (R pp. 87-88), and one properly providing Notice from the superior court's denial of defendant's Motion for Reconsideration of Summary Judgment and Motion for Leave to Amend Defendant's Admissions (R p. 177).

ARBITRATION

Choice of Venue and FAA Preemption - *Earnhardt Plumbing, LLC v. Thomas Builders, Inc.*, No. COA23-228, 2023 N.C.App.LEXIS 653 (10/17/23)(Hampson, Murphy, Wood) – Plaintiff (NC company) and Defendants (NC and TN companies) entered into a subcontracting agreement for Plaintiff to provide and installing plumbing/gas lines for a hotel under construction in Fayetteville, NC. The agreement required arbitration of disputes, with the arbitration to be held "at the discretion of the [Defendants] either at [Defendants'] principle [sic] place of business or where the Project is located." Plaintiff sued Defendants, claiming almost $160K owed for its work under the contract. The superior court ordered arbitration but declined to compel a TN venue, ruling that the Federal Arbitration Act did not preempt state law, and the forum selection clause was unenforceable under NCGS § 22B-3 (declaring void and unenforceable as against public policy any contract provision that requires arbitration of contract disputes in another state). The Court of Appeals pointed to precedent[9] that the FAA preempted the NC statute where a dispute involved interstate commerce, but the superior court did not include findings of fact supporting its conclusion that there was no FAA preemption, so the panel vacated and remanded to the superior court for further findings.

ATTORNEY-CLIENT PRIVILEGE

Rat-fink codefendant - *Howard v Iomaxis, LLC*, No.64A22, 384 N.C. 576, 887 S.E.2d 853, 2023 N.C.LEXIS 426, 2023 WL 4037483 (6/16/2023)(Dietz) – all defendants (a parent corp and subsidiary members) were represented by a single law firm. During a joint conference call with counsel, one of the defendants, Hurysh, secretly recorded the conversation, and then after a falling out among co-defendants sought to waive attorney-client privilege and disclose the contents of the call. Parent corp moved for a protective order, arguing that it exclusively held the privilege because the call was to discuss corporate matters and counsel on the call provided legal advice to individual defendants solely in their roles as agents of the company, so that Hurysh had no authority to waive the privilege. The business court rejected this argument and ruled that Hurysh held the privilege individually and could waive it. The supreme court affirmed: the business court made a factual finding that counsel was acting as joint defense counsel under a written joint defense agreement at the time of the call (which specifically stated that it would not protect information the parties shared with counsel if there was a later disagreement among them), and this finding was supported by competence evidence in the record. Accordingly, the trial court properly found that Hurysh jointly held the privilege and could opt to waive it. The supreme court emphasized that each attorney-client privilege question is a fact-intensive inquiry

[9] The panel cited *Goldstein v. Am. Steel Span, Inc.*, 181 N.C.qpp. 534, 538 (2007) (when contract involves commerce among the States, the FAA preempts NC's statute and public policy re forum selection); *Hobbs Staffing Servs., Inc. v. Lumbermen's Mut. Cas. Co.*, 168 N.C.App. 223, 226 (2005)(FAA applies if contract evidences transaction involving interstate commerce).

that must be resolved on a case-by-case basis. Additionally, the facts found by the business court made it unnecessary to consider whether to apply the *Bevill* test,[10] as urged by the Parent Corp, because the advice had been given as joint defense counsel and not as corporate counsel.

Civil Procedure

12(b)(6), 12(c) and Attachments -- *Knudson v. Lenovo*, No. COA22-955, 2023 N.C.App.LEXIS 649 (N.C.App. 10/17/23) (Murphy, Hampson, Griffin)(unpub.) – plaintiff brought claims alleging constructive fraud, UDTPA violation, unjust enrichment, and W&H violations after Lenovo failed to pay him sums plaintiff alleged were owed under Lenovo's Patent Program. Defendant filed a Rule 12(b)(6) and 12(c) motion to dismiss, attaching a General Release Agreement signed by plaintiff, as well as an agreement whereby plaintiff assigned his rights to intellectual property. The superior court granted Lenovo's motion, and the plaintiff appealed, arguing that it was improper to consider attachments to the defendant's motion. The court of appeals agreed that the attached documents could not be considered for purposes of 12(b)(6) unless they were the subject of the plaintiff's action, as framed in the complaint. That analysis only permitted application of the attachments to the plaintiff's W&H claim, which – although sufficient on its face for purposes of Rule 12(b)(6) -- was nevertheless barred because the General Release specifically waived any and all claims for wages and benefits. As to the remaining claims, the panel concluded the plaintiff's allegations were insufficient on their face to establish the plaintiff's remaining claims under Rule 12(b)(6):

- the constructive fraud claim failed because there was no fiduciary relationship between employer/employee,
- the UDTP claim did not sufficiently allege a continuing wrong and was thus time-barred under the 4-year SOL,
- the unjust enrichment claim was likewise time-barred under the 3-year SOL, and the 10-year SOL did not apply because there was no fiduciary relationship.

Motion to Strike, Pleading a Contract - *Elwir v. The Boundary, LLC*, No. COA22-961, 2023 N.C.App. LEXIS 588, 2023 WL 6119970 (9/19/2023) (Griffin, Stroud, Wood)(unpub.) – plaintiff sued for breach of contract related to the sale of the plaintiff's business. Defendants moved for summary judgment, arguing (a) there was no agreement because plaintiff signed in his own name and not on behalf of the entity, (b) the agreement was rescinded when defendant could not get the

[10] Under this test, corporate officers asserting personal privilege claims must show (1) they approached corporate counsel for the purpose of seeking legal advice, (2) they made it clear to counsel they were seeking legal advice in their individual capacities and not in their representative capacities, (3) counsel communicated with them in their individual capacities knowing that a possible conflict could arise, (4) the conversation was confidential, and (5) the substance of the conversation did not concern matters within the company or the general affairs of the company. The test is based upon a 3rd Circuit case, *In re Beville, Bresler & Schulman Asset Mgmt Corp.*, 805 F.2d 120, 123 (3rd Cir. 1986), and has been adopted by several state and federal courts, as cited in the NC Supreme Court's opinion.

required liquor license, and (c) any agreement failed for illegality. Plaintiff submitted an affidavit in opposition, arguing that the parties entered into an oral agreement that was later *memorialized* in the written document. The superior court granted defendant's motion to strike as inconsistent with the plaintiff's pleadings, the plaintiff appealed, and the Court of Appeals affirmed, finding no abuse of discretion or prejudice (both of which had to be shown) because plaintiff failed to properly plead the existence of an oral contract,[11] and any contrary deposition testimony would not be admissible at trial.

Service, Petition for Judicial Review - *N.C. State Board of Educ. v. Minick*, COA22-303, 890 S.E.2d 193, 2023 N.C.App. LEXIS 343 (6/20/23) (Stroud, Murphy, Gore) – a teacher challenged his suspension, printing his attorney's name/address on the CCH Petition form. The ALJ reversed his suspension, and the Board filed a petition for judicial review of the ALJ's final decision, but **served** it c/o the teacher's attorney, and not to the teacher. The court of appeals agreed with the superior court that sending the petition to the attorney failed to satisfy service requirements, so that the superior court did not have personal jurisdiction under NCGS § 150B-46, and dismissal of the Board's petition was appropriate.

Gamesmanship? Notice on MSJ – *D.V. Shah Corp. v. Vroombrands, LLC*, No. COA22-104, 286 N.C.App. 223, 881 S.E.2d 338, 2022 N.C.App. LEXIS 715 (11/1/22) (Jackson) (Dillon, concurring in result) (Tyson, dissenting) – Defendant entered into a 5-year lease (2018-2023) of plaintiff's gas station, convenience store and tire shop, and defendant's sole member and manager, Obaika, gave an unconditional personal guaranty of the lease. One year later, in February 2019, defendant stopped paying rent, and in October 2019 vacated the premises. Plaintiff filed a complaint against defendant and Obaika the same month. Defendants filed an Answer and

[11] The plaintiff's Complaint alleged:

9. On or about February 8, 2017, Defendants Boundary and Boundary Holdings (together "Defendant Companies") and Plaintiffs entered into an agreement to buyout Plaintiffs' sublease (the "Sublease).

10. The Sublease was for the operation of a general store located at 1000 Brookside Drive, Raleigh, NC 27601 (the "Premises").

11. Plaintiffs and Defendant Companies also entered into a limited asset sale and transfer agreement for the inventory held on the Premises at the time of the termination of the Sublease.

12. The agreements were *memorialized in* a contract attached as Exhibit A (the "Contract.").

…

29. Plaintiff and Defendants entered into a Contract for Defendants to purchase inventory and for Defendants to buy Plaintiff out of the value of its Sublease.

(emphasis by plaintiff on appeal). The Court of Appeals panel found this language only sufficient to allege <u>one</u> contract (rejecting that the prior negotiations could themselves be considered an oral contract), and finding that a reasonable defendant would not have understood these allegations to describe two contracts, notwithstanding defendants' rote assertion of statute of frauds as an affirmative defense.

Counterclaim in June 2020. The trial court entered a scheduling order setting discovery to close on 11/15/2020, and a dispositive motion deadline of 12/01/2020. On 9/15/2020, Plaintiff sent its first set of interrogatories and requests for production. Defendant's guarantor responded on 11/18/2020, making objections and offering to produce documents at a convenient time. Plaintiff informed Defendant's counsel, Copeland, that the discovery responses were inadequate and Plaintiff would file a motion to compel if it did not receive supplementary responses and production. Copeland responded a week later, and on 12/7/20 told Plaintiff's counsel that supplemental responses would be delayed due to a serious family medical issue. On 1/5/21, Copeland moved to withdraw, with all parties' consent, and the court granted the motion on 2/3/21. Plaintiff never moved to compel discovery. Instead, on April 29, 2021, Plaintiff filed a motion for summary judgment on Plaintiff's breach of contract claim – after the dispositive motion deadline – but served it on Copeland, who had withdrawn. On May 7, 2021, Plaintiff noticed the hearing for May 24, 2021, serving the notice and a copy of the motion on Defendants (not counsel).[12] On May 14, 2021, Obaika requested that Plaintiff's affidavit in support of the motion be shared, but the affidavit was not notarized until May 19, 2021 and was not served on Defendants until May 20, 2021, when Plaintiff also served its brief which also sought summary judgment on Defendants' counterclaim and affirmative defenses. At the WebEx hearing on May 24, 2021, Obaika appeared pro se on his own behalf, but was not permitted to appear on behalf of Defendant because Obaika was not a lawyer. Obaika objected that the motion was untimely under the scheduling order and asked for a continuance until he and Defendant could retain counsel, but a continuance was denied. After hearing – including questions about the lack of notice re Plaintiff's request for summary judgment on Defendants' counterclaim – the superior court granted summary judgment in favor of Plaintiff, and awarded $103K in back pay and front pay and taxes, as well as $12,578 in attorneys' fees. Judge Jackson wrote that the superior court abused its discretion in denying Obaika's motion for continuance and Judge Dillon concurred. Judge Jackson cited Rules of Civil Procedure, General Rules of Practice and Local Rules which were violated by Plaintiff's failure to comply with the scheduling order, failure to confer with Defendants regarding a hearing date, failure to serve its motion upon Defendants on April 29, 2021, failure to serve its supporting affidavit with its motion. Accordingly, Judge Jackson would vacate and remand.

Judge Dillon agreed with Judge Tyson that Plaintiff's verified Affidavit was sufficient to establish its claim on summary judgment, so that Defendants were not prejudiced by the trial court's consideration of Plaintiff's Affidavit, but pointed out that Mr. Obaika attempted to provide live

[12] I found Judge Jackson's analysis perplexing (but I'm old and tired, so that could just be me): Judge Jackson relied on the *file-stamp* of the Notice of Hearing and Amended Certificate of Service (for the MSJ) for his assertion that these documents were not timely served. He also referred to the lack of a file-stamp on the Plaintiff's Brief, even though parties are not permitted to file Briefs unless ordered by the court. *See* N.C.R.Civ.P. 5(d); Mecklenburg Co. Local Rule 12.11(d), available at https://www.nccourts.gov/assets/documents/local-rules-forms/813.pdf.

testimony at the hearing in rebuttal but the judge cut him off, saying his oral testimony could not be accepted in the context of summary judgment – which was error. Additionally, the record demonstrated prejudice and Defendants' answer and counterclaims – if true -- created issues of fact precluding summary judgment on Plaintiff's claims. Finally, Plaintiff did not timely notice its motion regarding Defendants' counterclaims, so it was inappropriate to grant summary judgment on them. Accordingly, he would also vacate and remand.

However, Judge Tyson dissented, focusing on the substantive issues and whether evidence was presented regarding Defendants' alleged breach, Plaintiff's alleged failure to mitigate, and the calculation of damages. Judge Tyson agreed that Plaintiff violated rules of procedure by failing to timely serve its Affidavit with its Motion but found no prejudice to Defendants because the same facts were set out in the verified Complaint. He also had no problem with the notice issues Judge Jackson pointed out, instead finding fault with Defendants for not having obtained replacement counsel in the three months after Copeland withdrew, and that Defendants waived the 10-day notice required by Rule 56.

Not surprisingly, this case is currently on appeal to the N.C. Supreme Court.

DISCOVERY

More Sanctions - *Abdo v. Jones*, No. COA22-271, 286 N.C.App. 382, 881 S.E.2d 726, 2022 N.C.App. LEXIS 759 (11/15/22)(Collins, Tyson, Inman) – In 2017 Plaintiff and Jones were in an auto accident. In June 2020 Plaintiff filed an amended complaint against Jones, which included claims against Erie Insurance Exchange and USAA for underinsured motorist coverage. The same month, Erie answered and served its First Requests for Production of Documents and Interrogatories. Plaintiff responded to Erie's discovery requests by the end of July, but on August 31, 2020, Erie notified Plaintiff her responses were deficient. Plaintiff did not respond and in December 2020 Erie filed a motion to compel. Plaintiff served supplemental discovery responses in March 2021 and the Court entered a Consent Order executed by Plaintiff and Erie, directing Plaintiff to provide additional production by May 24, 2021. Plaintiff didn't, and on August 25, 2021, Erie filed an Amended Motion for Sanctions or, alternatively, to dismiss for failure to prosecute. The superior court heard Plaintiff's and Erie's arguments on the Amended Motion on September 27, 2021 and on October 28, 2021 entered its Order granting dismissal of Plaintiff's claims against all named and unnamed defendants. Plaintiff appealed, but the court of appeals affirmed dismissal of her claims against Erie as within the court's discretion and supported by the court's findings regarding Plaintiff's failures to comply and that it had considered less severe sanctions. However, the court of appeals ruled that the superior court erred in dismissing claims against USAA, as there was no evidence that Plaintiff failed to obey any discovery order involving USAA.

JURISDICTION – PERSONAL

Totality of Contacts - *Schaeffer v. Singlecare Holdings, LLC*, No. 321PA21, 384 N.C. 102, 884 S.E.2d 698, 2023 N.C.LEXIS 271, 2023 WL 2800403 (4/6/23) (Earls) – Schaeffer was hired in CA and jointly employed by SingleCare and RxSense in CA and then in NC as a Senior VP of Business Development until he was fired in October 2018. After he was fired, Schaeffer sued to recover fully vested shares that he alleged were promised during employment negotiations, but were revoked upon his termination. Defendants moved to dismiss, arguing lack of sufficient connection with NC to give rise to personal jurisdiction, and that any connection was solely because Schaeffer chose to move to NC for his own benefit. Schaeffer disagreed, pointing out that Defendants employed him in NC, paid employment taxes to NC, had him perform work in NC, communicated with him in NC, solicited business and employed others in NC in businesses connected with his work, and assisted in his move to NC. The court of appeals unanimously affirmed dismissal, ruling that Plaintiff could not rely upon connections with NC that were unilaterally established by Plaintiff at his request and for his benefit. However, the supreme court granted discretionary review and reversed as to corporate defendants, ruling that the courts must consider the totality of the Defendant's voluntary contacts with the forum state over the entire period of the employment – and not just their recruitment and hiring efforts -- to determine whether it would be foreseeable that defendant could be hauled into court in that forum. Here, corporate defendants voluntarily and knowingly engaged with a North Carolina-based employee (Schaeffer) to support and expand his work in the state, reaped business benefits from his work in NC that was targeted in part at the NC market, expected to gain as a result of their support of Schaeffer in NC, breached their agreement with Schaeffer in NC, and also intentionally and voluntarily conducted other activities in the state that should have put them on notice of the possibility of litigation in NC, including employing at least 3 other individuals, soliciting other candidates in NC for business development roles, intentionally servicing NC consumers by offering access to pharmacy discounts at retail locations throughout the state – all of which were related to Schaeffer's claims. Accordingly, the court reversed as to the corporate defendants. However, as to the individual defendants, the court found that Schaeffer did not make sufficient factual allegations to support finding of personal jurisdiction, so their dismissal was affirmed. The court concluded with a summary recognizing the "fundamental transformation of our national economy," through technological innovations, including remote work and the ease of modern transportation and communication, all of which made it far less burdensome to require that a party litigate in a forum where it has voluntarily engaged, as well as the reality that contacts with distant forums are more easily and widely cultivated today, making it not unfair to subject a party to suit in a forum where it has engaged in such activities.

Remand for Further Consideration after *Ford*- *Miller v. LG Chem, Ltd.*, No. 69A22, 384 N.C. 632, 887 S.E.2d 844, 2023 N.C.LEXIS 424, 2023 WL 4037461 (6/16/23) (per curiam)– from factually complicated, divided Court of Appeals decision involving foreign manufacturers and distributors,

reversed and remanded with direction for trial court to consider whether further jurisdictional discovery was warranted in light of *Ford Motor Co. v Mont. Eighth Jud. Dist. Ct*., 141 S.Ct. 1017, 209 L.Ed.2d 225 (2021).

NONCOMPETES

Landlord's Revenge? - *Precision Machine Design, LLC v JBD Holdings, Inc.*, No. COA22-838, 886 S.E.2d 193, 2023 N.C.App. LEXIS 214, 2023 WL 3194447 (5/2/23)(Hampson, Murphy, Stading)(unpub.) – in May 2020, Plaintiff PMD purchased Defendant JBD's business, hired JBD's owner (Bowen), and had him enter into a noncompete acknowledging the need to protect the good will transferred during the asset sale, and imposing a 3-year noncompete prohibiting "in any manner" participating, owning, or acting as an agent, employee manager or consultant in any business that provided services/goods of the type provided by PMD, as well as a 5-year non-solicitation provision for business, customers or employees of PMD. PMD also entered into a month-to-month lease agreement with Bowen for real property. About 5 months later, PMD fired Bowen, and he responded by cancelling PMD's lease, which had the effect of making PMD unable to conduct business. Bowen also began notifying customers that he had left PMD and how to reach him and his new company, "JBD Holdings," and stepped in to assist one of PMD's customers when the customer contacted him. In December 2020 PMD sued Bowen and JBD for breach of the noncompete, among other things. The superior court found in favor of PMD on the noncompete and entered judgment of $61,769. JBD and Bowen timely appealed, but the court of appeals affirmed, rejecting their argument that PMD had no legitimate business interest to protect: defendants did not challenge the findings of fact, there was no finding of fact supporting JBD's contention that PMD had ceased operations and the facts that were found supported the conclusion that PMD still had legitimate business interests to protect (i.e., its goodwill). Additionally, the court of appeals found ample findings of fact supporting the conclusion that the Defendants breached the noncompete when Bowen took action on behalf of PMD's customer who contacted him and forwarded a third party's contact information to other PMD customers.

PUBLIC EMPLOYEES – Termination

Back Pay and Overtime - *Stockli v. N.C. Dept of Public Safety*, No. COA22-63, 286 N.C.App. 494, 879 S.E.2d 397 2022 N.C.App. LEXIS 774, 2022 WL 16937444 (11/15/22)(Dietz, Inman, Jackson)(unpub.) – Stockli successfully challenged his termination from employment at Pasquotank Correctional Institution. The ALJ's decision awarded back pay including two days of "mandatory overtime" for each month since Stockli's termination, based on Stockli's testimony he was required to work approximately 2-3 days overtime each month due to staff shortages. DPS challenged the award of mandatory overtime, arguing that NCGS 126-34.02 only authorized to award back pay based on the employee's regular salary and that Stockli's testimony was self-serving. The court of appeals disagreed, pointing out that Stockli's sworn testimony was unrebutted and that 25 N.C. Admin. Code § 1J.1306(9) authorized ALJs to include in back pay

calculations "any across-the-board compensation that would have been included in the grievant's regular salary except for the interruption in employment." The ALJ's award was consistent with the law, and supported by the evidence, so was affirmed.

Free Speech - *Mitchell v. UNC Bd of Governors*, No., COA21-639, 288 N.C.App. 232, 886 S.E.2d 523, 2023 N.C.App. LEXIS 157, 2023 WL 2762472 (4/4/23)(Hampson, Zachary) (Murphy, concurring in part and dissenting in part) – Alvin Mitchell was a tenured professor at Winston-Salem State University in the Department of Social Studies. In July 2015, two women became co-chairs of the department and Mitchell's supervisor. In Fall 2015 Mitchell allowed a student an incomplete, but then failed to fill out the paperwork for a grade, resulting in the incomplete converting to an "F," which after more than a year involved administrative intervention and a verbal altercation with one co-chair calling the police. In 2016, Mitchell objected to a co-chair's denial of funding to attend a New Orleans conference, and her suggestion that they instead attend a different conference, writing to his co-chair that she didn't know what she was talking about, was always trying to debunk him, accused her of thinking that "anything white is better," and told her that "white folks" associated with the recommended conference would always look at her as "wanna be white, an international nigger, an international coon and an international sambo (lol)…," and she needed to "wake up." In summer 2017 a Constitutional Law class was involuntarily reassigned from Mitchell to another professor, and Research Methods II (a class he had taught for at least six years) was reassigned to Mitchell. A week before the course was to start – and after he had already approved it on his schedule – Mitchell said he was uncomfortable teaching the course and thereafter failed to open an online course, later claiming he did not know his schedule any more. WSSU's Provost gave notice of WSSU's intent to discharge him for neglect of duty and misconduct, but the Faculty Hearing Committee determined after hearing WSSU's evidence that WSSU had not made a prima facie case for termination. The Chancellor disagreed, and remanded it back to the FHC to conclude the hearing. Mitchell then declined to present any further evidence, and the FHC again found that WSSU had not proven its case for discharge. The Chancellor then upheld the Provost's decision to discharge based upon Mitchell failing to provide his student with a final grade and failing to open the online course (neglect of duties), and sending the offensive letter to the co-chair (misconduct). Mithcell appealed to WSSU's Board of Trustees which upheld the termination, and then the UNC Board of Governors, which upheld the termination and rejected Mitchell's argument that his letter to the co-chair was written as a private citizen on a matter of public concern. The superior court also affirmed the termination. On appeal, the panel likewise affirmed, finding Mitchell's due process challenge failed because the Chancellor had the ultimate authority to make the decision to discharge, irrespective of the FHC's recommendations; Mitchell's error in not submitting evidence (because he assumed the Chancellor was bound by the FHC's recommendation), did not render the procedure defective; and there was no evidence that the Chancellor ignored the FHC's findings of fact or that the Chancellor did not act in good faith and in accordance with governing law. Additionally, the

majority found that Mitchell's 1st amendment claim failed because he presented no evidence that his letter to the co-chair addressed a matter of public concern, or any evidence that the co-chair's decision to deny funding to the students was racially motivated or a product of racial bias in academia, or that Mitchell intended his letter to combat those issues. Instead, the letter reflected Mitchell's personal grievance toward his co-chair and his displeasure with her administrative decision.

Judge Murphy dissented from the majority's decision on the 1st Amendment issue, observing that Mitchell's letter was initially a defense of the legitimacy of the preferred conference, and then an expression of Mitchell's belief that racial bias informed the perception that the preferred conference was less academically legitimate. The personally offensive character of the letter did not preclude a finding that the letter addressed a matter of public concern under NC and US precedent and, accordingly, Judge Murphy would reverse the superior court's determination and remand for further proceedings, including a balancing of the interests of the employee, as a citizen in commenting upon matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of public services it performs through its employees.

Ratting Out Students - *Boulware v. UNC Board of Governors,* COA22-840, 890 S.E.2d 514, 2023 N.C.App. LEXIS 395 (7/5/23)(Tyson, Murphy, Stading)(unpub.) – Boulware had a 4-year head coach (football) contract with Winston-Salem State University that expired 12/31/20. His contract permitted termination for "just cause for a significant or repetitive violation of the duties set forth in the contract as well as a 'significant or repetitive violation of any law, regulation, constitutional provision or bylaw of the institution.'" One of his duties was to serve as a Campus Security Officer obligated to immediately report crimes that posed an ongoing threat to the community, even if he was unsure that an on-going threat existed. In April 2019 there were fights during practice, in the weightroom after practice, and in the players' dorm room. A player's father told him that a gun might be involved, but the players denied it and no search occurred. A bag was found that might have been pot, but Boulware gave it to a player's father who had arrived on the sign and disposed of it. Boulware attempted to inform the Athletic Director but was unable to reach him; he did not inform campus police. Two weeks later, the Chancellor gave Boulware notice of Intent to Discharge for cause based on "incompetence, unsatisfactory performance, neglect of duty, or misconduct that interferes with the capacity of the employee to perform effectively the requirements of his or her employment." Boulware requested a hearing before the WSSU Grievance Committee, and after hearing the Grievance Committee recommended termination and the Chancellor adopted their recommendation. Boulware appealed to WSSU's Board of Trustees who upheld the termination.

The court of appeals affirmed, finding that Boulware was required to report law enforcement when he became aware that a gun might be involved, and his failure to do so (or search for one) risked serious harm or even death of students, staff or public. Accordingly, the court found "clear

and substantial evidence of a violation of Boulware's contractual obligations was presented and substantiated his termination." Moreover, WCCU had several reasons for his termination, each of which was consistently asserted, and there was no conflicting evidence that undermined the trial court's findings of fact.

Ditching the Weed – *N.C. Dept of Public Safety v. Locklear*, COA22-890, 887 S.E.2d 501, 2023 N.C.App. LEXIS 321 (6/6/23) (Flood, Murphy, Gore) (unpub.) – Master Trooper Locklear was on routine patrol when he thought he saw a driver not wearing a seatbelt and drinking a beer. He activated his lights, stopped the driver, and then spoke to the driver from his own vehicle, confirming that the driver was wearing a seatbelt and drinking a Red Bull, so he gave the driver a warning and let him go. Locklear then saw a camouflage bag on the side of the road, stopped to retrieve it, and discovered marijuana inside. He put the bag in his vehicle and attempted to locate the driver he had stopped to question him about it, but could not locate him and threw the bag into the woods. The driver meanwhile called in a report that Locker "stole" his bag (the driver also later admitted that he had about 4-5 oz. of marijuana (a felony, if true) in the bag, and threw it out the window when he saw Locklear's lights – he was never prosecuted or referred for prosecution and there was no evidence that this was due to Locklear's actions or omissions). Locklear denied he had stolen the bag, saying he never got out of his vehicle, but the next day went to the scene of the stop and explained to his superiors everything that had happened. SHP terminated his employment for neglect of duty, untruthfulness, and unbecoming conduct; he appealed and OAH reversed the termination. The Court of Appeals affirmed, finding that the department failed to consider "most of the factors" identified in *Wetherington v. NC DPS*, 368 N.C. 583 (2015), including resulting harm of the trooper's conduct, his work history, and discipline imposed in comparable cases, none of which supported termination in this case.

Collateral Estoppel - *Semelka v. UNC*, No. COA22-831, 888 S.E.2d 385, 2023 N.C.App. LEXIS 278 (6/6/23)(Arrowood, Hampson, Griffin) – tenured professor's employment was previously terminated due to irregularities in his expense reimbursement claims (he asked the university to reimburse him for legal expenses incurred in his prior challenges to university decisions). He pursued an unsuccessful administrative challenge against the university arguing that his dismissal was retaliatory, and his dismissal was ultimately affirmed by the court of appeals. Meanwhile, in 2018 he filed a separate whistleblower action against the University and individual defendants, arguing that initiation of dismissal proceedings were retaliatory under NCGS 126-84. After appeal of venue challenges, Plaintiff calendared for hearing Defendants' prior motion to dismiss. The Defendants amended their prior motion (twice) and, after hearing, the trial court granted dismissal of individual defendants in their individual capacities but denied the remainder of the motion. Both parties appealed, arguing that substantial rights were affected (plaintiff argued the possibility of two trials; defendants argued collateral estoppel arising from prior administrative litigation). The court of appeals granted the appeal based on collateral estoppel, finding that the same facts, issues, and parties were involved in the prior administrative proceedings, and the

retaliation issue raised by plaintiff was actually litigated in the prior proceeding. Accordingly, because the prior proceeding had already determined that his discharge was proper and not retaliatory, interlocutory appeal was proper. Additionally, because the allegations of his complaint and the prior proceedings established that plaintiff could not prove that his prior protected activity played a substantial factor in his termination, 12(b)(6) dismissal was appropriate.

Admin delays and TSERS - *Willis v. N.C. Dept of State Treasurer*, No 22-373, 287 N.C.App. 614, 882 S.E.2d 751, 2023 N.C.App. LXIS 51, 2023 WL 1788518 (2/7/23)(Griffin, Zachary, Arrowood) (unpub.) – Thomas Willis worked as a temporary employee at NCState for a year, at which point policy required that his employment convert to permanent full-time status with benefits, including TSERS participation. However, due to circumstances beyond his control, there was a delay in submitting the documentation, that delayed his re-classification by approximately 14 months. Mr. Willis worked in the correct permanent employee classification at NCState for one year, and was then employed as a permanent employee with NCDOT for another 18 years and one month, when he died. Under state law, his widow was entitled to be paid his accumulated contributions at the time of his death, unless she elected to receive the Survivors' Alternate Benefit; however, she was only entitled to the SAB if her husband's total years of TSERS creditable service was 20 years or more. Mrs. Willis opted for the SAB, but the State denied her request based upon its records showing less than 20 years of TSERS creditable service. Mrs. Willis appealed but the ALJ affirmed, agreeing that Mr. Willis should have been reclassified sooner, but only the time as a contributing member of TSERS counted. However, on further appeal, the superior court agreed with Mrs. Willis that the State should be estopped from denying at least 11 months of his employment at NCState as creditable service, and estopped from denying that his total creditable service was 20 years. The court of appeals affirmed the superior court, pointing out that the State agreed Mr. Willis would have been credited with the missing year of service if NC State had timely reclassified Mr. Willis' position as permanent, and that estoppel was the proper remedy to prevent loss to another, without impairing the State's exercise of its governmental powers. Moreover, the error in timely submitting the necessary paperwork was entirely on NC State, was inconsistent with NC State policy, and Mr. Willis had no reason to know that he had not been classified as a permanent employee in accord with policy. Ultimately, the State could not rely on NC State's error to deny benefits to which a beneficiary was otherwise entitled. Requiring that the State provide this benefit was consistent with precedent, as well as NCGS § 135-4(d) which allowed individuals to ask the Board of Trustees to modify or correct service credit earned prior to retirement. The panel concluded, "We are confident that Respondent can manage to make the correction needed to afford the Petitioner the benefit to which she is entitled without compromising the exercise of its governmental powers."

Wrong on So Many Levels -- *Hwang v. Cairns*, No. COA22-31, 287 N.C.App. 521, 882 S.E.2d 153, 2023 N.C.App. LEXIS 10, 2023 WL 192912 (1/17/23)(Zachary, Arrowood, Green)(unpub.) – from

2010-June 2017, Hwang was a physician employed by UNC as a tenure-track Assistant Professor in the Department of Surgery, Burn Center, and practiced medicine at a hospital operated by UNC Health Care System in Orange County. Hwang's supervisor was Cairn, who was the Division Chief of Burns in UNC's Department of Surgery and the Medical Director of the Burn Center. Hwang did not like Cairns, and alleged Cairns regularly yelled at him and others), without justification. Accordingly, in February 2017 Hwang accepted a position with the Univ. of Alabama. A few weeks before his final day at UNC, Hwang's colleagues organized a going-away party for Hwang and UNC/UNC-HCS employees at Top of the Hill in Chapel Hill, NC. Party decorations included photoshopped posters of Hwang's head on a squatting ody of a person wearing thong underwear and on bodies of shirtless men. Party organizers also hired a male stripper who removed his pants and shirt, and danced with some of the partygoers. The next morning, a research fellow at the Burn Center saw photographs of the party on FB, found them inappropriate and distasteful, and reported them to one of her supervisors. Cairns learned of the research fellow's concerns, and felt he was required to report it to his supervisor, the Chair of the Surgery Dept. Thereafter, UNC's Associate Dean opened an investigation, and Hwang's incentive compensation of $63,545 was withheld until the investigation concluded. In November 9, 2017, the investigation concluded that Hwang had not violated any policies at the party, and UNC authorized release of his incentive pay. Roughly six months later, Hwang sued UNC and UNC-HCS for breach of contract, and breach of implied covenant of good faith and fair dealing, and sued Cairns (personally) for interference with existing contractual duties, and slander. The superior court ultimately granted summary judgment in favor of the defendants, and Hwang appealed. The Court of Appeals ruled that because Hwang alleged an express contract with UNC and UNC-HCS, sovereign immunity was not available as an affirmative defense. However, Hwang's claims nevertheless failed: UNC-HCS was not a party to Hwang's contract with UNC (so could not breach it), UNC policies permitted withholding pay when a faculty member had not met professional standards so there was no breach when UNC initiated an investigation and withheld Hwang's incentive pay until the investigation was concluded, Hwang's claim for breach implied covenant of good faith was part and parcel of his breach of contract claim so could not be separately pursued, Cairns' conduct in reporting the research fellow's concern was consistent with his discretionary administrative duties, and there was no evidence of malice, so that he was entitled to immunity on the slander and tortious interference claims.

On August 30, 2023, the supreme court granted (1) Hwang's petition for discretionary review on the issue of whether the court of appeals erred in granting Cairns' motion for summary judgment on plaintiff's slander per se and tortious interference claims, and (2) Cairns' conditional petition for discretionary review on whether the trial court erred in denying defendants' initial motions to dismiss based on Cairns' immunity defenses to Hwang's slander and tortious interference claims. *Hwang v. Cairns*, 890 S.E.2d 913, 2023 N.C. LEXIS 607, 2023 WL 5669127 (8/30/23).

REDA

Covid-19 Absence - *Sloan v. Town of Mocksville,* No. COA23-121, 2023 N.C.App. LEXIS 572, 2023 WL 6120297 (9/19/2023)(Flood, Stroud, Stading)(unpub.) – law enforcement officer Sloan was required to come in to work on June 19, 2020, even though he felt ill and had 100+ fever. He worked over the next six days, and then tested positive for Covid-19 and was quarantined. While he was in quarantine, local officials denied to the public and the rest of the department that Sloan had tested positive for Covid-19, but on July 3, 2020, an anonymous Facebook page posted a photograph of the Chief's department-wide email warning employees not to discuss other employee's medical status, and then the letter Sloan received from Rowan County Public Health Department, confirming his positive Covid-19 test. On July 9, 2020, Sloan filed an anonymous OSHA complaint with the NC Dept of Labor (based on being required to work while sick and the lack of any contact tracing to identify other potentially exposed co-workers or notify them of their exposure), and on July 15, 2020 DOL notified the Department.

On July 16-17, 2020, Sloan and another officer (Davidson) were interviewed as part of the Department's investigation of the Facebook posts, and were told not to discuss the investigation with anyone until the investigation was completed. Accordingly, both Sloan and Davidson immediately discussed their interviews with others, including another officer (Doss) whose supervisor reported that "one of his officers had concerns about the investigation." The investigator asked Sloan if he had discussed the investigation, Sloan admitted he had, and on August 27, 2020 he was terminated for insubordination; Davidson was neither questioned about nor fired for his own disclosures. Sloan then filed a REDA complaint, asserting he was fired because of his OSHA complaint, obtained a "reasonable cause" RTS ten months later, and filed his lawsuit. The Town argued Sloan was fired for insubordination, not his OSHA complaint, and on October 12, 2022, the superior court (Klass) granted summary judgment dismissing Sloan's case, and Sloan appealed.

The Court of Appeals affirmed, finding that Sloan had satisfied his burden of showing a prima facie case of REDA violation because, even though his OSHA complaint was anonymous, the DOL included sufficient information to identify Sloan as the source of the Complaint, and his termination was in close temporal proximity to the Town learning of the complaint. However, Sloan failed to establish that the Town's stated reason for termination (insubordination) was pretextual, because there was no evidence in the record that the Town knew that Davidson had also discussed the investigation with others.

TORTS – Negligent Hiring/Retention/Supervision

Sex and Church -- *High v. Wake Chapel Church, Inc.* No. COA22-358, 287 N.C.App. 217, 880 S.E.2d 785, 2022 N.C.App. LEXIS 859, 2022 WL 17815134 (12/20/22)(Dillon, Dietz, Inman)(unpub.) – Aleah High claimed that the Defendant Church's spiritual leader, Wilkins, "groomed" her for three

years beginning when she was 15 years old, and then sexually assaulted her on multiple occasions in 2018 and 2019. She sued Wilkins for breach of fiduciary duty, clergy malpractice, negligence and gross negligence, IIED, NIED, as well as the torts of seduction and sexual assault and battery, and claimed *respondeat superior* liability against the Church, as well as direct liability for NIED, negligent hiring, retention and supervision of Wilkins. The superior court dismissed all of High's claims against the torts of seduction, sexual assault and battery against Wilkins, and her claim of negligent hiring, retention, and supervision against the Church. The court of appeals rejected Wilkins' request that it dismiss the tort of seduction as outdated, stating that it wasn't their job to do so where the NC Supreme Court had recognized the tort, and likewise rejected his defense of ecclesiastical doctrine because the seduction tort could be considered using neutral principles of law. Similarly, the panel found that a church could be held liable for negligent supervision under the same standards as other employers, so that the superior court did not err in denying the Church's motion to dismiss on 1st Amendment grounds. The court declined to hear High's appeal of the superior court's dismissal of her other claims because she failed to articulate how a failure to consider her arguments at this time could result in inconsistent verdicts.

TORTS – Sovereign Immunity

Waiver - ***Farmer v. Troy University***, No. 457PA19-2, 382 N.C. 366, 879 S.E.2d 124 (N.C. 11/4/22)(Earls) – plaintiff was hired by an Alabama state university (Troy) to work as a recruiter for Troy's on-line programs in Troy's Fayetteville office. Plaintiff sued Troy University for WDPP, negligent retention/supervision, IIED and tortious interference with contractual rights after he was fired for complaining about sexual harassment of himself and students by two female co-workers. Troy asserted sovereign immunity and moved for dismissal under Rule 12(b)(6), but its motion was denied. Seven months later, the US Supreme Court issued its opinion in Franchise Tax Board of CA vs. Hyatt (5-4) ruling that States retain their sovereign immunity from private suits brought in other States, irrespective of whether the forum state's decision to extend sovereign immunity to sister states as a matter of comity. As a result of this decision, Troy again moved to dismiss, the trial court granted the motion, the court of appeals affirmed, and the supreme court granted review, reversing the dismissal based on its determination that by registering with the Secretary of State as a non-profit corporation and engaging in a commercial (and not governmental) business activity[13] in North Carolina subject to N.C.Gen.Stat. § 55A-3-02(a)(1)(sue and be sued clause), Troy consented to be treated like a domestic corporation of like character and explicitly waived its sovereign immunity.

UNEMPLOYMENT

Timely Service of Petition - ***Williams v. N.C. Dept. of Commerce, DES***, No. COA22-103, 286 N.C.App. 381, 2022 N.C.App. LEXIS 742, 2022 WL 1655863 (11/1/22)(Dietz, Murphy, Wood)(unpub.) –

[13] The court found Troy's business activity in North Carolina was comprised of marketing and recruiting students.

Williams was denied unemployment benefits and appealed through DES' administrative reviews, she filed a Petition for Judicial Review on March 30, 2021, and gave it to the USPS for delivery via certified mail the same day (and apparently again on April 9, 2021). However, her return receipt did not provide a date of delivery and DES claimed it did not receive the Petition until April 14, 2021. Because NCGS 96-15(h), as interpreted by precedent, required *receipt* by DES within ten days of filing the Petition, and this requirement was jurisdictional, the superior court had no choice but to dismiss.

WAGE AND HOUR

LLC Not an "Employee" - *Jessey Sports, LLC v. Intercollegiate Men's LaCrosse Coaches Ass'n, Inc.*, No. COA22-882, 888 S.E.2d 677, 2023 N.C.App. LEXIS 283 (6/6/23) (Wood, Griffin, Gore) – plaintiff LLC was formed in 2009 and hired by defendant in 2017 to "grow [defendant's] income and partnership opportunities" with sponsors. In 2020 the parties entered into a 5-year contract memorializing the plaintiff's compensation structure. The contract was terminable at will upon 90-days' notice. In August 2021 defendant gave notice of its intent to terminate; on October 28, 2021, plaintiff sued to recover sums owed for July-September 2021, alleging breach of contract or, alternatively, unjust enrichment; UDTPA; and W&H violation. The trial court partially granted a 12(b)(6) motion, dismissed the W&H and unjust enrichment claims, and plaintiff appealed, arguing that while NCGS § 95-25.4 defined "employee" as any individual employed by an employer, the NCWHA did not define "individual,"[14] so that the court should apply the economic realities test employed in the federal courts.

The court of appeals allowed the interlocutory appeal in order to avoid the possibility of two trials on the same issues (the W&H and breach of contract claims relied on the same evidence/facts), but affirmed dismissal of the W&H claim, pointing out that NCGS § 95-25.2(4) defines "employee" as "any *individual* employed by an employer, in contrast with NCGS 95-25.2(5), which used the word "person" to define an employer, and then defined "person" to include individuals as well as corporate entities. The court of appeals ruled that a corporate entity was not an "individual" under the NC W&H, irrespective of what "unpersuasive" federal FLSA cases had to say. The court reversed dismissal of the unjust enrichment claim, however, stating that it was properly alleged as an alternative to the breach of contract claim.

[14] The plaintiff cited *Acosta v. Jani-King of Oklahoma, Inc.*, 905 F.3d 1156, 1159-60 (10th Cir. 2018)(janitors could be FLSA employees, regardless of corporate status, if economic realities test is satisfied; district court erred when it dismissed FLSA complaint because corporate entities could never be "individuals"). *See also Mouanda v. Jani-King Int'l*, 653 S.W.2d 65 (KY 2022)(reversing dismissal of wage and hour claim where relationship between plaintiff and defendant was complicated and required more than examination of documents signed by parties; employer would not be permitted to avoid employment law and regulation by requiring that individuals incorporate).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. _____

ANITA S. EARLS, Plaintiff, v. NORTH CAROLINA JUDICIAL STANDARDS COMMISSION; THE HONORABLE CHRIS DILLON, in his official capacity as Chair of the North Carolina Judicial Standards Commission; THE HONORABLE JEFFERY K. CARPENTER, in his official capacity as Vice Chair of the North Carolina Judicial Standards Commission; and the following Members of the North Carolina Judicial Standards Commission, each in his or her official capacity: THE HONORABLE JEFFERY B. FOSTER; THE HONORABLE DAWN M. LAYTON; THE HONORABLE JAMES H. FAISON III; THE HONORABLE TERESA VINCENT; MICHAEL CROWELL; MICHAEL T. GRACE; ALLISON MULLINS; LONNIE M. PLAYER JR.; JOHN M. CHECK; TALECE Y. HUNTER; DONALD L. PORTER; and RONALD L. SMITH, Defendants.	)	**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Plaintiff Anita S. Earls ("Earls"), by her undersigned counsel and pursuant to 28 U.S.C. §§ 2201 *et seq.*, and the First and Fourteenth Amendments to the United States Constitution, alleges as follows:

SUMMARY OF THIS ACTION

1. This is an action for declaratory judgment and injunction by Plaintiff, Anita S. Earls, Associate Justice of the North Carolina Supreme Court, who is being investigated and will potentially be punished for exercising her First Amendment rights to speak on the subject of lack of diversity in our State's courts, a matter of substantial public concern.

2. Justice Earls has been subjected to a series of months-long intrusive investigations, initiated by one or more anonymous informers, concerning her comments regarding operation of the North Carolina judicial system. Those comments, including those concerning diversity in the North Carolina judicial system, are fully protected by the First Amendment of the United States Constitution as core political speech.

3. The North Carolina Code of Judicial Conduct ("Code") which provides ethical guidance to judges in this State expressly permits judges to speak concerning the legal system and the administration of justice. This case concerns an on-going campaign on the part of the North Carolina Judicial Standards Commission (the "Commission"), which administers the Code, to stifle the First Amendment free-speech rights of Justice Earls and expose her to punishment that ranges from a letter of caution that becomes part of a permanent file available to any entity conducting a background check to removal from the bench.

4. As more fully described below, over the course of this year, the Commission has initiated two investigations into public comments made by Justice Earls on the subject of the legal system and the administration of justice. Most recently, on

August 15, 2023, the Commission indicated its intent to investigate and potentially punish Justice Earls for an interview in a legal news publication in which she discussed the North Carolina Supreme Court's recent record on issues relating to diversity. The interview was prompted by a published study of the race and gender of advocates who argue before the Court. In that interview, Justice Earls discussed matters such as the decision by the North Carolina Supreme Court to disband the Commission on Fairness and Equity, the Court's lack of judicial clerks from racial minority groups, the implicit bias associated with the interrupting of female advocates (and even herself as an African-American female justice) during oral argument, and the discontinuance of racial equity and implicit bias training in the North Carolina courts.

5. The Commission has indicated that it believes that Justice Earls' comments on these issues of legitimate public concern potentially violate a provision of the Code which requires judges to conduct themselves "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

6. It is Justice Earls' position that public confidence in the judiciary is compromised when the court system does not reflect the population it serves and is not promoted, as one court striking down a sanction levied against a judge who criticized the court system put it, "by casting a cloak of secrecy around the operations of the courts."[1]

7. More importantly, though, the First Amendment of the United States Constitution prohibits the Commission, as an arm of the State, from stifling or even chilling free speech, especially core political speech from an elected Justice of the North

[1] *Scott v Flowers*, 910 F.2d 201, 213 (5th Cir. 1990).

Carolina Supreme Court. The First Amendment allows Justice Earls to use her right to free speech to bring to light imperfections and unfairness in the judicial system. At the same time, the First Amendment prohibits the Commission from investigating and punishing her for doing so.

8. In this action, Justice Earls seeks a judicial declaration that any attempt to investigate her and potentially punish her for speaking out on matters of public concern violates the First Amendment. She seeks an injunction, preliminary and permanent, to stop the Commission from continuing to chill her right to speak on matters of public concern.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this case under (i) 28 U.S.C. §§ 1341 & 1343, in that it seeks to secure equitable relief to redress the deprivation, under color of any state law or statute, of any right, privilege, or immunity secured by the Constitution or by any Act of Congress, specifically 42 U.S.C. 1983, (ii) under 28 U.S.C. § 2201(a) to secure declaratory relief, and (iii) under 28 U.S.C. § 2202 to secure preliminary and permanent injunctive relief.

10. Venue of this action is proper within this judicial district pursuant to 28 U.S.C. § 1391(b) because Justice Earls resides in this district.

PARTIES

11. Justice Earls is a citizen and resident of Durham, North Carolina. In 2018, she was elected to the position of Associate Justice of the North Carolina Supreme Court. In that election, Justice Earls received the votes of over 1.8 million North Carolinians,

nearly one-third more than the votes received by the next-highest vote getter, the incumbent who was running for re-election. Justice Earls duly received a certificate of election from the State Board of Elections, a commission from the Attorney General as provided by law, and was sworn into office in January 2019 for a term of eight years – through December 2026 – as established by Art. IV, § 16 of the North Carolina Constitution. She is currently a candidate for reelection, having filed a letter in November 2022 declaring her intention to seek reelection to her office of Associate Justice.

12. The Defendant Commission was established by Article 30 of Chapter 7A of the North Carolina General Statutes, §§ 7A-374.1, *et seq.*, "to provide for the investigation and resolution of inquiries concerning the. . .conduct of any judge or justice of the General Court of Justice," including the imposition of various forms of "discipline," short of impeachment. *Id*. Such discipline is founded on violation of the Code, *i.e.*, the North Carolina Code of Judicial Conduct. *See* N.C. Gen. Stat. § 7A-374.2. The Commission is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

13. The Commission is composed of 16 members. Under the current law, six are judges appointed by the North Carolina Chief Justice, two each from the North Carolina Court of Appeals, the Superior Court bench, and the District Court bench. N.C. Gen. Stat. § 7A-375(a). Four are lawyers appointed by the North Carolina State Bar Council, and four are lay citizens, two appointed by the Governor and one each appointed

by the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives. *Id*.

14. Defendant Judge Chris Dillon is sued in his official capacity as the Chair of the Commission. In his official capacity, it is his responsibility to oversee the administration of the Commission, including overseeing investigations and potential discipline by the Commission. Judge Dillon is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

15. Defendant Jeffery K. Carpenter is sued in his official capacity as the Vice Chair of the Commission. In his official capacity, it is his responsibility to assist in overseeing the administration of the Commission, including overseeing investigations and potential discipline by the Commission. Judge Carpenter is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

16. Defendant Judge Jeffery B. Foster is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Judge Foster is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

17. Defendant Judge Dawn M. Layton is sued in her official capacity as a member of the Commission. In her official capacity, it is her responsibility to participate in the work of the Commission, including investigations and potential discipline by the

Commission. Judge Layton is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

18. Defendant Judge James H. Faison is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Judge Faison is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

19. Defendant Judge Teresa Vincent is sued in her official capacity as a member of the Commission. In her official capacity, it is her responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Judge Vincent is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

20. Defendant Michael Crowell is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Crowell is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

21. Defendant Michael T. Grace is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Grace is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

22. Defendant Allison Mullins is sued in her official capacity as a member of the Commission. In her official capacity, it is her responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Ms. Mullins is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

23. Defendant Lonnie M. Player, Jr. is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Player is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

24. Defendant John M. Check is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Check is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

25. Defendant Talece Y. Hunter is sued in her official capacity as a member of the Commission. In her official capacity, it is her responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Ms. Hunter is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

26. Defendant Donald L. Porter is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work

of the Commission, including investigations and potential discipline by the Commission. Mr. Porter is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

27. Defendant Ronald L. Smith is sued in his official capacity as a member of the Commission. In his official capacity, it is his responsibility to participate in the work of the Commission, including investigations and potential discipline by the Commission. Mr. Smith is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

THE OPERATION OF THE COMMISSION

28. The disciplinary measures available to the Commission to apply to North Carolina judges and justices range from a private "letter of caution," N.C. Gen. Stat § 7A-374.2(6), which the Commission is authorized to issue on its own authority, *id*., to a "public reprimand," *id*. at § 7A-374.2(7), "censure," *id*. at § 7A-374.2(1), "suspension," *id*. § 7A-374.2(9), or "removal," *id*. at § 7A-374.2(8), each of which ultimately requires a "finding by the Supreme Court." The penalty of removal includes not only removal of the judge from her current position, but also "disqualif[ication] from holding further judicial office." *Id*.

29. The Chair of the Commission, by statute one of the appointed Court of Appeals judges (and here Judge Dillon), N.C. Gen. Stat § 7A-375(a1), is authorized to employ – and currently does employ – an executive director, Commission counsel, investigator, and other support staff. *Id*. at § 7A-375(f).

30. The Commission is also empowered, subject to approval by the Supreme Court, to adopt and amend "its own rules of procedure for the performance of the duties and responsibilities" under Article 30. N.C. Gen. Stat § 7A-375(g).

31. By statute, "[a]ny citizen of the State may file a written complaint with the Commission concerning the. . .conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary." N.C. Gen. Stat § 7A-377(a). The Commission may also "make an investigation on its own motion." *Id*. The investigation is defined as "the gathering of information with respect to alleged misconduct or disability." N.C. Gen. Stat § 7A-374.2(4).

32. Under the Rules promulgated by the Commission, the Chair is charged with dividing the Commission into two panels, designated Panel A and Panel B. Rule 2(b)(1), Rules of the Judicial Standards Commission ("Rules"). The Chair serves as Chair of each Panel while the other Commission members are assigned equally according to their status – as judges, lawyers, or lay citizens – to one Panel or the other. Rule 2(b)(2). Each panel serves either as an "investigative panel" or a "hearing panel," in a given matter. Rule 2(b)(4).

33. Complaints, including the name of the person who lodges the Complaint, are kept confidential by the Commission. Rule 6. Rule 10(c)(1) specifically provides that the notice letter to the accused judge "shall not identify the name of the complainant" (unless necessary to determine whether the judge must be disqualified from continued

involvement in cases involving the complainant). Thus, the judge's accuser is generally anonymous.

34. If a written complaint is not summarily dismissed by the Executive Director and Commission Counsel on the grounds that it fails to disclose facts which, if true, indicate that a judge has engaged in conduct in violation of the Code, the complaint is "considered by an investigative panel" which, by an affirmative vote of at least five members "may dismiss the complaint or authorize an investigation pursuant to Rule 10." Rule 9(b).

35. Rule 10, titled "Investigations," provides for both a "preliminary investigation" for "the purpose of verifying the credibility of or ascertaining additional facts necessary to evaluate the allegations," Rule 10(b), and a "formal investigation" made "for the purpose of determining whether a judge has engaged in actual misconduct in violation of the Code." Rule 10(c).

36. The Commission Rules provide that an accused judge is "given a general description of the subject matter of the investigation," as well as a "reasonable opportunity to respond to the notice letter and provide relevant information to the Commission relating to the subject matter of the investigation." Rule 10(c).

37. Upon "the affirmative vote of at least 5 members," the investigative panel may authorize the initiation of a disciplinary proceeding. . .against the judge." Rule 12(a). That proceeding is instituted by a Statement of Charges, Rule 12(b), followed by an Answer, Rule 13, opportunities for discovery, Rule 16, and a hearing with witnesses. Rules 19 & 20. At the conclusion of the hearing, the hearing panel, by an affirmative

vote of at least five members, may recommend discipline, up to and including removal of the judge, to the North Carolina Supreme Court. Rule 21.

38. While the Commission "has the same power as a trial court. . .to punish for contempt, or for refusal to obey lawful orders or process issued" by it, N.C. Gen. Stat § 7A-377(d), the Commission, by statute, "is limited to reviewing judicial conduct, not matters of law." *Id*. at § 7A-377(a). For that reason, the Commission does not provide a forum for Justice Earls to raise her constitutional claims against its actions.

THE OPERATIVE PROVISIONS OF THE NORTH CAROLINA CODE OF JUDICIAL CONDUCT

39. As more fully described below, this action concerns statements made by Justice Earls in an interview with a legal publication.

40. On August 15, 2023, Justice Earls was provided with a Notice Letter (the "Notice") from the Commission stating that the Commission had reopened a formal investigation into her "based on an interview" given "to the media in which you appear to allege that your Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision making." (A true and complete copy of the Notice is attached to this Complaint as Exhibit A.)

41. The Code pursuant to which the Commission seeks to investigate Justice Earls was first promulgated by the North Carolina Supreme Court in 1973, 283 N.C. 771 (1973), and has been amended many times in the years since. *See* A Publication Record of the Code of Judicial Conduct at 15. The current version was adopted in 2006, 360 N.C. 676 (2006), and amended in 2015. 368 N.C. 1029 (2015).

42. As stated in its Preamble, "[a]n independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established." Code, Preamble. The Preamble further states that "[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina." *Id*. The Code is comprised of seven Canons, each with multiple subparts.

43. Of the seven Canons, only one, Canon 7, explicitly deals with speech. That Canon states that a "judge may engage in political activity consistent with the judge's status as a public official," and is explicitly "designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity." Code, Canon 7.[2]

44. North Carolina's Canon 7 was significantly revised to provide for fewer restrictions on speech after the United States Supreme Court, in *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002), struck down a similar code provision in

[2] Part of Canon 3 (not at issue here), specifically Canon 3(A)(6), also provides that a "judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law."

Minnesota prohibiting candidates for judicial elections (including judges) from announcing their views on disputed legal and political issues on the grounds that it violated the First Amendment.

45. The Notice to Justice Earls references two Code provisions, Canons 2(A) and 3(A)(1). (Notice at 1.) Neither of those two Code provisions under which the Commission seeks to investigate Justice Earls' speech explicitly references speech. The first, a part of Canon 2 – headed "[a] judge should avoid impropriety in all the judge's activities" – sets out a standard that a "judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

46. The Commission's Notice announcing the investigation also refers to Canon 3(A)(1) which, under the rubric "Adjudicative Responsibilities," states that a "judge should be unswayed by partisan interests, public clamor, or fear of criticism."

47. The Commission Notice letter makes no mention of a further Code provision – Canon 4(A) – which explicitly provides in pertinent part that a "judge may speak, write. . .or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice."

JUSTICE EARLS' INTERVIEW COMMENTS CONCERNING DIVERSITY

48. The events at issue in this case arise out of a May 17, 2023 article by North Carolina Solicitor General Ryan Park and two co-authors published in the magazine of the North Carolina Bar Association, *North Carolina Lawyer*, titled "Diversity and the North Carolina Supreme Court: A Look at the Advocates."

49. In that article, Solicitor General Park using "a dataset painstakingly compiled over the last two years," concluded that "over ninety percent of oral advocates in the North Carolina Supreme Court identified as white and over seventy percent as male." Those statistics were contrasted with North Carolina's overall population which is only 70% white and less than half male. The analysis concluded that in the "rarefied space" of Supreme Court oral arguments, "opportunities remain scarce for attorneys from certain backgrounds," *i.e.*, female and non-white.

50. Following up on the issues raised in that article, on June 20, 2023, *Law360*, an on-line publication directed to the legal profession, published an interview with Justice Earls, the only non-white female serving on the North Carolina Supreme Court, which it titled "North Carolina Justice Anita Earls Opens Up About Diversity" (the "Interview"). (A true and complete copy of the Interview is attached to this Complaint as Exhibit B.)

51. In the preface of the Interview, *Law360* described Justice Earls as "a former civil rights attorney elected as a justice of the North Carolina Supreme Court" who "shared her perspective on being a Black female Democrat on a state Supreme Court that is largely white, male and, after last year's elections, Republican." (Interview at 1.)

52. In response to the question raised by the article, namely, "[w]hy are oral advocates that come before the North Carolina Supreme Court overwhelmingly male and white, despite a diverse state population and state bar membership," Justice Earls referred to several factors, including:

- That the current Supreme Court was "lacking" on "racial diversity" with "14 or 15 law clerks serving in our court and no African Americans. One Latina. (Interview, at 2.)

- "Implicit bias" as evidenced by a circumstance where Justice Earls felt "like my colleagues are unfairly cutting off a female advocate" and she was "unfairly, not allowed to answer the question, interrupted." (*Id.*) This, while "not uniform" and "not in every case," Justice Earls said, could have been a factor "in the politics of the particular case that's being argued." (*Id.*)

Justice Earls took pains to point out that she was "not suggesting that any of this is conscious, intentional, racial animus," but that "our court system, like any other court system, is made up of human beings and I believe the research that shows that we all have implicit biases."

53. Asked about efforts to "diversify the appellate bench," Justice Earls noted that an internal equity committee set up "to look at just the North Carolina Supreme Court and our hiring practices" was "disbanded at the beginning of this year." (Interview at 2.)

54. She also mentioned that the Supreme Court, as previously constituted, had "issued an order appointing a Commission on Fairness and Equity in the North Carolina judicial system," which "dealt with gender as well as race." (Interview at 2.) Although that Commission "was established by order of the court in October of 2020," in "January of 2023, the chief justice refused to reappoint members of that committee." (*Id.*) In her view, Justice Earls continued, the "new majority on the court didn't issue a new court order saying we're superseding the old order. …It's in line with the values of the current party in power in our court." (*Id.*, ellipsis in original.) She continued, "[t]he new members of our court very much see themselves as a conservative bloc. They talk about

themselves as 'the conservatives.' Their allegiance is to their ideology, not to the institution."

55. As an example of that point, the Interview contained an "illustration hung in the North Carolina Supreme Court" depicting the elected Republican appellate justices and judges as cartoon superheroes, called the "North Carolina Justice League." (Interview at 3.)

56. In response to a third question about the obstacles attributable to gender or race that Justice Earls had personally faced as an appellate advocate or judge, Justice Earls stated that she believed that she was "interrupted by more junior colleagues" and sometimes even advocates "who won't let me get my question out." (Interview at 4.) In seeing "ways in which I'm treated differently by my colleagues and during oral argument," Justice Earls stated it was sometimes "hard to separate out: Is this race or is this gender or is this because of my political views." (*Id*.) She went on to state that "[a]ny one of those three or the combination of all three might be the explanation." (*Id*.) She also stated that "[t]here were two times when one of my colleagues publicly tried to embarrass me. . .in the context of the case and the oral argument." (*Id*.)

57. A fourth question asked Justice Earls about implicit bias trainings offered to North Carolina judges, to which Justice Earls replied that a curriculum had been developed and offered, but that the newly elected Chief Justice had ended the program (Interview at 4), which she described as "part of the general antipathy towards seeing that racial issues matter in our justice." (*Id*.) In explaining her position, Justice Earls noted that the current Chief Justice had actually dissented to the earlier Supreme Court order

establishing the Commission on Fairness and Equity, based on his view that the timing of the order was political, and that it prejudged issues of racial discrimination, and improperly inserted the judiciary into the policymaking arena. (*Id*.)

58. In response to a question about increasing diversity on the bench, Justice Earls mentioned the financial difficulties associated with running for office and the removal of public financing in North Carolina. (Interview at 4-5.) Finally, in response to the question "[w]hat would you tell women and people of color hoping to join North Carolina's appellate bench or appellate bar," Justice Earls said "I think the message I would give is: It's twice as important that you do this. You can find resources to help you surmount the hurdles." (*Id*. at 5.)

59. It is for this speech – core political speech concerning important public policy questions regarding the justice system and administration of the courts – that the Commission seeks to investigate Justice Earls to determine whether she has violated the Code, and potentially sanction her for a violation.

60. According to the Commission's Notice, Justice Earls' comments "appear to allege that your Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision-making." Yet, as shown above, none of Justice Earls' statements related to a "decision" in case (or the "decision-making" in arriving at such a decision), but concern, at most, only "decisions" to interrupt advocates or fellow justices at oral argument.

61. The other "decisions" – *i.e.*, whether to hire minority law clerks and to continue the work of committees dedicated to equity or court-based implicit bias trainings

– also do not relate to decision-making in any particular case, but instead to the public-policy implications of different aspects of court administration.

62. In fact, nowhere in the interview does Justice Earls discuss a single case that has come before the Supreme Court or its decision in such a case. Given that clear context, the Commission's statement (Notice at 2), that "publicly alleging that another judge makes decisions based on a motivation not allowed under the Canons without some quantum of definitive proof runs contrary to a judge's duty to promote public confidence in the impartiality of the judiciary," is obtuse, if not nonsensical.

63. Even on that point, the Commission pays minimal obeisance to the constitutional primacy of free speech, noting that "there are circumstances where a judge may publicly criticize another judge's judicial philosophy and decision-making process (see *GOP v. White*)" (Notice at 1-2), referencing the decision in which the U.S. Supreme Court struck down speech restrictions on judges. The Notice, moreover, entirely fails to reference Canon 4(A) which, consistent with the First Amendment, permits judges to "speak" concerning the "legal, or governmental system, or the administration of justice." Instead, the Commission's Notice indicates that it would read that Canon entirely out of the Code in favor of squelching free speech.

64. Indeed, the entire tenor of the Notice, and, more importantly, its decision to initiate an investigation based on a judge's speech, bespeaks a callous disregard for the principles of the First Amendment. The Commission's actions in instituting the investigation indicate that it believes that "promot[ing] public confidence in the impartiality of the judiciary" (Notice at 2), is best accomplished by threatening judges

who speak out about what they view as imperfections or defects in the judicial system and who do so in a measured and nuanced manner. Nothing could be more inimical to the First Amendment.

THE COMMISSION'S NOTICE IS PART OF A CONTINUING EFFORT TO THWART JUSTICE EARLS' RIGHT TO FREE SPEECH

65. If this were the first effort of the Commission to thwart the free-speech rights of Justice Earls, it might charitably be viewed as an over-zealous aberration. The fact that it is part of a continuing effort to stifle Justice Earls, however, makes such a conclusion impossible.

66. Earlier this year, on March 20, 2023, the Commission issued a Notice to Justice Earls indicating that "a written complaint [had been] filed with the Commission" and that it was initiating a formal investigation – dubbed "Inquiry No. 23-081" – concerning comments made by Justice Earls regarding "matters being currently deliberated in conference by the Supreme Court" and discussed by her at "two public events," and subsequently in a media inquiry. (A true and complete of the March 20, 2023 letter initiating the investigation ("Notice No. 1") is attached to this Complaint as Exhibit C.)

67. As with the Commission's more recent Notice, Notice No. 1 did not accuse Justice Earls of discussing any specific case being considered in the Supreme Court's conference, but instead only three administrative matters: (1) the Court's decision to rescind its 2019 Rule adopting the universal citation format, (2) the Court's decision to adopt a rule permitting published opinions of the court of appeals to be deemed

"unpublished" by the Court (and thus without precedential effect), and (3) consideration of a possible legislative change that would eliminate the right of appeal to the Supreme Court based on a dissent in the Court of Appeals. Each of these three issues was the subject of substantial earlier public discussion by members of the Court and others. The first issue, in fact, was already decided and the subject of a published order before Justice Earls even publicly addressed it. In other words, the Commission was investigating Justice Earls for publicly reporting on an already-public order on a technical administrative issue, *i.e.*, changing the manner in which cases would be cited by the courts.

68. Those matters, moreover, were discussed in forums at which a Supreme Court Justice's right to speak could hardly be questioned, namely, the North Carolina General Assembly Courts Commission (a commission made up of legislators and judges of which Justice Earls was a member), and the North Carolina Bar Association Board of Governors (of which Justice Earls was a vice president).

69. Nevertheless, as a result of the institution of the investigation, Justice Earls was required to retain a lawyer, to submit to a lengthy and probing interview by Commission staff, and to devote a substantial amount of time to defending herself, taking away time from the role to which she had been elected, that of Associate Justice of the North Carolina Supreme Court.

70. Ultimately, Justice Earls' counsel submitted a substantial letter explaining why her conduct not only did not violate any of the Canons of the Code, but was actually consistent with Canon 4(A)'s endorsement of judges engaging in activities "concerning

the legal. . .or governmental system or the administration of justice." (A true and complete copy of Justice Earls' counsel's response Notice No 1 is attached to this Complaint as Exhibit D.)

71. The letter sent to the Commission on behalf of Justice Earls attempted to explain to the Commission the potential problems with seeking to investigate judges with regard to speech, stating:

> The Code of Judicial Conduct, like all governmental pronouncements, is subject to the First Amendment of the U.S. Constitution and its proscription against the abridgment of free speech. The U.S. Supreme Court, for example, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), ruled that the "Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment" and struck down that particular canon. *Id*. at 788.
>
> An attempt to impose discipline of any type in this circumstance could be an appropriate subject of a First Amendment as-applied challenge in federal court to the putative authority of the Commission to proscribe and/or punish speech by judges concerning administrative matters. The lack of any written authority, coupled with the necessary reliance on opaque court traditions whose existence is disclaimed by multiple retired Justices, counsels against proceeding in this matter.

(Exhibit D, at 9.)

72. In addition to the response letter, Justice Earls submitted statements supporting her position from four retired Supreme Court Justices and a member of the North Carolina General Assembly.

73. On May 16, 2023, counsel for the Commission reported to Justice Earls' counsel that a Commission Panel had met on May 12, 2023 and voted to dismiss the complaint against Justice Earls without any further action.

74. Later, on June 12, 2023, Justice Earls, through counsel, informed Commission Counsel that she was waiving her right to confidentiality regarding the investigation pursuant to Commission Rule 6(b)(2).[3]

75. Despite the dismissal, Commission Counsel informed Justice Earls' counsel that Justice Earls should be reminded "of the language in Canon 2(A), that a Judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

76. Justice Earls took that "reminder" as a caution to be certain that her public comments do not reveal any confidential matters, as that is what is required to comply with the law; and to carry out her duties to uphold the fair and equitable administration of justice, as that is what the Code contemplates will promote public confidence in the judiciary. She did not perceive this to be a warning that if she continued to speak out on issues of public concern, she would again be subject to investigation and discipline for exercising her First Amendment rights.

77. However, it now appears that the warning was also intended to stop her from speaking on issues of public concern more broadly. Even though the earlier investigation concerning Justice Earls was reported as "dismissed," and the fact that the Commission's Rules have no procedure for "reopening" a case in which a Panel votes to dismiss, the Notice announcing the Commission's new inquiry states that it represents a

[3] Justice Earls, on August 28, 2023, also waived confidentiality with respect to the new investigation.

"reopen[ing]" of the earlier-dismissed formal investigation, utilizing the same inquiry number, No. 23-081. The Commission's failure to adhere to its own Rules is a further example of the irregularities surrounding its continuing harassment of Justice Earls concerning her right to speak out.

78. The Commission's continuing efforts to investigate and potentially discipline Justice Earls are a blatant attempt to chill her First Amendment rights. The fact that the Commission is doing so under Canon 2(A) with its vague standard when applied to speech that somehow fails to "promote[] public confidence" in the judiciary, makes the actions of the Commission even more unconstitutional and discourages both Justice Earls and other judges and candidates from making statements critical of the judicial system. Some members of the public will lose confidence in the judiciary if issues of race and gender bias are not addressed, especially if those issues are not addressed because the Commission is using its powers to stifle the discussion.

79. The Commission's reference to a second Canon – Canon 3(A)(1) – which concerns only a judge's "adjudicative responsibilities," is entirely without basis. Justice Earls' comments, which do not relate to any adjudicative case, cannot fairly be portrayed as "swayed" by "partisan interests, public clamor, or fear of criticism" as described in that Canon. Rather, her statements addressed a matter raised by an article written by the North Carolina Solicitor General and of sufficient public concern to merit publication by the North Carolina State Bar Association, and a follow-up article by the legal periodical, *Law360*. Her statements are core political speech protected by the First Amendment.

80. The series of investigations into Justice Earls has, in fact, led to a chilling of her First Amendment rights. As a result of the actions of the Commission, Justice Earls turned down an invitation to write an article for a national publication, and decided not to discuss the issue of the racial and gender composition of state courts in response to a request to contribute an essay to the Yale Law Review forum about state courts because of concerns that it could lead to further investigation by the Commission. In addition, Justice Earls refrained from speaking publicly at a meeting of the Equal Access to Justice Commission concerning a proposal to extend a court rule that broadens the pool of advocates available to indigent litigants for fear that she could not speak without running the risk of discipline from the Commission. She also declined to provide her personal views on the merits of the proposal when directly asked to do so in a private conversation with a person with a professional stake in the issue. Justice Earls has further considered whether any statement she makes in the opinions she issues might likewise subject her to discipline.

81. The effects have not only chilled the free-speech rights of Justice Earls, but have also interrupted her ability to do her work as a Justice of the North Carolina Supreme Court and have understandably taken a substantial emotional toll as she has tried to negotiate the Commission's capricious line on what judges can and cannot say about important public issues affecting the justice system. Part of the capriciousness of the Commission is based on the fact that other judges appear able to comment publicly on similar issues without challenge. Any discipline from the Commission has the potential

to derail Justice Earls from seeking or being considered for any future professional opportunities, which causes her considerable stress and anxiety.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

82. Paragraphs 1 through 81 of the Complaint are realleged as if fully set forth herein and reincorporated by reference.

83. The First Amendment of the U.S. Constitution prohibits the "abridging the freedom of speech" of persons by the government and those acting under color of its laws. Justice Earls is entitled to a declaration that any attempt to investigate or discipline her under the Code for speech concerning matters of public concern, including, without limitation, the statements in the Interview, is unconstitutional as applied to her. Justice Earls is currently under the cloud of yet another burdensome and protracted investigation with the prospect of discipline, up to and including her removal from the North Carolina Supreme Court as described above. Justice Earls, both as a judge and a judicial candidate, also intends to continue to engage in the core political speech described above in a manner that potentially subjects her to further investigations by the Commission backed by the additional threat of other discipline under the Code.

84. As applied to Justice Earls, the actions of the Commission seek to wield the Code as a content-based restriction in order to regulate, as well as punish, core political speech. As such, it is both subject to strict scrutiny and presumptively unconstitutional.

85. The fact that virtually any speech critical of the judicial system could be construed to undermine "public confidence" in the judiciary, renders Canon 2(A) in this

context unconstitutionally vague. In fact, nothing will undermine public confidence in our courts more than serial burdensome disciplinary investigations into speech designed to inform the public about problems perceived in the judicial system by one of its elected Supreme Court Justices. The actions of the Commission in this circumstance necessarily serve only to chill free speech.

86. In short, the actions of the Commission in wielding the Code against Justice Earls accomplishes no compelling state interest, let alone does so in a "narrowly tailored" fashion as otherwise required by the Constitution. The fact that the Commission has forced Justice Earls to engage with these invasive and expensive investigations for months shows that the Commission is acting primarily to chill protected political speech and, in fact, has achieved that improper goal.

88. Justice Earls has no adequate remedy at law. The Commission should be enjoined from purporting to reopen its earlier-dismissed investigation and its investigation of Justice Earls' statements on matters of public concern, including statements in the Interview, should be declared unconstitutional, and any further investigation or enforcement proceeding under the Code against Justice Earls for her speech on matters of public concern should be preliminarily and permanently enjoined.

SECOND CAUSE OF ACTION
FIRST AMENDMENT & 42 U.S.C. § 1983

89. Paragraphs 1 through 88 of the Complaint are realleged as if fully set forth herein and reincorporated by reference.

90. The actions of the Commission as alleged above violate the freedom of speech clause of the First Amendment of the United Stated Constitution by purporting to regulate – through the investigative powers of the Commission and the sanctions against judges provided for in the Code – speech at the absolute core of the First Amendment, namely protected political speech, all in violation of 42 U.S.C. § 1983.

WHEREFORE, Plaintiff prays the Court that:

A. The Court declare pursuant to 28 U.S.C. § 2201(a) that the investigation and potential punishment of Plaintiff for her statements on matters of public concern, including, without limitation, the statements in the Interview, is unconstitutional;

B. The Court grant preliminary injunctive relief as well as a permanent injunction in favor of Plaintiff barring further investigation or punishment of her for statements on matters of public concern;

C. That Plaintiff be granted her attorneys' fees under 42 U.S.C. § 1988; and

D. The Court grant Plaintiff such further relief as it may deem appropriate.

This the 29th day of August, 2023.

By: /s/ Pressly M. Millen

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EXHIBIT A

State of North Carolina
Judicial Standards Commission

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JUDGE CHRIS DILLON, CHAIR
JUDGE JEFFERY CARPENTER, VICE-CHAIR
JOHN M. CHECK
MICHAEL CROWELL
JUDGE JAMES H. FAISON, III
JUDGE JEFFERY B. FOSTER
MICHAEL GRACE
TALECE Y. HUNTER
JUDGE DAWN M. LAYTON
ALLISON MULLINS
LONNIE M. PLAYER, JR.
DONALD L. PORTER
RONALD L. SMITH
JUDGE TERESA H. VINCENT

BRITTANY PINKHAM
EXECUTIVE DIRECTOR

PATRICIA A. FLOOD
COMMISSION COUNSEL

August 15, 2023

CONFIDENTIAL
SENT VIA EMAIL PURSUANT TO WAIVER OF PERSONAL SERVICE TO COUNSEL
Justice Anita Earls
Press.millen@wbd-us.com

Re: Inquiry No. 23-081

Dear Justice Earls:

I hope you are doing well. As I discussed with Mr. Millen, the Commission has reopened the formal investigation into allegations raised against you in 23-081. For your information and as required pursuant to Rule 10(c) of the Judicial Standards Commission, I would like to inform you of the following:

1. The original subject matter of the investigation involved allegations that you disclosed confidential information concerning matters being deliberated in conference by the Supreme Court at two public events and to a newspaper reporter which led to media coverage of the subject matter. At the conclusion of this investigation, the Commission voted to dismiss the complaint and provide you with a verbal reminder to be mindful of your public comments in light of the language of Canon 2A. This verbal warning was provided to your counsel and was later reiterated in written correspondence.

2. The Commission voted to reopen this investigation based on an interview you since gave to the media in which you appear to allege that your Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision-making. This conduct, if true, potentially violates Canon 2A of the Code of Judicial Conduct which requires a judge to conduct herself "at all times in a manner which promotes public confidence in the integrity and impartiality of the judiciary." Since Canon 3 requires judges to perform their duties "impartially and diligently . . . unswayed by partisan interests," consistent with the Commission's historical interpretation of Canon 2A, a judge should not publicly suggest that another judge before whom litigants are appearing is making decisions based on some improper basis, unless the criticizing judge *knows* this to be the case. While there are circumstances where a judge may publicly criticize another judge's judicial philosophy and

decision-making process (see *GOP v. White*), publicly alleging that another judge makes decisions based on a motivation not allowed under the Canons without some quantum of definitive proof runs contrary to a judge's duty to promote public confidence in the impartiality of the judiciary.

3. You are entitled to a reasonable opportunity to present any relevant information regarding this matter at any time during this investigation. This includes any documents, statements, or other information. The Commission Investigator will also contact you regarding a time to set up a formal interview to address the Commission's questions and concerns.

4. You may, but are not required to, retain counsel to represent you in this matter, but we ask that you have such counsel file a written notice of appearance with the Commission to ensure proper communication. Consistent with Formal Opinion No. 2011-02, which is available on the Commission's website, if you retain counsel in this matter, you should request an informal advisory opinion as to whether disqualification is required in cases in which such counsel appears before you.

5. This investigation is confidential in accordance with the provisions of N.C. Gen. Stat. § 7A-377 and Commission Rule 6, and information or documents provided to you in furtherance of the investigation may not be disclosed.

6. The Commission Investigator or I may be conducting interviews with your court colleagues, court staff, or attorneys as part of this investigation. A thorough, fair, and accurate investigation depends on their full cooperation and candor without fear of reprisal, actual or perceived. As such, I want to make you aware that pursuant to Commission Rule 10(e), any conduct on your part that may be reasonably perceived as retaliatory for cooperating with the Commission may constitute a separate violation of the Code.

If you have any questions about the Commission's procedures, the status of the investigation, or any other issue relevant to this matter, please do not hesitate to reach out to me. If you would like to review the Commission's Rules, the Code of Judicial Conduct, formal advisory opinions, ethics resources, or past disciplinary decisions, they are available on our website, www.ncjsc.gov.

Sincerely,

Patricia A. Flood
Commission Counsel

EXHIBIT B

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North Carolina Justice Anita Earls Opens Up About Diversity

By **Hannah Albarazi**

Law360 (June 20, 2023, 10:45 AM EDT) -- In an interview with Law360, North Carolina Supreme Court Justice Anita Earls discusses what's behind a glaring lack of diversity on the state's appellate bench and among advocates who argue before her court, and how the newest chief justice derailed initiatives addressing implicit bias and racial inequities in the state's justice system.

Justice Anita Earls

Justice Earls, a former civil rights attorney elected as a justice of the North Carolina Supreme Court in 2019, shared her perspective on being a Black female Democrat on a state Supreme Court that is largely white, male and, after last year's elections, Republican, when voters flipped the court's majority from 4-3 Democratic to 5-2 Republican.

In this conversation, Justice Earls shined a spotlight on the decision by North Carolina Chief Justice Paul Newby — who did not respond to Law360's request for comment — to discontinue efforts within the judiciary to address implicit bias and racial discrimination at a time when there remains a significant lack of diversity on the appellate bench and among those who argue before it.

A Law360 analysis found that North Carolina Supreme Court justices are 71% white males and that the state's Court of Appeals judges are 93% white and 60% male. A recent study by the state Solicitor General Ryan Y. Park likewise found that attorneys who argue before the state Supreme Court are 90% white and 70% male and do not reflect the state's diversity.

This interview has been edited for length and clarity.

Why are oral advocates that come before the North Carolina Supreme Court overwhelmingly male and white, despite a diverse state population and state bar membership?

Part of it is the current pool of who's eligible to argue in front of us and then who decides who gets to do the arguments. But then beyond that: What is the pipeline to arguing in front of us? If you look at who is hired to serve as clerks to the justices … we have plenty of female clerks, but on racial diversity we're lacking. … For the term that just started in January … there were 14 or 15 law clerks serving in our court and no African Americans. One Latina.

I think another part of this, in terms of the gender and race discrepancies that you see, I really do think implicit bias is at play.

There have been cases where I have felt very uncomfortable on the bench because I feel like my colleagues are unfairly cutting off a female advocate. We have so few people of color argue, but in one case there was a Black woman who argued in front of us and I felt like she was being attacked unfairly, not allowed to answer the question, interrupted. It's not uniform. It's not in every case. And so it could certainly factor in the politics of the particular case that's being argued.

So when that is the culture of our court — that is to say, when the culture is that male advocates and advocates who reflect the majority of the court, white advocates, when they get more respect, when they are treated better —I think it filters into people's calculations about who should argue and who's likely to get the best reception and who can be the most persuasive.

I'm not suggesting that any of this is conscious, intentional, racial animus. But I do think that our court system, like any other court system, is made up of human beings and I believe the research that shows that we all have implicit biases.

What efforts have been made to diversify the appellate bench, which is largely male and white?

Under the prior court, there was an equity committee looking at these issues. That committee was disbanded at the beginning of this year. That was an internal equity committee to look at just the North Carolina Supreme Court and our hiring practices. That's an issue, too.

The prior court had [also] issued an order appointing a Commission on Fairness and Equity in the North Carolina judicial system. It dealt with not only how we treat the public but how we operate internally. It dealt with gender as well as race. It was established by order of the court in October of 2020. And then in January of 2023, the chief justice refused to reappoint members of that committee.

There's been no attention to that because it's all been done very quietly. It's not like there was a big press conference …The new majority on the court didn't issue a new court order saying we're superseding the old order. … It's in line with the values of the current party in power in our court.

The new members of our court very much see themselves as a conservative bloc. They talk about themselves as "the conservatives." Their allegiance is to their ideology, not to the institution.

An illustration hung in the North Carolina Supreme Court depicts a slate of current elected Republican jurists as superheroes: Supreme Court Chief Justice Paul Newby and Justices Philip Berger Jr. and Tamara Barringer and Court of Appeals Judges Chris Dillon, Jeffery Carpenter, Fred Gore, Jefferson Griffin and April Wood. Click to enlarge. (Courtesy of Robyn Sanders)

Have you faced obstacles that you attribute to your gender or race on your journey to becoming an appellate advocate or Supreme Court judge?

Both. Yes.

I had to have very sharp elbows sometimes as I got further along in my career, to say, "Look, I have 25 years' experience. You're not going to shut me out of this litigation strategy decision." So, just to be in the position to ultimately be the person who gets to argue the case on appeal, there were

certainly challenges as a female litigator.

In terms of being on the court, interestingly, I didn't feel any barriers running for office. I didn't feel like voters had any preconceived notions that I couldn't be an appellate judge because I was a woman.

But I certainly think that now that I'm on the bench, I see ways in which I'm treated differently by my colleagues and during oral argument, and sometimes it's hard to separate out: Is this race or is this gender or is this because of my political views? Any one of those three or the combination of all three might be the explanation.

I've been interrupted by more junior colleagues and I've had to say, "Excuse me, I'm not finished with my question." And less often or less striking to me, but still occasionally happens is, advocates who won't let me get my question out. That just doesn't happen to my male colleagues.

There were two times when one of my colleagues publicly tried to embarrass me, and in the context of the case and the oral argument, that's just not only my perception. Other people in the courtroom at the time were shocked and surprised because that isn't how our court operates, at least in the past.

Are there implicit bias trainings offered to North Carolina's jurists?

Well, there were.

I am co-chair of the Governor's Task Force on Racial Equity and Criminal Justice, [created] following George Floyd's murder in 2020. One of our first recommendations was that all judicial system actors have implicit bias and racial equity training.

The [University of North Carolina] School of Government … developed a curriculum. Some trial court judges attended their implicit bias training, and then when the new chief justice came into office in January 2021, he ended that by renegotiating the contract with the School of Government. It's no longer being offered to judges.

I think that it's part of the general antipathy towards seeing that racial issues matter in our justice system.

The current Chief Justice Newby — at the time [Senior Associate] Justice Newby — wrote a dissent to the order creating the Commission on Fairness and Equity, in which he basically said … that he thought the timing of the order was political, that the text of the order improperly prejudged issues of racial discrimination, and that it improperly inserts the judiciary into the policymaking arena.

So it's a very political issue. And the current party [in power] doesn't think that there are any problems of racial discrimination in our justice system.

And so why would you have training on implicit racial bias if there is no such thing as racial discrimination or racial bias, right? That's their worldview.

What can be done to increase diversity on the bench?

It can be really challenging to figure out how you're going to run for office and keep a full-time job. Because for me, running for office was a full-time job, and I could only do it when I had the financial means to go without income for a year. It was only after 30 years of practicing law, with both my kids out of college, could I finally say, "I can go without an income for a year." So I think that's a barrier at the appellate level.

The fact that you have to campaign statewide to win the seat, you have to raise a lot of money. I had to raise $1.5 million. That was in 2018. That wouldn't be enough now. When we had public financing of statewide judicial appellate races, that was actually when you saw the bench diversify.

If you look at when did women start getting elected to our appellate courts in North Carolina. It was after public financing came in, and that has since ended. Elimination of that was part of the monster voter suppression bill in 2013.

What would you tell women and people of color hoping to join North Carolina's appellate bench or appellate bar?

It would break my heart to think that people are discouraged from doing appellate work because they don't want to face these hurdles.

I think the message I would give is: It's twice as important that you do this. You can find resources to help you surmount the hurdles.

--Editing by Jill Coffey.

EXHIBIT C

State of North Carolina
Judicial Standards Commission

P. O. Box 1122
Raleigh, NC 27602
(919) 831-3630

March 20, 2023

CERTIFIED MAIL
CONFIDENTIAL

Justice Anita Earls
North Carolina Supreme Court
2 E. Morgan Street
Raleigh, NC 27601

Re: Inquiry No. 23-081

Dear Justice Earls:

I hope you are doing well. As you discussed with our Executive Director this morning, the Commission has ordered a formal investigation into allegations raised against you in a written complaint filed with the Commission. For your information and as required pursuant to Rule 10(c) of the Judicial Standards Commission, I would also like to inform you of the following:

1. The subject matter of the investigation involves allegations that you disclosed confidential information concerning matters being currently deliberated in conference by the Supreme Court at two public events and to a newspaper reporter which led to media coverage of the subject matter. This conduct, if true, potentially violates the following provisions of the North Carolina Code of Judicial Conduct: (1) failing to conduct yourself in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canons 1 and 2A); (2) failing to be faithful to the law and unswayed by partisan interests, public clamor, or fear of criticism (Canon 3A(1)); and (3) failing to facilitate the performance of the administrative responsibilities of other judges and court officials (Canon 3B(1)).

2. You are entitled to a reasonable opportunity to present any relevant information regarding this matter at any time during this investigation. This includes any documents, statements, or other information. The Commission Investigator will also contact you regarding a time to set up a formal interview to address the Commission's questions and concerns.

3. You may, but are not required to, retain counsel to represent you in this matter, but we ask that you have such counsel file a written notice of appearance with the Commission to ensure proper communication. Consistent with Formal Opinion No. 2011-02, which is available on the Commission's website, if you retain counsel in this matter, you should request an informal advisory opinion as to whether disqualification is required in cases in which such counsel appears before you.

4. This investigation is confidential in accordance with the provisions of N.C. Gen. Stat. § 7A-377 and Commission Rule 6, and information or documents provided to you in furtherance of the investigation may not be disclosed.

5. The Commission Investigator or I may be conducting interviews with your court colleagues, court staff, or attorneys as part of this investigation. A thorough, fair, and accurate investigation depends on their full cooperation and candor without fear of reprisal, actual or perceived. As such, I want to make you aware that pursuant to Commission Rule 10(e), any conduct on your part that may be reasonably perceived as retaliatory for cooperating with the Commission may constitute a separate violation of the Code.

If you have any questions about the Commission's procedures, the status of the investigation, or any other issue relevant to this matter, please do not hesitate to reach out to me. If you would like to review the Commission's Rules, the Code of Judicial Conduct, formal advisory opinions, ethics resources, or past disciplinary decisions, they are available on our website, www.ncjsc.gov.

Sincerely,

Patricia A. Flood
Commission Counsel

EXHIBIT D

WOMBLE BOND DICKINSON

May 4, 2023

By Email and First-Class Mail
Patricia A. Flood, Esq., Commission Counsel
Judicial Standards Commission
P.O. Box 1122
Raleigh, NC 27602

Re: Inquiry No. 23-081

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Ms. Flood:

I am writing concerning the above-referenced Inquiry on behalf of our client, North Carolina Supreme Court Associate Justice Anita Earls ("Justice Earls"). As I understood from our discussion at Justice Earls' interview, we have the opportunity to provide information pertinent to the Inquiry to be shared with the Panel conducting the Inquiry. We appreciate that opportunity and this letter and its attachments constitute additional supplemental information to that provided by Justice Earls at her interview.

We are attaching the following:

Annex A – Statement of former Chief Justice, Cheri L. Beasley, dated May 3, 2023;

Annex B – Statement of former Associate Justice Samuel James Ervin, IV, dated May 4, 2023;

Annex C – Statement of Justice Robin E. Hudson (Retired), dated May 3, 2023;

Annex D – Statement of Representative Marcia Morey, dated April 30, 2023; and

Annex E – Statement of Retired Associate Justice Robert F. Orr, dated April 27, 2023.

Initiation of the Inquiry

We understand from discussions with the Commission's Investigator that this inquiry was initiated by the Commission *sua sponte* as a result of an online article published on the website of WRAL-News with the headline "Leaked document shows big changes could be underway at

GOP-majority NC Supreme Court," first published on February 12, 2023.[1] As described by the Investigator, the initial concern was that a confidential court document had been "leaked" in a manner similar to the leaking at the U.S. Supreme Court last year of a draft of the majority opinion in *Dobbs v. Jackson Women's Health Organization*.

Notably, the article published by WRAL-News uses the word "leaked" solely in the headline.[2] In the body of the article there are simply references to "notes…taken from a North Carolina Bar Association Meeting last month," which were "obtained by WRAL News" and which "were taken by a meeting attendee." In other words, it appears that the decision to investigate Justice Earls may have been made based upon a misleading disparity between a headline and the more accurate and responsible account found in the body of the story.

This particularly lamentable phenomenon has been discussed in the academic literature. *See* Ecker, U. K. H., & Lewandowsky, S. (2014), "The effects of subtle misinformation in news headlines," *Journal of Experimental Psychology: Applied*, 20(4). That article described how misleading headlines "constrain further information processing, biasing readers towards a specific interpretation" of the body of the story. In less academic settings, the phenomenon is often referred to as "clickbait" which is defined by Merriam-Webster's on-line dictionary as "something (such as a headline) designed to make readers want to click on a hyperlink especially when the link leads to content of dubious value or interest."

Thus, given the fact that there is no purportedly "leaked" document from the Court (or from anywhere else for that matter) actually described in the article, it appears that this investigation may have arisen as a result of clickbait. In our view, the investigation should never have begun in the first place.

The Canons at Issue

As described in the original March 20, 2023 letter informing Justice Earls of the investigation, the four Canons at issue with respect to the investigation are Canons 1, 2(A), 3(A)(1), and 3(B)(1). None of those Canons purports to set forth any explicit requirement regarding confidentiality or to constrain a judge's speech concerning administrative responsibilities of the judge as discussed below.

Thus, at the outset, it is important to note the explicit dichotomy recognized in Canon 3 between "Adjudicative Responsibilities" (found in Canon 3(A)(1)-(7)), on the one hand, and "Administrative Responsibilities" (found in Canon 3(B)(1)-(4)), on the other.

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[1] It is unclear how that representation is consistent with the notice letter dated March 20, 2023 that was provided to Justice Earls which indicates that "the Commission has ordered a formal investigation into allegations raised against you in a written complaint filed with the Commission."

[2] Found at https://www.wral.com/story/leaked-document-shows-big-changes-could-be-underway-at-gop-majority-nc-supreme-court/20716857/).

Here the information disclosed – relating to two possible rule changes and a possible legislative change for consideration by the General Assembly – are in no way "adjudicative" and thus clearly fall within the category of performance of the Justice's administrative responsibilities as covered by Canon 3(B). As Justice Earls described, moreover, those issues can *only* have concerned administrative responsibilities because the Court's January 11, 2023 Retreat at which those items were discussed occurred at a time when there were no pending cases before the Court, two new members had just joined the Court, and the Court had heard no cases yet.

For that reason in our view, the provisions of Canon 3(A)(1) are simply inapplicable to the circumstances here.[3] With respect to the three other Canons mentioned in the March 20 letter – Canons 1, 2(A) and 3(B)(1) – as discussed more fully below, we do not believe that the circumstances here can fit within their proscriptions, no matter how broadly interpreted. Equally importantly, we are of the view that the conduct of Justice Earls was consistent with the requirements of other applicable Canons.

The Lack of a Written Confidentiality Rule

Pursuant to § 13 of Article IV of the North Carolina Constitution, the Supreme Court has exclusive authority to make rules for the appellate division, including itself. As Justice Earls indicated, she was not aware of any rule promulgated by the Court concerning confidentiality of the Conference. We have now confirmed that with four former Justices with tenures dating back to 1995 and continuing forward to the end of 2022. (*See* Orr Statement ¶ 4; Ervin Statement ¶ 6; Hudson Statement ¶ 8; Beasley Statement ¶ 5.)

Lacking any Rule or any specifically applicable Canon proscribing the statements made by Justice Earls, it is our view that there is simply no basis for any discipline in this circumstance. Any assertion of disciplinary authority pursuant to an opaque "unwritten rule" or some amorphous concept of the "traditions" of the Court would violate due process since the subject judge is given no fair notice of what conduct is prohibited. *See Chicago v. Morales*, 527 U.S. 41, 56 (1999).

[3] Even if those provisions were somehow found to be broadly applicable in spirit, they do not appear to have any relevance to these facts since we do not understand that there is any issue regarding Justice Earls' being less than "faithful to the law and unswayed by partisan interests, public clamor, or fear of criticism" (Canon 3(A)(1)), in the course of performing her adjudicative responsibilities. Similarly, the June 30, 2021 letter from Chief Justice Newby to Philip Feagan (which Justice Earls was not copied on and which she had not previously seen) and the excerpt from briefs submitted in federal court litigation that were provided with the March 20, 2023 notice letter are both irrelevant to the issues here because they clearly concern only adjudicative matters, that is, cases that come before the Court, as opposed to administrative responsibilities, including rulemaking.

The Standard Practice of the Justices has been to Discuss Rule Changes with Pertinent Stakeholders Prior to Adoption

Any resort to the "traditions" of the Court fares no better. The Statement of Retired Justice Orr – given without knowledge of the subject of this inquiry (Orr Statement ¶ 8) – makes it clear that during his time on the Court (from 1995 through 2004), he and other members of the Court would informally consult with other knowledgeable persons outside the Court "with regard to administrative matters relevant to the practice of law and the function of the judiciary of the State." (*Id*. ¶ 5.) The examples he gives of persons so consulted include "practitioners, retired or active Court of Appeals or trial judges, law professors and others." (*Id*.) Justice Orr stated his view that such consultations were appropriate in order that he be better informed in his decision making regarding those administrative matters. (*Id*.)

Retired Justice Ervin has provided a Statement to the same effect regarding the more recent practices of the Court. He identifies a number of specific examples of individual justices' consultations with stakeholders on issues such as the Uniform Bar Examination (Ervin Statement ¶ 9), the creation of a specialty in utilities law (*id*. at ¶ 10), and the adoption of the rule concerning the Universal Citation format (*id*. at ¶ 11) in which he and other Justices consulted with persons outside of the Court during the consideration of a rule change by the Court, but prior to its adoption. Justice Ervin even recalls that he had discussions with the staff of the Judicial Standards Commission indicating that his proposed discussions were permissible under the Code of Judicial Conduct. (*Id*. at ¶ 12.)[4]

Former Chief Justice Beasley has also provided a Statement indicating, among other things, that "it was a regular practice for members of the Court to consult with as many relevant stakeholders as possible regarding, for example, rule changes" and that these consultations were, in her view, "necessary for individual justices to understand the nature of given rule changes and the implications of those changes." (Beasley Statement ¶ 8.) She, too, provided a number of examples in which such consultations occurred with respect to specific rules proposals, including universal citation (*id*. at ¶ 10), adoption of a new general rule of practice concerning the ability of a trial court judge to assess a defendant's ability to pay before imposition or waiver of discretionary fines or fees (*id*. at ¶ 11), and the establishment of the Chief Justice's Commission on Fairness and Equity (*id*. at ¶ 12.) She stated that she even sought input from outside the Conference for exigent rules established during the Covid-19 pandemic as to which she had plenary authority to impose. (*See id*. at ¶ 13.)

In her view, "[t]raditionally and necessarily, it has fallen to each justice to determine what level of consultation each deems appropriate for the purposes of fulfilling their role in diligently discharging the justice's administrative responsibilities." (Beasley Statement ¶ 14.)

[4] Justice Ervin indicated in that regard his "understanding … that the staff of the Judicial Standards Commission felt that different standards applied to conversations involving matters that the Court was deciding in its adjudicative capacity and to matters that the Court was deciding in its administrative authority." (Ervin Statement ¶ 12.)

Most pertinently, perhaps, the long-standing practices of the Appellate Rules Committee of the North Carolina Bar Association best exemplify the open communications between Justices and practitioners concerning administrative matters thus demonstrating that Justice Earls' communications were well within the norms of past practice of Justices of the Court.

Justice Hudson, whose decades-long service on the Appellate Rules Committee (Hudson Statement ¶ 2), makes her a unique resource regarding its historical practice (*id*. at ¶ 3), states that in her experience "[d]iscussions concerning administrative matters" have "typically been frank, open, and cordial between Bench and Bar," and that "[s]uch administrative matters include rule changes considered by the Court, as well as wide-ranging issues affecting appellate practice more broadly." (*Id*. at ¶ 5.) Those discussion, in Justice Hudson's words, typically included serving Justices "express[ing] their own views regarding potential rule changes and related issues," including providing "assessments about how the Court as a whole might view a specific rule proposal." (*Id*. at ¶ 6.) Other practitioner-members of the Committee have confirmed the accuracy of this account to me.

In her view, "such discussions facilitate the administration of justice." (Hudson Statement ¶ 7.) She indicated, moreover, that she has "not understood that any confidentiality rules or practices of the Court prohibited members of the Court from engaging in such discussions with members of groups like the Appellate Rules Committee." (*Id*.) Rather, "[d]uring [her] time on the Court" – some 16 years in all and concluding only months ago (*id*. at 1) – it was her understanding that she and "other members of the Court could consult with knowledgeable persons outside the Court concerning administrative matters, including, for example, rule changes and related issues." (*Id*. at ¶ 9.)

Justice Ervin, in his Statement, also indicates that the Appellate Rules Committee played a particularly important role in the rule-making process receiving regular updates about rules under consideration by the Conference, some recommended by practitioners and others originating within the Court. (Ervin Statement ¶¶ 13-14.) As he put it, "[i]n those meetings, it was typical for members of the Committee and members of the judiciary to have frank and open discussions, including expressions of opinion by one or more members of the appellate courts concerning the level of interest in or advisability of potential rule changes." (*Id*. at ¶ 14.) He did not, moreover, "understand that confidentiality considerations precluded members of the appellate courts from participating in such discussions." (*Id*.)

In our view, there is no principled reason to distinguish between the Appellate Rules Committee, the North Carolina Bar Association Board of Governors, and the North Carolina General Assembly Courts Commission in terms of whether they are appropriate professional bodies to inform and consult regarding potential changes to the Rules of Appellate procedure and similar matters of judicial administration.

In summary, the retired Justices are in general agreement that members of the Court have recognized a distinction between confidentiality with respect to their adjudicative responsibilities and a different standard for administrative responsibilities. That distinction, explicitly recognized in the Code of Judicial Conduct, is borne out by the long-standing practices of the Justices reflected in specific examples occurring over many years up to and including 2022, most

especially at the Appellate Rules Committee. Any attempt to discipline Justice Earls based on her communications at the Bar Association's Board of Governors meeting or the meeting of the Courts Commission would be inconsistent with the long-standing practice of Justices of the Court and would be a wrongful application of the Code of Judicial Conduct.

The Matters in this Inquiry were Already the Subject of Open Discussion Prior to Justice Earls Raising the Issues

As has been explained to us, there are three rule changes publicly identified by Justice Earls at those two professional meetings that are the subject of this inquiry: (1) the Court's decision to rescind its 2019 Rule adopting the universal citation format, (2) the Court's decision to adopt a rule permitting published opinions of the court of appeals to be deemed "unpublished" by the Court (and thus without precedential effect), and (3) consideration of a possible legislative change that would eliminate the right of appeal to the Supreme Court based on a dissent in the Court of Appeals (pursuant to N.C. Gen. Stat. § 7A-30(2)). Justice Earls, as she described at her interview, discussed those issues at a meeting of the Board of Governors of the North Carolina Bar Association (of which she is a member) on January 19, 2023, and at a meeting of the North Carolina Courts Commission (of which she is a member) on January 27, 2023.

In the case of all three appellate rule changes, there had already been discussion outside of the Conference prior to the dates of the two meetings at which Justice Earls spoke.

First, the Court's Order rescinding the universal citation format – including the noted dissents of Justices Morgan and Earls – was actually published on January 13, 2023, nearly a week before the first meeting at which Justice Earls discussed the rule change. The Order was publicly announced with a press release stating the purported rational for the rule change.[5] To the extent that there was any confidentiality issue regarding that rule change, it necessarily evaporated upon publication of the new rule.

Second, with respect to the possible rule change concerning the unpublishing of Court of Appeals' opinions, it was represented *at the Conference itself* that the issue had already been discussed outside the Conference, namely, with one or more judges of the Court of Appeals who – it was represented – preferred that their decisions be unpublished rather than reversed. To the extent that the issue had already been discussed outside of the Conference, there can have been no putative breach of confidentiality. It simply cannot be the case that some members of the Court ethically can discuss a proposed rule change outside of conference while other members are prohibited from doing so.

[5] The press release states that "[t]he paragraph numbering has imposed significant administrative burdens on court staff responsible for preparing opinions for filing and physical publication." Available at https://www.nccourts.gov/news/tag/press-release/supreme-court-of-north-carolina-withdraws-order-implementing-universal-citation-system.

Third, the legislative change to eliminate of the right to appeal based on a dissent, has been the subject of much discussion outside the Conference for a long period of time.[6] For example, the Appellate Rules Committee – comprised, as described above, of both practitioners and judges, including current and former Supreme Court Justices – had been considering for some time the issue of the right to appeal based on a dissent in connection with attempts to harmonize Rules 16 and 28 of the Rules of Appellate Procedure.[7] In that connection, the Appellate Rules Committee sought to keep abreast of the Court's views regarding the statutory provision because, if the statutory right were to be repealed, there would be no need to continue to discuss clarification of the interaction between the two appellate rules.

Indeed, a discussion of a subset of the issue – on the subject of the right of appeal based on a dissent in cases concerning termination of parental rights – had come before the General Assembly as early as 2021. This circumstance is documented in the Statement in which Representative Morey describes the General Assembly's debate of Senate Bill 113 during which one Justice (not Justice Earls) conveyed to Representative Morey the positions on the provision at issue held by other Justices on the Court. (Morey Statement at 1.) Representative Morey describes that after later confirming that the particular Justices in question, in fact, were against ending the right to appeal based on a dissent in these cases, she sponsored an amendment to the pending bill which passed 77 to 39 on April 21, 2021. Senate Bill 113 was ultimately approved without the provision removing the right of appeal. (*Id.*)

If one Justice is able to convey the views of other Justices concerning legislation outside of the Conference in 2021, it cannot be a violation of some unwritten rule of confidentiality or in any other way improper for Justice Earls to do something similar in 2023, particularly with regard to substantially the same subject matter.

Justice Earls Conducted Herself in Accordance with the Code of Judicial Conduct and the Regular Practices of the Court

The specific activities of Justice Earls at issue here fit well within the actions deemed acceptable – and rightfully encouraged – under Canon 4's endorsement of judges engaging in activities "concerning the legal . . . or governmental system or the administration of justice," including:

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[6] Unlike a rule change which, as a matter of both constitutional and statutory law, can be effected by the Court unilaterally, a legislative change, by definition, requires action by a separate and co-equal branch of government. As a result, any determination to seek a legislative change, by definition, requires discussion outside of Conference, at a minimum with legislators. For that reason, any claim concerning the confidentiality of the legislative desires of one or more Justices, or the Court as a whole, is a logical *non sequitur*.

[7] Since at least January, 2020, there had been discussion in the Appellate Rules Committee concerning how Rule 16's definition of the scope of review when appeal is taken based on a dissent can be in tension with Rule 28(c)'s discussion of the contents of the Appellee's brief. Obviously that tension would disappear if parties no longer could take an appeal based on a dissent.

- "Speak[ing]" concerning "the legal . . . or governmental system or the administration of justice" (Canon 4(A));

- Appearing at a "public hearing before an executive or legislative body" (clearly applicable with respect to Justice Earls' role at the Courts Commission (Canon 4(B)); and

- "Serv[ing] as a member, officer, or director of an organization or governmental agency" (with respect to both the Bar Association Board of Governors and the Courts Commission) (Canon 4(C).)

Any attempt to impose discipline based on a judge's discussion of administrative matters at a meeting of the Board of Governors of the North Carolina Bar Association or the General Assembly's Courts Commission would squarely run afoul of the Code's endorsement of activities in which judges are explicitly permitted to participate in accordance with Canon 4. Any attempt to assert some vague construction of the largely generic provisions of Canons 1 and 2 against Justice Earls cannot prevail against the more specific provisions permitted under Canon 4. And, as noted below, such an attempt would potentially run afoul of the First Amendment rights of judges.

Importantly, this interpretation is consistent with the Statements made by the four former Justices as well as that of Representative Morey, herself a long-time member of the judiciary. Thus, former Chief Justice Beasley stated that consultations outside the Conference are "necessary for individual justices to understand the nature of given rule changes and the implications of those changes." (Beasley Statement ¶ 8.) Former Justice Ervin offered his opinion that "it is helpful for individual justices of the Supreme Court to be able to consult with persons outside the Court concerning proposed rule changes and the manner in which other administrative responsibilities should be carried in order to permit the members of the Court to properly perform their administrative responsibilities." (Ervin Statement ¶ 15.) Justice Orr stated that given the breadth of the rule-making authority of the Court, "it is useful to be able to discuss such matters with experts in the field." (Orr Statement ¶ 5.) Indeed, in his view, "as elected officials," Justices "have a right to discuss administrative matters being considered by the Court that would potentially impact practice before the Court or the practice of law generally." (*Id*. at ¶ 7.) Justice Hudson underscored, specifically with respect to the Appellate Rules Committee, that such "discussions are important for the purposes of informing members of the Court with respect to administrative issues under consideration, as well as to assist Committee members in providing constructive proposals and information to the Court." (Hudson Statement ¶ 10.)

Representative Morey indicated that "[a]s a member of the General Assembly," she "would consider any effort to apply judicial discipline in a manner that would impinge on the rights of any judge, including especially a Supreme Court Justice, to consult concerning court administration with members of the General Assembly to raise serious separation-of-powers issues, as well as substantial First Amendment concerns." (Morey Statement at 2.)

Other Prudential Considerations

The Code of Judicial Conduct, like all governmental pronouncements, is subject to the First Amendment of the U.S. Constitution and its proscription against the abridgment of free speech. The U.S. Supreme Court, for example, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), ruled that the "Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment" and struck down that particular canon. *Id*. at 788.

An attempt to impose discipline of any type in this circumstance could be an appropriate subject of a First Amendment as-applied challenge in federal court to the putative authority of the Commission to proscribe and/or punish speech by judges concerning administrative matters. The lack of any written authority, coupled with the necessary reliance on opaque court traditions whose existence is disclaimed by multiple retired Justices, counsels against proceeding in this matter.

Our research of ethics violations and discipline in state and federal courts has found no other instance where a judge or Justice was disciplined in any matter for speaking publicly about potential rule changes impacting the administration of justice. In this case, Justice Earls was diligently performing her duties under the Code of Judicial Conduct and should not be subject to any form of warning, censure, or discipline whatsoever.

* * * *

In the event that this matter proceeds to hearing, Justice Earls' current intention is to waive confidentiality of the hearing so that the matter can proceed in public. In addition, if we are required to proceed in that context, it is our intention to assert her full rights under the Commission's Rules with respect to both discovery and the subpoenaing of witnesses (including those who have already provided witness statements to us). Our inquiry will need to delve into the understanding of current and former Justices regarding the Court's rules, procedures, and practices regarding confidentiality, and could even require further inquiry into the actions of current and former Justices with respect to similar administrative responsibilities and their communications with various stakeholders outside the Court.

Thank you for your attention to this matter. Please let me know if you have any questions concerning the foregoing or any further questions for Justice Earls.

Sincerely,
WOMBLE BOND DICKINSON (US) LLP

Pressly M. Millen

cc: Justice Anita Earls

NC Federal District Court and State Court Update

Danny Lyon

Michael Elliot

Elliot Morgan Parsonage, PLLC

Laura Wetsch

Winslow Wetsch, PLLC

NC Federal District Court Cases

- Title VII/ 42 U.S.C § 1981
- ADA
- ADEA
- FMLA
- Trends

Title VII/ 42 U.S.C. § 1981

- Kennedy v. Abbott Labs, Inc. 2023 U.S. Dist. Lexis 17018*, ____F. Supp.3d _____ (Feb. 1, 2023) (EDNC-Western Div.)

  - Plaintiff employed as Senior Regional Account Manager from 2015-2017
  - Court references history of documented performance issues starting in July 2016 and running through termination in September 2017. Plaintiff did complain regarding 2016 performance review
  - March 2018 Plaintiff filed EEOC charge alleging sex discrimination and retaliation in violation of Title VII. Court notes that the EEOC did not reference HWE based on sex, but Complaint included one
  - Plaintiff files suit in January 2020 following issuance of Right to Sue

Kennedy v. Abbott Labs, Inc. 2023 U.S. Dist. Lexis 17018*, ____F. Supp (Feb. 1, 2023) (EDNC-Western Div.)

- Court grants SJ to Defendant on all claims relying upon:

  - Documentation of Plaintiff's performance issues in 2016 and 2017, despite a 2015 positive performance review
  - Employer held all team members to the same customer call frequency standards based on customer assignments
  - Plaintiff's EEOC Charge did not allege sexually hostile work environment claim under Title VII, but Court determines that claim would fail
  - Retaliation Claim failed because Plaintiff's complaint regarding 2016 review did not mention sex discrimination, and temporal gap

Kennedy v. Abbott Labs, Inc. 2023 U.S. Dist. Lexis 17018*, ____F. Supp (Feb. 1, 2023) (EDNC-Western Div.)

- Lengthy time lapse between protected activity (complaint) and termination

- Regardless of time, Defendant had legitimate non-discriminatory reason for termination

- Case would also fail under Rule 4 of North Carolina Rules of Civil Procedure for failure to renew summons after not serving Complaint and failing to get endorsement or A&P summons

Torres v. Duke Energy Progress, LLC, 2023 U.S. Dist. 147510*; _____F. Supp. _____ (August 22, 2023) EDNC –Western Div.

- Plaintiff (A Black/ Hispanic Male) employed as a Project Manager, reporting to a manager of different race from 2018 until May 2021 when terminated
- Plaintiff brought claims, including Hostile Work Environment based on race under Title VII and 42 USC § 1981, in Amended Complaint, among others, including retaliation following complaints of discrimination
- Defendant filed a 12(b)(6) on the Hostile Work Environment claims based on failure to allege conduct sufficiently severe and pervasive to support Hostile Work Environment Claim

Torres v. Duke Energy Progress, LLC, 2023 U.S. Dist. 147510*; _____F. Supp. _____ (August 22, 2023) EDNC –Western Div.

- Hostile Work Environment Claim for Employee:

  (1) Employee experienced unwelcome conduct

  (2) Conduct was based on a protected characteristic under relevant statute

  (3) The conduct was sufficiently severe and pervasive to alter the condition of employment and create an abusive atmosphere
    - Court looks subjectively and objectively
    - Frequency, Interference with work performance, and nature of statements/actions

  (4) The conduct is imputable to the employer

Torres v. Duke Energy Progress, LLC, 2023 U.S. Dist. 147510*; _____F. Supp. _____ (August 22, 2023) EDNC –Western Div.

- Conduct alleged by Plaintiff:
  - Supervisor stated " people" of Plaintiff's race and ethnic background are less stable, organized, and less structured.
  - Supervisor never mentioned Plaintiff's race, but inferred by comment and reference to structure;
  - Supervisor stated " minorities have to work harder" and reference to more "structure" in a white employee's home
  - Disparate management standards and placement on low complexity projects in comparison to colleagues

Torres v. Duke Energy Progress, LLC, 2023 U.S. Dist. 147510*; _____F. Supp. _____ (August 22, 2023) EDNC –Western Div.

- In granting 12(b)(6) on Hostile Work Environment claims, Court relied upon:
  - Reference to ongoing discriminatory conduct and disparate treatment was vague;
  - Alleged discriminatory comments (“structure” and “work harder” were made in a single conversation
  - Isolated comment and vague description did not rise to level of severe and pervasiveness necessary to alter terms and conditions of employment

Torres v. Duke Energy Progress, LLC, 2023 U.S. Dist. 147510*; _____F. Supp. _____ (August 22, 2023) EDNC –Western Div.

- Court does clarify that while Hostile Work Environment Claims often involve repeated conduct

- "isolated incident of harassment can amount to discriminatory changes in the terms and conditions of employment, if that incident is extremely serious" *Boyer v. Liberto*, 786 F.3d at 277

- Also, a "supervisor's power and authority invests his or her harassing conduct with a particular threatening character" *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763, 118 S. Ct. 2257 (1998)

Mingo v City of Mooresville, 2023 U.S. Dist. Lexis 165647 (September 17, 2023) WDNC- Statesville Div.

- Plaintiff, and African American, was a police officer of the City of Mooresville (MPD) starting in 2015

- Plaintiff made internal complaints and filed an EEOC charge based on race, including Hostile Work Environment based on Race. In total Plaintiff files 3 EEOC Charges from 2018-2019, including retaliation, failure to promote, drug testing policies, and disparate treatment based on race

- Plaintiff resigns in April 2020, citing “continuous racial disparities towards minorities and [himself].”

Mingo v City of Mooresville, 2023 U.S. Dist. Lexis 165647 (September 17, 2023) WDNC- Statesville Div.

- Defendant moves for Summary Judgment (SJ) on all claims, including race discrimination in drug testing, Hostile Work Environment claim, and retaliation

- Court granted SJ on drug testing claims, finding no question of fact on Plaintiff's allegation regarding targeting and disparate application of drug testing policy on race. Court looked at statistics and selection process for testing

- Court does find that there is a question of fact on Hostile Work Environment, and specific events and timeline are critical

Mingo v City of Mooresville, 2023 U.S. Dist. Lexis 165647 (September 17, 2023) WDNC- Statesville Div.

- Like *Torres,* the Court uses a similar framework of analysis, focusing in large part on severe and pervasive element
- Following facts are highlighted in finding a question of fact for Jury regarding Hostile Work Environment:
  - In December 2017, Plaintiff "expressed his reluctance to participate" to MPD's request that Plaintiff participate in a wreath laying ceremony at a Confederate soldiers' monument, explaining he was a descendant of slaves. MPD supervisors "resented" Plaintiff for interfering with "Departmental responsibilities"

Mingo v City of Mooresville, 2023 U.S. Dist. Lexis 165647 (September 17, 2023) WDNC- Statesville Div.

- Court references Defendant official questioning if Plaintiff had violated " white people rights," and asked MPD to investigate Plaintiff

- Claims of disparate application of disciplinary policies in November 2018 and throughout employment

- Multiple EEOC Charges, and internal complaints including following annual review

- Plaintiff testified to being repeatedly subjected to racial epithets and asked if he friends in a gang

Torres and Mingo Comparison - Hostile Work Environment Claims

- 12(b)(6) versus Summary Judgment standard
- Timeline and specificity of conduct, comments, and frequency
- Torres (Pro se) and Mingo (Court references that that no deposition taken by Plaintiff and only RPD)
- Specificity in pleading and claims

Chapman v. Oakland Living Ctr., Inc. 2023 U.S. Dist. Lexis 11984*, ____F. Supp.3d _____ (January 24, 2023) WDNC- Asheville Division

- Claims for Title VII and 42 USC § 1981. Following appeal to 4th Circuit, case was remanded regarding constructive discharge claim against Defendant

- Remand on constructive discharge related to erroneous standard applied by Court

Chapman v. Oakland Living Ctr., Inc. 2023 U.S. Dist. Lexis 11984*, ____F. Supp.3d _____ (January 24, 2023) WDNC- Asheville Division

- Standard for constructive discharge *once* required a showing that the "employer deliberately ma[d]e the working conditions in an effort to induce the employee to quit" See. Honor v. Booz-Allen & Hamilton, Inc. 383 F.3d 180, 186 (4th Cir. 2004)

- Prior elements were (1) the deliberateness of [the employer's] actions and (2) the objective intolerability of the conditions

Chapman v. Oakland Living Ctr., Inc. 2023 U.S. Dist. Lexis 11984*, ____F. Supp.3d _____ (January 24, 2023) WDNC- Asheville Division

- Court then applies the standard set out in *Green v. Brennan*, 578 U.S. 547, 136 S. Ct. 1769, 195 L.Ed.2d 44 (2016))

> [t]he Supreme Court now has clearly articulated the standard for constructive discharge, requiring objective 'intolerability'- 'circumstances of discrimination so intolerable that a reasonable person would 'resign' – but not 'deliberateness,' or a subjective intent to force a resignation.

EEOC v. Consol Energy, Inc. 860 F.3d 131, 144 (4th Cir. 2017) quoting *Green*, 578 U.S. at 560, 136 S.Ct. 1769

ADEA

- Donald v. Novant Health, Inc. 2023 U.S. Dist. Lexis 154946*, ____F. Supp.3d _____ (Sep. 1, 2023) (EDNC-Western Div.)

  - Discrimination & retaliation under Title VII and § 1981, ADEA, Equal Protection
  - Rule 12 motions following Amended Complaint
  - Plaintiff employed as Anatomical Pathology Supervisor from 2017-2020
  - Position eliminated due to COVID-19 in June, 2020, reposted approximately six months later, plaintiff not selected for position in January, 2021
  - April, 2021 Plaintiff filed EEOC charge alleging race discrimination and retaliation in violation of Title VII and discrimination in violation of ADEA.
  - Court dismissed claims pertaining to acts prior to October 30, 2020, including original job elimination – failure to hire and 1981 claims survive

- Court rejects argument for Equitable Tolling
- Equitable tolling requires two elements:
  - Plaintiff has been pursuing rights diligently
  - Extraordinary circumstance stood in plaintiff's way – generally either:
    - Wrongful Conduct by defendant
    - Extraordinary circumstances beyond plaintiff's control
- Court rejects plaintiff's argument that EEOC denied plaintiff's attempts to file without "direct evidence" of race discrimination
- Will address further in trends – this maybe not perfect example, but we have seen some narrowing of claims based on failure to exhaust arguments

ADA

- Anderson v. Diamondback Inv. Grp., 2023 U.S. Dist. Lexis 42239*, ____F. Supp.3d _____ (Mar. 14, 2023) (MDNC)

  - Wrongful discharge, failure to accommodate in violation of ADA; state law claim for discrimination due to lawful use of lawful products (NCGS 95-28.2)
  - Motion for Summary Judgment on all claims
  - Plaintiff employed by defendant from October, 2020 – January, 2021
  - Tested positive for marijuana on initial screening and 1 of 2 follow up tests
  - Told employer that, upon recommendation of her medical provider, took CBD to treat anxiety from abusive relationship and muscle and joint pain
  - Court granted MSJ on all three claims

- Court finds the following:

➢ Wrongful discharge claim
  - Did not establish she was individual with disability – insufficient evidence consisted of note from doctor, affidavit and deposition testimony, email to employer following first failed drug screening
  - Even if she had, could not defeat LNDR of failed drug screenings in violation of policy and has not offered evidence of pretext

➢ Failure to accommodate claim
  - Does not provide adequate notice to employer – verbal, note from medical provider, email following drug screening – insufficient for notice
  - Even if she had, did not present evidence that she requested reasonable accommodation

➢ Uphill battle for plaintiff, but perhaps surprising rationale on failure to accommodate

Bone v. Univ. of N.C. Health Care Sys., 2023 U.S. Dist. Lexis 108410*, ____F. Supp.3d _____ (June 22, 2023) (MDNC)

- Plaintiffs alleged that UNC Health and Nash were denying blind individuals equal opportunity to access their health care information in violation of the Americans with Disabilities Act Title II (against UNC Health) and Title III (against Nash), Section 504 of the Rehabilitation Act (against both), and Section 1557 of the Patient Protection and Affordable Care Act (against both)
- Plaintiffs alleged that UNC Health and Nash provided information critical to the health of their patients in standard print only, without a statutorily required accessible alternative
- Plaintiffs sought a declaratory judgment, injunctive relief, compensatory damages, and attorneys' fees
- After several years of litigation, all claims other than injunctive relief were settled by the parties, including admissions of violations of ADA by defendants
- Court granted injunctive relief on some claims, denied on others

- The court held that:
  - Plaintiffs had won on their ADA claims because UNC Health had admitted to violating the ADA as part of the settlement
  - Plaintiffs demonstrated ongoing irreparable harm because UNC Health was still not properly meeting accessibility requirements
  - Plaintiffs established individualized rather than systemic harms caused by UNC Health, and that UNC Health had made positive systemic changes already
  - NFB and DRNC's requested relief was limited to the harm caused to their members, and therefore they were not entitled to broad relief
  - Some of the plaintiffs' requested relief involved accommodations that went beyond what the law required
- The court ruled that:
  - Injunction was granted requiring UNC Health to provide accessible documents to the individual plaintiff and the person whose interests NFB and DRNC were representing
  - Injunction was denied as to plaintiffs' request for a broader systemic injunction
  - The court's injunction was set to last three years

Griffin v. Maximus, Inc., 2022 U.S. Dist. Lexis 206694*, 641 F. Supp.3d 251, (November 15, 2022) (WDNC)

- Pro se plaintiff brings Title VII claims of race discrimination (black) and gender and sexual orientation discrimination (heterosexual male)
- Initial review by the Court of pro se amended complaint
- Claims of employee:
  - Discrimination, failure to promote, failure to hire, harassment, retaliation
  - Some highlights: was hired by employer, still employed
  - Applied for 80 jobs – admits that he was "indiscriminate" and his resume "needs some work"
- Evidence of employee:
  - Heckling and belittling over email, butt was possibly touched, closing of bathroom for cleaning, other employees constantly clearing throat near plaintiff
- Court dismissed complaint based on frivolity and failure to state a claim
  - "Bizarre filings" are "outlandish and unmoored from reality"

Smith v. Lowes Cos., 2022 U.S. Dist. Lexis 198244*, 638 F. Supp.3d 572 (Nov. 1, 2022) (WDNC)

- Pro se plaintiff brings claims of violation of Title VII in regards to race discrimination (black) and gender and sexual orientation discrimination (homosexual male), and violations of ADA (ulcerative colitis)
- Initial review by the Court of pro se second amended complaint
- Claims of employee: discrimination, harassment, failure to promote, retaliation
- Evidence: denial of accommodations, harassment due to homosexuality, failure to promote to several positions for which he is qualified
- Court allows Second Amended Complaint to proceed

FMLA

- Webb v. Daymark Recovery Servs., 2022 U.S. Dist. Lexis 228277*, ____F. Supp.3d _____ (Dec. 20, 2022) (MDNC)

  - FLSA violations and retaliation, NCWHA violations, FMLA interference and retaliation, REDA
  - Cross-Motions for Summary Judgment on all claims
  - Plaintiff employed by defendant from 1991-1996 and 1998-May 26, 2020
  - Fact intensive case
  - Longtime employee brought claims for pay issues, FMLA interference, retaliation
  - Court granted MSJ on the retaliation claims

Facts

- Longtime employee of Freedom House – successful and high performing employee up until 2018
- In late 2018, Daymark became involved with Freedom House, arguably joint employers, Daymark brought more structure, methods, and processes
- Took new position upon merger, far more documentation required for position and because of Daymark involvement
- According to employer: accessibility, responsiveness, documentation problems began
- According to employee: significant pay issues began; last complaint approximately February, 2019
- July, 2019: plaintiff's son in serious accident and hospitalized for several months; plaintiff used most of sick leave but traveled to work some weekends and cut care short to save last of sick leave (used about 6 weeks); never told of right to FMLA
- October, 2019 – documentation of performance problems begin (other than June 2019 comment re: documentation); heavy documentation and correspondence leading up to termination in May, 2020

- Court finds the following:

➢FLSA claim
  - Reasonable jury could find defendant failed to pay wages as promised, claims survive

➢FMLA interference claim
  - Court finds enough evidence for jury
    - Defendant failed to provide "rights and responsibilities" notice as required in 29 CFR 825.300(c)
    - Employers obligated to "ensure…employees [may] make informed choices about leave"
    - Violation of above is interference in exercise of employee's rights
    - Jury may find prejudice based on plaintiff's cutting off care and returning to "save" leave time

➢Retaliation claims
  - Court grants SJ to defendants and rejects pretext argument
  - Plaintiff's argument of "inconsistent justifications" are minor discrepancies
  - Heavy documentation, inconsistencies on temporal proximity

South Carolina Bar

Continuing Legal Education Division

South Carolina State and District Court Update

South Carolina Legal Update 2023

George A. Reeves, III
Fisher Phillips, LLP
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October 28, 2023

Armstrong v. Argos USA LLC
2:23-cv-00478-RMG (D.S.C. May 5, 2023)

- Clog in cement storage container, Plaintiff instructed his crew to work to clear clog from access hatch above clog instead of opening the hatch below the clog because there was several tons of material in clog, supervisor instructs employees to open the hatch and clear clog
- After clog was cleared Plaintiff was reprimanded for his method, Plaintiff says he wasn't going to put employees in danger, Plaintiff was subsequently fired due to "reluctance to listen to feedback"
- Asserted wrongful termination, negligent supervision and negligent retention claims

Armstrong v. Argos USA LLC
2:23-cv-00478-RMG (D.S.C. May 5, 2023)

- Defendant files 12(B)(6) – granted

- Wrongful termination – existing remedy under The Mine Safety and Health Act

- Negligent supervision/retention – employer owes no duty to an at-will employee and therefore cannot establish element of negligence claim
  - Relies upon *Gause v. Doe*, 317 S.C. 39 (1992)

Wright v. FedEx Ground Package System, Inc.
0:22-cv-2836-SAL-SVH (D.S.C. Oct. 27, 2023)

- Report and Recommendation relying upon *Armstrong v. Argos* recommending dismissal of negligence claims against employer
- Plaintiff terminated for violating company policy after accused of sexual harassment
- Claims Defendant failed to adequately investigate allegations
- Court: no duty owed to Plaintiff

Freda Butler-Bohn v. Walmart, Inc., Walmart Stores East, LP and Walmart Associates, Inc.

Civil Action No. 7:22-cv-00156-TMC (D.S.C. Sept. 19. 2023)

- At issue: ADA discrimination and failure to accommodate

- Job applicant with muscular dystrophy applied for cashier position, told interviewer she needed to use a wheelchair, interviewer tells her she may be better suited for a fitting room attendant position, applied for that position, offered the job, arrives at store in wheelchair and was then told that her application was rejected, complained though "Open Door" procedure, received initial response but nothing more

Freda Butler-Bohn v. Walmart, Inc., Walmart Stores East, LP and Walmart Associates, Inc.

- Defendant filed for summary judgment and magistrate judge issue Report and Recommendation recommending summary judgment be granted in part and denied in part

- Judge Cain issues order denying in full

Freda Butler-Bohn v. Walmart, Inc., Walmart Stores East, LP and Walmart Associates, Inc.

- Receipt of total disability benefits and ability to perform the essential functions of her job

- Court rejects: receipt of benefits does not, in and of itself, defeat ADA claim because ADA and SSA require different inquires into a disability (SSA does not consider reasonable accommodation)

- Plaintiff testified that she was aware of the parameters on working and receipt of SSDI and was working within those parameters in another position

Freda Butler-Bohn v. Walmart, Inc., Walmart Stores East, LP and Walmart Associates, Inc.

- Knowledge of wheelchair use
- Defendant: wheelchair use was known at time of hire
- Court: evidence shows that offer was withdrawn not long after a store manager (not the interviewer) saw her in a wheelchair and factfinder can infer discriminatory animus

Freda Butler-Bohn v. Walmart, Inc., Walmart Stores East, LP and Walmart Associates, Inc.

- Pretext:
  - 7 different reasons given by Defendant as to why Plaintiff was not employed
  - Insufficient investigation
    - Did not interview the Plaintiff
    - Did not interview the hiring manager
    - Did not return Plaintiff's call until after EEOC filing

Hattan v. Volvo Car USA, LLC
2:21-cv-03519-RMG (D.S.C. July 17, 2023)

- Employee working under doctor-ordered restrictions from work injuries, confronted by supervisor and workers' comp coordinator and told she didn't have work restrictions and needed to fully do her job, employee replied that she did have restrictions
- Two days later employee had medical appointment
- Next day terminated for producing several defects and abandoning her workstation without coverage
- Workers' compensation retaliation claim filed

Hattan v. Volvo Car USA, LLC
2:21-cv-03519-RMG (D.S.C. July 17, 2023)

- Defendant files summary judgment – plaintiff cannot establish "but-for" causation

- Denied – jury could find causal connection:
  - Plaintiff had been on restrictions for years and doing fine
  - New manager fired her after a couple of months
  - Confrontation about work restrictions
  - Jury could find that the new manager was frustrated by plaintiff's productivity due to restrictions and that supervisor was looking for a reason to terminate

Kitchen Planners, LLC v. Samuel E. Friedman and Jane Bryer Friedman and Branch Banking & Trust

Appellate Case No. 2020-001669 (August 23, 2023)

- At issue: kitchen cabinets and a mechanic's lien . . . *and summary judgment*
- Court of Appeals affirmed circuit order granting summary judgment in favor of Friedmans and dissolving Kitchen Planner's lien
- Supreme Court says: we agree with you **but** not how you got there…

Kitchen Planners, LLC v. Samuel E. Friedman and Jane Bryer Friedman and Branch Banking & Trust

- "Standard of Review" section of opinion the court of appeals stated, "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."

- Supreme Court: COA incorrectly applied the wrong standard for a motion for summary judgment when the motion was based on insufficiency of the evidence.

Kitchen Planners, LLC v. Samuel E. Friedman and Jane Bryer Friedman and Branch Banking & Trust

- Supreme Court notes that in most cases applying Rule 56(c) the court has applied "genuine issue of material fact" standard and requires opposing party to show a "reasonable inference" to be drawn from the evidence

- Explains that the court has rejected the "mere scintilla" standard; however, in *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009) the Court made the statement relied upon by COA in this case.

- Notes that this has caused both standards to be cited and applied and can be considered inconsistent

Kitchen Planners, LLC v. Samuel E. Friedman and Jane Bryer Friedman and Branch Banking & Trust

“We now clarify that the "mere scintilla" standard does not apply under Rule 56(c). Rather, the proper standard is the "genuine issue of material fact" standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166. To the extent what we said in *Hancock* is inconsistent with our decision today, *Hancock* is overruled.”

Cleo Sanders v. Rick Hendrick Dodge Chrysler Jeep Ram, et al
Appellate Case No. 2021-000137 (July 26, 2023)

At issue: who decides whether a party can enforce an arbitration provision in a contract after it has been assigned to a third-party: the arbitrator or the court?

Circuit Court: the court

Court of Appeals: the court

Supreme Court: the arbitrator

Cleo Sanders v. Rick Hendrick Dodge Chrysler Jeep Ram, et al
Appellate Case No. 2021-000137 (July 26, 2023)

Court begins by reminding us that the court does not "favor" arbitration – the often-misquoted language simply means that the court must respect and enforce a contractual provision to arbitrate

Two types of challenges to arbitration:

(1) Validity of the contract as a whole, and

(2) Validity of the arbitration provision itself

Under *Prima Paint* (1) goes to the arbitrator and (2) goes to the court

Cleo Sanders v. Rick Hendrick Dodge Chrysler Jeep Ram, et al
Appellate Case No. 2021-000137 (July 26, 2023)

Here, the challenge is to the whole contract as Sanders argued the dealership's rights under the contract (including arbitration) were divested when the agreement was assigned to a third-party

Prima Paint requires the arbitrator to decide this issue

Reversed

Joseph Abruzzo v. Bravo Media Productions, LLC et al
Appellate Case No. 2020-001095 (Ct. App. July 26, 2023)

At issue: arbitration agreement . . . *and "reality" television*

Florida man meets reality tv cast member

Abruzzo agrees to be on episode and is required to sign a Release and Arbitration Agreement

Joseph Abruzzo v. Bravo Media Productions, LLC et al
Appellate Case No. 2020-001095 (Ct. App. July 26, 2023)

- Agreement covered all manner of sins
- Shocker: bad things were said about Abruzzo
- Abruzzo files suit in state court asserting ten causes of action
- Bravo moves to compel arbitration and court denies

Joseph Abruzzo v. Bravo Media Productions, LLC et al Appellate Case No. 2020-001095 (Ct. App. July 26, 2023)

- Question on appeal: who gets to decide the Abruzzo's claims are subject to arbitration – court or arbitrator?
- COA says: Arbitrator
- Abruzzo was claiming fraud inducement of the contract in general not of the arbitration provision
- Applying *Prima Paint* the circuit court should have let arbitrator decide

Hicks Unlimited, Inc. v. UniFirst Corporation
Appellate Case No. 2021-001042 (June 14, 2023)

- At issue: compelling arbitration and requirement for interstate commerce

- Contract to rent uniforms for employees contained arbitration provision pursuant to AAA rules and governed by FAA; UniFirst moved to compel arbitration; Hicks opposed because it didn't comply with SCAA notice; circuit court denied motion because contract did not implicate interstate commerce, so FAA didn't and apply; provision unenforceable because it didn't meet SCAA's notice requirements

Hicks Unlimited, Inc. v. UniFirst Corporation
Appellate Case No. 2021-001042 (June 14, 2023)

- UniFirst appealed, COA reversed holding agreement involved interstate commerce so FAA preempted SCAA; cert granted

- UniFirst argued that Supreme Court need not address the interstate commerce issue because the parties agreed by contract that FAA applied

- Court: Nope.

Hicks Unlimited, Inc. v. UniFirst Corporation
Appellate Case No. 2021-001042 (June 14, 2023)

"What UniFirst is really asking us to do is to bless the principle that parties may agree – preemptively – that a court may apply the FAA's federal preemption power to their contract without first peeking behind the curtain to ensure interstate commerce is involved.

This we cannot do."

Holding: "a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce."

Hicks Unlimited, Inc. v. UniFirst Corporation
Appellate Case No. 2021-001042 (June 14, 2023)

Was there interstate commerce here?

- COA based conclusion on shipping uniforms across state lines and making payments to headquarters in another state

- SC points out that this was an error because the information first appeared in a motion to alter or amend the circuit court's judgment and was never mentioned by the circuit court
- Further- the information was from counsel's statements and not contained in the pleadings, the contract, or in affidavit or other evidence

Tammy C. Richardson v. Halcyon Real Estate Services, LLP and McCabe, Trotter & Beverly, P.C.

Appellate Case No. 2019-000671 (April 19, 2023)

- At issue: HOA foreclosure action for unpaid dues . . . *and discovery sanctions*
- Richardson files for sanctions under Rule 37 after deposition when (1) MTB's counsel discussed previously disclosed documents presented during deposition with the deponents, (2) engaged in witness coaching, and (3) instructed a deponent to leave deposition early

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- Hearing held, sanctions granted, MTB filed motion for reconsideration, circuit court denied, appeal followed
- Novel question of law
- COA: “Too soon, MTB”

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- S.C. Code Ann. § 14-3-330 provides that only final judgments and certain interlocutory orders are immediately appealable
- Interlocutory order must involve the merits of the case or affect a substantial right
- An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review is interlocutory and no immediate appeal is allowed

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- Requiring deposition to be reconvened has been held to be interlocutory (order directing parties to engage in discovery)
- Award of fees and costs is interlocutory
- Prohibiting conduct in violation of Rule 30(j)(8) is not an "injunction"

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- Note:
  - Remember Rule 30(j)(8), SCRCP – produce documents in advance and cannot discuss any documents provided at least two business days before the deposition
  - Local Rule 30.04(H) – seven days

Trisha Gibbons v. Aerotek, Inc.

Appellate Case No. 2020-001065 (August 2, 2023)

- At issue: termination for complying with a subpoena . . . *and attorney's fees*
- *Aerotek moves for directed verdict at close of evidence, trial court grants, Aerotek requests attorney's fees and costs under terms of Employment Agreement, circuit court denies*
  - *(1) Aerotek did not sufficiently plead basis for attorney's fees in pleadings, and*
  - *(2) The authenticity of the Employment Agreement was in dispute.*

Trisha Gibbons v. Aerotek, Inc.

Questions on appeal:

(1) Can Aerotek seek contractual fees where it did not assert a counterclaim for the fees but requested an award of fees in answer, or must it file a separate lawsuit asserting an original claim for fees?

(2) Did Aerotek have an obligation to authenticate the contract under which it seeks contractual, prevailing party fees, and if so, did it do so sufficiently?

Trisha Gibbons v. Aerotek, Inc.

COA says:

- second issue was not preserved for review, the issue is now the law of the case, and issue is affirmed

- Under “two-issue” rule first issue will not be addressed

Trisha Gibbons v. Aerotek, Inc.

Note:

> Court notes that a Rule 59(e) motion would have given Aerotek the opportunity to argue the circuit court's errors in finding that it had not properly authenticated the Employment Agreement

Tekayah Hamilton v. Regional Medical Center

Appellate Case No. 2019-001921 (August 2, 2023)

- At issue: medical negligence involving a child . . . *and use of Requests to Admit at trial*

- Regional Medical Center served requests to admit about the value of the case on Hamilton; Hamilton moved to publish the responses as a stipulation; Regional objected under Rule 403 arguing the purpose was to obtain an IME under Rule 35 and not as a stipulation or admission; trial court allowed questions and responses to be read to jury with no explanation; jury finds for Hamilton

Tekayah Hamilton v. Regional Medical Center

- Appeal follows regarding exclusion of expert witness testimony, admission of photographs, and publishing requests to admit to jury

- COA says: we'll allow it.

- No case law on this issue and most case law deals with publishing the responses whereas here the issue is the actual requests

Tekayah Hamilton v. Regional Medical Center

- Regional argued that publication was prejudicial and confused the issues for the jury and led jury to believe that it had to award a verdict of at least $100,000

- Rule 403, SCRE, does not apply to requests to admit

- In this case the Court noted that in addition to the responses to regarding the amount in controversy the jury was given the general instruction to evaluate the evidence and if it decided any damages were warranted then the jury was to decide the amount

Questions?

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